

Before the
COPYRIGHT ROYALTY BOARD
Library of Congress
Washington, D.C. 20559

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In re)	
)	
Notice of Proposed Rulemaking)	RM 2008-7
)	
NOTICE AND RECORDKEEPING FOR)	
USE OF SOUND RECORDINGS UNDER)	
STATUTORY LICENSE)	
)	

**MOTION of INTERCOLLEGIATE BROADCASTING SYSTEM
to INCORPORATE INTO THE RECORD THE
RELEVANT EVIDENCE RECEIVED IN DOCKET No. 2005-1**

This motion is filed on behalf of Intercollegiate Broadcasting Systems, Inc. (IBS), the nation's first and largest association of academically affiliated broadcasters and webcasters since 1940. IBS is incorporated as a non-profit corporation in Rhode Island. IBS filed comments in prior rulemakings and was a party to the webcasting royalty hearing before the Board (Dkt. 2005-1 CRB DTRA), now before the U.S. Court of Appeals for the D.C. Circuit, Dkt. 07-1123. In the course of the webcasting hearing IBS presented oral testimony and documentary evidence as to the distinctive characteristics of the non-profit webcasting operations staffed by college and high school students. These operations are very local and diverse in nature and bear little resemblance to larger commercial and non-commercial operations and programming. In that hearing the Board received additional testimony as to the peculiar burdens on stations with these characteristics of applying recordkeeping and reporting requirements more suitable for larger operations with paid staffs. The listenership to music subject to licensing under Sections 112 and 114 of the Copyright Act is relatively limited; the academic witnesses were agreed that the number of instantaneous listeners was only about five. Because these witnesses and documents as to the uniquely small audiences and operational characteristics of these academically


affiliated, non-commercial webcasters were comprehensively described and subject to cross-examination and/or rebuttal on the record, the data and comments from this group of webcasters might not be otherwise duplicated by other comments to the instant NPRM.

By order of September 8, 2006, the Board received testimony and exhibits offered in rebuttal to the testimony of Ms. Barrie Kessler, SoundEx's chief operating officer, on record-keeper and reporting requirements and penalties, etc., for incorporation in the collateral rulemaking proceeding. *See* Determination and Order in Webcasting II, 72 Fed. Reg., No. 83, 24084, 24109-10 (May 1, 2007).

WHEREFORE, IBS moves the Board to incorporate in this rulemaking all relevant evidence in the record in Docket No. 2005-1 CRB-DTRA. Copies of key portions of the prior record are attached hereto for the Board's convenience.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM.

by: 

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January 29, 2009

Exhibit

4122\03\00145044.DOC

Index to Exhibits

<u>Exhibit No.</u>	<u>Description</u>
1	Kass WDT at ¶¶ 4-13
2	Papish WDT at ¶¶ 4, 6, 9
3	Papish WRT at pp. 1-3
4	8/7/06 WORD Tr.11-21, 23-24, 51, 53-56, 62-67 (Kass)
5	8/7/06 WORD Tr. 78-114 (Papish)
6	11/14/06 WORD Tr. 199-212, 259-266 (Papish)
7	Picard WRT at pp. 7-8
8	11/13/06 WORD Tr. 165-72 (Picard)
9	Declaration of Capt. Kass in support of the Joint Motion of IBS and WHRB (FM) for partial reconsideration in Docket No. 2005-1 CRB DTRA, filed 3/19/07

Before the
COPYRIGHT ROYALTY BOARD
in the Library of Congress
Washington, D.C.

In the Matter of)

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Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
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Docket No. 2005-1 CRBJ DTRA

TESTIMONY
of
FREDERICK J. KASS, JR.

on behalf of
INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

Curriculum vitae

1. Frederick J. Kass, Jr. ("Fritz") is treasurer, director of operations (chief operating officer), and a director of the Intercollegiate Broadcasting System, Inc. He became an owner and the operator of a retail shopping center in Upstate New York, as a result of owning an electronics supply house in the '70s. Fritz is the Director of Aviation for Orange County Airport, Montgomery, New York. He holds the rank of Captain (Ret) in the United States Navy (Reserve). Captain Kass receives monthly retirement pay from the United States Navy for his past service. He served on the active duty in Vietnam at times during 1965, 1966, and 1967. Captain Kass volunteered for and was recalled to active duty in 1990 to serve the United States as the Assistant Chief of Staff for Operations and Plans for COMUSNAVCENT, the Navy

been involved in negotiations with the performing rights organizations and SoundExchange née RIAA on behalf of IBS' member stations.

4. Through his work with the IBS board, managing IBS' national and coast to coast regional meetings of member-stations, manning IBS' central office, and visiting stations in the field since 1961, Mr. Kass has become familiar with the wide range of campus broadcast stations operating in North America, Asia, Australia and Europe.

Description of IBS

5. The Intercollegiate Broadcasting System was founded in the early '40s, when there were just a handful of unlicensed carrier current radio stations on American campuses, and was incorporated as a non-profit corporation in Rhode Island in 1944. As radio broadcasting has evolved over the decades, the functions of IBS have changed correspondingly. IBS has (i) actively supported the interests of college radio at the Federal Communications Commission, (ii) distributed programming, (iii) provided technical and other guidance to member stations, (iv) had assisted the stations in selling national advertising 1950s until that market dried up, (v) has assisted member stations in obtaining copyright licenses from the performing rights organizations since 1970s, (vi) has conducted national and regional meetings for the education of, and exchange of experience among, its members, and (vii) has published newsletters and magazines (Journal of College Radio and College Radio) to keep member stations' staffs informed, etc. As student listenership shifted to FM radio from AM radio, IBS assisted many member stations in converting from unlicensed AM operation to licensed FM operation; and when campuses were wired for the Internet, IBS assisted many member stations in streaming.

IBS has member stations in high schools as well as colleges, and IBS has sought to aid them in their particular problems.

6. Currently there are estimated to be 1,500 student-staffed stations and webcasting operations affiliated with domestic academic institutions. IBS is the largest organization representing such stations, and its membership includes approximately 970 such stations.

7. IBS' membership encompasses a wide variety of student-staffed operations, from in-building PA systems to high-power FM broadcast stations. The hours of operation vary widely, from a few hours per week to around-the-clock and from term-time to 365 days per year. FCC rules do not require even the licensed Educational FM stations to operate in vacation periods. The number of undergraduate staff members ranges from a handful to over a hundred. Some stations are operated by academic departments as curricular activities or as laboratories, to provide practical experience for undergraduates; others are encouraged or tolerated by college administrations as extra-curricular student activities. Funding sources vary from academic budgets to student activity funds to advertising to contributions by staff members. Few salaries are paid; academic instructors are usually paid out of departmental budgets; occasional student managers are given stipends; and a few student staff members receive financial aid of one sort or another, tied to participation in the station's operations.

8. IBS' member stations are not in the business of selling music or anything else. They are interested in educating America's sons and daughters. The use of digital recordings, though essential as a practical matter, is merely incidental to their primary educational purpose. Operating a radio station offers opportunities to learn by doing. It gives the next generation many of the skills and abilities essential to success in our society, including personal

responsibility and initiative, management skills, business skills, marketing, music, writing and journalism, engineering, digital communications, digital networking – streaming audio, and a lot of other extra-curricular knowledge. A generation or so ago a fair percentage of students matriculated with some of this knowledge already, it having rubbed off from voluntary or involuntary participation in small family businesses. Today the employment of the parents of a majority of students -- and those students who are themselves employed -- is as “salary men,” to appropriate the Japanese term, and the students have no firsthand experience or perspective on standalone enterprises -- what makes them operationally successful and how one conducts himself or herself to succeed in such an environment. These are abilities and skills that are not listed in the course syllabi. USA students and worldwide students are in a critical competition for world economic productivity.

9. From time-to-time IBS has surveyed its member stations to obtain information about operating budgets. The most recent survey showed that the average annual operating budget for campus stations to be about nine thousand dollars per year, but some having annual operating budgets of only \$ 250 or less. All member stations are, as far as IBS is aware, themselves non-profit and/or parts of non-profit institutions. Most IBS Member academic institutions are part of local, state, and even federal government (military service academies).

10. Student staffs are typically characterized by relatively short tenure and high turnover, reflecting the academic environment from which they are drawn. This means in practice that operational procedures and the like are constantly being relearned by each successive college generation of students. These factors also place a practical limit on the complexity of procedures and practices that can be passed from one student generation to the

next. A few stations even experience discontinuities in operation from one generation of staffers to the next.

11. As previously intimated, solely student volunteers staff most stations; some volunteers' participation tends to be somewhat "laid back." In most stations the depth of staffing is variable from semester to semester and even within a given semester as examination periods come and go. The volunteer nature of the staffing means that operations in these stations tend to be somewhat informal, and it places a practical limit on the number and intensity of formal duties that can be imposed on day-to-day operations.

12. Performance of digital recordings by college webcasters benefits the composer and artists of new music. Most college stations do not program music under rigidly circumscribed formats dictated from above. A far wider variety of music is played by them than by their commercial broadcast counterparts. The academically affiliated stations, having young staffs, naturally present more new music by emerging artists. As emerging artists these musicians need and desire public exposure. They see presentation by these college stations as ways to build a following, and they promote themselves by distributing copies of their recordings and allied promotional materials to such stations. This is a mutually beneficial relationship. Many college stations, having restricted programming budgets, take advantage of such promotional disks and other materials, thereby assuring new works and artists of prompt exposure.

IBS Relations with the Performing Rights Organizations

13. As alluded to earlier in my testimony, IBS has negotiated licensing agreements over the past three decades with the performing rights organizations, viz., ASCAP, BMI, and

SESAC. A few member stations report operating under campus-wide licenses negotiated by the parent academic institutions. The IBS-negotiated licenses are tailored to the distinctive characteristics of campus stations. The stations' licenses with ASCAP provide for an annual fee of under \$ 300 and for reporting music played on a sampling basis, i.e., during a calendar week and a further sampling of a few stations designated annually by ASCAP; the licenses with BMI provide for an annual fee of under \$ 300 and for reporting music played on a sampling basis, i.e., 72 hours once a year, and the licenses with SESAC contain no reporting requirement.

14. Under the terms of the Small Webcaster Settlement Act of 2002, P.L. 107-321, IBS and other small webcasters negotiated a nonprecedential rate agreement for October 28, 1998 - December 31, 2004. Those rates and terms were published in the Federal Register, 68 Fed. Reg. 35,008 (June 11, 2003). Subsequently, RIAA, IBS, and Harvard Radio Broadcasting Co., Inc., negotiated a nonprecedential extension of those rates for 2005. The agreement had special provisions concerning recordkeeping and reporting, tailored the academically affiliated noncommercial webcasters' uses and capabilities.

15. The three signatories filed a "Joint Petition for Adjustment of Rates and Terms for Statutory Licenses Applicable to Noncommercial Webcasters Making Eligible Nonsubscription Transmissions" with the Office on August 26, 2004. A copy of that petition is attached as an exhibit hereto. The Office declined to publish the agreement in the Federal Register, and at that point the legal situation became contentious among the Office and the parties. Nevertheless, rates and terms were continued in effect in 2005 by intervening statutory enactment.

Before the
COPYRIGHT ROYALTY BOARD
in the Library of Congress
Washington, D.C.

In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2005-1 CRB DTRA

TESTIMONY
of
MICHAEL PAPISH

on behalf of
HARVARD RADIO BROADCASTING CO., INC.

Curriculum Vitae

1. I am currently the Treasurer of Harvard Radio Broadcasting Co., Inc., licensee of Station WHRB (FM), Cambridge, Massachusetts, and President & CEO of MediaUnbound, a music recommendation and personalization technology company also based in Cambridge, Massachusetts.¹

2. From 1998 to 2000, I was Chief Engineer of the Harvard radio station, WHRB (FM). In this capacity I spearheaded WHRB's efforts to begin webcasting in 1999. In January of

¹ MediaUnbound is the leading provider of third-party recommendation technology to the music industry, and the company has played an important role in the evolution of digital music over the past five years. Representative clients of MediaUnbound include Napster, HMV, and Mix & Burn.

2000, I took a leave of absence from Harvard to co-found MediaUnbound. I resumed undergraduate status in 2003 and am scheduled to receive my A.B. degree in March, 2006. I currently serves as Treasurer of the station and have served on its Administrative Board. In the past years I have been involved in program creation for broadcast and streaming.

3. Since 2000, I have been an active participant in legal, policy and technology matters related to webcasting by educationally-affiliated groups. In addition to being the principal author for WHRB's comments on recordkeeping, I was a participant in the May 10, 2002, U.S. Copyright Office Roundtable on "Reporting to Determine Royalty Allocation." In November of that year, I moderated a panel at the College Music Journal (CMJ) conference on the webcasting rate proceeding before the CARP. On November 10, 2002, I published an op-ed in the Washington Post detailing my thoughts on the flaws of the CARP and how the process hurt educationally affiliated webcasters. In addition, I routinely speak at college radio conventions on the technical and legal aspects of webcasting. Participation in these events has afforded me an opportunity to talk to students from hundreds of educationally affiliated stations around the country on their efforts to webcast.

Description of
Harvard Radio Broadcasting Co., Inc.

4. Harvard Radio Broadcasting Co., Inc., is an eleemosynary corporation, incorporated in Massachusetts in 1951. The corporation has been the licensee of Station WHRB (FM), Cambridge, Massachusetts, since mid-1957. The corporation is tax-exempt under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(e)(3), and the station is exempt from the FCC's annual regulatory fees under Section 9(h)(1) of the Communications Act, 47 U.S.C. § 159(h)(1). The corporation is controlled by an independent board of trustees, and the station is

operated, managed, and administered on a day-to-day basis on by a volunteer staff composed of undergraduates of Harvard College, whose participation is subject to regulation by the College's Dean of Students. It has no employees within the meaning of Section 73.2080 of the FCC's rules, 47 C.F.R. § 73.2080. The station broadcasts programming 24 hours every day from its studios in a building owned by Harvard University. The station began operating as a closed-circuit AM broadcast station under Part 15 of the FCC's rules on December 2, 1940, and was licensed as a commercial FM broadcast station by the FCC in mid-1957. The original carrier current operation -- a technological precursor of today's BPL (broadband over power line) technology -- was abandoned in 1973.

5. The principal purpose of WHRB is to offer musical, cultural, educational, informational, and other programs and materials for the entertainment and benefit of the public and for the education and training of its staff. The commercial nature of the station's operations provides opportunities for practical training its undergraduate staff in management, programming, marketing, finance, and engineering. Over the past sixty-five years many of the station's alumni have gone into broadcasting, journalism, music, finance, engineering, and allied fields.

6. WHRB's daily programming is diverse. Its music programming embraces classical music, jazz, and underground rock, exploring a great repertory of music left largely untouched by other commercial stations. WHRB's weekend music lineup features blues and urban contemporary programs, and Hillbilly at Harvard. On Saturday afternoons WHRB is the Boston outlet for the Metropolitan Opera's international radio network, and during the broadcast season the station often broadcasts locally originated commentary and discussions. Twice a year

WHRB's Use of Recorded Music is Limited and Distinctive

8. Station WHRB does not adhere to a music-only or disc jockey format. WHRB's musical programming philosophy stresses variety and the airing of musical works not often heard on commercial sources and stands in contrast to the practices of large AM/FM broadcasters and webcasters and other large internet-only webcasters. Instead of relying on a rotation of 500-1,000 musical works, WHRB estimates it plays 70,000-90,000 unique sound recordings annually.²

9. Because of its distinctive programming, the station relies almost entirely on non-digital recordings. WHRB is one of the few domestic stations transmitting a sizable percentage of its music from LP's, including many historical recordings not otherwise available. In addition, the station broadcasts taped dubs of 78 rpm disks dating back to the beginning of the 20th century, some of which have never been reissued since the 78 rpm era, which ended in the early 1950s. The "Record Hospital" program routinely uses 45s, 7", 10" EPs and LPs. Jazz programming uses as estimated 25-30 percent LPs. Classical music might routinely air 5-8 percent LPs, with some orgies® significantly more. Some, with particularly unusual subjects, might be as much as half. The station, in contrast to many college and other small AM-FM webcasters, maintains its own, extensive library of recordings, although it draws on public and private archival resources throughout the Boston area. Its record library, located at its studios, probably contains on the order of 75,000 78s, LPs, 45s, disks, and tapes. Many of the so-called digital CDs, of course, are simply digital dubbings of analog recordings.

² WHRB broadcasts 24 hours each day for 365 days each year. We estimate that the average sound recording transmitted is 5 minutes in duration. Since the station's programming generally attempts to minimize repetitions of any sound recording in a given calendar year, we estimate that between 70,000 and 90,000 are transmitted annually.

Before the
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Washington, D.C.

In the Matter of)

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Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
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Docket No. 2005-1 CRB DTRA

REBUTTAL TESTIMONY
of
MICHAEL PAPISH

on behalf of
HARVARD RADIO BROADCASTING CO., INC.

I submit this testimony in rebuttal to two facets of the testimony of Barrie L. Kessler, who testified before this Board on behalf of SoundExchange as SoundEx's Chief Operating Officer.

Exhibits for identification 159-60

First, her testimony as to the presence or absence of specific information, viz., ISRCs (international standard recording codes) and default data on or accompanying the photographic representations of the two sound recordings identified in the record as Services Exhs. 159-60, was at best incomplete. The purpose of this affidavit is to further identify the underlying tangible discs as Exhs. 159B and 160B and to support the

admission of Exhs. 159-60. I am informed that some months ago WHRB's counsel offered the other parties in this proceeding the opportunity to physically examine Exhs. 159B and 160B and that there have been no requests to do so.

The two discs -- which are to be marked as Exhibits 159B and 160B for identification and the photographic images of the discs and their respective album covers, marked Exhibits 159 and 160 for identification, which are to be reoffered for admission into evidence -- are discs that have actually been played over Station WHRB (FM) and are representative of a substantial class of recordings that are played over the station (and consequently webcast) in the course of regular programming. Despite using software of the sort described by Ms. Kessler, I have been unable to detect an ISRC embedded in either disc. Given the physical characteristics of these discs I should not have expected to find any. Taking both the disc label and the album for each disk, respectively, I could not confidently find all four of the default identifying data elements on either of the disks, so that neither WHRB (FM) nor anyone else would have been able to report all the elements Ms. Kessler proposed to require webcasters to report to SoundExchange in order to avoid the penalties she proposed.

As a practical matter, given its programming format, Station WHRB (FM) would not be able in a substantial number of cases each week to comply with SoundExchange's proposed data-reporting requirements. This is so, because many of the 1,500 sound recordings played by the station in the course of the week -- of which many are manufactured and/or distributed by labels that are members of SoundExchange's affiliated organization, the Recording Industry Association of America (RIAA) -- a

substantial proportion do not contain embedded ISRCs. In fact, various examinations were made of a spot-check of divers discs drawn from broadcast station libraries in the Boston area that were made by me or at my request did not detect embedded ISRCs, with the exception of one label. On discs issued under the SONY label from the late 80s-on the ISRC seemed to be regularly embedded.

Error Inherent in Sampling

Second, Ms. Kessler testified and was examined at length on the error inherent in any sampling method and on the materiality of such systemic errors in sampling digital recordings played by college radio stations and whether the census-type reporting she proposed would be cost-effective. I have made some simple and intuitive, back-of-the-envelope calculations to estimate the probable range of dollars-and-cents impacts on the average recording artist (or group) that would result from sampling certain representative classes of radio stations' use of digital sound recordings in their simultaneously webcasting their aired broadcasts. The formula underlying these estimates is simple enough to allow anyone to perform informal sensitivity analyses of the results obtained by varying the values assigned to the independent variables in the formula in light of whatever additional information might be available to him or her. There are certain limitations in the data available for analysis, and some of these are discussed in greater detail below. The approximations in the spreadsheet are simply the best available within the data-imposed limitations. Thus, while the calculations in the spreadsheet do not yield precisely accurate numbers, the figures in columns (14) – (15) do provide qualitative

Before the
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Washington, D.C.

Exhibit 4 – 8/7/06 Tr. pp. 11-21, 23-
24, 51, 53-56, 62-67
(Kass)

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In the Matter of:

The Digital Performance Right
in Sound Recordings and
Ephemeral Recordings

Docket No.
2005-1 CRB DTRA

(Webcasting Rate Adjustment
Proceeding)
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Volume 34

Room LM-414
Library of Congress
First Street and
Independence Avenue, S.E.
Washington, D.C. 20540

Monday,
August 7, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

1 Q And that's set forth in your
2 testimony?

3 A Yes, it is.

4 Q Over the past 40 or so years, what
5 positions have you occupied and duties have
6 you performed with IBS?

7 A Principally two. I am the
8 Treasurer of the Intercollegiate Broadcasting
9 System and, again, essentially what we would
10 call the chief operating officer. It's
11 described as Director of Operations.

12 Q What has been your specific
13 involvement in copyright matters from that
14 period?

15 A Since the 1970s, the
16 Intercollegiate Broadcasting System and myself
17 have been involved in negotiating rights with
18 artists and performers.

19 Q And organizations throughout?

20 A Yes. Principally in the early
21 years, in the 1970s, ASCAP, BMI, and SESAC.

22 Q To what extent have you had an

1 opportunity to become familiar with the
2 organization and staffing of radio stations of
3 educationally affiliated institutions?

4 A I'm very, very familiar with all
5 aspects of school and college radio stations.
6 I have visited hundreds of them. I meet with
7 over 1,000 staff members every year coast to
8 coast.

9 Q Are there some meetings of these
10 staff members that IBS runs in which you're
11 involved?

12 A Yes. We have coast to coast
13 conferences in the fall, primarily in Boston,
14 Chicago, and Los Angeles. And in the spring,
15 we have our international conference in the
16 Hotel Pennsylvania in New York City.

17 Q And at these meetings, can you
18 characterize the nature of your involvement
19 with the attending student staff members?

20 A I greet and talk to the vast
21 majority of them as they come in the door. I
22 ask them questions, like "What are your

1 biggest challenges? How have you solved those
2 challenges? What can IBS do for you? And are
3 we doing the right things?"

4 Q Going back prior to 1960,
5 actually, when was IBS founded?

6 A In 1940.

7 Q And how is it organized
8 corporately?

9 A In 1944, we organized as a Rhode
10 Island corporation.

11 Q And is this a nonprofit
12 corporation or a for-profit corporation?

13 A It is a not-for-profit
14 corporation.

15 Q To be clear, then, is it a
16 tax-exempt nonprofit membership organization?

17 A Yes.

18 Q Does it have a board of directors,
19 which directs its affairs?

20 A Yes.

21 Q And can you characterize the
22 composition of the membership of that board?

1 A It's very diverse, both by age and
2 other characteristics, geographic.

3 Q And what about by occupation?

4 A We have some tenured professors.
5 We have some technological people from Apple
6 Corporation and certainly myself, who is not
7 an academic.

8 Q Does IBS have any paid officers,
9 directors, or employees?

10 A No.

11 Q Then it's purely voluntary staff?

12 A Yes. I've never been paid by IBS
13 in the 40-some years that I have worked 20 to
14 40 hours a week for them.

15 Q Looking back, then, and coming
16 forward from the early '40s, what have been
17 some of the functions that IBS has performed
18 for its member stations?

19 A Pretty much whatever they needed.
20 In the early years, the discussions certainly
21 centered around how we moved from the carrier
22 current or public address and campus-oriented

1 to licensed facilities.

2 And IBS certainly worked with
3 Congress and the federal communications system
4 and got the 20 lower end of the bands as
5 noncommercial educational stations. We in the
6 very early days sold advertising from New
7 York, when a lot of our stations were
8 commercial in nature but not for profit. And
9 we in the very early days also had program
10 series.

11 Q Picking up that point, if I may
12 interrupt you, does IBS at this time
13 distribute programming?

14 A No. We have not for a couple of
15 decades.

16 Q I take it, then, that based on
17 your previous testimony that IBS has conducted
18 national and regional meetings for the
19 education of an exchange of experience among
20 its members?

21 A Yes, for 66 years.

22 Q And what about printed

1 publications?

2 A Yes. We have had magazines in the
3 past, such as the Journal of College Radio and
4 College Radio Magazine. And we currently
5 produce a newsletter.

6 Q And do you maintain a Web site?

7 A Yes, we do.

8 Q How many radio stations that are
9 student-staffed are there domestically?

10 A Approximately 1,500.

11 Q And how many of these are members
12 of IBS?

13 A Approximately 1,000.

14 Q And how would you characterize
15 IBS' membership? You know, is it homogeneous
16 or diverse?

17 A It's extremely diverse, very
18 difficult to characterize. You have
19 everything from the small five-person student
20 station at a high school or a community
21 college to the large metropolitan stations.

22 Q And is it possible at all to

1 generalize without exceptions to these
2 stations?

3 A No.

4 Q I mean, there's a range?

5 A There's a full range. And it's
6 very, very difficult. In fact, IBS is unique
7 in the fact that part of all of the other
8 noncomm. groups are the religious
9 broadcasters. Part of NPR, part of
10 CPB-qualified stations are all IBS members.

11 Q To clarify, you don't mean that
12 all CPB-qualified stations are members?

13 A No. All NPR and CPB-qualified
14 stations would be 800 entities. And of those,
15 maybe only 50 to 100 are IBS members.

16 Q But your point, I take it, is that
17 the IBS membership is --

18 A Very broadly based and for people
19 that -- stations that want best management
20 practices, want to have the collective wisdom
21 of 66 years of experience, and want to know
22 how it's done correctly.

1 Q How would you characterize the
2 educational institutions with which these
3 stations are affiliated?

4 A Most of them are public
5 tax-supported institutions.

6 Q And those that are not are what?

7 A Private high schools, private
8 colleges.

9 Q How many of these member stations
10 webcast?

11 A About 28 percent.

12 Q And is such webcasting confirmed
13 to simultaneously streaming of the off-the-air
14 programming?

15 A Yes.

16 Q But are there stations that
17 overcast without having an over-the-air
18 facility?

19 A Yes.

20 Q Is that a large percentage, a
21 small percentage?

22 A Probably about a third principally

1 are high school stations and these small
2 community colleges that couldn't get FM
3 licenses. And this is their chance to
4 participate and educate their people using the
5 radio and Web streaming as a way of doing
6 that.

7 Q Could you sort of summarize what
8 purposes these campus stations serve?

9 A It's sort of like a chemistry lab
10 or a physics lab. Only in this particular
11 case, it's a college radio or high school
12 radio lab. It certainly teaches the students
13 the soft skills of showing up on time or
14 electronically figuring out how to show up on
15 time in your absence.

16 It teaches them digital
17 communications, very valuable in the
18 marketplace, how to stream audio, potentially
19 video. It teaches them speech skills, teaches
20 them organizational skills, leadership skills.

21 It's a tremendously valuable tool.
22 And the best part about it, the part that I am

1 passionate about, is it's a fun way to learn.
2 And educators tell us that the best way to
3 learn is while you're having fun.

4 Q Do some of these stations sell
5 advertising?

6 A Yes.

7 Q What percentage would you say?

8 A Maybe five percent.

9 Q So 95 percent do not?

10 A Correct.

11 Q And as to the five percent, then,
12 what purposes does this advertising serve?

13 A Well, it's a very valuable
14 educational tool because the business school
15 and the university certainly wants to teach
16 its people marketing and invoicing and
17 contracting and different skills. And the --
18 selling the commercials is a good way to do
19 that.

20 Q What about the programming of
21 these stations? Is it confined to recorded
22 music?

1 A Oh, absolutely not. The major
2 listenership is probably sports broadcasting.

3 Q And is there a connection there
4 with the non-recorded music?

5 A Absolutely. Most of college radio
6 stations have a good relationship with local
7 artists and local bands. They quite often
8 perform right in the studio, demonstrate their
9 work, and build their audience.

10 Q And are all of the IBS members
11 nonprofit operations?

12 A Yes.

13 Q What's the typical Web audience of
14 each of these stations?

15 A On average, less than five
16 listeners.

17 Q At any given time?

18 A At any given time.

19 Q Over the past 40 years or so, have
20 you had discussions with member stations about
21 the magnitudes of their annual operating
22 budgets and their sources of funds?

1 A Well, of IBS members, the vast
2 majority of the staffs are students and maybe
3 in a few cases, under ten percent, with some
4 paid staff or a faculty person designated to
5 look over their behalf, but the vast majority
6 are students. And they range from maybe five
7 students to a couple of hundred on the staff.

8 Q And what is the relationship to
9 their participation to academic credit?

10 A Very few stations receive academic
11 credit. Those are primarily ones connected
12 with a mass communications school. One comes
13 to mind. KXUL in Monroe, Louisiana is
14 certainly one that there is some credit given.
15 But the vast majority have no credit.

16 Q Are these station staffs stable or
17 is there some --

18 A No. They're anything but stable.
19 They're constantly changing, even sometimes
20 within the semester, but the average term of
21 someone at a station would be a year, two
22 years. And academic pressures or other

1 pressures lead them to have other pursuits.

2 Q So there's high turnover?

3 A Very high turnover.

4 Q And does this turnover have
5 practical implications for the complexity of
6 procedures and practices that can be passed
7 from one student generation to the next?

8 A A successful station has to keep
9 everything very simple and tolerate a high
10 degree of error because the students just
11 aren't trained. They're learning. It's part
12 of their learning experience. I entered as a
13 freshman, and I think a lot of them do.

14 Q Do some stations even experience
15 discontinuities in operation?

16 A Absolutely. Most of the stations,
17 most of IBS member stations, are off the air
18 during the summer months and on major
19 vacations. The FCC has even permitted
20 broadcast stations to have as few as 36 hours
21 a week of the 168 possible hours and to close
22 on all holidays.

1 am I right that during the last answer you
2 were nodding your head yes?

3 A I said yes for the one or two.

4 MR. HANDZO: That is all I have.
5 Thank you.

6 CHIEF JUDGE SLEDGE: Mr. Malone?

7 REDIRECT EXAMINATION

8 BY MR. MALONE:

9 Q Mr. Kass, for clarification, Ms.
10 Ablin asked you about the modifications in the
11 IBS fee proposal. And you spoke of the
12 quantitative aspects. Did you mean leave the
13 non-quantitative aspects in place or change
14 them also?

15 A I'm glad. I'd like to clarify
16 that. There's basically no recordkeeping
17 involved with the NPR and CPB-qualified
18 stations for the smaller entities. And, of
19 course, there is none under the IBS agreement.

20 Q So that's something you intend to
21 leave unchanged?

22 A Correct, that there would be no

1 least, that would affect the SoundExchange's
2 ability to distribute royalty proceedings to
3 such small artists.

4 Do you see any difference between
5 a small sample on a single station and a small
6 sample, the 28 percent, of the stations that
7 are webcasting?

8 A One eighteen calls for a sampling
9 of ten stations throughout the year. And
10 that's adhered to by ASCAP. BMI does an even
11 smaller period of sampling.

12 The challenge because IBS
13 passionately wants the copyright holder to
14 receive the vast majority of the royalty
15 payments, we want the artists, we want the
16 performers to get the money that we're paying
17 in. And assuming that they're going to get 90
18 percent of the money or some large percentage,
19 obviously a very accurate sample costs the
20 entire amount of the fee. So the artist gets
21 nothing.

22 So if you have a 100 percent

1 sample, that basically means that the
2 data-processing costs are going to eat up the
3 entire royalty.

4 Q What would be your impression
5 based on your experience with the college
6 stations as to whether there's a difference
7 between sampling one college station for a
8 week and sampling whatever, 28 percent of 970
9 college stations it is?

10 A Well, a sample is a sample. You
11 are going to miss some people when you sample,
12 but it's the best way. RIAA suggested that we
13 create a fund and we buy, in effect, the
14 information. And that's possible. There are
15 other suggestions that have been made, but
16 there's an old saying in data processing,
17 "Garbage in, garbage out."

18 And when you have volunteer
19 student staffs attempting to create or have
20 data, which the FCC no longer requires. So
21 these stations that are broadcasting over the
22 air do not have to have programming logs, do

1 not -- that requirement has been eliminated by
2 the FCC.

3 So there is no other reason to be
4 capturing this data. And, therefore, we have
5 to work on a better way to do it. But a small
6 sample is probably the best way at this point.
7 Pick 10 stations or pick 20 stations and do a
8 sample of those stations. And you can process
9 that data and pay most of the artists.

10 Q Let me see if I understand the
11 implications of what you are saying. When you
12 increase the number of stations sampled, does
13 that give you more data to work with and a --

14 A It costs more to process. It
15 gives you more data to work with, but it costs
16 more to process. And you want the artists to
17 get most of the money, not the data
18 processors.

19 Q Well, let's focus on this small
20 artist who might be missed on the sample from
21 one station, but you've got, you suggested, 10
22 stations or I suggested 280 stations. Does

1 that change the --

2 A Most of the artists by number, the
3 vast majority of the artists by number, are
4 not interested in the royalty payments.
5 They're interested in being heard on school
6 and college radio because that's the only way
7 they're going to be heard.

8 MR. MALONE: I have no further
9 questions on redirect.

10 CHIEF JUDGE SLEDGE: Ms. Ablin?

11 MS. ABLIN: No further questions,
12 Your Honor.

13 CHIEF JUDGE SLEDGE: Ms. Brown?

14 MS. BROWN: No further questions,
15 Your Honor.

16 CHIEF JUDGE SLEDGE: Mr. Handzo?

17 MR. HANDZO: A couple of
18 questions, Your Honor.

19 RECROSS-EXAMINATION

20 BY MR. HANDZO:

21 Q Mr. Kass, you were just talking
22 about whether or not there was a need to

1 and the future of internet in this country to
2 be spending time dealing with clubs of
3 students who may have five people listening to
4 them, to each club.

5 THE WITNESS: I think that's a
6 very perceptive question, Your Honor. And I
7 think Congress intended for groups like us to
8 have been quickly dealt with during the open
9 negotiation period and probably should have
10 been.

11 We probably have consumed more of
12 the artists' money in attorneys' fees and more
13 of the student broadcasters' money in
14 attorneys' fees than the royalties that will
15 result.

16 CHIEF JUDGE SLEDGE: Should I
17 infer from your answer that it is not a good
18 use of money to be participating in these
19 proceedings for these clubs?

20 THE WITNESS: I don't think it's a
21 good use of the artists' money or the college
22 and high school broadcasters' money. I think

1 that a fixed rate should be agreed on as
2 rapidly as possible -- I wish it had been
3 agreed on 18 months ago during the open
4 negotiation period -- and move on to where the
5 big money is for the artists with the
6 commercial broadcasters. And because the
7 proper way, it certainly appears now, would be
8 for these clubs with five listeners to be
9 something like \$25 a year.

10 And how much legal time and how
11 much of Your Honor's time and the court's time
12 and the Board's time should be spent on
13 something as de minimis as this is the case.
14 I wish that this had been dealt with 18 months
15 ago during the open negotiation period.

16 CHIEF JUDGE SLEDGE: And absent
17 that agreement, would it be smarter to
18 structure the educational process so that you
19 weren't involuntarily taking the property that
20 belongs to somebody else and have an
21 educational process that did not involve that
22 involuntary taking of somebody else's

1 property?

2 THE WITNESS: The interesting part
3 of it is that our society is competing with
4 societies worldwide. And our youth need that
5 knowledge of digital communications, of
6 streaming. And a good way to teach them those
7 techniques and those technologies and what
8 have you is through internet Web streaming.

9 And music makes it fun. And music
10 makes it interesting. And education is always
11 a whole lot better when it's fun and
12 interesting. So I think it's absolutely vital
13 that music be part of high school and college
14 radio.

15 I just wish there was a simple
16 way, a flat fee, a simple way of sampling so
17 that we would eliminate the barriers to entry.
18 What concerns me is the 90,000 high schools
19 that aren't yet webcasting and that would
20 tremendously benefit these young minds that
21 should be learning digital technology, should
22 be learning the techniques of digital

1 communication, and make it easy for them, make
2 it a package.

3 I think it's our duty in
4 government and certainly our duty to the
5 artist as well as to our America's sons and
6 daughters that are at -- Intercollegiate
7 Broadcasting members that we figure out a way
8 to help them learn and to do it.

9 It certainly isn't impacting
10 greatly with five listeners or less on the
11 scheme of things, but it is impacting
12 tremendously on the education of our youth.
13 They soak this stuff up. And better that they
14 learn it in a high school or college radio
15 than a video game.

16 CHIEF JUDGE SLEDGE: Well, you
17 make a compelling statement of the fine
18 experience which is educational to students.
19 But in your scenario, you're involuntarily
20 enlisting the property that belongs to
21 somebody else to provide that experience. You
22 don't want to pay for the property you're --

1 THE WITNESS: To the benefit of
2 the artist, the artist also is getting a
3 chance to expose their music to young ears.
4 And it's certainly the youthful demographic
5 that artists would like to reach.

6 And so it's those artists by
7 number, if not by RIAA representation, which
8 would certainly eagerly like to have their
9 music heard, even if only by five high school
10 listeners.

11 CHIEF JUDGE SLEDGE: And, of
12 course, that can be done by agreement?

13 THE WITNESS: Absolutely.

14 CHIEF JUDGE SLEDGE: But it
15 hasn't?

16 THE WITNESS: No, sir. We're
17 hoping that you and the other members of the
18 Board will facilitate that.

19 CHIEF JUDGE SLEDGE: Mr. Malone,
20 any other questions?

21 THE WITNESS: We'll certainly
22 encourage SoundExchange or RIAA to facilitate

1 that.

2 MR. MALONE: Yes, please.

3 FURTHER REDIRECT EXAMINATION

4 BY MR. MALONE:

5 Q His Honor asked you some questions
6 in terms of the phrase "involuntary taking."
7 And to your mind, does the noncommercial use
8 affect whether this is a classical taking?

9 A Well, it's not a classical taking
10 because the way that IBS members receive the
11 music is it's given to them by the artist and
12 by the music industry.

13 So it's certainly not an
14 involuntary taking. The music industry
15 provides the music we play, if that answers
16 the question.

17 MR. MALONE: I think it does.

18 Thank you, Your Honor.

19 CHIEF JUDGE SLEDGE: Any other
20 questions?

21 MR. HANDZO: No, Your Honor.

22 CHIEF JUDGE SLEDGE: Thank you,

Before the
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Washington, D.C.

Exhibit 5 - 8/7/06 Tr. pp. 78-114
(Papish)

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In the Matter of:

The Digital Performance Right
in Sound Recordings and
Ephemeral Recordings

Docket No.
2005-1 CRB DTRA

(Webcasting Rate Adjustment
Proceeding)
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Volume 34

Room LM-414
Library of Congress
First Street and
Independence Avenue, S.E.
Washington, D.C. 20540

Monday,
August 7, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

1 for college radio.

2 Q What is Harvard Radio Broadcasting
3 Co. Inc.?

4 A It's basically an independent
5 organization. It's a 501(c)(3) nonprofit
6 organization. It's separate from the
7 university. It holds the license for the
8 radio station. So the university does not
9 hold WHRB's license.

10 This is different than many
11 college radio stations. And Harvard Radio
12 Broadcasting basically has a board of
13 trustees, which oversees the station and then
14 also is what organizes the day-to-day
15 operation by hiring students to be general
16 managers, program directors, and really runs
17 the station operations.

18 Q You used the word "hiring." Did
19 you misspeak?

20 A I mean, no one at WHRB is paid a
21 salary. So when I say, "hiring," it's much
22 more of applying for a position and choosing

1 or electing. For example, the station
2 president is elected from members that are
3 undergraduates.

4 It looks very much like a student
5 club. You might be familiar with, you know,
6 debate clubs, newspaper. We are very similar
7 looking from an organizational perspective.

8 Q In paragraph 4 of your written
9 statement, you mentioned the annual regulatory
10 fees under the Communications Act. What is
11 the station's status with respect to such
12 federally imposed fees?

13 A The -- so we're exempt from the
14 annual regulatory fees. But obviously as a
15 radio station, we have to abide by all the FCC
16 rules concerning how to operate a radio
17 station.

18 Q Elaborating the question of staff,
19 is the station run by volunteers or by paid
20 people?

21 A It's entirely volunteer-based.
22 There are no paid employees as part of the

1 radio station. And, in addition, it's
2 completely staffed by mainly undergraduates
3 but a few graduate students, although the
4 bylaws preclude graduate students from having
5 any role in the administration of the station.
6 So there really are no I should say adult
7 supervision on a day-to-day basis coming into
8 the station.

9 Q What is the applicability of the
10 nondiscrimination provisions of the FCC's
11 rules in 47 CFR section 73.2080?

12 A I'm not intimately familiar
13 exactly with the specific statute number that
14 you have read off. Obviously the station
15 doesn't discriminate in any way regarding who
16 they hire other than they look to hire
17 students that are at the university. Other
18 than that, there is no other way in which the
19 station would use it for its day-to-day
20 operations.

21 Q You used the word "hire" again.
22 Is that subject to the prior qualification?

1 A Yeah. Yes. Again, the station
2 does not hire in the sense of paying anybody,
3 although it does like to think of itself as an
4 educational opportunity in the way a business
5 might be run. So the general manager of the
6 station, you know, sort of deals as if they
7 were running a radio station.

8 Q What are the antecedents of the
9 present FM station?

10 A So in 1951, basically several
11 students that were interested in some of the
12 more engineering aspects of audio broadcasting
13 created basically a closed-loop broadcast in
14 the university, where they were experimenting
15 with different technologies of broadcasting
16 without using over-the-air transmissions.

17 And later on, almost as an
18 experiment, the station expanded to FM
19 broadcasting, which in 1957, when we received
20 the license, was still very much an
21 experimental medium. And the station was one
22 of the first to begin broadcasting on FM.

1 Q Did you mean to say 1951 or --

2 A Nineteen fifty-one was when the
3 station -- I'm sorry. Nineteen forty was when
4 the station began closed-circuit broadcasts.
5 Nineteen fifty-seven was when it began FM.

6 Q And when there is a reference here
7 in your testimony to that operation being a
8 technological precursor of BPL, would you
9 explain to the Board the significance in the
10 definition of that?

11 A Yeah. I mean, it's so -- there
12 have been many attempts to try to use
13 basically power currents to not only contain
14 electricity but also be able to modulate a
15 signal so that, in addition to getting power,
16 you could also, say, get -- as today you often
17 see in residential homes broadband. you might
18 be able to plug a modem into your electrical
19 outlet in one room and then receive the
20 internet in another room as transmitted over
21 your power lines, similar technology used in
22 some of the very early audio experiments for

1 putting an audio signal over a power line,
2 although obviously the amount of data that was
3 being able to transmit in those early
4 experiments was vastly inferior to what
5 today's broadband over power could do.

6 Q What is station WHRB's principal
7 purpose?

8 A So the station is set up to be --
9 basically educate the public and its listeners
10 in new and interesting music that they might
11 otherwise not hear in any other outlet as well
12 as educate the student staff as to what one
13 might do in order to create a 24-hour radio
14 station. And also it's a nice learning lab
15 for students as to how you might create a
16 business and how you might operate a business.

17 So they learn everything from
18 sales to marketing to interpersonal
19 relationships between different members of the
20 staff. It's actually a really interesting and
21 very much hands-on experience for the
22 students.

1 Q Did you mean to imply by your
2 answer that the programming was limited to
3 music?

4 A No. So the station in its
5 activities has several different formats,
6 several of which are music, such as classical
7 music, jazz, and rock. In addition, there are
8 sports broadcasts. So the station currently
9 carries a large number of varsity sports
10 programs, including football; hockey, both
11 men's, women's; basketball, both men and
12 women's, in addition to, you know, the playoff
13 implications of these sports.

14 There's also a public issues
15 program which airs, dealing with both
16 university issues and issues of the
17 surrounding communities. And the station will
18 run several talk shows at time. And often
19 programs about music that don't even pertain
20 to music necessarily but are more speaking and
21 talking about the concept of issues.

22 Q Does the station have the

1 technical capability of bringing material out
2 of lecture halls?

3 A Yeah. There are several different
4 ways the station can do what's called remotes
5 in the radio industry. One of which has been
6 around for quite a while at Harvard University
7 is there is a set of steam tunnels which
8 connects almost all buildings on the Harvard
9 campus.

10 And we have a set of priority
11 audio lines, which run so that we can
12 broadcast, say, a live concert from one of the
13 concert halls on campus.

14 In addition, using internet
15 technology, which is available widely
16 throughout the university setting, we're
17 capable of modulating a signal over the
18 internet to be picked up in our station and
19 then broadcast over the air. So we can do
20 remotes from almost anywhere there is an
21 internet connection.

22 And obviously the sports

1 broadcasts all come from remote locations,
2 whether from an actual facility on our campus
3 or when we go to another university for a
4 sporting event, we'll use what's called an
5 ISDN line to send our signal back to the
6 station for broadcasting.

7 Q Could you sort of summarize the
8 types of programming that WHRB carries, then?

9 A Sure. I mean, the overriding
10 theme is trying to program material which in
11 general you're not going to hear almost
12 anywhere else, certainly not on commercial
13 radio and quite often not on noncommercial
14 radio either.

15 It encompasses things as diverse
16 as classical music, which runs from 1:00 in
17 the afternoon up until 10:00 o'clock at night.
18 These are well-researched program material
19 spanning different centuries of classical
20 music, where we're trying to be very diverse
21 and very eclectic in this programming.

22 Overnight there's basically what

1 is called the record hospital program, which
2 plays independent and somewhat experimental
3 rock and independent music.

4 There's a jazz program which runs
5 in the morning, which also tends to focus on
6 jazz recordings that you won't hear on one
7 other jazz station in the Boston market.

8 There is an urban contemporary
9 program, which runs Saturday nights. There is
10 a blues program which runs Sunday mornings.
11 Saturday mornings there is a program entitled
12 Hillbilly at Harvard, which is run by several
13 long-time radio hosts who have been on the air
14 at our station for over 40 years dealing with
15 country, rockabilly, really music that you
16 don't hear anywhere in the Boston area.

17 And then, as I mentioned, there's
18 also sports broadcasts, which can happen
19 normally in the evenings or on the weekends
20 for football games and news which occurs on
21 Sunday afternoons.

22 And then there will be special

1 programming, you know, for election coverage.
2 We had to do pretty heavy election coverage at
3 the station, both locally and also for more
4 national scope.

5 And also there are two periods
6 which we call orgy periods, which occur during
7 our exam period at Harvard, where students
8 will take a genre, a composer, an artist, a
9 theme, and basically expand on that for up to
10 a full week of dedicated programming.

11 One example I mentioned in my
12 testimony is the Mozart orgy, which was over
13 a week of full-time programming looking at
14 everything that Mozart had composed, multiple
15 different recordings of many of the pieces,
16 some pieces which were unclear whether they
17 were even Mozart compositions, and commentary
18 from several well-known professors about the
19 music and about what it meant, what we were
20 doing with this orgy.

21 Q May I interrupt you?

22 JUDGE WISNIEWSKI: If I may

1 interrupt you for a second, Mr. Malone, --

2 MR. MALONE: Yes.

3 JUDGE WISNIEWSKI: -- just to
4 follow up?

5 I noticed in your testimony that
6 you have trademarked this notion of orgy. It
7 sounds funny to say. But, nevertheless, why?

8 THE WITNESS: Right. Obviously
9 the trademark is very narrowly applied to the
10 use of creating a type of programming. You
11 know, it doesn't apply to other things.

12 And the reason was was in radio,
13 the way that one markets its brand or its
14 programming tends to be very competitive. And
15 so we thought the idea of an orgy was both a
16 unique programming idea as well as a unique
17 way to speak about or to reference this type
18 of programming.

19 And so we thought -- and, again,
20 this was -- I think the trademark goes back at
21 least 30 years, if not longer, something that
22 we thought was important to our identity as a

1 radio station.

2 JUDGE WISNIEWSKI: So it was for
3 competitive marketing reasons. Is that
4 correct?

5 THE WITNESS: Yeah. I mean, it
6 could also be seen as somewhat of a joke, as
7 many things in the college radio or in
8 general, folks enjoy engineering or other
9 pursuits. Similar at MIT, how they have
10 certain pranks, I think you could also look at
11 the idea of having a Harvard
12 University-sponsored club. Trademarking the
13 term "orgy" is sort of humorous.

14 JUDGE WISNIEWSKI: Well, it
15 certainly wasn't submitted for consideration
16 by the PTO Office as a joke, was it?

17 THE WITNESS: No, no. It's a
18 serious application. And it is used. And
19 that's why we reference the trademark at any
20 time we use it in print or in our programming
21 guides.

22 JUDGE WISNIEWSKI: Thank you.

1 MR. MALONE: To the extent it
2 makes any difference, Your Honor, it is a
3 service mark.

4 JUDGE WISNIEWSKI: Yes.

5 BY MR. MALONE:

6 Q I interrupted you, Mr. Papish,
7 when you were beginning to describe the recent
8 Mozart orgy. I want to show you what is
9 marked as Services exhibit 103, which I showed
10 Dr. Brynjolfsson. And I ask you if you can
11 identify what this is.

12 CHIEF JUDGE SLEDGE: Mr. Handzo?

13 MR. HANDZO: Thank you, Your
14 Honor.

15 Your Honor, I would object to
16 testimony about this exhibit. It was not
17 attached to the witness' direct written
18 statement. I think the regulations require
19 that exhibits that are used with the witness'
20 testimony have to be part of the direct
21 written statement. This was not. And on that
22 basis, I would object to it.

1 CHIEF JUDGE SLEDGE: Mr. Malone?

2 MR. MALONE: The call for this
3 exhibit arose in the course of Dr.
4 Brynjolfsson's testimony. We showed it to Dr.
5 Brynjolfsson. He was not able to identify it.
6 I think that that certainly is beyond the
7 scope of the rule which Mr. Handzo refers to.

8 CHIEF JUDGE SLEDGE: Objection
9 sustained.

10 BY MR. MALONE:

11 Q What about Saturday afternoons,
12 Mr. Papish? We were speaking of programming.

13 A Yes. Starting, I guess it was,
14 four years ago, WHRB is now the sole carrier
15 of the Metropolitan Opera on Saturday
16 afternoons. And so we receive a direct feed
17 from the opera, which we then broadcast.

18 It's become a very popular
19 program. There are many people in the Boston
20 metro area when the other station which
21 carried this ceased to do so really enjoyed
22 the fact that we have picked this up and

1 broadcast it. It runs for 20 weeks or 22
2 weeks, I believe, every year.

3 Q And do you do anything in
4 conjunction or adjacent? I guess, "adjacency"
5 is the correct term. Are there any
6 adjacencies to the carriage of the live
7 Metropolitan Opera broadcasts?

8 A Traditionally there are classical
9 programming that's geared towards whatever
10 that opera is. There could be historical
11 remarks that might illuminate the opera which
12 people are going to be listening to, basically
13 creating a full block of programming, you
14 know, centered around that piece.

15 Q And that for the adjacency, the
16 adjacent programming is created by the
17 station?

18 A That's correct. It's by students
19 and folks that do classical programming for
20 our station.

21 Q Does WHRB simulcast its
22 programming over the network and over the

1 internet? And why?

2 A Yes, we do. With a couple of very
3 small exceptions, we simulcast all of our
4 programming over the internet. And it is
5 accessible at whrb.org.

6 The reasoning for this is -- again
7 relates directly back to our purpose as an
8 organization. One is to educate a listener.
9 And we believe that the programming that we're
10 doing would benefit a world wide audience.
11 And the more people that could hear us, the
12 better. So that is one reason.

13 And the other is from an
14 educational standpoint for students. We
15 really think that the combination of the
16 internet and music and media in general is a
17 very interesting phenomenon. It's definitely
18 growing quite quickly. And it's something
19 that students really should have experience
20 with.

21 And in many cases, we have been on
22 the cutting edge of a lot of the things that

1 have gone on in this regard.

2 Q Do you have any quantitative idea
3 as to the listenership to WHRB's webcast?

4 A Sure. So WHRB simulcasts with the
5 help of a third party, outside vendor,
6 Live365. And we're able to get some
7 statistics from them as to our listenership.

8 One statistic that we're able to
9 get is aggregate tuning hours per month. And
10 the last time that I did any calculations
11 closely dealing with these numbers about 6
12 months ago, the average listenership was 12
13 simultaneous listeners. And you can derive
14 that from taking the average tuning hours in
15 a month divided by the number of hours in that
16 month, which would then end up with number of
17 simultaneous average listeners.

18 Q Do you suffer from any limitations
19 on the type of data that Live365 will provide
20 you?

21 A Yes. I mean, since they are the
22 outside vendor that actually connects to our

1 listeners, they maintain and would have to
2 store any data about how those feeds reached
3 listeners. And so basically we're beholding
4 to any kind of processing they might do on
5 their raw data.

6 And we're capable through a basic
7 interface that they have available to anyone
8 that is broadcasting to see certain
9 statistical information in one of those
10 aggregate tuning hours, but we do not see any
11 raw usage data which we could parse on our
12 own.

13 Q Going back to the 12 simultaneous
14 listeners, is there a limitation imposed by
15 your financial arrangement with Live365 on the
16 number of people who can listen?

17 A Yes. So Live365 structures its
18 vendor relationships in terms of bandwidth.
19 And so the amount of bandwidth that we're
20 granted based on our monthly fee would enable
21 us to have up to about 100 simultaneous
22 listeners but no more.

1 And at certain times of the year,
2 specifically for things such as very large
3 sporting events, like the Harvard-Yale
4 football game or playoff contests in the NCAA
5 hockey tournament, or the commencement
6 broadcast, when there's a speaker that
7 generates a significant interest, we can order
8 -- have additional bandwidth for our webcast.
9 And we traditionally would order maybe three
10 times the amount of bandwidth for those
11 specific instances.

12 Q So those are the big audience
13 programs?

14 A Yes. From a webcasting audience
15 perspective, those seem to be the programs
16 that receive the largest audience.

17 Q Do you have any basis for relating
18 the station's webcasting audience to its
19 over-the-air audience?

20 A Yes. We estimate our over-the-air
21 audience to be in the thousands of
22 simultaneous listeners. It is difficult to

1 get a precise number of how many over-the-air
2 listeners one has.

3 Companies such as Arbitron do do
4 researching reports on this type of behavior,
5 although they're survey-based so they don't
6 actually monitor what people are listening to
7 on the radio, but they ask them if they can
8 remember certain catch phrases or certain
9 things they have heard on the radio. And we
10 think that our lack of having a consistent tag
11 line could hinder those survey results.

12 In addition, we don't subscribe to
13 Arbitron to use these figures for sales
14 purposes. So we have mainly received this
15 data from third parties that share with us our
16 audience figures.

17 Q Moving on to the station's use of
18 recorded music, how would you distinguish
19 WHRB's programming from the larger AM-FM
20 broadcast stations and the large internet
21 webcasters?

22 A Sure. So there are several

1 different axes in which you can see
2 differences. One major axis is the amount of
3 unique sound recordings that we might play in
4 a given year.

5 A traditional over-the-air FM
6 radio station might air 100 to 1,000 unique
7 sound recordings in a given year. We air
8 70,000 to 90,000 unique sound recordings. So
9 it's obviously a much more diverse and
10 eclectic set of programming.

11 Secondly, when you look at the
12 operational standpoint of how we actually go
13 about creating these programs, we program in
14 real time using human DJs. So we do not
15 preprogram and store programming on a hard
16 drive.

17 And oftentimes the human DJ can
18 create programming on the fly. They can
19 decide what they want to play, run to the
20 record library, pull out a record, and play it
21 in real time. This is vastly different than
22 almost all commercial radio stations and most

1 internet webcasters, which preprogram.

2 Thirdly, we actually use physical
3 media. So we use items such as vinyl records,
4 actual CDs, tapes, 78s, 45s. And this is,
5 again, vastly different from almost all
6 webcasters and almost all commercial radio
7 stations, which will use a hard drive to
8 broadcast. They store all of their sound
9 recordings on a hard drive. And then they can
10 easily call them up using a computer program.

11 We don't do that. We have humans
12 that physically have to choose these items
13 from a library and place them on either a
14 turntable, a CD player, a tape reel in order
15 to effect the broadcast.

16 Q Given the vast number of
17 recordings in the WHRB's record library, to
18 which you have alluded, and in its programming
19 in the course of the year, is there anything
20 you can tell us about the difference and
21 difficulty WHRB would experience in
22 identifying sound recordings?

1 A Yes. And, again, there's probably
2 a twofold answer here. One, the fact that we
3 play a very eclectic set of recordings and
4 oftentimes from more independent artists, who
5 either self-create their pieces of media or
6 publish through smaller record labels, the
7 defining information on the cover art work or
8 on the accompanying material to a sound
9 recording is a lot different than what you
10 would find in a commercial recording.

11 It's often very artistic. It
12 often lacks some of the pieces of detail that
13 would be required to uniquely identify a sound
14 recording. So that's one factor that would
15 make it difficult.

16 The second is dealing with a
17 library of our size and the fact that it is
18 physical, we don't have a master database
19 which includes identify information for all of
20 the physical media that we own.

21 So every time you would want to
22 uniquely identify a sound recording, a human

1 would have to actually sit down and enter each
2 piece of information individually.

3 This is in stark contrast to a
4 commercial station, where their hard drive
5 system that plays the recordings stores what
6 is known as metadata about the recordings in
7 that database, making it very easy for a
8 commercial broadcaster to call up that
9 information that uniquely identifies a sound
10 recording.

11 Q Would you spell metadata, please?

12 A Sure. The industry term is
13 standardized, I think, as m-e-t-a-d-a-t-a.
14 And there is no hyphen, and it is a single
15 word, though some people do throw a hyphen in.

16 Q And the meta comes from the Greek
17 going along. So can you give the --

18 A Sure. In the industry, it's
19 basically considered data about the media, not
20 the media itself. And there are several
21 different categories. What I am calling
22 metadata here should really be called basic

1 metadata, things that you need to identify a
2 sound recording, you know, an album name, an
3 artist name, track name. That would be basic
4 metadata.

5 There also exists the concept of
6 extended metadata. This could be anything
7 from a biography about an artist to whether or
8 not the artist is a female vocalist or a male
9 vocalist. That would be more extended
10 metadata, which is not part of the basic
11 metadata.

12 Q To what extent does metadata exist
13 in a non-digital environment?

14 A In a non-digital environment,
15 there really is not a compendium of metadata.
16 I mean, for example, a vinyl record is an
17 analog sound recording. There is no digital
18 code that accompanies it. There is no data
19 about that. It's a purely analog piece of
20 media. So there really is no data.

21 For some CDs, there are embedded
22 codes, although we found in our own research

1 that they are not universally applied. And if
2 they're not applied, there is no -- in the
3 standard, the CD standard, there is no place
4 to accompany the metadata as we know it in a
5 human-readable form.

6 Q Is the absence of metadata in
7 digital materials characteristic of a
8 particular class of originators?

9 A It is. You know, for sure,
10 independent labels and independent artists
11 tend to have the least amount of accompanying
12 metadata or, you know, certain codes, like
13 ISRC codes, tend to be utilized more by major
14 record labels.

15 However, in our own findings in
16 MediaUnbound dealing with basically large
17 metadata databases from all of our different
18 clients, we found that, even things such as
19 ISRC codes are really not present in more than
20 maybe 20 to 30 percent of digital sound
21 recordings from both major and independent
22 record labels.

1 Q Do you also in MediaUnbound's
2 business deal with the UPCs?

3 A Yes. One of the goals that
4 MediaUnbound has to do for our clients is
5 figure out what they're offering for sale so
6 we can understand what kind of recommendations
7 we can make. We obviously don't want to
8 recommend something they don't have access to.
9 And in doing this, we need to identify the
10 different items they have in their catalogue.

11 So we do use the UPC codes as a
12 way to match certain album information, but
13 UPC codes are only applied at the album level.
14 They're basically the bar codes you might find
15 on the back of a CD. And, again, they're
16 mainly constrained to recordings that are
17 created for a commercial environment.

18 You don't often find them on many
19 independent releases, which, really, you
20 wouldn't find in a mainstream record store.
21 And there is no need for the bar code or the
22 UPC label.

1 There is also a movement among
2 some college radio stations to really stay
3 away from commercial releases or music
4 releases that have UPC codes..

5 They sort of see, the programmers
6 see that as evidence, that this is intended
7 for a mainstream popular audience. And
8 oftentimes that would disqualify it from being
9 played on the college radio station.

10 Q Do I understand your last comment
11 to be that the college radio programmers
12 discriminate against ISRC embedded record
13 recordings?

14 A I wouldn't say ISRC since most
15 programmers are blind to those codes, but
16 UPCs, which are usually evidenced by an actual
17 bar code on the back of a recording, would
18 often be a reason to ignore a recording, as
19 would just the fact that it's been released by
20 a major record label.

21 Oftentimes this would disqualify
22 the piece of music from really being played in

1 any real rotation on a radio -- on a college
2 radio station.

3 Q Mr. Papish, I hand you a copy of
4 Services exhibit 159, on which Ms. Kessler was
5 questioned at some length, and ask if you can
6 identify it.

7 A Yes. This is --

8 MR. HANDZO: I'm sorry, Your
9 Honor. I have the same objection as
10 previously that it was not attached to this
11 witness' statement. I don't believe it was
12 admitted during Ms. Kessler's testimony. So
13 I think the same rules apply here.

14 MR. MALONE: And I would make the
15 same argument as to why it should be admitted.

16 CHIEF JUDGE SLEDGE: And that is
17 that it was used during the cross-examination
18 of another witness?

19 MR. MALONE: Well, that's correct
20 and that it certainly is pertinent to the line
21 of testimony that has just come through.

22 CHIEF JUDGE SLEDGE: Objection

1 sustained.

2 MR. MALONE: Well, no because we
3 did not anticipate that it would be used in
4 the cross-examination of Ms. Kessler.

5 CHIEF JUDGE SLEDGE: Objection
6 sustained.

7 BY MR. MALONE:

8 Q Mr. Papish, I'm handing you --

9 MR. HANDZO: Same objection, Your
10 Honor.

11 CHIEF JUDGE SLEDGE: Mr. Malone?

12 MR. MALONE: And same response.

13 CHIEF JUDGE SLEDGE: Objection is
14 sustained.

15 BY MR. MALONE:

16 Q Could you summarize, then, Mr.
17 Papish, why ISRCs either do or do not solve
18 the recordkeeping problem?

19 A Sure. From our own use of ISRCs
20 in a digital environment, we find that they're
21 not uniformly or universally applied. So that
22 a large percentage of recordings, sound

1 recordings, will not have an attached ISRC
2 code.

3 And, really, in order to do any
4 sort of recordkeeping, the fundamental problem
5 is identifying the recording. And so if ISRC
6 codes will only give you a small percentage of
7 the content and specifically an even smaller
8 percentage of the content you might find on a
9 college radio station, it won't really suffice
10 for the purposes of recordkeeping.

11 Q So this problem is accentuated by
12 the type of music that college stations tend
13 to play?

14 A Yes. Both the fact that a college
15 radio station plays an eclectic set of music,
16 a large set of music, oftentimes a neither
17 popular, known, nor new releases but older
18 recordings that they have had in their
19 libraries for a long period of time and
20 compounded by the fact that any analogue vinyl
21 recording will never have an ISRC, regardless
22 of whether or not that same recording in its

1 digital incarnation could have one.

2 Q To what extent does WHRB's
3 broadcasting of these distinctive types of
4 recordings benefit the artists?

5 A So one of the major issues for an
6 artist is getting exposure to an audience.
7 It's very difficult in order to do so. And so
8 by focusing on unknown experimental artists
9 that you really can't hear anywhere else, the
10 radio station is really providing a great
11 promotional opportunity in helping people find
12 out about artists.

13 I mean, that's one of our goals.
14 We don't really look at this as an economic
15 thing. Being a nonprofit, we see it as
16 serving our community, exposing them to things
17 they otherwise might not find.

18 Great examples of this are the
19 classical programming that you really wouldn't
20 hear anywhere else as well-researched stores
21 in depth. And also, you know, we have a large
22 number of requests from artists to appear on

1 our programs, to be interviewed. They send us
2 material, which they would like us to play
3 because they want people to hear it and
4 they're not being served by a more commercial
5 market.

6 Q Can you characterize the media on
7 which this music arrives from such independent
8 artists?

9 A Sure. It arrives on all kinds of
10 different media, from the home-produced CDR
11 recording, which is basically what you create
12 out of your computer with, you know, black
13 markings as to what maybe the tracks are, to
14 what has become more and more popular, very
15 elaborate artistic vinyl recordings, where you
16 will find the artist has gone to great lengths
17 to maybe hand-create 100 or 200 or 300 copies
18 of a vinyl recording.

19 We found at college radio
20 stations, actually, many artists in a reaction
21 to the digital internet world, where it is
22 very easy to download via peer-to-peer network

1 a sound recording, that they're actually
2 creating these vinyl recordings as a way to
3 create a piece of art that people still want
4 to purchase and still want to collect.

5 So, you know, while I am probably
6 maybe one of the only people here that didn't
7 grow up with vinyl recordings, I now find that
8 a large percentage of the music at the radio
9 station that is being played is on vinyl
10 because the artists really still feel that is
11 a really artistic, meaningful medium, as
12 opposed to some of the digital forms.

13 Q To summarize --

14 JUDGE WISNIEWSKI: Mr. Papish, is
15 that a general presumption about the age of
16 folks in this room?

17 THE WITNESS: It was a general
18 presumption, yes. There are several.

19 BY MR. MALONE:

20 Q Mr. Papish, to summarize, then,
21 the point of how WHRB's eleemosynary purposes
22 shape its day-to-day operations?

1 A Sure. I mean, it's a nonprofit
2 educational organization. So our goal is not
3 to maximize the amount of advertisements that
4 we play on our FM frequency or the amount of
5 money that we charge for these. It's more
6 about educating students in the process of how
7 one would do sales and how one would do
8 marketing and how one would run a radio
9 station.

10 And so, you know, one of the
11 reasons why we choose the music that we choose
12 isn't because of the economic benefit that we
13 might receive for broadcast fitness material.
14 I mean, oftentimes we're choosing things which
15 aren't all that commercially viable, but we
16 feel that it serves the deeper purpose of our
17 organization.

18 Q How does WHRB fund its operations?

19 A The radio station is funded
20 primarily from sale of advertising time. And,
21 as I mentioned, the budget is in the order of
22 \$130,000 a year. And WHRB is a commercially

1 licensed FM radio station. It broadcasts on
2 95.3 FM, and it reaches the entire greater
3 Boston area.

4 And so \$150,000 annually pales in
5 comparison to what a commercial radio station
6 or what a for-profit commercial radio station
7 on that frequency and broadcast signal, the
8 greater Boston area, would probably create in
9 revenues.

10 Q You mentioned advertising
11 revenues. Are those associated with a
12 particular type of programming?

13 A Certain of our programming
14 definitely tends to be more commercially
15 viable than others. The major source of
16 advertising revenue is, again, sports or other
17 broadcasts, such as commencement, things
18 associated with Harvard University. Sporting
19 events attract a large number of alumni.

20 Many of the advertisers in the
21 local Boston-Cambridge area are folks that
22 market and/or sell products to the Harvard

1 Q Mr. Papish, do you have the
2 original from which Exhibit 159 was made?

3 A Yes, I do.

4 Q And could you just hold that up?

5 And I would represent to the board
6 that we had previously offered to make this
7 physical exhibit available for scientific
8 inspection, and there were no affirmative
9 responses to our offer.

10 CHIEF JUDGE SLEDD: Mr. Papish, is
11 that a 45?

12 WITNESS: Well, it's a 7-inch
13 record, although technically I believe this
14 one is a 33, but I just referred to a 45, yes.

15 BY MR. MALONE:

16 Q And can you describe the physical
17 object there that you have?

18 A Yes, it's a 7-inch vinyl
19 recording. Sometimes they are called 45s.
20 That refers to the speed at which they're
21 played, although oftentimes you'll find a 7-
22 inch record that can be played at 33. This

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1 one I believe is - this one might be - the
2 other exhibits we look at might not be. It's
3 put out by a band that appears to be called
4 Man dot dot dot, or Astroman question mark.
5 It's unclear exactly what the album recording
6 title is. I would call it Astrolaunch.

7 And there is other information on
8 the back. One might assume that the label
9 would be the Estrus Manufacturing Company, and
10 there is an address given.

11 Q And how did that record come into
12 your possession, and what did you use it for,
13 and is it still in your possession?

14 A This is a 7-inch record that was
15 played at a radio show at WHRB by a DJ. It is
16 currently in my possession.

17 Q Now have you had an opportunity to
18 examine that physical object in terms of
19 whether it contains an ISRC or not?

20 A Yes. I took a look at the
21 recording. As far as I can tell from the
22 specifications of ISRCs for an analog

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1 recording such as this, it would have to be
2 visually stamped somewhere on the recording.
3 And I cannot find a visual stamp of ISRC
4 anywhere on this recording.

5 Q And is there any element in the
6 four alternative data fields Ms. Kessler
7 identified in her testimony that is missing
8 from that?

9 A I'm not entirely sure without
10 doing additional research what the album title
11 is. Again, I assume it's Astrolaunch, but
12 that I am not positive of. I would also have
13 questions as to how I report the name of this
14 recording artist. Here in the front it's Man
15 dot dot dot, or Astro, all in capital letters,
16 hyphen man question mark.

17 However, in other places on this
18 recording it is also credited as man or
19 Astroman, no dot dot dot, and all the first
20 letters of each of those items in capital
21 letters.

22 So I'm not exactly sure how to

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1 report the name of this artist.

2 Q Did you learn anything more from
3 looking at the label?

4 A The label of the -

5 Q Of the physical recording?

6 A No, actually the - as far as I can
7 tell, the label of the physical recording
8 doesn't seem to correlate at all with any of
9 the other information that's in French.

10 Q So you would anticipate difficulty
11 in recording - reporting that - the play of
12 that record?

13 A Yes, I would be confused as to
14 what I report.

15 Q All right.

16 MR. MALONE: I would like to mark
17 the physical exhibit Exhibit 159B. I'd like
18 to move the admission of a photocopy which
19 constitutes Exhibit 159 into evidence.

20 (Whereupon the
21 aforementioned document
22 was marked for

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1 identification as
2 Services Exhibit No.
3 159B)

4 CHIEF JUDGE SLEDD: Any objection
5 to the services Exhibit 159?

6 MR. HANDZO: No.

7 CHIEF JUDGE SLEDD: Exhibit 159 is
8 admitted.

9 (Whereupon the
10 aforementioned document
11 having previously been
12 marked for
13 identification as
14 Services Exhibit No. 159
15 was received into
16 evidence)

17 MR. MALONE: Thank you, Your Honor.

18 BY MR. MALONE:

19 Q Mr. Papish, I now turn to what has
20 been marked as Exhibit 160 for -

21 CHIEF JUDGE SLEDD: Do you intend
22 to mark another exhibit?

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1 MR. MALONE: I will mark the
2 physical exhibit as 160B and proceed in the
3 same fashion.

4 CHIEF JUDGE SLEDD: Well, 159, did
5 you intend to mark another one too?

6 MR. MALONE: The 159B.

7 CHIEF JUDGE SLEDD: Have you done
8 that?

9 MR. MALONE: Well, he has it in
10 hand, and 159 is the photocopy of what he has
11 in hand.

12 I am not going to entrust you with
13 the physical exhibit.

14 CHIEF JUDGE SLEDD: I misunderstood
15 you. I thought you said you intended to do
16 it.

17 MR. MALONE: I apologize for my
18 imprecision.

19 BY MR. MALONE:

20 Q Would you identify what you have
21 in your hand?

22 A This was the original object which

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1 is marked 160 in my testimony which there are
2 photocopies of.

3 Again, it's a 7-inch recording.
4 This one, although it is not specifically
5 labeled anywhere, when I attempted to play it
6 on an actual turntable, I believe it does play
7 at 45 RPM.

8 Again, this is another somewhat
9 confusing example. On the sleeve the only
10 piece of writing is Jason Molina (phonetic),
11 which is the name of an individual who has
12 recorded under his own name, although on the
13 actual recording there is also the name,
14 Magnolia Electric Company, which is a band
15 that he's also recorded as. And the only
16 other text I would assume is the name of the
17 track. There is one called, No Moon on the
18 Water, and there is one called, In the Human
19 World.

20 And there are marks as to who owns
21 the publishing rights, but it is unclear
22 exactly who would be the recording label.

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1 Q And how did this come into your
2 possession, and what was it used for, and
3 where is its present home?

4 A This again was a recording that
5 was used to create a radio show at WHRB. I
6 currently have possession of the disk.

7 Q So just to make sure that the
8 record is clear, you don't find the ISRC on
9 it?

10 A Again, using the same method that
11 I did the other recording, I could not find
12 the visual stamp of an ISRC on this recording.

13 Q And would you have difficulty in
14 reporting the play of that record on station
15 WHPK?

16 A I would, and in this case, even
17 with additional research, actually it makes it
18 more complicated, the fact that I understand
19 that Jason Molina is an individual who has
20 recorded under this name, and that Magnolia
21 Electric Company is also a recording artist
22 name, and now a regular label name, actually

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1 makes it very complicated. I'm not sure who
2 this would be attributed to as a recording
3 artist, and then there does not seem to be a
4 recording label attributed to this.

5 Someone who had no knowledge
6 whatsoever of the music might assume that
7 Magnolia Electric Company would be the name of
8 the company that put out this recording, but
9 that's not in fact true.

10 MR. MALONE: Again, I would like to
11 mark the physical exhibit as Exhibit No. 160B
12 for identification.

13 (Whereupon the
14 aforementioned document
15 was marked for
16 identification as
17 Services Exhibit No.
18 160B)

19 MR. MALONE: And I would like to
20 move the admission of the photocopy thereof,
21 which has already been marked for
22 identification as Exhibit No. 160.

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1 CHIEF JUDGE SLEDD: Any objection?
2 Exhibit No. 160 is admitted.

3 (Whereupon the
4 aforementioned document
5 previously marked for
6 identification as
7 Services Exhibit No. 160
8 was received into
9 evidence)

10 MR. MALONE: Thank you, Your Honor.

11 BY MR. MALONE:

12 Q You alluded to your experience as
13 quote unquote disk jockey. Which stations
14 broadly have you performed that sort of
15 service?

16 A I've had a position of a disk
17 jockey playing multiple shows at two different
18 radio stations, WHRB and then WHPK, which as
19 I mentioned in my previous testimony is the
20 radio station attached to the University of
21 Chicago.

22 Q So would your experience enable

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1 you to give some idea to the board of how
2 frequently this sort of identification problem
3 that you've described with respect to two
4 disks comes up at least with the genre that
5 you play?

6 A Yes, it's fairly common.
7 Oftentimes, as is probably the case with
8 Exhibit No. 160 these seem to be recordings
9 that are created by the artists themselves,
10 with and often without any label help, and so
11 it's unclear what kind of information is
12 included, and oftentimes like the other
13 exhibit the recording is more of a piece of
14 artwork than it is necessarily used to convey
15 information, so using French words and strange
16 pictures, that's very common with vinyl
17 recordings.

18 Some CDs that are self-pressed
19 have these problems as well, but certainly
20 vinyl is definitely something where you often
21 see this.

22 Q And as you think over your

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1 exposure and familiarity with various radio
2 stations that play recordings from that source
3 or sources you've just described, are there
4 play policies in place that affect the
5 prevalence of that problem of identification?

6 A Right, so these problems of
7 identification often crop up with music that
8 is not necessarily released by a major record
9 label. Oftentimes it's by smaller labels or
10 even by artists without a label. And those
11 tend to be the areas that college radio
12 stations focus on in their programming.

13 I testified earlier that many
14 college radio stations have as a programming
15 philosophy and rule that they don't want to
16 play commercial recordings that can be found
17 on other radio stations. So that really does
18 end up leaving a lot of the programming to be
19 items like this.

20 Q Now in the middle of this process,
21 and this is addressed in the run over
22 paragraph on page two to page three of your

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1 testimony, did you have some tests run to
2 identify or get some feeling if you will for
3 the prevalence of ISRCs?

4 A Yes. So based on my knowledge of
5 vinyl recordings, I have never seen an ISRC
6 code on a vinyl recording, and it can only be
7 there visually. So everything I've done
8 demonstrates that I can't find ISRC codes on
9 vinyl recordings.

10 However, for compact discs, I had
11 a gentleman, Robert Landry, who is chief
12 engineer at WCRB and is an alumnus of Harvard
13 Radio, and helps us out from time to time on
14 technical issues, he did what I'd probably
15 describe as a spot check of the library of
16 WCRB, which is a classical radio station,
17 slightly more mainstream than WHRB. And he
18 used several different software programs to
19 try to find ISRC codes which can be embedded
20 digitally inside of a compact disc.

21 And from his investigations, he
22 found that they were not widely applied.

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1 Again, smaller labels and independent labels
2 never had ISRC codes. He was able to find,
3 and this is a correction I want to make to the
4 testimony here, on discs issued by the
5 Deutsche Grammaphone label, which is owned
6 currently by Universal, not by Sony - so
7 that's the change here; I said Sony, but it's
8 actually a Universal label; I was in error as
9 to who was the owner of this label today - he
10 was able to find ISRC codes dating back to the
11 late 1980s, which was the first time that
12 actually that standard even existed.

13 JUDGE ROBERTS: Where are you
14 pointing to here? What section in your
15 testimony, Mr. Papish?

16 WITNESS: It's the last sentence of
17 the top paragraph on page three. And so it
18 just should be, just issued by the Deutsche
19 Grammaphone label, which is now owned by
20 Universal.

21 JUDGE ROBERTS: Instead of Sony?

22 WITNESS: That's correct.

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1 MR. ASTLE: In that case I have no
2 further questions.

3 CHIEF JUDGE SLEDD: Any questions
4 by NPR or DiMA?

5 MR. LARSON: No, Your Honor.

6 CHIEF JUDGE SLEDD: I invited that,
7 didn't I?

8 Any questions by Sound Exchange?

9 MR. HANDZO: I have a few, Your
10 Honor.

11 BY MR. HANDZO:

12 Q Mr. Papish, you testified at the
13 outset about a couple of vinyl disks that I
14 think were identified as Exhibits 159 and 160.

15 And I take it those are from the
16 library of WHRB?

17 A That is correct.

18 Q Which is the Harvard radio
19 station?

20 A That is correct.

21 Q What percent of the programming at
22 WHRB is represented by those kinds of vinyl

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1 disks?

2 A It differs based on the program
3 format. And I would say in the rock format,
4 the rock programmers strive for about 50
5 percent vinyl. In the classical format it
6 depends on the era in which the music is
7 coming from. Oftentimes, the earlier
8 recordings, the best recordings exist on vinyl
9 only.

10 Obviously shows that focus on new
11 releases, new classical releases are rarely
12 put out on vinyl, where new rock, independent
13 rock, and electronic music, often do come out
14 on vinyl, so there is a difference there.

15 Jazz recording is similar, a jazz
16 format. Again earlier recordings oftentimes
17 only exist on vinyl. Newer recordings will
18 more likely be on a compact disc. And that
19 can vary based on the show.

20 Q Looking at WHRB programming
21 overall, do you have any way to say what
22 percentage of programming is represented by

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1 vinyl disks?

2 A I would estimate probably 40
3 percent, but I don't have a numerical way of
4 showing you that.

5 Q Now, I think you said, the only
6 other radio station you've worked for is
7 Chicago?

8 A WHBK is the only other station
9 that I've worked for. I've visited and seen
10 many radio stations, and talked to a whole lot
11 of people who do noncommercial college radio
12 stations.

13 Q If you know, is it fair to say
14 that commercial radio stations tend not to
15 play vinyl recordings?

16 A Yes. That's a point I think we've
17 been trying to make earlier in this proceeding
18 as well. There is a big difference between a
19 large commercial station, which often plays
20 music directly off of a hard drive, versus
21 these stations that are not only playing
22 physical media such as a CD or vinyl

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1 recording, but they are actually - I mean they
2 actually are playing vinyl.

3 Q So this issue that you have
4 identified is one that is really unique to
5 college stations; is that right?

6 A I believe that is correct, yes.

7 Q And you don't have any way to know
8 how many college stations are playing a lot of
9 vinyl, do you?

10 A That's actually interesting. So
11 there are several different organizations
12 which bring together college radio stations.
13 We've heard from some. IBS was one here; CBI.
14 CBI has an email listserv, so actually people
15 communicate quite a bit.

16 And from what I can tell most
17 stations do have a pretty large vinyl library.
18 All the stations that I've visited - so I've
19 probably visited maybe 60 different college
20 radio stations around the country, I talk at
21 different conferences, I visit students who
22 are very interested in learning about that.

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1 Most of them show off with pride their vinyl
2 recording libraries.

3 Q But you don't know how often those
4 vinyl recordings are played by those college
5 stations, do you?

6 A I mean I have anecdotal evidence.
7 Some stations you are correct, I do not.
8 Although many stations really strive to. And
9 as I said, stations that focus on certain
10 areas of music, this music really only is
11 being put out on vinyl, even though that is
12 bizarre in today's digital world. But there
13 is a movement back towards vinyl recordings.

14 Q So the best you can say is that
15 this issue you've raised relates to some
16 college stations; correct?

17 A I would think a large number of
18 college stations. I can't give you a
19 numerical figure, but I think that the
20 majority of college radio stations probably
21 face this issue.

22 Q And your basis for saying that is

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1 anecdotal evidence?

2 A Yes, with speaking to, visiting
3 and general interaction with college radio
4 stations and their people that work there.

5 Q Now if these kinds of vinyl disks
6 are only being played by for the most part
7 college radio stations, we can assume that
8 these sound recordings are not being played by
9 commercial stations; right?

10 A That's pretty much correct, I
11 think.

12 Q So if sampling doesn't pick it up
13 from a college station, the artists on these
14 vinyl recordings are not going to get paid,
15 right?

16 A In general, that is correct.
17 There is the slight difference with the
18 webcasting market that you do have stations
19 that aren't necessarily noncommercial but are
20 smaller than a commercial broadcaster, so
21 there could be some stations that focus on
22 niche music.

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1 Q You don't know that?

2 A I can rattle off different niche
3 radio stations, but I can't give you an
4 estimate of the market size or what they look
5 like.

6 Q But you don't know how they
7 program or what they use?

8 A Only the specific examples that I
9 know off the top of my head.

10 Q Now am I correct that WHRB for
11 example does not tend to repeat songs very
12 often?

13 A That's correct. That's one of the
14 programming philosophies.

15 Q That's one of the things it takes
16 pride in, right?

17 A Yes, that's correct.

18 Q And the same thing for some of the
19 other college stations that you are
20 anecdotally familiar with, right?

21 A That is correct. They all strive
22 to not repeat music. There are different

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1 degrees. Certain stations repeat say more new
2 releases more often than other stations.

3 But in general the program
4 philosophy is to try not to repeat themselves.

5 Q So if you have music on these
6 vinyl disks that only gets played by some
7 college radio stations, and doesn't get played
8 by them very often, that is precisely the kind
9 of music that may get missed by sampling;
10 correct?

11 A That would increase the
12 probabilities; that is correct.

13 MR. HANDZO: That's all I have.

14 CHIEF JUDGE SLEDD: Mr. Malone, any
15 further questions?

16 MR. MALONE: No, thank you.

17 CHIEF JUDGE SLEDD: Any questions
18 from the bench?

19 Thank you, Mr. Papish.

20 (Witness excused)

21 CHIEF JUDGE SLEDD: Do we have any
22 other witnesses available to testify today?

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Rebuttal Testimony of
DR. JEROME PICARD
before the
Copyright Royalty Board
on behalf of

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

1. Following receipt of my AB degree in history from Dartmouth College in 1955, I attended OCS Newport. Upon commissioning I served on active duty for three years in a U.S. Navy patrol squadron. In 1961 I received my MIA degree from Columbia University's School of International Affairs. For the next twenty years I pursued a career in international organizations and international banks in New York City, during which time I earned master's and PhD degrees in development economics at the New School for Social Research. I also taught economics parttime at local colleges in the City. In 1986 I took a fulltime position teaching economics and finance to graduate and undergraduate students at Mount Saint Mary College in Newburgh, New York. After twenty years of teaching, I retired on June 30, 2006. I am or have been a member of the American Economic Association and Eastern Economic Association.

2. I offer this testimony to address the implicit assumption by SoundExchange in this proceeding that the Board should set a uniform rate and record-keeping and reporting requirements for all webcasters' eligible nonsubscription uses of digital sound recordings. That assumption is not consistent with the economic theory of market segmentation.

In practice market segment-by-market segment pricing is quite common in many markets within our domestic economy.

Costs in a Segmented Market

In the sale of such intangible performance rights as we are discussing here, there are no costs of production, no costs of sales, and only the cost of collection, which the supplier will seek to optimize in each segment so that the marginal cost of collection equals the marginal return from that level of collection effort and no more.

Fair Market Value

The concept for fair market value (FMV), alluded to above, is well-recognized in classical economics. It is, of course, the objective price at which a sale between a willing seller and willing buyer will close. Obviously, if the price is more than the seller is willing or able to pay, the sale will not take place. Conversely, if the price is less than that at which the seller is willing to sell, the sale will not close. The FMV will necessarily fall somewhere between those two extremes. As intimated above, the maximum amount that the buyer is willing to pay is the value to him of the good or service, less the expense to him of making the purchase. For example, if the sale of goods is FOB the seller's dock, then the shipping expense is an additional cost to the buyer, and he deducts that expense from the price he is willing to pay the seller. This is the intangible analogue to what some economists would call a total life cost of a tangible good. A closer analogy would be the purchaser of anti-virus software who must buy an annual subscription to virus definition updates. The total annual cost to the computer user is the initial price for the software, plus the annual subscription price. Here, the added expense to the buyers

of rights is any expense of recordkeeping and reporting requirements imposed by the seller as a condition of sale.

Conclusions

Current economic theory recognizes market segmentation and the necessary corollary that the selling firm will price each market segment differently in accordance with its distinctive demand curve.


Jerome Picard

Xscript

XXXIX-1

Before The
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

Exhibit 8 - 11/13/06 Tr. pp. 171-172
(Picard)

In the Matter of:

The Digital Performance Right
in Sound Recordings and
Ephemeral Recordings

(Webcasting Rate Adjustment
Proceeding)

Docket No.
2005-1
CRB DTRA

*Witness:
Dr. Picard*

Volume 39

Room LM-414
Library of Congress
First & Independence Ave., S.E.
Washington, D.C. 20540

Monday,
November 13, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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1 buyers of Honda Civics?

2 A Well, it certainly would, wouldn't
3 it?

4 Q All right.

5 A I guess I wouldn't have been able
6 to buy a Honda at that price.

7 Q All right. Now, by going back to
8 the top of page 3, you pick up on the use of
9 your term on page 2, segmentation variables,
10 and you attempt to suggest that there may be
11 some variables that are distinctive of the
12 webcasting market and a particular segment
13 thereof.

14 And what -- can you explain to the
15 Board what those are?

16 A Well, number one is the fact that
17 they are nonprofit activities. The larger
18 stations tend to get much more advertising and
19 other kinds of revenue, so they are perhaps a
20 little bit more concentrated on making sure
21 that they earn a little -- quite a bit more
22 money.

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1 And the college stations, of
2 course, don't have that kind of income or
3 revenue, so -- and they have to concentrate on
4 quite different things, which varies beyond on
5 some of these other ones that I have mentioned
6 here.

7 Second here, the main purpose is
8 the education of students with the
9 entertainment of listeners as a secondary
10 objective. It's important, but it's
11 secondary. Really it's to train students how
12 to run a station rather than actually having
13 them engaged full-time on a job basis of
14 running a station, a larger station, or
15 working in a larger station.

16 The third one was that the
17 listener base is generally limited to a group
18 with an affinity to the educational
19 institution, and I think one instance of that
20 would be the case that most of these smaller
21 college stations broadcast the works of fairly
22 new artists, and so that appeals to a certain

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1 younger group in the community.

2 Q Now, that would be true
3 particularly, would it, of the Mount St.
4 Mary's station?

5 A Yes.

6 Q All right.

7 A Yes, tend to broadcast to that, so
8 it's aimed at a particular group, group of
9 listeners and quite different from the larger
10 NPS stations, which are broadcasting well-
11 established artists for the main part. So the
12 fact that you have these newer people with
13 their works trying to get established is, I
14 think, a good point to make here in this case.

15 And then, finally, another reason
16 that these buyers are a little bit different
17 in their willingness and ability to purchase
18 rights is they are constrained by the
19 college's budget. Most don't receive the off-
20 budget funding, advertising and so forth.
21 They don't receive this kind of funding.

22 Q And that's certainly true for

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1 Mount St. Mary's?

2 A Certainly true of Mount St.
3 Mary's, yes. And so for all of these reasons,
4 the buyers certainly appear to be considerably
5 different in their willingness and ability to
6 broadcast music compared to the larger
7 stations that have the advertising revenues
8 and the different constituency and they are
9 not as constrained by their budgets.

10 Q And does that difference that you
11 have described have anything to do with the
12 shape and slope of the demand curves, the D
13 curves that you have in your economics?

14 A Yes, very much so. Yes, very much
15 so.

16 Q And, please, bring the Economics
17 101 along on that point.

18 A Okay. Well, as I put it on page
19 4, you can see the diagrams there, the demand
20 by public broadcasting stations is drawn as --
21 comes out to be inelastic in character,
22 because the fees that are charged for music

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1 A That's right.

2 Q All right.

3 A And then --

4 CHIEF JUDGE SLEDGE: Be careful.

5 You're not testifying.

6 MR. MALONE: Thank you, Your
7 Honor. I will try to avoid that.

8 BY MR. MALONE:

9 Q And would you look at your points
10 1, 2 and 3?

11 A Okay. Oh, okay. Well, the fact
12 that they are nonprofit activities means that
13 they have no vested interest in making money.
14 That is not their primary objective. Their
15 primary objective is to educate students, so
16 that the students would become competent in
17 the broadcasting and webcasting field. Okay.

18 So that's a difference there and,
19 as I have said, that relates to Question 2 as
20 well. They are somewhat similar. And the
21 entertainment is an important objective, but
22 it's really secondary to developing the

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1 ability and skills that are needed to webcast,
2 which may not be inconsiderable, because you
3 have to think about digital, digitalization,
4 and that really requires, I understand, a
5 considerable amount of skill, which you have
6 to acquire, as well as running the station and
7 everything else.

8 Okay. And I mentioned about the
9 listener base before saying that the quality
10 or character of music that is being webcast by
11 college broadcasting stations would be
12 probably the works of new artists rather than
13 the works of established artists. So I guess
14 I'm just -- does that answer your question?

15 Q I think that's as close as we're
16 going to get. Looking ahead then to page 7 of
17 your testimony, and the concept of fair market
18 value as a meaning to economists.

19 A It very definitely has a meaning,
20 yes.

21 Q And the Economics 101 level, can
22 you tell me what that meaning is?

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Exhibit 9 -

Declaration of Capt. Kass in support
of the Joint Motion of IBS and
WHRB (FM) for partial reconsidera-
tion in Docket No. 2005-1 (CRB
DTRA, filed 3/19/07

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C. 20554

DECLARATION OF FREDERICK J. KASS

I am the same Frederick J. Kass whose written direct testimony was earlier submitted to the Board and who testified before the Board as a witness on behalf of the Intercollegiate Broadcasting System, Inc. I submit this declaration in support of the Joint Motion of IBS and WHRB (FM) for reconsideration of the decision determining rates. Absent reconsideration the Board's decision to defer any modification of the interim record-keeping and reporting requirements to align them with the rules adopted in the rate determination decision will adversely impact the ability of the smaller, under-cap, non-commercial, educationally affiliated, webcasters to continue, or to commence, webcasting.

For these smaller educationally affiliated webcasters to immediately come into compliance with the combination of the interim final rules and Section 380.1(b) would be impossible. Unlike the commercial webcasters, whose largely unattended operations are built around automated programming and logging, the smaller, educationally affiliated webcasters are manually programmed – often on-the-fly, and the solo announcers for such webcasts do not have the capability of programming and recording the four data elements sought by SoundExchange for each performance. Logging on a year-round basis, such as contemplated by the rules, is simply not practical for such operations thinly

staffed by a limited number of volunteers with heavy competing academic demands on their time. By and large these webcasters are simply not in a position to command the ability-level and quantity of volunteer-hours for recording and reporting. As a practical matter, compliance requires an automated audio programming system with a database of music. Unlike most commercial simulcasters with tightly constricted playlists, these small webcasters typically draw on a broad range of eclectic music, which it would not be practicable for them to key into a database. In addition, computation of ATHs requires a dedicated server capable of capturing fine-grained data, but much of that data is not available to these small webcasters because they don't own or control the servers which they use.

The prospects are particularly grim for the webcasters and prospective webcasters operating in high schools. They are a rapidly growing "hot bed" of educational webcasting. High school webcasters constitutes over thirty percent of the membership of IBS. As I testified, IBS regularly holds regional meetings of its member-stations. After IBS' regional meeting in Boston in ~~December~~ ^{November} – well after the time for taking evidence in this proceeding was past – I was surprised to find that for the first time over fifty percent of the registrants were from high schools!

Based on my familiarity with student broadcasting and webcasting operations, gained over nearly five decades, it is plain that a large percentage of the 90,000 high schools in the country, as well as many webcasting operations at small colleges, would be foreclosed from complying with the rules that were designed for an incompatible operational model on a quite different scale. As a result, America's sons and daughters

at these institutions would be deprived of the educational experience that is important to their careers and to the country. A generation of our youth that must compete globally in a digital world would be denied the educational opportunity to experiment with digital communication, webcasting techniques, management, etc., using the catalyst of musical performances, incidental to that educational mission.

I hereby swear under the penalties of perjury that the foregoing statements of fact are true and correct to the best of my knowledge and belief.


Frederick J. Kass

Pittsburgh, Pennsylvania
March 18, 2007

Certificate of Service

I hereby certify that I have this day caused copies of this motion to be sent by U.S. mail and e-mail to the following:

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Matthew K. Schettenhelm

Washington, D.C.

January 29, 2009