Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
ADJUSTMENT OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	**Docket No. 2006-1 CRB DSTRA**

REPLY TO SOUNDEXCHANGE'S PROPOSED CONCLUSIONS OF LAW, JOINTLY SUBMITTED BY SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO INC.

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October 11, 2007

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INTRODUCTION

1. SoundExchange's Proposed Conclusions of Law ("SX PCL") distort both the legal authority governing this proceeding and the facts adduced at trial as they relate to that authority. Based on SoundExchange's submission, one would be led to believe that copyright law in general, and statutory license proceedings governed by section 801(b)(1) of the Copyright Act in particular, have as their predominant (if not sole) purpose the preservation of the business interests, and related licensing prerogatives, of copyright owners – here, the recording industry. From that mistaken premise, SoundExchange combines its lament over the current circumstances faced by the recording industry (concededly brought about by causes unrelated to the emergence of satellite radio) with a parsing of the section 801(b)(1) statutory objectives that reflects the erroneous view that the objectives were intended primarily to remedy those circumstances rather than to accommodate the emergence of socially valuable new forms of digital dissemination of copyrighted works. All of this serves as the theoretical underpinning for SoundExchange's request for exorbitant royalties based on wildly inappropriate marketplace "benchmarks" that bear no relationship to the section 801(b)(1) factors as properly understood.

2. Neither copyright law nor the specific statutory license provisions embodied in sections 114(f)(1) and 801(b)(1) remotely embrace the plea for protectionism of copyright owners advocated by SoundExchange. As already discussed in the SDARS' Proposed Conclusions of Law ("SDARS PCL"), the purposes underlying the system of copyright reflect the need to strike an appropriate balance between the private interests of creators and the public interest in promoting the broad availability of works of creative expression. *See* SDARS PCL ¶¶ 1-6. Likewise, the statutory license framework involved here was not created simply to endorse the record industry's interest in profit maximization – at rates that will not, moreover, enable the SDARS to recover their costs, let alone provide fair income. As stated in an

analogous setting, sections 114(f)(1) and 801(b)(1) are not "placebo[s]" without a policy purpose, designed simply to rubber stamp "the fees [the record industry] had successfully obtained from other users." *American Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990). They are, instead, meaningful expressions of legislative intent to balance the legitimate expectations of sound recording copyright owners in relation to digital uses of their works against the imperative that new technologies affording exciting new avenues for disseminating music be encouraged.

3. In contrast to SoundExchange's disregard for this mandated balancing of interests, the SDARS, at trial and in these post-trial submissions, have struck the necessary balance, with full regard for governing legal precedent.

I. SOUNDEXCHANGE MISCONSTRUES THE PRINCIPLES AND HISTORY OF COPYRIGHT LAW RELEVANT TO THIS PROCEEDING, WHICH ARE DESIGNED TO PROMOTE THE PUBLIC INTEREST, NOT THE PRIVATE INTERESTS OF THE RECORDING INDUSTRY.

4. SoundExchange's Proposed Conclusions of Law suffer from a pervasive misapprehension as to the nature of the section 114 compulsory license within the overall system of copyright law. This fundamental error is manifested most clearly in SoundExchange's statement that "the overriding purpose of the DPRA and the DMCA was and continues to be 'to protect the livelihoods' of record companies and recording artist copyright owners." SX PCL ¶ 13. As discussed in the SDARS' Proposed Conclusions of Law and further herein, this self-interested view is not accurate.

5. Despite SoundExchange's assertions to the contrary, providing financial rewards to copyright owners has never been the overriding objective of copyright law. The overriding objective of copyright is instead "to promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8; *see also* SDARS PCL ¶¶ 1-6. In keeping with this, "[c]reative work is to

be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Accordingly, "copyright law . . . makes reward to the owner a secondary consideration." *Mazer v. Stein*, 347 U.S 201, 219 (1954) (internal quotation marks and citation omitted).

6. SoundExchange's undue focus on rewarding copyright owners also is inconsistent with the considerations addressed by Congress in passing the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") and the Digital Millennium Copyright Act ("DMCA"). As SoundExchange would have it, Congress, in creating a sound recording public performance right, was motivated exclusively, or almost so, by the concern with protecting copyright owners against encroachment from developing digital distribution systems. *See* SX PCL ¶¶ 7-13. But SoundExchange ignores the critical offsetting policy imperative: Congress' desire to prevent "hampering the arrival of new technologies." S. Rep. No. 104-128, at 14-15 (1995) ("1995 Senate Report"); *see also* SDARS PCL ¶¶ 27-34. Indeed, congressional concern with appropriately balancing the interests of the recording industry with those of the proprietors of new digital forms of dissemination led Congress to rebuff the recording industry's efforts to secure anything beyond a limited sound recording public performance right subject to statutory licensing in defined applications. *See* SDARS PCL ¶¶ 27-34.

7. SoundExchange's skewed interpretation of the essence of the inquiry involved in this proceeding leads it to be extremely selective in its discussion of the governing precedents, not only in erroneously contending that this proceeding is all about determining free-market rates (*see* SDARS PCL ¶¶ 35-39, 46-53 and *infra* Parts II & III), but also in asserting that each of the section 801(b)(1) factors favors a higher, rather than lower, rate for the SDARS. A far more

comprehensive and balanced view of the pertinent legal authority and its proper application to the record developed in this proceeding has been provided by the SDARS in their Proposed Conclusions of Law and will not be exhaustively repeated here. Instead, only certain of the more glaring distortions in SoundExchange's filing are addressed below.

II. SOUNDEXCHANGE'S ARGUMENT THAT SECTION 801(B)(1) IS AIMED AT APPROXIMATING COMPETITIVE MARKET RATES MISAPPREHENDS THE LAW.

8. SoundExchange's Proposed Conclusions of Law are permeated by the erroneous proposition that the Judges' sole charge in this section 114(f)(1) proceeding – in which the rates and terms to be established are to reflect the policy considerations articulated in section 801(b)(1) – is to determine a royalty fee equivalent to that which would be called for in a proceeding under section 114(f)(2), the criterion for which is rates and terms that approximate those that would have been negotiated in the marketplace between a willing buyer and a willing seller. *See* 17 U.S.C. §§ 114(f)(1) & (2). SoundExchange nowhere explains how it is that such distinct statutory language is, in fact, intended to convey essentially the same thing. Nor does SoundExchange attempt to explain away the consistent body of precedent that states the obvious: section 801(b)(1) and willing buyer/willing seller are distinct standards reflecting different policy considerations and producing different rate-setting outcomes.

9. As the SDARS demonstrated in their Proposed Conclusions of Law, both the governing legal precedent and relevant legislative history squarely rebut SoundExchange's theory that the Judges' duty in this proceeding is to set a royalty rate that mirrors marketplace parallels. *See* SDARS PCL ¶¶ 35-39, 46-53. Congress, in fact, wrote into the statutory license provisions of section 114 two distinct sets of standards to govern rate- and term-setting. Section 114(f)(1)(B), which governs here, requires that the Judges, "[i]n establishing rates and terms for . . . preexisting satellite digital audio radio services," are to apply "the objectives set forth in

section 801(b)(1)." 17 U.S.C. § 114(f)(1)(B). In sharp contrast, section 114(f)(2)(B), which governed the recent webcasting proceeding, directs the Judges, "[i]n establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services," to establish rates and terms "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B).

10. The distinction between the two statutory provisions was neither accidental nor can it properly be ignored. Rather, as the SDARS have shown, *see* SDARS PCL ¶¶ 35-39, when Congress enacted the DMCA in 1998, rate-setting adjudications were expanded to encompass webcasters and new subscription services under a new "willing buyer/willing seller" standard rather than under section 801(b)(1). But Congress purposefully retained the section 801(b)(1) standard for rate-setting for the SDARS and preexisting subscription services ("PSS"). Congress, clearly, knew how to make reference to a marketplace standard as the guidepost for section 114 statutory license proceedings when it so desired, and it did so for prescribed categories of users while expressly excluding the SDARS from that standard.[1]

11. Rate-setting tribunals and reviewing judicial bodies uniformly have affirmed the distinction between the section 801(b)(1) objectives and rate-setting that mirrors market rates. Accordingly, as the Court of Appeals for the D.C. Circuit recognized, any claim that section 801(b)(1) "requires the use of 'market rates' is simply wrong." *RIAA v. LOC*, 176 F.3d 528, 533 (D.C. Cir. 1999) (emphasis in original); *see also* SDARS PCL ¶¶ 46-53. Section 801(b)(1) "does

[1] SoundExchange's assertion that "the grandfathering of the conditions and standards obviously did not reflect Congress's position as to what would be a 'reasonable' rate for the SDARS," SX PCL ¶ 11, is irrelevant to the core point, which is not what precise rates for the SDARS Congress may have had in mind but, rather, which standard was to govern rate-setting for the SDARS.

not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates"; and "there is no reason to think that the two terms are coterminous." *RIAA v. LOC*, 176 F.3d at 533.

12. Moreover, "when Congress sought to require market rates in the Act, it used the term 'market rate' or its equivalent" – as it did in enacting section 114(f)(2)(B), while leaving section 114(f)(1)(B) "unchanged." *Id.*; *see also Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394, 25,396 (May 8, 1998) ("*Librarian PSS Determination*") (concluding that "reasonable rates" under section 801(b)(1) "need not be the same as rates set in a marketplace"); Report of the Copyright Arbitration Royalty Panel, Docket No. 96-5 CARP DSTRA (Nov. 28, 1997) at 36 (concluding that "reasonable compensation" under section 801(b)(1) "is not synonymous with fair market rate"); *Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, 46 Fed. Reg. 10,466, 10,471 (Feb. 3, 1981) ("*Mechanical Royalty Determination*") ("Congress intended for the Tribunal, not the marketplace, to set the rate, and in doing so, the Tribunal must adhere to the statutory criteria.").

13. SoundExchange's attempt to extract a fundamentally different conclusion from these cases does not withstand analysis. SoundExchange thus points to the PSS proceeding in asserting that section 801(b)(1) proceedings almost by default produce marketplace rates. *See* SXL PCL ¶¶ 14, 16. But, as discussed above, the Librarian rejected that premise, instead concluding that "[u]nlike a marketplace rate which represents the negotiated price a willing buyer will pay a willing seller, reasonable rates are determined based on policy considerations." *Librarian PSS Determination*, 63 Fed. Reg. at 25,399. The Court of Appeals for the D.C. Circuit

affirmed, likewise rejecting the argument pressed by SoundExchange here that marketplace benchmarks are both the beginning and the ending of the rate-setting analysis. *See RIAA v. LOC*, 176 F.3d at 533 (holding that "'reasonable rates' are those that are calculated with reference to the four statutory criteria").[2]

14. The other decisions cited by SoundExchange make equally clear that the section 801(b)(1) objectives, not marketplace analogies, must guide the Judges' determination here. SoundExchange cites *RIAA v. CRT*, 662 F.2d 1 (D.C. Cir. 1981), for its contention that section 801(b)(1) "replicates the forces that operate in the marketplace and are generally accounted for by marketplace rates." SX PCL ¶ 29. But the court there concluded precisely the opposite, emphasizing that it is section 801(b)(1)'s "policy" and "legislative" considerations that govern rate-setting. *RIAA v. CRT*, 662 F.2d at 8-9; *see also id.* at 12 (holding that "the statutory criteria" allow rate-setting bodies "to determine policy within the framework of the statute").

15. SoundExchange's reliance on *National Cable Television Association v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983), *see* SX PCL ¶¶ 17, 28, is equally misplaced. That case was not governed by section 801(b)(1) and the court there recognized that in proceedings governed by section 801(b)(1), the focus of the rate-setting analysis must be on the statutory objectives. On that very point, the tribunal's decision that was affirmed in *NCTA v. CRT* emphasized "the detailed criteria provided in 17 U.S.C. 801(b)." *Adjustment of the Royalty*

[2] In attempting to obfuscate the relevant analysis, SoundExchange claims the Librarian concluded that marketplace benchmarks are "the starting point" for rate-setting analyses under section 801(b)(1) and that application of the statutory objectives in most cases will not result in rates that deviate from marketplace analogies. *See* SX PCL ¶ 14. But that statement reflected the particular record in that case, and even under those circumstances, the Librarian observed that they are "merely the starting point." *Librarian PSS Determination*, 63 Fed. Reg. at 25,404 (emphasis added). Ultimately, as discussed above and as held by the Librarian, it is the section 801(b)(1) objectives that govern.

Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 Fed. Reg. 52,146, 52,152 (Nov. 19, 1982).[3]

17. The primacy of the section 801(b)(1) objectives is reinforced by an additional determination cited by SoundExchange. *See* SX PCL ¶ 20 (citing *Noncommercial Educational Broadcasting Compulsory License*, 63 Fed. Reg. 49,823, 49,834 (Sept. 18, 1998)). The Librarian in *Noncommercial Educational Broadcasting Compulsory License*, which involved a statutory license under section 118 of the Copyright Act, expressly distinguished section 118 rate-setting from section 114 rate-setting pursuant to section 801(b)(1): "Section 801(b)(1) of the Copyright Act prescribes that section 114 rates are to be adjusted to achieve four specific objectives. Because section 114 rates must be observant of those objectives, they need not be market rates. Such is not the case with section 118." 63 Fed. Reg. at 49,834-35 (citation omitted).

18. Even in proceedings where marketplace analogies have been considered, the tribunals have recognized that such analogies only could be considered as part of an overall analysis under section 801(b)(1) that, ultimately, must be guided by the statutory objectives. To this point, SoundExchange cites the Court of Appeals for the Seventh Circuit's claimed "approv[al of the CRT's] decision under § 801(b) to 'rely[] primarily on marketplace analogies.'" SX PCL ¶ 15 (quoting *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1148 (7th Cir. 1982)); *see also* SX PCL ¶ 17. But the court in *AMOA*

[3] In keeping with the lack of policy-based statutory criteria applicable to the rate-setting there, the tribunal and appellate court in *NCTA v. CRT* were confronted with an evidentiary record based solely on marketplace analogies: "All of the parties before the Tribunal favored a market price approach, *i.e.*, estimation of the rate copyright owners and users would agree upon in the absence of compulsory licensing and the presence of copyright liability." *NCTA v. CRT*, 724 F.2d at 185; *see also id.* at 184 (noting "absence of other, more useful evidence"). *NCTA* thus provides no guidance here, where the SDARS have argued, based on abundant record evidence, that the section 801(b)(1) policy objectives ultimately must guide the setting of reasonable rates and terms.

v. CRT concluded that any such marketplace analogies were "to be weighed together with the entire record and the statutory criteria in arriving at a fair royalty fee." *AMOA v. CRT*, 676 F.2d at 1148. The court further held with respect to any marketplace evidence that "we do not believe that the Tribunal was bound by that evidence to select a fee rate." *Id.* at 1157. An examination of the CRT determination reviewed in *AMOA v. CRT* reinforces the centrality of the statutory objectives to rate-setting under section 801(b)(1); the tribunal there discussed at length each of the statutory criteria. *See 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players*, 46 Fed. Reg. 884, 889 (Jan. 5, 1981) ("*Jukebox Determination*"); *see also AMOA v. CRT*, 676 F.2d at 1149 (noting that the CRT "provided a detailed analysis of its final rule in relation to the four statutory criteria set out in section 801").

19. In sum, the authority that SoundExchange cites for its contention that the section 801(b)(1) objectives are designed to validate rates that would be set in the marketplace says nothing of the sort. To the contrary, the authority makes clear that section 801(b)(1) requires rate-setting analyses to take account of the enumerated policy objectives. Representatives of the recording industry, in fact, have recognized this – even advocating the view that a market rate need not be the starting point of the analysis. Specifically, in the ongoing section 115 proceeding – a proceeding that, as here, is subject to section 801(b)(1) – the recording industry has submitted a rate proposal based not on marketplace agreements but on the section 801(b)(1) factors and the Copyright Royalty Tribunal's analysis of them in 1981. The recording industry's expert, Dr. David Teece, testified in the proceeding that "[t]he best place to begin this [rate-setting] analysis, in [his] judgment, is with the decision of the Copyright Royalty Tribunal in 1981, which has

served as the basis for the mechanical royalty rates over the last twenty-five years." Teece WDT, Docket No. 2006-3 CRB DPRA, at 76 (Apr. 10, 2007).[4]

20. Even more revealing of the recording industry's understanding of the sharp distinction between market rates and section 801(b)(1), Edgar Bronfman, the Chief Executive Officer of Warner Music Group and a witness for SoundExchange in this proceeding, testified before the Senate Judiciary Committee and urged that the section 801(b)(1) standard be changed to a willing buyer/willing seller standard, which Congress has not done. *See* 6/20/07 54:2-55:7 (Bronfman). SoundExchange appears to now be seeking to achieve through this proceeding what it has failed to achieve legislatively.

III. THE SECTION 801(B)(1) OBJECTIVES WEIGH IN FAVOR OF THE SDARS' RATE PROPOSAL, NOT THAT OF SOUNDEXCHANGE.

21. SoundExchange hedges its legal bet by construing the section 801(b)(1) factors in a fashion designed to maximize the weight to be accorded the record industry, versus the SDARS. As discussed below, here too SoundExchange distorts the law in significant respects.

A. Maximizing the Availability of Creative Works to the Public

22. SoundExchange interprets section 801(b)(1)(A), which requires the Judges to set a reasonable royalty rate so as to "maximize the availability of creative works to the public," to credit solely the role performed by the recording industry in creating sound recordings, as opposed to the contributions that have been made by the SDARS in providing the public with broad access to creative works. *See* SX PCL ¶¶ 31-38. This interpretation contradicts the

[4] Pursuant to Federal Rule of Evidence 201, the Judges can take judicial notice of Dr. Teece's testimony, as it is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also* Fed. R. Evid. 201(d) ("A court shall take judicial notice if requested by a party and supplied with the necessary information."). As the rule and advisory committee note clearly state, "[j]udicial notice may be taken at any stage of the proceeding," even including on appeal. *See* Fed. R. Evid. 201(f) & advisory committee's note.

relevant legislative and judicial authority, as well as SoundExchange's own advocacy in other settings.

23. Contrary to SoundExchange's claim, section 801(b)(1)(A) requires consideration of the significant role of the SDARS in making creative works widely available to the public. Indeed, as discussed above and in the SDARS' Proposed Conclusions of Law, financially rewarding copyright owners for their creation of copyrighted works is a subsidiary consideration in copyright law. The primary consideration is dissemination – that is, promotion of "broad public availability of literature, music and the other arts." *Twentieth Century Music Corp.*, 422 U.S. at 156; *see also Mazer*, 347 U.S. at 219 ("copyright law . . . makes reward to the owner a secondary consideration" (internal quotation marks and citation omitted)).

24. Accordingly, section 801(b)(1)(A) is properly read to take into account the dual copyright policies of fostering the creation as well as the dissemination of copyrighted works. Creation alone does not serve the constitutional purpose of "promot[ing] the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8. Without dissemination of copyrighted works to the public – to which SoundExchange acknowledges the SDARS contribute substantially – the public-minded constitutional mandate cannot be satisfied. *See* SDARS PCL ¶¶ 57-62; *see also, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("[C]opyright supplies the economic incentive to create and disseminate ideas." (internal quotation marks and citation omitted)).

25. Where the licensing shoe sits on the other foot, the record industry itself has recognized that the concept of "availability" under copyright law embraces both creation and dissemination. In particular, after the submission of SoundExchange's direct case in this proceeding, RIAA, through its expert Dr. David Teece, asserted in the ongoing section 115 statutory license proceeding that a sound recording is "available" only after it is recorded,

marketed, and distributed. *See* Teece WDT, Docket No. 2006-3 CRB DPRA, at 82 (Apr. 10, 2007) ("In order to be 'available' to the public . . . a song must be recorded, marketed, and distributed. . . . [T]he marketing and promotion done by the record companies seeks to make potential customers aware of the newly-released album and help ensure that there is sufficient information in the market that members of the public can find the recording.").

26. The SDARS agree with the recording industry on this point. The concept of availability necessarily embraces all facets of the distribution of a sound recording to the consuming public. So recognized, the SDARS' contribution to that end result is a critical one. To this point, it is worth observing that Congress' recognition of the importance of new forms of digital distribution in promoting greater availability of sound recordings was central to the establishment of the limited sound recording performance right and to the statutory license regime applicable here. As the 1995 Senate Report stated: "These new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible . . . . Such systems could increase the selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords." 1995 Senate Report at 14; *see also* SDARS PCL ¶ 64.

27. SoundExchange's cramped conception of the concept of "availability" is not supported by the cases on which it relies. *See* SX PCL ¶¶ 38-41. In the *Mechanical Royalty Determination*, the CRT expressly held that section 801(b)(1)(A) "is intended to encourage the creation and dissemination of musical works." 46 Fed. Reg. at 10,479 (emphasis added).

28. Both the *Jukebox Determination* and the *Librarian PSS Determination* are distinguishable and consequently of no import here. *See* SDARS PCL ¶¶ 46, 65-66. In the *Jukebox Determination*, the CRT based its finding in favor of the copyright owners on a lack of

record evidence as to whether the rates adopted would deprive the public of access to music. *See Jukebox Determination*, 46 Fed. Reg. at 889. Here, as previously discussed, *see* SDARS PFF Part V.B, and as summarized below, there is extensive record evidence that the SDARS increase the availability of creative works to the public. SoundExchange, for its part, has presented no evidence that higher royalty rates would increase the number of recordings the recording industry could make available to the public. Even if there were such evidence, that potential increase would need to be balanced against the significant likelihood that the SDARS, faced with a higher royalty, would be forced to decrease their music offerings. In this regard, Sirius CEO Mel Karmazin testified that if SoundExchange's rate proposal were adopted, Sirius would "have to dramatically scale back on the music programming that we offer." 6/6/07 Tr. 311:1-7 (Karmazin).

29. Finally, in the *Librarian PSS Determination*, the Librarian based its conclusion as to section 801(b)(1)(A) in significant part on the fact that the CARP had failed in its determination to discuss relevant case law. *See Librarian PSS Determination*, 63 Fed. Reg. at 25,406. Here, by contrast, the SDARS have discussed extensive judicial and other authority demonstrating that section 801(b)(1)(A) encompasses both the creation and dissemination of copyrighted works. *See* SDARS PCL ¶¶ 65-66.[5]

30. The record demonstrates that the SDARS have fulfilled Congress' vision in broadly disseminating creative works. They have, in particular, dramatically expanded the availability of sound recordings beyond what can be heard on terrestrial radio, both in terms of

[5] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985), which SoundExchange cites for the proposition that a low royalty rate will result "in a dearth of creative works," SX PCL ¶ 34, is inapposite. The Supreme Court there, addressing a concept entirely unrelated to the issues presented here, held that the fair-use doctrine could not be invoked merely because the copyrighted expression at issue was of broad public interest. *See Harper & Row*, 471 U.S. at 555-60.

their nationwide coverage and the diversity and depth of their music and non-music programming. *See* SDARS PCL ¶ 71; SDARS PFF Part V.B. SoundExchange itself has described how the SDARS make sound recordings available that cannot be heard on terrestrial radio. *See* SX PFF ¶¶ 458-59. In addition, although unaddressed by SoundExchange, the SDARS have made available to the public a wide variety of original talk, entertainment, and sports programming (which the SDARS not only disseminate but also create with teams of talent and in partnership with their non-music content providers). Nor does SoundExchange mention the original music programming that the SDARS create and disseminate, including live on-air talk shows with artists. *See* SDARS PFF Parts IV, V.B, VII.C, VII.D.

31. SoundExchange acknowledges that dissemination of older works – where no new creation is involved – advances the purpose of making creative works available to the public. *See* SX PCL ¶ 35. As to these works, the SDARS play an enormous role in making available to the public types of music that, as a factual matter, are rarely heard on terrestrial radio or other media. *See, e.g.*, SX PFF ¶ 458.

32. Conversely, SoundExchange has offered no evidence that its proposed rate would increase the availability of creative works. It has not, as Professor Noll puts it, undertaken to properly analyze, much less quantify, the inducement effect of higher rates on the creation of sound recordings. *See* Noll WRT at 44-47 (testifying that SoundExchange's experts "do not provide any empirical evidence about the magnitude of the inducement effect for record companies"). SoundExchange expert Dr. Herscovici – who is not a record company executive and who admitted that he did not review any nonpublic information from the record companies in preparing his testimony, 8/30/07 Tr. 59:1-9 (Herscovici) – could state only that he "could not

imagine" that the additional money SoundExchange's proposal would generate would not stimulate creative activity. 8/30/07 Tr. 15:8-14 (Herscovici).

33. As against the foregoing, SoundExchange's position in this proceeding that "low rates for those who disseminate will simply result in a dearth of creative works," SX PCL ¶ 34, is insupportable. To the contrary, Professor Noll testified that rates that minimize retail SDARS prices would maximize the availability of satellite radio to consumers and thereby maximize the availability of music to them, within the limits imposed by the effect on inducing creative product and other statutory factors. Noll WRT at 42.

34. In sum, the law establishes that section 801(b)(1)(A) requires a rate that credits the SDARS for their undisputed role in maximizing the availability of creative works by making it feasible for them to continue to do so. In arguing to the contrary, SoundExchange misconstrues the nature of the record evidence relevant to this factor.

B. Reflecting the Relative Roles of the Copyright Owner and Copyright User

35. SoundExchange asserts that section 801(b)(1)(C) – requiring a rate that "reflect[s] the relative roles of the copyright owner and the copyright user" – "is one that 'marketplace evidence, standing alone' can address." SX PCL ¶ 50 (quoting *AMOA v. CRT*, 676 F.2d at 1157); *see also* SX PCL ¶ 52; SX PFF ¶ 277.[6] But as already shown, section 801(b)(1) is not simply superfluous language intended, implicitly, to do no more than mimic the willing

[6] The court in *AMOA v. CRT*, in fact, did not state that section 801(b)(1)(C) can be addressed by "marketplace evidence, standing alone." The court instead was discussing section 801(b)(1)(D): "Indeed, the Tribunal could not ignore this statutory directive to consider industry disruption – a factor which the marketplace evidence, standing alone, does not address." *AMOA v. CRT*, 676 F.2d at 1157. As is clear from its face, the quoted passage is silent as to whether section 801(b)(1)(C) can be addressed solely by marketplace evidence. Moreover, SoundExchange's contention is contradicted by language in the same paragraph of that decision, where the court recognized that the CRT had weighed the evidence presented to it "specifically in light of the four statutory criteria of section 801(b)." *Id.*

buyer/willing seller standard. Because the record that has been adduced overwhelmingly favors the SDARS in relation to the section 801(b)(1)(C) factors of relative cost, risk, capital investment, and technological and other contributions as they relate to satellite radio, it is understandable that SoundExchange would adopt the legal posture it has; that is not to say, however, that the posture is a correct one. It clearly is not.

36. SoundExchange cites the determinations in the webcasting, PSS, and cable distribution proceedings in its effort to collapse the relative contribution factors into market analogies, but none of these determinations supports SoundExchange's argument. *See* SX PCL ¶¶ 50, 52-57. The Judges' determination in the webcasting proceeding is inapposite insofar as that proceeding expressly was governed by the distinct willing buyer/willing seller standard embodied in section 114(f)(2) of the Act. The Judges thus had no occasion there to interpret, let alone apply, any of the section 801(b)(1) factors.

37. Moreover, it cannot suffice, as SoundExchange contends, that the Judges in the webcasting proceeding construed section 114(f)(2)(B)(ii) – a provision similar to section 801(b)(1)(C) – as not necessitating a separate evaluation of the "relative roles" of the parties there involved. *See* SX PCL ¶¶ 51-52. The agreements that the Judges accepted as benchmarks in that proceeding involved not only identical licensors, but also licensees that had the same infrastructure and costs and were in many cases identical to the licensee participants in that proceeding. *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24,084, 24,092-100 (May 1, 2007). The Judges' statement that they "have further reviewed the evidence bearing on these considerations" under section 114(f)(2)(B)(ii) and found no need to make adjustments reflects these similarities in buyers and sellers. *Id.* at 24,092. There are no comparable similarities here.

38. SoundExchange also points to the determinations in the PSS and cable distribution proceedings in an effort to minimize the contributions of, and investments, costs, and risks shouldered by, the SDARS. SX PCL ¶¶ 53-57. But as a factual matter, the SDARS' contributions to their services are far more substantial than those of the copyright users at issue in those proceedings. *See* SDARS PCL ¶¶ 77-84. The record here shows beyond dispute that the SDARS cannot be deemed, as SoundExchange claims, to have "'merely enhanced the presentation of the final work,'" SX PCL ¶ 53 (quoting *Librarian PSS Determination*, 63 Fed. Reg. at 25,407), or to have simply "broadcast the creative works of others," SX PCL ¶ 53.

39. For example, in contrast to the digital services involved in the PSS proceeding, which exclusively performed sound recordings, the SDARS' services involve significant creative and other contributions by the SDARS. *See* SDARS PFF Part V. The SDARS have invested billions of dollars, and assumed significant risks, to build entirely new distribution channels – pioneering undertakings that required the ingenuity to solve technological problems that had never before been confronted, let alone successfully overcome. *See id.* The "market" rates SoundExchange insists account for all of this in fact do not. Indeed, analysis of each of the aspects of section 801(b)(1)(C) contemplated by the statute – creative contributions, technological contributions, capital investment, costs, risk, and contributions to the opening of new markets – leads inexorably to the conclusion that the contributions of the SDARS to their end-to-end services far outweigh those of the record industry and are magnitudes greater than those of the services involved in any prior rate-setting proceedings. *See id.*

40. In any event, the section 801(b)(1)(C) considerations relevant to satellite radio would only even potentially be reflected in marketplace agreements between buyers and sellers with creative and technological contributions, capital investments, costs, and risks regarding the

relevant product that are similar to those of the buyers and sellers at issue here. None of the agreements that SoundExchange proffers as benchmarks – which involve entirely different buyers, such as the digital music agreements upon which Professor Ordover relies, or entirely different sellers, such as the non-music programming agreements upon which Dr. Pelcovits relies, or the direct broadcast satellite agreements upon which Professor Ordover relies – meets this condition. Thus, even on its own terms, SoundExchange's "market rate" theory is wrong.

41. SoundExchange attempts to overcome the fact that the section 801(b)(1)(C) factors weigh overwhelmingly in the SDARS' favor by asserting that "it is necessary to consider all of the record companies' investment, cost, and risk – not simply some subset that is attributable to satellite radio." SX PCL ¶ 54. But if all that the third section 801(b)(1) factor entailed was a comparative measurement of the magnitude of the investment, and associated risk, undertaken by the recording industry as a whole without regard to the "product made available to the public" for which fees are to be set, there would be no point in engaging in the statutory exercise at all. It would prove nothing of relevance to this proceeding for SoundExchange to demonstrate, for example, that annual expenditures (most of which are not investments in any conventional sense of the word) by the record labels in their overall businesses – many components of which have nothing to do with satellite radio – may outstrip those of the SDARS.

42. In fact, the argument advanced by SoundExchange would make a mockery of the intended examination under section 801(b)(1)(C). The statute makes clear that the relevant inquiry is investment, costs, risks, and the like as they pertain to the offering of the service at issue – in this case the SDARS' services. *See* 17 U.S.C. § 801(b)(1)(C) (stating that relevant inquiry is examination of "relative roles" in relation to "the product made available to the public"); *see also* SDARS PCL ¶¶ 74-75 (discussing precedent concluding that "product" refers

to entire offerings of services like the SDARS, not merely to sound recordings). In this regard, SoundExchange cannot identify any investment, cost, or risk incurred by the recording industry specifically in connection with satellite radio. Nor can it claim any credit for opening a new "market" for creative expression, as the SDARS have done.

43. SoundExchange's remaining points merit only brief mention. First, SoundExchange states that "the trends that each industry is facing in the marketplace are relevant to analyzing this factor." SX PCL ¶ 55. Putting aside whether SoundExchange's portrayal of those trends is accurate, that inquiry may go to section 801(b)(1)(D), but it has no bearing on section 801(b)(1)(C), which focuses solely on relative contributions and risks.

44. SoundExchange also states that "the impact of possible substitution or promotion is highly relevant to the risk that record companies face and to the cost – here an opportunity cost." SX PCL ¶ 56. As the SDARS have shown, there is no credible evidence of sales substitution/displacement in this proceeding. To the contrary, the record as to the promotional effect of satellite radio demonstrates that the SDARS, if anything, reduce the risks to the recording industry by giving record companies an additional nationwide means of exposure for their products and artists – one that exposes listeners to genres and artists they cannot hear on terrestrial radio. *See* SDARS PFF Part V.C; SX PFF ¶¶ 458-59. The record demonstrates that record companies recognize the value of airplay by the SDARS and actively solicit such exposure. For example, record companies, agents, and artists routinely provide the SDARS with free copies of CD releases and otherwise contact XM and Sirius aggressively seeking airplay. *See* SDARS PFF ¶¶ 285-91.

45. SoundExchange's claims of substitution suffer from an additional fatal flaw. Specifically, SoundExchange seeks to recover from the SDARS all moneys necessary to offset

the alleged "declining sales and revenues" faced by the record industry. SX PCL ¶ 55. But, as SoundExchange acknowledges, Congress passed the DPRA in part to "address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business." 1995 Senate Report at 13; *see also* SX PCL ¶ 7. In other words, the clear purpose of the statutory license here at issue was to offset any injuries the record companies might sustain as a result of reductions in CD sales caused by the SDARS. The license was not intended to give record companies a new source of revenue to make up for losses that cannot be traced to the impact of satellite radio.

C. Minimizing Disruptive Impact

46. SoundExchange concedes that section 801(b)(1)(D) – which requires that the royalty rate "minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices" – is not addressed by marketplace evidence. *See* SX PCL ¶ 58. In the end, however, SoundExchange pays mere lip service to this factor, interpreting it to be satisfied – no matter what the actual record facts may demonstrate – by a "phasing-in" of free-market rates by the final year of the license. *See* SX PCL ¶ 59.

47. The statute nowhere states or implies that section 801(b)(1)(D) is satisfied merely by the phasing-in of (marketplace-derived) royalty rates, without regard to what the disruptive effect of the ultimate rates might be. SoundExchange's argument is tantamount to saying that the disruption criterion loses relevance over the term of a statutory license. Nothing on the face of the statute or in its regulatory or judicial interpretations bears out such a construction. Notably, in the PSS proceeding, the Librarian endorsed a rate that did not increase over time. *See Librarian PSS Determination*, 63 Fed. Reg. at 25,413; *see also id.* at 25,408 ("[A] reasonable rate for the digital performance right should be set at a level to allow the three companies currently doing business to continue to do so.").

48. In addition, neither of the decisions cited by SoundExchange (the *Jukebox Determination* and the decision that affirmed that determination, *AMOA v. CRT*) suggests that the disruption factor may be satisfied simply by phasing in a rate. The CRT in the *Jukebox Determination* reached its conclusion solely on the record before it, *see* 46 Fed. Reg. at 885-89, and SoundExchange has presented no evidence in this proceeding that a similar phasing-in approach would "minimize any disruptive impact" on the SDARS.

49. Aside from its baseless "phasing-in" argument, SoundExchange misrepresents the SDARS' position with respect to section 801(b)(1)(D) when it asserts that the SDARS measure the prospect of disruption solely by the extent to which a significant rate increase would adversely affect their stock prices. *See* SX PCL ¶¶ 60-62. The SDARS have never so contended. To the contrary, the SDARS maintain that rates must be set low enough to allow the SDARS the opportunity to achieve long-term viability and so as not to disrupt their current business practices. *See* SDARS PCL ¶¶ 99-109; SDARS PFF Part V.I. As the SDARS' Proposed Findings of Fact and Conclusions of Law make clear, numerous risks to viability would be posed by an unduly high rate structure, only one of which concerns the reaction of the investing community to the SDARS as potential objects of capital investment. *See* SDARS PCL ¶¶ 99-109; SDARS PFF Part V.I. There are numerous other concerns. These include, for example, the very real risk that, as the SDARS' maturing debt and lines of credit come due during the license period, the SDARS will face heightened financing obstacles as a result of significantly increased royalty rates that they otherwise might not face. Such rates also could force the SDARS to undertake cost-cutting measures that, as a practical matter, are not feasible, thereby potentially requiring disruptive alterations in the SDARS' business models.

50. SoundExchange fares no better with its legal claims pertaining to the SDARS' stock prices. In particular, *Williams v. WMATC*, 415 F.2d 922 (D.C. Cir. 1968), provides no support for SoundExchange's assertion that "the very arguments that the SDARS make here about setting rates in order to maintain the SDARS stock price at some current or projected level have been rejected." SX PCL ¶ 62. The same court that decided *Williams*, which involved public utility rate-setting, subsequently concluded that such factual settings are not analogous to those presented here. Specifically, the Court of Appeals for the D.C. Circuit held that because of "distinct aspects of the royalty rate scheme" pursuant to which copyright royalty rate-setting bodies operate, "[t]he setting of the royalty rate is not a routine exercise in historical cost of service ratemaking for a public utility." *RIAA v. CRT*, 662 F.2d at 8.

51. SoundExchange's reliance on *Adjustment of the Royalty Rate for Cable Systems*, 47 Fed. Reg. 52,146 (Nov. 19, 1982), to contend that fear of increasing costs is not a legitimate basis for rejecting a higher rate, *see* SX PCL ¶¶ 63-64, also is misplaced. The CRT there was operating under a statutory standard that did not reflect a desire to "foster[]" new forms of distribution. *See Adjustment of the Royalty Rate for Cable Systems*, 47 Fed. Reg. at 52,153. Accordingly, the CRT concluded:

> We observe first that the Congress has not assigned to this body the determination of national policy as to fostering of various competing methods of transmitting programs to the public. If the payment of fees based on the reasonable value of the programs causes operators to drop distant signals with resulting adverse public policy consequences, the Congress may wish to consider if some form of assistance to the cable industry is appropriate. Clearly that is not the function of the Tribunal or copyright owners.

Id. In the DPRA, by contrast, Congress affirmatively expressed its desire to prevent "hampering the arrival of new technologies." 1995 Senate Report at 14-15. In any event, the SDARS have never argued that an increase in costs *per se* results in disruption, only that the enormous

increase sought by SoundExchange – including a quadrupling of existing fee levels as of day one – would do so.[7]

52. Lastly, SoundExchange's insistence that the SDARS' payments for exclusive non-music content prove they can afford to pay the same for non-exclusive sound recording performance rights, *see* SX PCL ¶ 65, has no merit. Even were the comparison not inapt for the many reasons the SDARS have articulated, *see, e.g.*, SDARS PFF Parts VII.C, VII.D, there is no basis for the assumption that the SDARS could incur commensurate costs for non-music programming without disruption. To the contrary, implementation of SoundExchange's proposal that it be paid as much as the non-music content providers would lead to absurd results. As Dr. Woodbury has shown, if Dr. Pelcovits' methodology for attributing incremental subscriber revenue to Howard Stern, based on Professor Wind's purported attempt to value "music," were applied to each category of non-music content, it would lead in Sirius' case to the company paying some 83% of its revenue for programming and content, an "obviously unrealistic" percentage. *See* Woodbury WRT ¶¶ 101-03.

D. Affording a Fair Return and a Fair Income

53. As with SoundExchange's section 801(b)(1) analysis overall, SoundExchange seeks to reduce section 801(b)(1)(B) – which requires "afford[ing] the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions" – to a search for marketplace analogies. The law is directly to the contrary.

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[7] SoundExchange also cautions the Judges to consider "the extent to which the establishment of an unreasonable fee here will affect other rates that are not subject to the statutory license," SX PCL ¶ 66, but no such consideration is warranted. The Librarian in the PSS proceeding, in responding to RIAA's professed "uneasiness with the possibility that the rate which is ultimately adopted may have precedential value for their negotiations with other digital services," rejected RIAA's claim, concluding that "such concern is misplaced." *Librarian PSS Determination*, 63 Fed. Reg. at 25,408.

54. SoundExchange's reliance on the Librarian's section 115 mechanical royalty determination – which also was governed by section 801(b)(1) – for the proposition that fairness is best accomplished by replicating market rates is particularly wide of the mark. *See* SX PCL ¶ 43; SX PFF ¶¶ 33, 276, 306, 818 (citing *Mechanical Royalty Determination*, 46 Fed. Reg. at 10,479). SoundExchange quotes the Librarian's observation in that proceeding that "[t]he evidence shows that in most instances, the rate of return afforded the copyright owner is determined on the free market." *Mechanical Royalty Determination*, 46 Fed. Reg. at 10,479. But the Librarian in that passage was referring to rate-setting in proceedings not governed by section 801(b)(1). SoundExchange fails to quote the very next two sentences which are the sentences applicable to that proceeding governed by section 801(b)(1): "[The evidence] further shows that in the case of the composer of non-dramatic musical composition, however, the rate of return from recordings is fixed under section 115 of the Act. The statutory rate thus regulates the price of music." *Id.* at 10,479-80.

55. More recently, the Librarian in the PSS proceeding pointed out that although Congress "encourages interested parties to negotiate among themselves and set a reasonable rate which inevitably affords fair compensation to all parties," "[a] statutory rate . . . need not mirror a freely negotiated marketplace rate – and rarely does – because it is a mechanism whereby Congress implements policy considerations which are not normally part of the calculus of a marketplace rate." *Librarian PSS Determination*, 63 Fed. Reg. at 25,409. In other words, the Librarian in the PSS proceeding rejected SoundExchange's argument that "fairness to both parties under this provision is best accomplished by replicating to the greatest extent possible the returns that would exist in workably competitive markets." SX PCL ¶ 43.

56. The Librarian expressed a different understanding of the purpose of the statutory license proceeding, noting, in its discussion of section 801(b)(1)(B), that the digital sound recording performance right affords copyright owners "some control over the distribution of their creative works through digital transmissions," while balancing copyright owners' right to compensation against "the users' need for access to the works at a price that would not hamper their growth." *Librarian PSS Determination*, 63 Fed. Reg. at 25,409. The Librarian explained that it considered the proposed market benchmarks and "weighed the record evidence in light of the statutory objectives." *Id.* The object of such weighing, the Librarian observed, was to arrive at a rate that "reflects the balance between fair compensation for the owners and a fair return to the users." *Id.* This straightforward explication of the governing legal framework and the legislative history of the sound recording performance right stands in sharp contrast to the portrayal advanced here by SoundExchange, which posits that the requisite balance somehow can be struck without regard to the interests of the copyright users (the SDARS).

57. As the SDARS explained in their Proposed Conclusions of Law, "fair return" is understood in industrial organization economics as a risk-adjusted return on investment. *See* SDARS PCL ¶¶ 116-17; Noll WRT at 48. SoundExchange's effort to paint a dire picture of the current state of the recording industry notwithstanding, there is no evidence that the record companies are not earning such returns. *See* SDARS PFF Part V.C; Noll WRT at 55. To the contrary, the evidence shows that they are. *See* SDARS PFF Part V.C.

58. SoundExchange asserts that "fairness requires the rate to compensate record companies and performers for their lost opportunity costs," SX PCL ¶ 48, but there is no credible evidence of any such costs with respect to satellite radio, particularly in respect of alleged sales displacement. *See* SDARS PFF Part V.C. As discussed more fully in the SDARS' Proposed

Conclusions of Law, *see* SDARS PCL ¶¶ 118-26, Congress, in enacting the DPRA, recognized that the concern with sales displacement was attenuated with respect to noninteractive services such as the SDARS. *See* 1995 Senate Report at 16. Congress further recognized the potential promotional benefits of airplay, *see id.* at 14-15, and sought to enhance the promotional effect of digital services by requiring, for example, that they include digitally encoded information about the titles of recordings and the names of performers when they transmit sound recordings to listeners, *see* 17 U.S.C. § 114(d)(2)(A)(iii). *See* Logan WDT ¶ 75 ("The screen on every XM radio displays the name of the artist and the title of the song that the subscriber hears.").

59. In the absence of any credible evidence that the SDARS impose any material opportunity costs on the record companies, there is no basis in any conception of economic fairness to impose on the SDARS the cost of propping up recording industry profits to the level represented by the peak of the increasingly obsolete CD distribution format, particularly as digital sales are mushrooming. *See* SDARS PFF Part V.C; *see also* Herscovici WRT ¶ 12 ("[F]ormerly 'non-traditional' sources of revenue, such as digital downloads and mobile ringtones, have grown substantially since 2004."); *id.* at Appendix D (chart of "dollar value of digital shipments" showing that compound annual growth rate for 2004-06 was 218.4%); *id.* at Appendix F (chart showing that since the advent of digital download sales as a new revenue stream, industry revenues have stayed essentially level).

60. On the other side of the ledger – which SoundExchange ignores – the SDARS have made enormous investments and incurred substantial costs since inception and have yet to generate any net income, let alone a competitive return on their historical investments. As Dr. Herscovici acknowledged, a "normal rate of return" is "a return that is sufficient to justify any investments or any expenditure of resources that the user would undertake to be in the industry."

8/30/07 Tr. 74:8-75:4 (Herscovici). A construction of section 801(b)(1)(B) that would supply the recording industry with windfall profits unrelated to costs incurred while depriving the SDARS of the ability to continue on the path to eventual profitability would contravene fundamental principles of economic fairness.

61. Contrary to SoundExchange's contention, there also is no fairness (or other) rationale for the SDARS to pay for the sound recordings performance right what they pay under their non-music programming agreements. *See* SX PCL ¶¶ 45-47. As discussed in the SDARS' Proposed Findings of Fact, *see* PFF Parts VII.C, VII.D, the differences between the rights obtained from the SDARS' non-music content providers and those obtained from SoundExchange are stark. Significantly, for example, the SDARS receive rights from their deals with personalities and entities such as Howard Stern and Major League Baseball – rights to broadcast those personalities and entities on an exclusive basis, rights to exploit the content providers' names, likenesses, and trademarks, and rights to require the providers to endorse or otherwise promote Sirius' or XM's service – that they do not receive as part of the sound recording performance right. Fairness thus requires not making a direct comparison to the SDARS' payments for non-music content but instead recognizing the many differences between such content deals and the sound recording performance right. *See* PFF Parts VII.C, VII.D.

62. In the PSS proceeding, the Librarian found that the fact that the record companies provided promotional copies of sound recordings to the services there at issue undermined RIAA's contention that the services did not promote sales, and it cited the acknowledgement by RIAA's expert that there are "promotional benefits to recording companies from having their music played on radio stations or the digital music services." *Librarian PSS Determination*, 63 Fed. Reg. at 25,408. As noted, the record here contains the same type of evidence with respect

to the SDARS, *see, e.g.*, SDARS PCL ¶ 123; SDARS PFF Part V.C, thereby further undermining the rationale for awarding SoundExchange compensation from the SDARS anywhere near the level it seeks.

CONCLUSION

62. For the reasons set forth herein and in the SDARS' Proposed Conclusions of Law, SoundExchange's market-based rate proposal does not comport with the law, and the Judges should instead adopt the SDARS' rate proposal.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply to SoundExchange's Proposed Conclusions of Law, Jointly Submitted by Sirius Satellite Radio Inc. and XM Satellite Radio Inc., was served on October 11, 2007 via overnight courier on the following party:

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