PUBLIC VERSION

Before the
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In the Matter of	)	**Docket No. 2006-1 CRB DSTRA**
Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services	)	

REBUTTAL TESTIMONY AND EXHIBITS JOINTLY SUBMITTED BY SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO INC.

VOLUME 3 OF 3

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Before the
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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**

WRITTEN REBUTTAL TESTIMONY OF DR. ERICH A. JOACHIMSTHALER

1. I have been retained by counsel for Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM") (collectively, "SDARS" (satellite digital audio radio services) or "Services") to respond to SoundExchange expert Dr. Michael Pelcovits' contention that monetary amounts paid by Sirius and XM for non-music programming – including Howard Stern – provide a benchmark for the value of the sound recording performances covered by the statutory license at issue in this proceeding. My testimony addresses a significant element of value that the SDARS derive from their non-music deals – the value of associating with powerful brands – that the SDARS do not receive from the right to play sound recordings. Dr. Pelcovits' failure to account for this important difference between non-exclusive music and exclusive non-music programming on the Services renders this aspect of his analysis invalid. I am not an economist and thus do not opine on the other aspects of Dr. Pelcovits' reports.

QUALIFICATIONS

2. I have been a professional in the branding and marketing field for more than twenty years. I am the founder and Chief Executive Officer of Vivaldi Partners (formerly

known as The Brand Leadership Company), a strategic marketing and brand strategy consulting firm with headquarters in New York and offices in London, Munich, and Hamburg. Before founding Vivaldi Partners, I co-founded a company with Professor David A. Aaker called Aaker - Joachimsthaler & Partners, which we sold in 1999 to Prophet, a brand strategy consulting firm. I served as a Chairman at Prophet before founding Vivaldi Partners.

3. I have provided expert brand and marketing advice to a diverse set of clients in industries such as telecommunications, automotive, consumer products, technology, financial services, entertainment, and energy, among others. Over the past fifteen years, I have been involved in building strong brands for many clients in North America and Europe, including Adidas, Bertelsmann, Deutsche Telekom, IBM, Levi's, Sanoma, and Siemens. I have worked for clients in extending brands into premium sectors of markets as diverse as food, automotive, durables, and fashion. I have assessed the value of brands and their potential for development in several hundred situations, and I have led research into the extension of brands or well-known trademarks.

4. I am a published authority on marketing strategy and building strong brands. My book, *Brand Leadership*, which I co-authored with David Aaker, was published by The Free Press in January 2000. My latest book, *Hidden in Plain Sight: How to Find and Execute Your Next Growth Strategy,* was published by Harvard Business Press in May 2007. I also have published extensively in academic journals such as the *Harvard Business Review, Journal of Marketing Research, Journal of Marketing, Journal of Consumer Research*, and *Sloan Management Review.*

5. I have held faculty positions at the Darden Graduate School of Business Administration at the University of Virginia, the University of Southern California, and the

University of Houston. In addition, I am Visiting Professor of Business Administration at IESE (Instituto Superiores de la Empresa) in Barcelona, Spain, one of the leading European business schools offering MBA and executive education programs.

6. In 1988, I completed a post-doctoral fellowship at the Harvard Business School. I received my Ph.D. in Business Administration, with emphasis on statistics and marketing, from the University of Kansas in 1985, where I also received my Master's Degree of Science, with emphasis in quantitative methods, in 1981. In 1979, I received my Economics Degree from the Fachhochschule Giessen-Friedberg, Germany.

7. I have served as an expert witness in several cases, including *Coty (Davidoff) v. CVS*, *Exide v. Enersys*, *Adidas America, Inc. & Adidas-Salomon AG v. Kmart Corporation*, and *Adidas America, Inc. & Adidas AG, v. Payless ShoeSource, Inc.* A more detailed summary of my training, past experience, and prior testimony appears as an appendix at the end of this testimony.

8. I am being compensated at my normal and customary hourly rate of $700 per hour. My consulting firm is also being compensated for the time spent by its research staff at their normal and customary hourly rates.

MATERIALS REVIEWED

9. To carry out the foregoing assignment, I have reviewed and relied on, among other materials, the following:

- the original and amended Written Direct Testimony of Michael Pelcovits;
- the trial testimony of Michael Pelcovits and various fact witnesses from Sirius and XM;
- the Sirius and XM introductory memoranda and opening statements;

- certain Sirius and XM brand tracking reports and other internal company documents;
- my book with co-author David A. Aaker, *Brand Leadership* (Free Press 2000);
- Douglas B. Holt, *How Brands Become Icons: The Principles of Cultural Branding* (Harvard Business School Press 2004);
- Kevin Lane Keller, *Strategic Brand Management* (Prentice Hall 2003);
- press coverage on Sirius, XM, and the SDARS generally;
- press releases and websites of Sirius and XM;
- the agreements entered into by XM or Sirius with Howard Stern, Oprah Winfrey, Martha Stewart, NFL, NASCAR, NBA, MLB, and Opie & Anthony (collectively, the "Non-Music Content Providers"); and
- my discussions with Sirius and XM executives.

SUMMARY OF CONCLUSIONS

10. I conclude that the Services' deals with the Non-Music Content Providers cannot be directly equated with the right to play sound recordings in terms of value to the Services without taking into account significant differences between the Non-Music Content Providers, on one hand, and sound recordings, on the other. Specifically, the Non-Music Content Providers individually are powerful brands that contribute significant value to Sirius and XM above and beyond the value of the content itself. The right to play sound recordings, by contrast, is a category "point of parity" for Sirius and XM and does not differentiate Sirius' and XM's services from competing offerings in the way that the content from Non-Music Content Providers does.

11. My testimony is organized as follows: Part I discusses the nature of brands and the powerful role of brands in media industries. Part II analyzes Howard Stern, Oprah Winfrey, Martha Stewart, NFL, NASCAR, MLB, and Opie & Anthony under the four components of brand equity and concludes that each are powerful brands that differentiate Sirius and XM from each other and from terrestrial radio. Finally, Part III discusses some of the ways in which these powerful brands provide dimensions of value to Sirius and XM beyond the value of the content itself that Sirius and XM do not receive merely from playing sound recordings.

I. BRANDS PLAY A SIGNIFICANT AND VALUABLE ROLE IN MEDIA INDUSTRIES

A. The General Role of Brands

12. At the outset, I will introduce several generally accepted notions of brands. These notions are fundamental to understanding the value that Howard Stern, Oprah Winfrey, NFL, MLB, and the other Non-Music Content Providers bring to Sirius and XM.

13. A brand has two key types of components: the tangible and the intangible. The tangible components, or physical manifestation, of a brand may include names, logos, images, or designs. The more important components of the brand, however, and those that give it meaning, are the intangible components. As David Ogilvy, founder of the global communications agency Ogilvy & Mather, once stated, a brand is "the intangible sum of a product's attributes: its name, packaging, and price, its history, its reputation, and the way it's advertised."[1] Ogilvy refers here to everything that is stored in a consumer's memory and linked to a name of a product, service, company, person, or any other thing. This includes thoughts, feelings, emotions and experiences. Metaphorically speaking, a brand thus can be viewed much like a box in

[1] Keith Newton, *America's Greatest Brands Volume IV*, http://www.americasgreatestbrands.com/volume5/council/keith-newton.php.

someone's head – as people receive information about a brand, either positive or negative, they file it away in their mental box labeled with the name of the brand.

14. The concept of a brand is not limited to corporations, products, or services. Brands can consist of countries, cities, fictional characters, sports teams, rock bands, universities, and people[2] – essentially, any entity with specific associations existing in consumers' minds. It is, accordingly, widely recognized that people – particularly personalities in the public spotlight – can be considered brands in their own right. Kevin Lane Keller, in his leading text on branding and brand management, states:

> Brands extend beyond products and services. People and organizations also can be viewed as brands. . . . This fact becomes particularly true when considering public figures such as politicians, entertainers, or professional athletes. . . . A special case of marketing people and organizations as brands is in the sports, art, and entertainment industries.[3]

In a global survey asking consumers to identify their favorite brands, product brands (*e.g.*, Starbucks), cartoon characters (*e.g.*, Hello Kitty), as well as personalities (e.g., Oprah Winfrey and Lance Armstrong) were among those listed as consumers' top-ranking brands.[4]

B. A Strong Brand Brings Tremendous Benefits and Value to the Brand Owner

15. Strong brands provide a means of differentiating one product from another and a basis for generating preference, choice, and loyalty among consumers. Functionally speaking, products can be quite similar. Take, for example, the cluttered marketplace of music radio.

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[2] DOUGLAS HOLT, HOW BRANDS BECOME ICONS: THE PRINCIPLES OF CULTURAL BRANDING (Harvard Business School Press 2004).

[3] KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY 16-18 (2d ed. 2003).

[4] Robin D. Rusch, *The Search is Over: Google Wins in 2005,* BRANDCHANNEL, http://www.brandchannel.com/features_effect.asp?pf_id=298 (2005 Readers' Choice Awards survey conducted by BrandChannel.com).

From the consumer's perspective, the purpose of music radio is to play music and provide entertainment, and, as such, all music radio shows serve broadly the same function for the consumer. A well-branded music show, however, has the ability to stand out from the crowd. It is the branded aspects of the show – such as the name, programming style, host, or other unique elements of the show – that invoke in consumers' memory the distinctive information he or she has stored about the brand. For instance, strongly branded music channels like Sirius' "Elvis Radio" and XM's "Willie's Place" (Willie Nelson) are unique and distinctive because they offer exclusive content not found elsewhere, while Sirius' "Shade 45" (Eminem) offers the pedigree of being co-produced by a music superstar.

16. Numerous studies demonstrate that brand attitudes directly impact consumers' purchasing decisions, with more favorable attitudes strongly influencing brand preference and brand choice. Consumer decision-making with respect to the purchase of goods and services is generally conceived as consisting of the following stages: need recognition, information search, consideration set formation, evaluation, purchase, and post-choice.[5] Consumers rely on brands to help them make purchase decisions so that they do not have to conduct exhaustive search and evaluation processes. As a real-world example of this concept, studies have shown that when a consumer buys sports shoes, the brand of the shoes has a twenty-nine percent impact on the choice. In essence, whenever a consumer is deciding on a product or service, the brand is a significant factor in influencing the ultimate purchase decision.[6]

17. Although it is considered an intangible asset on the company's financial statement, a strong brand contributes real value to a company. In fact, the company's brand is

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[5] WAYNE D. HOYER & DEBORAH J. MACINNIS, CONSUMER BEHAVIOR (Houghton Mifflin 2003).

[6] M. Fischer et al., *Brand Policy: Is it relevant for every company?*, DIE BETRIEBSWIRTSCHAFT, May/June 2004.

in many cases its most valuable asset. Marketers recognized this truism as far back as 1900, when John Stuart, Chairman of Quaker, stated: "If this business were split up, I would give you the land and bricks and mortar, and I would take the brands and trade marks, and I would fare better than you."[7] More recently, academic work by Aaker and Jacobson has shown a relationship between brand equity and shareholder return.[8] Firms experiencing the largest gains in brand equity have seen their shareholder return average thirty percent; conversely, those firms with the largest losses in brand equity have seen stock return average a negative ten percent. Another study has shown that a portfolio of high brand-value companies outperformed a total stock market index by a wide margin (twenty-three percent per annum versus sixteen percent) throughout most of the 1990s.[9] And in the 2006 ranking by *BusinessWeek* magazine and the global branding firm Interbrand of the 100 top global brands based on each brand's financial value and the economic performance driven by the brand, the top-ranked brand was Coca-Cola, with an estimated brand value of $67 billion.[10]

18. An additional benefit to the owner of a strong brand consists of sustaining relevance with consumers.[11] Especially for products and services targeting young adults,

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[7] ECONOMIST BOOK SERIES, BRANDS AND BRANDING (Bloomberg Press 2003).

[8] David A. Aaker & Robert Jacobson, *The Financial Information Content of Perceived Quality*, JOURNAL OF MARKETING RESEARCH 191-201 (1994).

[9] Thomas Madden et al., *Brands Matter: An Empirical Demonstration of the Creation of Shareholder Value Through Brands*, SOCIAL SCIENCE RESEARCH NETWORK, Working Paper, 2002.

[10] *The World's Best Brands*, BUSINESSWEEK, Aug. 7, 2006, http://www.businessweek.com/magazine/toc/06_32/B399606globalbrands.htm.

[11] David Aaker, *The Innovator's Prescription: The Relevance of Brand Relevance*, STRATEGY + BUSINESS, Special Report, Summer 2004; DAVID AAKER, BRAND PORTFOLIO STRATEGY 103-127 (Free Press 2004).

relevance is needed to sustain the business amid constantly changing tastes and rapid turnover of core customers. A typical young adult target market is 18-24 year-olds, which means that every seven years, the brand is addressing a completely new group of consumers. Entertainment brands targeting young adults therefore must carefully manage their brands through constant refinement of brand positioning and user imagery, plus consistent investment in the brand. Not surprisingly, celebrities constantly update their brands by aligning themselves with the current times and trends, as can be seen in Jennifer Lopez's adoption of the new moniker J. Lo – a change inspired by the attempt to have more street credibility and a nod to her Bronx roots.[12]

19. A third benefit to the owner of a strong brand is building and sustaining competitive advantage over others in the market. Media businesses with a strong orientation toward building brands achieve competitive advantages in the following dimensions: advertising and communications, add-on revenue streams through retail and merchandising opportunities, partnerships and alliances, and attracting investment capital. For example, through carefully cultivating and building their brands, Oprah Winfrey, Martha Stewart, and Howard Stern have succeeded in standing out from their peers and creating new revenue-generating opportunities that capitalize on their brand names. As discussed below, for example, Howard Stern has moved beyond his original role as a radio show host to become a true entertainment brand across different media.

20. A final significant benefit of strong brands is that they provide the basis for brand extensions, which involves using an existing brand name to introduce new products or services. Brand extensions can open new revenue streams by bringing new customers to the brand franchise, increasing market coverage, or differentiating the core brand by new associations.

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[12] Chris Grannell & Ruwan Jayawardena, *Celebrity Branding: Not as Glamorous as It Looks*, BRANDCHANNEL (Jan. 19, 2004), http://www.brandchannel.com/brand_speak.asp?bs_id=76.

For example, as described below, Oprah Winfrey's strong brand has allowed her successfully to enter into new businesses and to use brand extensions of the Oprah name to open untapped streams of revenue.

21. All of the above benefits that accrue to brand owners emerge from the fact that consumers tend to behave in a positive way toward strong brands. Specifically, consumers tend to exhibit: (a) greater willingness to consider the brand's products or services; (b) greater receptivity to marketing information about a brand's products or services; (c) stronger desire or aspiration for the brand's products or services; (d) greater loyalty and willingness to purchase or use the brand again; (e) greater tolerance toward the brand in case of product failure or problems; (f) greater willingness to pay for the brand's products or services than for other comparable products or services; and (g) greater willingness to recommend the brand to other consumers.

II. THE NON-MUSIC CONTENT PROVIDERS ARE STRONG BRANDS THAT DIFFERENTIATE SIRIUS' AND XM'S CONTENT FROM EACH OTHER AND FROM TERRESTRIAL RADIO

22. Dr. Pelcovits asserts incorrectly that amounts paid by the SDARS pursuant to agreements with strong brands such as Howard Stern, Oprah Winfrey, the NFL, MLB, and the other Non-Music Content Providers can be used without adjustment as a benchmark for the sound recording performance royalty rate at issue here (based on the asserted importance to consumers of the non-music content vis-à-vis the music content). He overlooks the fact that the entities and individuals with which Sirius and XM have entered into deals for non-music programming are powerful, renowned brands that differentiate Sirius and XM from each other and from terrestrial radio and provide significant dimensions of value – beyond that of the content itself – that sound recordings do not provide.

A. The Non-Music Brands Provide Valuable "Points of Difference" for Sirius and XM

23. Category "points of parity" are features or associations of an enterprise that are shared with all other enterprises and thus are not unique. Consumers view points of parity as necessary to a legitimate and credible product offering within a certain category – they represent necessary, but not sufficient, conditions for brand choice.[13] For example, consumers would not consider a bank truly a bank if it did not: offer a range of checking and savings accounts; have convenient hours; and provide safety deposit boxes, automatic teller machines, and other such services.

24. The right to play sound recordings is a point of parity for radio businesses – whether the SDARS or terrestrial radio. They are the bare minimum needed for Sirius and XM to stay competitive, but they are not, by themselves, a source of competitive advantage. Rather, sound recordings are ubiquitous – freely and widely available on a myriad of terrestrial radio stations and from numerous other sources – and thus do not constitute a reason for consumers to subscribe to the SDARS. Accordingly, there is no basis for Sirius and XM to pay a premium for the right to play sound recordings; one does not pay a premium for a point of parity. To the extent music programming on the SDARS is a "point of difference" (discussed below), it is attributable to the significant value the Services add to the sound recording content through their innovative programming enhancements or to the premium that the Services already pay to operate exclusive branded channels such as Sirius' Elvis Radio channel or XM's XMX channel, which features exclusive shows with Bob Dylan, Ludacris, and Wynton Marsalis, among others.

25. In contrast to points of parity, "points of difference" are features or associations that are unique to the brand and are strongly held and favorably evaluated by consumers. The

[13] Keller, *supra* note 3, at Section II.

notion behind points of difference is that because consumers face a multitude of options, they must be given a compelling reason to buy a product or service in the form of some unique and valuable feature or association.

26. The Non-Music Content Providers provide the compelling and exclusive content that serves as clear category points of difference for Sirius and XM. First, they provide Sirius and XM with exclusive content that can be heard neither on the other satellite radio service nor on terrestrial radio. For example, content from Howard Stern and Martha Stewart is available only on Sirius and not on XM or terrestrial radio. Likewise, Oprah Winfrey's XM channel content can be found only on XM and not on Sirius or terrestrial radio; Opie & Anthony can be found in uncensored form only on XM. Similarly, with respect to NASCAR and the NFL on Sirius and MLB on XM, no other source offers 24-hour channels solely devoted to these sports properties, providing nationwide coverage of games and teams as well as additional channels of programming offering "behind the scenes" looks at the events and participants.

B. Howard Stern, Oprah Winfrey, Martha Stewart, the NFL, MLB, NASCAR, and Opie & Anthony, Among Other Non-Music Content Providers, Are Strong Brands

27. The properties and personalities engaged by Sirius and XM, such as Howard Stern, Oprah Winfrey, Martha Stewart, the NFL, MLB, NASCAR, and Opie & Anthony possess considerable brand strength and create significant value for Sirius, XM, and their subscribers. In this section, I describe and assess the components of brand equity. I then analyze the brand equity of each of the Non-Music Content Providers and conclude that each is a strong brand that contributes significant value to Sirius and XM beyond the value of the non-music content alone.

1. The dimensions of brand equity

28. To explain how brands contribute value to their owners or to licensees such as Sirius and XM, I employ the concept of brand equity, a well-known and accepted concept for

analyzing brand strength. Brand equity is defined as the set of assets or liabilities that add or subtract from the value provided by a product or service.[14] A brand with equity possesses four asset dimensions: (a) awareness, (b) associations, (c) perceived quality, and (d) loyalty.

(a) Awareness

29. Brand awareness denotes the familiarity of the brand and its branding elements (e.g., name, logo, consumer message, etc.) and is, accordingly, a critically important asset dimension. Without awareness, a brand has little hope of establishing other asset dimensions of brand strength. Awareness is thus a necessary, but not sufficient, element of brand strength.

30. When a celebrity such as Howard Stern or Oprah Winfrey, or other strong, renowned branded property such as the NFL or MLB, is associated with another brand, the awareness of that other brand tends to increase more rapidly. Because the brand becomes linked with the celebrity or other branded property in the minds of consumers, the brand will benefit not just when explicitly invoked by the other, stronger brand, but every time the stronger brand is brought to the awareness of consumers for any reason. For example, Howard Stern increases public awareness of Sirius not only when he appears in the press talking about Sirius or satellite radio, but even when he appears in the press for entirely unrelated reasons. Stern has become an icon for Sirius, and his presence in the public arena can be regarded as free advertising, so to speak, for Sirius, thereby making Sirius' branding more effective.

31. Based on my review of various Sirius and XM documents as well as my discussions with Sirius and XM executives, it is clear that the deals with the various Non-Music Content Providers were done not just for the value of the content, but also so that the fledgling SDARS could benefit from the enormous awareness boost they would receive through their

[14] DAVID AAKER, MANAGING BRAND EQUITY (Free Press 1991); DAVID AAKER & ERICH JOACHIMSTHALER, BRAND LEADERSHIP (Free Press 2000).

associations with these famous properties. As XM's Stephen Cook stated in his written testimony:

> XM . . . realizes tremendous benefits from adding well-established major brands to its programming. Our entire channel line-up, particularly on the news, talk and sports side, is replete with brands that are well-known to consumers, thanks to the extensive marketing efforts of other companies. . . . Our ability to market the new XM brand is greatly helped by aligning with established programming sources.[15]

(b) Associations

32. A second key asset of any powerful brand is strong, favorable, and unique brand associations. A brand has value when consumers hold such associations about that brand.[16] Such brand associations are anything "linked" in memory to a brand[17] and can be a visual image (the gecko lizard for Geico), a feature (iPod's design), an attribute (Volvo's safety), or a benefit (Crest's cavity prevention). Such associations form the core of how consumers evaluate a brand on an ongoing basis. As discussed more fully below, the Non-Music Content Providers' associations are strong, favorable among their target audiences, and unique.

(c) Perceived quality

33. Perceived quality, the third central aspect of brand equity, is "the customer's perception of the overall quality or superiority of a product or service with respect to intended purpose, relative to alternatives."[18] Perceived quality is an important component of brand strength, as it is the source of many brands' competitive advantage; while perceived quality is an

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[15] Cook WDT ¶ 28.

[16] Keller, *supra* note 3.

[17] Aaker, *supra* note 14.

[18] *Id.*

association, it is often separated out because of its strategic importance. The perceived quality of the Non-Music Content Providers is clear; as addressed below, they each are perceived by consumers as representing the highest standards in their respective fields.

(d) Loyalty

34. Loyalty, the final component of a strong brand, is "a measure of the attachment that a customer has to a brand. It reflects how likely a customer will be to switch to another brand."[19] Typically, a brand with more loyalty has higher brand value. Brands like Harley-Davidson exemplify the highest levels of loyalty, where customers are so deeply loyal that they tattoo the brand logo into their skin.

35. As further addressed below, each of the Non-Music Content Providers possesses considerable brand strength based on the four dimensions of awareness, associations, perceived quality, and loyalty. Indeed, integral to the contracts for each of the Non-Music Content Providers is the recognition that these entities and personalities have high brand equity and that, by associating with these renowned brands, Sirius and XM are able to draw upon that equity. Such contractual associations, in turn, strengthen Sirius' and XM's own brands and differentiate them from terrestrial radio and from each other. In the following sections, I analyze the brand equity of each of the Non-Music Content Providers.

2. Brand equity of Howard Stern

37. **Awareness**: Howard Stern's brand strength is typified, at the outset, by the widespread awareness of him. It requires little discussion that Howard Stern has achieved high awareness among the general public and especially among his target demographic: 18- to 49-

[19] *Id.*

year-old males.[20] Among this segment, Howard Stern is the most listened-to radio host.[21] Prior to his move to Sirius, Stern boasted a 12-million-strong audience on his terrestrial radio program,[22] one of the highest nationally.

38. **Associations**: Whatever one's subjective opinion of Howard Stern, his persona triggers strong, unique, and favorable associations in the minds of his fans. The best-known radio "shock jock," Stern stands for "antic audacity," "regular-guy standing," and brutal honesty – the "most provocative populist voice" of America, "denouncing the priorities and tastes of American elites."[23] Stern has been lauded as "a kind of deity, the mention of whose name brings glory to his acolytes," achieving his "godlike status" not through the traditional means of glamour, wealth, or beauty, but through his unabashed legitimization of "the dark side, the anarchic impulse, the savage beast in us all."[24] Positive or not, the name and brand of Howard Stern elicits instant associations in the mind of the consumer. Stern's unique standing is evidenced by the fact that some of the world's most influential and well-known personalities have appeared on Stern's show: David Letterman, the late John F. Kennedy, Jr., Robin Williams, Rudy Giuliani, Ben Affleck, Arnold Schwarzenegger, and many others.

39. **Perceived Quality**: As an entertainment brand, Stern's standing is at the highest level – he has proven to be an eminently bankable entertainer. Stern is a published author of

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[20] *See* News Releases, *Howard Stern and Sirius Announce the Most Important Deal in Radio History* (Oct. 6, 2004), http://investor.sirius.com/releaseprint.cfm?releaseid=151947.

[21] *See* "Howard Stern" Sirius Management Report, SIR00038000 at SIR00038001.

[22] Daren Fonda, *Howard Stern: The $500 Million Man*, TIME MAGAZINE, Dec. 16. 2005, http://www.time.com/time/business/article/0,8599,1141769,00.html.

[23] Richard Bernstein, *Books of the Times: Fantasies of a Regular Guy (With Worshipers)*, THE NEW YORK TIMES, Dec. 4, 1995.

[24] *Id.*

two books that topped The New York Times Bestseller list: *Private Parts* (1993) and *Miss America* (1995). The *Private Parts* movie ranked No. 1 in the opening weekend box office by grossing $14.6 million, ultimately grossing $41 million domestically.[25] In addition, the *Private Parts* original soundtrack became an RIAA-certified platinum album as of May 1997[26] and also made the Billboard Hot 200 chart.[27] Howard Stern's television show, The Howard Stern Show, beat out the popular Saturday Night Live in the 18- to 34-year-old male demographic in a number of markets.[28]

40. **Loyalty**: Howard Stern has demonstrated significant customer loyalty through "his unequalled ability to migrate fans to other media."[29] Stern's successful ventures into other forms of entertainment (books, movies, music) highlight his loyal fan base. His highly publicized move from terrestrial radio to Sirius satellite radio provides an excellent example of loyalty toward the Howard Stern brand. After Sirius announced its deal with Stern in October 2004, Sirius added nearly a half-million new subscribers from the third quarter of 2004 to the fourth quarter of 2004 alone, compared to 180,000 new subscribers from the second quarter of

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[25] IMDB.com, *Private Parts* (1997) - Box Office/Business, http://www.imdb.com/title/tt0119951/business.

[26] RIAA.com, Private Parts RIAA Rating, http://www.riaa.com/goldandplatinumdata.php?table=SEARCH (enter "Private Parts" in "Title" field).

[27] Billboard.com, Top Music Charts – Hot 100 – Billboard 200, http://www.billboard.com (search "Private Parts Soundtrack"; then follow "Album: The Billboard 200 5/10/1997" hyperlink).

[28] Lawrie Mifflin, *Howard Stern Has a TV Hit But Not a Knockout!*, THE NEW YORK TIMES, Feb. 16, 1999.

[29] *See* News Releases, *supra* note 20.

2004 to the third quarter of 2004, which brought its total to 1,143,258 subscribers.[30] When Stern commenced his show on Sirius in January 2006, there was an even more dramatic jump in the number of new subscribers, with Sirius adding a record 1,142,640 subscribers in the fourth quarter of 2005 and more than three-quarters of a million in the first quarter of 2006.[31]

3. Brand equity of Oprah Winfrey

41. **Awareness**: Like Howard Stern, there is little doubt that Oprah has achieved extremely high awareness among the general public and among her target demographic of 25- to 54-year-old adults.[32] Oprah was and continues to be one of the most recognizable celebrity marketing icons, having been ranked number one on Forbes' Celebrity 100 list in 2005 and having been among the top ten for many years.

42. **Associations**: Oprah represents associations of strength, taste, and kindness, embodying not only "American values but also an American way of using and making culture."[33] Oprah's own highly-publicized, personal struggle for success – failed relationships, childhood sexual abuse, and a recurring battle to lose weight – speaks to the American public as

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[30] *See* News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2004 Financial and Operating Results* (Jan. 26, 2005), http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=154690&cat=&newsroom=; News Releases, *Sirius Satellite Radio Announces Third Quarter 2004 Financial and Operating Results* (Oct. 27, 2004), http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=150206&cat=&newsroom=.

[31] *See* News Releases, *Sirius Satellite Radio Reports Record Subscriber Growth and Revenue for Fourth Quarter and Full-Year 2005* (Feb. 17, 2006), http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=187963&cat=&newsroom=; News Releases, *Sirius Satellite Radio Reports Strong First Quarter 2006 Results* (May 2, 2006), http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=194903&cat=&newsroom=.

[32] *See* "Oprah & XM" presentation (Dec. 7, 2005), XMCRB00141745 at 00141747.

[33] EVA ILLOUZ, OPRAH WINFREY AND THE GLAMOUR OF MISERY (Columbia University Press 2003).

a voice of strength, positioning her as the ideal role model. Oprah's philanthropic endeavors reinforce her role model status: her Angel Network helped raise $50 million over five years, $10 million for Hurricane Katrina victims.[34] On a larger scale, Angel Network "simply invite[s] all of us to make significant emotional improvements in problematic lives."[35] Indeed, Oprah Winfrey is more than a mere personality – she is "a cultural phenomenon."[36]

43. **Perceived Quality**: To millions of Americans, an endorsement by Oprah represents a seal of quality. Oprah's Book Club is well-known for jump-starting book sales: the first eleven books that Oprah picked previously had been unranked in *USA Today*'s top 150 bestseller list; after her endorsement, each immediately leapt into the top four on the list. Oprah's stamp of approval also ensures the books' staying power, allowing each to remain in the top twenty-five for an average of six-and-a-half weeks.[37] Oprah's perceived quality can, of course, be seen in her television career. Launched in 1986, the Oprah Winfrey Show is now almost twenty-one years old and has been the number one ranked talk show for nineteen consecutive seasons.[38] The show had won thirty-five Emmy Awards before Oprah stopped submitting it for consideration, and it is broadcast to 117 countries.[39]

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[34] About Oprah's Angel Network, http://www.oprah.com/about/press/about_press_oanfaq.jhtml.

[35] Illouz, *supra* note 33.

[36] *Id.*

[37] *See* News Release, *Oprah's Impact on Book Sales Bigger Than Expected*, Brigham Young University, Dec. 16, 2004, http://byunews.byu.edu/archive04-Dec-butler.aspx.

[38] Oprah Winfrey Show Trivia, http://www.oprah.com/presents/2005/20anniv/tows/tows_trivia.jhtml.

[39] *Id.*

44. **Loyalty**: Loyalty towards Oprah is extremely powerful. The Oprah Winfrey Show is watched by more than fifteen million people at least once a week, and *O, The Oprah Magazine* is considered the most successful magazine launch in recent publishing history, with a circulation of just over 2.6 million readers a month.[40] This loyalty manifests itself in huge boosts in sales of products endorsed by Oprah – in short, when Oprah speaks, her loyal fans listen and buy. A book's selection for Oprah's Book Club typically results in sales of more than one million copies, while the industry benchmark of 20,000 copies is considered a success.[41] The LiveSTRONG wristband sold 900,000 pieces after it was featured on The Oprah Winfrey Show.[42]

4. Brand equity of Martha Stewart

45. **Awareness**: The Martha Stewart name is extremely well known. The Martha Stewart brand appears in a vast array of forms, from her flagship *Martha Stewart Living* magazine to a host of other Martha Stewart-branded media forms. These include, for example, The Martha Stewart Show on television, Marthastewart.com on the Internet, the *Martha Stewart Weddings* magazine, etc. Martha's media properties reach 88 million people each month,[43] and The Martha Stewart Show is nationally syndicated, reaching 1.7 million viewers.[44]

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[40] MAGAZINE PUBLISHERS OF AMERICA, CIRCULATION TRENDS & MAGAZINE HANDBOOK 2004, http://www.magazine.org/Circulation/circulation_trends_and_magazine_handbook/11186.cfm.

[41] *See "Oprah – Programming and Marketing Investment Summary,"* XMCRB00141718 at XMCRB00141722 (Oct. 12, 2005).

[42] *Id.*

[43] Diane Brady, *Martha, Inc.*, BUSINESSWEEK, Jan. 17, 2000, http://www.businessweek.com/2000/00_03/b3664001.htm.

[44] Burt Helm, *Queen of the Product Pitch*, BUSINESSWEEK, Apr. 30, 2007, http://www.businessweek.com/magazine/content/07_18/b4032050.htm.

46. **Associations**: Recognized as "America's Lifestyle Queen," Martha Stewart maintains associations of perfection and self-reliance.[45] Martha's associations are strong, favorable, and unique. She has built her business empire around the home and her mass-market positioning – "very middle-American, with a slight aspiration – not to reach Rodeo Drive, but to live life a little better."[46] Moreover, Martha's strong associations have allowed her to bounce back from her recent jail time: shares of Martha Stewart Living Omnimedia have rebounded from $11 a share shortly after her sentencing in July 2004 to $31 per share at the time of her release on March 4, 2005.[47] Martha came back from prison "with a vengeance" with eight new projects and an unprecedented amount of celebrity and popularity.[48]

47. **Perceived Quality**: Not surprisingly, the Martha Stewart brand is an internationally acknowledged symbol of quality and taste. It has been said that when consumers watch her show, visit her website, read one of her books, buy one of her products, or bake one of her favorite recipes, they hope that some of her taste will rub off on them.[49] Similarly, retailers line up to be associated with the Martha Stewart brand and name: branded product lines include Martha Stewart Everyday at Kmart, Martha Stewart Furniture with Bernhardt, and a new Martha

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[45] Brady, *supra* note 43.

[46] *Id.*

[47] Pallavi Gogoi, *All Martha, All the Time*, BUSINESSWEEK, Aug. 9, 2005, http://www.businessweek.com/bwdaily/dnflash/aug2005/nf2005089_7875_db016.htm.

[48] *Id.*

[49] Mark Coultan, *Can't Keep A Good Thing Down*, THE AGE AUSTRALIA, Jul. 17, 2007, http://www.theage.com.au/news/management/all-things-american/2007/07/17/1184559749102.html?page=fullpage#contentSwap2.

Stewart Collection of home products at Macy's. Martha Stewart Living Omnimedia oversees all branches of Martha's business empire and brought in $288.3 million in revenues in 2006.[50]

48. **Loyalty**: Similar to Oprah Winfrey, strong loyalty toward the Martha Stewart brand translates into increased sales. In publishing, Martha Stewart's first bestseller, *Entertaining*, has sold more than 500,000 copies and is now in its thirtieth printing (since 1982).[51] In 1999, Kmart sold more than $1 billion worth of Martha Stewart Everyday products, which are still sold today.[52] This particular extension of the Martha Stewart brand highlights the "tremendous amount of loyalty" Martha has from her "rabid supporters," who already love and are willing to buy her products but also view purchasing these products as a sign of solidarity after the lifestyle guru's conviction.[53]

5. Brand equity of the NFL

49. **Awareness**: The NFL is one of the most popular sports leagues in the United States. The 2006-2007 season drew a record 67,000 fans per game[54] and was the third consecutive season during which the league sold more than 17 million game tickets, bringing in revenue of approximately $6 billion.[55] The NFL brand extends off the field as well, including

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[50] Martha Stewart Living Omnimedia, Inc., Annual Report 2006 (Form 10-K) at 19 (March 14, 2006), http://www.sec.gov/Archives/edgar/data/1091801/000095012307003756/y31800e10vk.htm.

[51] Brady, *supra* note 43.

[52] *Id.*

[53] Emily Kaiser, *Martha Stewart, Kmart Extend Licensing Deal*, FORBES, Apr. 26, 2004, http://www.forbes.com/newswire/2004/04/26/rtr1347082.html.

[54] *See* NFL News Releases, *NFL Sets Paid Attendance Record*, Jan. 4, 2007, http://www.nfl.com/news/story/9908132.

[55] *In a League of Its Own*, THE ECONOMIST, Apr. 27, 2006, http://www.economist.com/business/displaystory.cfm?story_id=6859210.

particularly to television. The NFL's "Monday Night Football" has been on air since 1970, and according to Nielsen Media Research, the Super Bowl was the most-watched television show for 2006, drawing ninety million viewers.[56]

50. **Associations**: The NFL is an American institution, known not just for its regular-season games but also for "Monday Night Football" and the league's post-season play culminating in the Super Bowl. The Super Bowl has come to be known as more than a championship football game, with the on-field play, the halftime show, and the commercials combining to create a cultural phenomenon on "Super Bowl Sunday." It is a testament to the strength of the NFL brand that even people who are not particularly interested in the NFL's primary content (i.e., football) still identify with and choose to associate with the brand – most notably by tuning in to the Super Bowl simply to watch the commercials.

51. **Perceived Quality**: The popularity of the NFL is, not surprisingly, a reflection of the perceived quality of entertainment provided by the league. The entertainment value comes not only from the caliber of play on the field, but, as noted, also from the Super Bowl's famed commercials. The Super Bowl commands the most expensive TV commercial air time, attracting advertising revenue from the renowned brands and businesses such as Frito-Lay, PepsiCo, Anheuser-Busch, Ford Motor, Monster, and Procter & Gamble. A thirty-second commercial commanded a staggering price of $2.4 million in 2005;[57] the same half-minute will

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[56] Nielsen Media Research, *The Nielsen Company's Guide to the Super Bowl*, NIELSEN, Jan. 31, 2007, http://www.nielsenmedia.com (search "Super Bowl"; then follow "4. The Nielsen Company's Guide to the Super Bowl: Charts & Tables" hyperlink).

[57] Krysten Crawford, *A Sneak Peek at Super Bowl Ads*, CNN MONEY, Feb. 4, 2005, http://money.cnn.com/2005/02/02/news/fortune500/superbowl_ads/.

cost $2.7 million in 2008.[58] Compared to the $2 million each spot commanded during the finale of the television show "Friends,"[59] it is clear that the NFL holds significant sway and influence with advertisers and viewers alike (a testament not just to the perceived quality of the NFL, but also to its high awareness, associations, and loyalty).

52. **Loyalty**: With its large number of teams and tradition-steeped heritage, the NFL boasts a large, passionate fan base. I already have noted the huge viewership of the NFL in general and the Super Bowl in particular. For the 2006-2007 season, games were at ninety percent stadium capacity, and a record ninety-seven percent of all games were sold out.[60] These numbers indicate that fans not only want to be a part of the football experience but also are willing to pay for it. Loyalty to the NFL is further exemplified by the popularity of fantasy football leagues, where fans compete against each other with their own virtual teams. The NFL itself has a website to facilitate this phenomenon, even charging fans $129.95 to participate in an online fantasy football training camp. Television networks also have fought to be part of the NFL experience. In 2004, Fox and CBS agreed to a cumulative $8 billion contract ($4.3 billion and $3.7 billion, respectively) extending their rights to NFL games for six more years[61] – a clear testament to the strength of the NFL brand.

6. Brand equity of MLB

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[58] Bruce Horovitz, *Super Bowl Ad for $2.7m Also Buys MySpace Posting*, USA TODAY, http://www.usatoday.com/money/advertising/2007-05-10-fox-superbowl-usat_N.htm.

[59] Crawford, *supra* note 57.

[60] NFL News Releases, *NFL Sets Paid Attendance Record*, http://www.nfl.com/news/story/9908132.

[61] *Late Season Games Can Be Moved to Monday Nights*, ESPN, Nov. 9, 2004, http://sports.espn.go.com/nfl/news/story?id=1918761.

53. **Awareness**: Major League Baseball needs no introduction – millions have grown up playing baseball in T-Ball and Little League, steeped in the lore of major league baseball greats. MLB is the quintessential national pastime, and its popularity continues to grow. In 2006, a record-breaking seventy-six million fans attended games at big league parks, while gate receipts for 2006 were approximately $1.9 billion, an increase of eight percent over 2005.[62]

54. **Associations**: Like football, baseball is one of the pillars of American culture and family tradition. The iconic advertising slogan "Baseball, Hot Dogs, Apple Pie, and Chevrolet" captures the powerful associations of baseball with the American way of life. The MLB also is closely associated with the World Series, which attracts millions of fans on television and scores more in person. Team rivalries, too, are abundant and heavily marketed, including the noted "Subway Series" between the New York Yankees and New York Mets. In sum, MLB's associations are strong, deeply ingrained, and positive, making it an attractive property for advertising revenue.

55. **Perceived Quality**: With its high caliber of play, its storied history, and its place in the American heritage, MLB's perceived entertainment quality similarly is extremely high. Like the Super Bowl, the World Series attracts enormous advertising revenue: a thirty-second spot cost approximately $275,000 in 2001, ultimately bringing in roughly $100 million for Fox.[63] Large and respected brands such as Master Card, PepsiCo, The Home Depot,

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[62] Kurt Badenhausen, *Baseball's Big Bucks*, FORBES, Apr. 19, 2007, http://www.forbes.com/2007/04/19/baseball-team-valuations-07mlb-cz_kb_0419baseballintro.html.

[63] Kevin Downey, *Buyers Upbeat for World Series*, MEDIA LIFE MAGAZINE, Sep. 7, 2001, http://www.medialifemagazine.com/news2001/sep01/sep03/5_fri/news1friday.html.

Chevrolet, and Frito-Lay are sponsors of MLB, a testament to its perceived quality as well as the positive nature of its brand associations.[64]

56. **Loyalty**: Loyalty towards MLB teams runs to extraordinary levels. The rivalry between the Boston Red Sox and New York Yankees is such that tickets for games at Boston's Fenway Park can scalp for more than $300, and Yankee game tickets have been offered for thousands of dollars online.[65] Loyalty has spawned new industries and markets: baseball caps began as the official headwear of ball players and are now a standard favorite with sports fans;[66] the Baby Ruth candy bar is named after Babe Ruth; and some baseball cards are valued at hundreds of thousands of dollars, with baseball card trading now a $700-million dollar industry.[67]

7. Brand equity of NASCAR

57. **Awareness**: NASCAR, the largest sanctioning body of motorsports in America, governs more than 1,500 races in North America in addition to exhibition races in Japan and Australia. Studies have shown that NASCAR has increased its avid fan base by seventy percent since 1998, while those of other professional sports leagues have either remained stable or

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[64] *See* News Releases, Red Carpet Rolled Out Again For All-Stars, Jul. 10, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20060710&content_id=1551184&vkey=allstar2006&fext=.jsp.

[65] Tom Van Riper, *The Summer's Hottest Tickets*, FORBES, June 11, 2007, http://www.forbes.com/media/2007/06/11/concerts-music-baseball-biz-media-cx_tvr_0611tickets.html.

[66] *Happy 50th, Baseball Caps*, BBC NEWS UK, Apr. 27, 2004, http:// news.bbc.co.uk/2/hi/uk_news/magazine/3660333.stm.

[67] Matt Krantz, *$425m Deal Could Merge Last 2 Baseball Card Makers*, USATODAY, May 24, 2007, http://www.usatoday.com/money/media/2007-05-24-topps-upper-deck_N.htm.

declined.[68] Internationally, NASCAR is broadcast in more than 150 countries in 23 languages.[69] Market research firm PSB ranked NASCAR as the nation's number two brand in 2005, ahead of Google and iPod.[70]

58. **Associations**: NASCAR prides itself on its associations of "performance, precision, and endurance."[71] The organization promotes both the sport and the league itself as "highly entertaining" with its "mix of veterans and up-and-coming new talent," flavored with "traditional values" and a "real sense of belonging" for the viewers.[72] On these two fronts, the perceived quality is unrivalled – there is no other motor sport that matches NASCAR. Sponsors of NASCAR accordingly see a valuable opportunity to target the "coveted consumer group" of young males[73] as well as middle-aged, middle-class married men.[74]

59. **Perceived Quality**: NASCAR boasts its ranking as the No. 1 spectator sport in the United States, holding seventeen of the top twenty best-attended sporting events nationwide. NASCAR further asserts that one in three American adults follows the sport's 10-month long

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[68] *See* "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040055.

[69] NASCAR.com, About NASCAR, http://www.nascar.com/guides/about/nascar/.

[70] Brian O'Keefe, *America's Fastest Growing Sport*, CNNMONEY (originally published in FORTUNE MAGAZINE), Sep. 5, 2005, http://money.cnn.com/magazines/fortune/fortune_archive/2005/09/05/8271412/*index*.htm.

[71] *Lincoln Sponsors NASCAR Fantasy Weekends Sweepstakes*, THOMASNET INDSUTRIAL NEWSROOM, Feb. 1, 2006, http://news.thomasnet.com/companystory/475461.

[72] *See* "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040068.

[73] O'Keefe, *supra* note 70.

[74] Natasha Kolar, *NASCAR Auto Racing Sponsors, Merchandise, and Advertising*, June 6, 2007, http://www.nascartime.com/sponsors-nascar-auto-racing-sponsors-merchandise-and-advertising.html.

season. This large fan base and the longest schedule in American professional sports attract a generous number of sponsors and advertisers.[75] More than 100 Fortune 500 companies are involved with NASCAR, including Levi's, L'Oreal, The Home Depot, DuPont, UPS, Budweiser, and Best Buy.[76] NASCAR's own "B2B" council makes it a goal to "discover reciprocal relationships, condense the business to business sales cycle, and learn how NASCAR sponsors can wield their position of influence."[77]

60. **Loyalty**: NASCAR boasts a 75-million-strong fan base, with the most brand-loyal followers of all sports – NASCAR prides itself on being ranked first in terms of brand loyalty among sports leagues. These fans purchase more than $2 billion a year in NASCAR-licensed products; a jacket decorated with a favorite driver's sponsor logo costs up to $300. This sort of "obsessive loyalty" is fueled by the fact that NASCAR drivers are more accessible to fans than other professional athletes, inspiring fans to collect almost every item related to their favorite driver.[78] Indeed, seventy-one percent of NASCAR followers said they "frequently or almost always" choose a product made by a NASCAR sponsor over one that was not due to that sponsor's involvement in the sport.[79] Fans are ninety-four percent more likely to have positive

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[75] *See* "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040057.

[76] O'Keefe, *supra* note 70.

[77] Kolar, *supra* note 74.

[78] David Harrison, *An Obsessive Loyalty*, ROANOKETIMES, Apr. 10, 2005, http://www.roanoke.com/news/roanoke/wb/xp-21597.

[79] Kolar, *supra* note 74.

feelings about a NASCAR sponsor, and eighty-two percent of these fans say that NASCAR-related products are always good value for their price.[80]

8. Brand equity of Opie & Anthony

61. **Awareness:** The popular radio show duo Opie & Anthony have garnered extensive attention over the years and have attained particularly high awareness among their target market of adult males. Before the pair joined XM, the Opie & Anthony terrestrial radio show was syndicated in seventeen U.S. metropolitan markets, including New York, Cleveland, Dallas, Las Vegas, New Orleans, and Washington, D.C.[81] In 2004, Opie & Anthony generated massive publicity and press coverage through antics that ultimately resulted in their terrestrial radio show being terminated. Today, Opie & Anthony draw a broad audience not just on their XM radio show but also again through their terrestrial radio show on CBS, which re-signed the duo after their XM deal and brought them back as part of a syndication arrangement. Opie and Anthony's radio shows now air at the peak drive-time listening hours of 6 a.m. to 9 a.m. across the nation.[82] The duo's CBS radio show undoubtedly draws attention to, and drives continued awareness of, the Opie & Anthony brand and attracts new audiences who desire uncensored content available only on XM.

62. **Associations:** As clear marks of differentiation, Opie & Anthony strive for notoriety, rebellion, and outrageousness. Their style triggers strong, unique, and favorable

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[80] *See* "Sirius Board of Directors Meeting" presentation (Feb. 15, 2005), SIR00040053 at 00040058.

[81] Larry McShane, *St. Patrick's Cathedral Shock Jock Returns to Satellite Radio*, ASSOCIATED PRESS, Aug. 5, 2004.

[82] Paul Heine & Mike Boyle, *Opie & Anthony Get All Seven Roth Markets*, MEDIAWEEK, Apr. 20, 2006, http://www.mediaweek.com/mw/news/tvstations/article_display.jsp?vnu_content_id=1002383686.

associations in the minds of their fans, particularly adult males aged 18 to 49. Opie & Anthony, indeed, are recognized by the media for their "stunt[s]" and "brash" behavior, along with sometimes controversial material that earns them their "shock jock" reputation.[83] Even as Opie and Anthony themselves have "matured," they have maintained that they will be as "edgy and crazy as ever."[84]

63. **Perceived Quality**: Although highly subjective, there is no doubt that Opie & Anthony are viewed positively by their target market as providing high entertainment value. Before they joined XM, Opie & Anthony's terrestrial radio show was ranked No. 1 among male listeners aged 18-49 years in New York, Philadelphia, Boston, Dallas, Cleveland, and Buffalo.[85] When they re-joined CBS radio with the syndication deal in 2006, it was reported that the "new arrangement has helped to save CBS from the ratings plunge it suffered after Howard Stern jumped from broadcast radio to the Sirius satellite service."[86]

64. **Loyalty**: Opie & Anthony have engendered significant loyalty among their fans. Tellingly, after XM recently suspended the duo for one month in response to a controversial on-air stunt, an immediate uproar among their fans ensued. Many were incensed at the suspension. In a poll conducted by People Against Censorship, a reported 3,200

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[83] Paul Farhi, *Opie & Anthony Get The Last Laugh*, WASHINGTON POST, June. 26, 2006.

[84] *Id.*

[85] *XM Satellite Hires Shock Jocks, Narrows Loss*, DOW JONES, Aug. 5, 2004.

[86] Marc Fisher, *"Opie & Anthony," Down to Earth but Also Turning the Air Blue*, WASHINGTON POST, Jul. 23, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/07/21/AR2006072100291.html.

subscribers cancelled their XM subscriptions, while another 1,600 said they put their subscriptions on hold until Opie & Anthony came back on the air.[87]

III. THE SDARS HAVE BOTH RECOGNIZED AND BENEFITED FROM THE BRAND STRENGTH OF THEIR NON-MUSIC CONTENT PROVIDERS IN WAYS THAT TRANSCEND THE VALUE OF THE CONTENT ITSELF

65. Based on my review of Sirius' and XM's agreements with the Non-Music Content Providers, it is clear that the SDARS were well-aware of the benefits that they would reap from their Non-Music Content Providers' brand strength. Most importantly, both Sirius and XM were careful to include provisions granting them exclusive rights to transmit the non-music content and authorizing them to use the name, likeness, trademark, and/or logo of the Non-Music Content Provider to promote their service.[88] Some of the contracts also obligated the Non-Music Content Provider to promote the service in other media.[89]

66. Sirius' and XM's intentional and exclusive association with these important brands has provided them with many valuable benefits in the real world. First, it has helped them increase their subscriber base. Associating with strong brands has given the services heightened levels of awareness needed to drive consideration and purchase and very loyal fan bases that drive loyalty and low churn rates.

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[87] Kevin Carter and Mike Boyle, *Advertiser Ire Over Opie & Anthony Suspension*, MEDIA WEEK, May 21, 2007, http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003587607.

[88] *See* Sirius/Stern Agreement, SIR00010466, at SIR00010472 (Oct. 1, 2004); Sirius/Martha Stewart Living Omnimedia ("Martha Stewart") Agreement, SIR000S27583, at SIR00027591 (Apr. 12, 2005); Sirius/NFL Agreement, SIR00040084, at SIR00040096 (Dec. 2, 2003); Sirius/NASCAR Agreement, SIR00041599, at SIR00041616-19 (Feb. 18, 2005); XM/HARPO Radio ("Oprah") Agreement, XMCRB00034928, at XMCRB00034932 (Jan. 31, 2006); XM/MLB Agreement, XMCRB00034955, at XMCRB00034959 (Oct. 15, 2004).

[89] *See* Sirius/Martha Stewart Agreement, at SIR00027591.

67. The brand associations also have made it more likely that automobile manufacturers will pre-install satellite receivers in their vehicles, a key listening location for SDARS subscribers. When a car does not already have a built-in satellite radio receiver, subscribers need to purchase an add-on device and either pay to have it installed professionally or install it themselves, which marketers know will discourage consumers from subscribing to satellite radio. As such, it is critical for the success of the SDARS that they convince as many automakers as possible to pre-install these devices. I have consulted with several automotive manufacturers, and I know that they are exceedingly careful in their selection of features and options to offer in their cars because it costs them money that they can only recoup if consumers perceive the feature as valuable and are willing to pay extra for it. So an automotive manufacturer will hesitate to pre-install a satellite radio receiver unless it has some reasonable foundation to believe that consumers desire, and are willing to pay for, the device. The associations with the Non-Music Content Providers achieve this effect, as they are powerful brands with wide followings, and provide the SDARS with instant credibility as a service.

68. The associations also undoubtedly enhanced the SDARS' financing options. By definition, Sirius and XM operate services with enormous fixed costs up front to set up the SDARS before a single dollar of profit is realized. As such, access to capital in the financial markets is vital in order for the SDARS to have enough operating capital to survive until they turn a profit. Brand value reflects an important asset that can often be leveraged to secure that capital.[90]

69. Perhaps the most important, yet most difficult to measure, benefit to the SDARS arises from the positive "halo effect" to Sirius and XM that results from the Services' association

[90] The branded content also can be expected to put the SDARS in a stronger strategic position to launch new products and services under their own brand names in the future.

with the Non-Music Content Providers. As noted above, a brand can be thought of as a box inside the minds of consumers. Brands, like all other ideas, are structured as networks of concepts.[91] These concepts develop structural associations with each other via human experience. For example, the network for "July 4" might include associations with "barbecue," "fireworks," "U.S.A.," and "summer." The more frequently a person experiences barbecues on July 4, the stronger the association between July 4 and barbecues.

70. The associative network structure of consumers' knowledge about brands explains in part why marketers that are faced with the task of creating a new brand (e.g., Sirius or XM) often try to leverage consumers' knowledge about other well-known brands by contracting for the right to associate with them (e.g., Howard Stern, Oprah, Martha Stewart, MLB, NFL, Opie & Anthony, etc.). It is generally assumed that the positive associations and feelings that consumers have about the preexisting brand will transfer to the new offering.[92] In fact, the structure and operations of the human cognitive system all but assure that this will happen. By signing Howard Stern to an exclusive deal, Sirius essentially imports many of the associations that form the mental conceptual network for Stern into its own set of associations. Consumers exposed to the massive amount of publicity generated by Stern and Sirius prior or subsequent to the launch of Stern's show on Sirius likely will link Stern to Sirius and vice versa. This linkage is of tremendous value to Sirius as it seeks to create and manage its own brand and realize all of the benefits that accrue to the owners of strong brands.

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[91] JOHN R. ANDERSON, THE ARCHITECTURE OF COGNITION (Harvard University Press 1983).

[92] Paul A. Bottomley and Steven J. S. Holden, *Do we really know how consumers evaluate brand extensions? Empirical generalizations based on secondary analysis of eight studies*, JOURNAL OF MARKETING RESEARCH, 494-500 (2001); Susan M. Broniarczyk and Joseph W. Alba, *The Importance of the Brand in Brand Extension*, JOURNAL OF MARKETING RESEARCH, 214-28 (1994).

71. The same holds true for the other Non-Music Content Providers. As discussed above, Oprah has very favorable associations, including "strength," "taste," and "kindness." These attributes become available to XM through its association with Oprah. Indeed, XM's strategy documents regarding the Oprah deal show that XM carefully thought through the impact Oprah would have on its brand and that XM valued the deal accordingly.[93] Sirius' deal with Martha Stewart is another example of this phenomenon – Mel Karmazin, CEO of Sirius, has referred to Martha Stewart Living as "the premier brand in lifestyle and how-to programming for women."[94] The sports offerings on both Sirius and XM (*e.g.*, MLB, NFL, and NASCAR) likewise are valuable not only because they offer quality content, but also because they each represent a unique phenomenon in the minds of consumers. These offerings are part of the fabric of American culture, and there can be no question of the tremendous associational value to Sirius and XM of these deals.

72. Companies, including Sirius and XM, that successfully tie their brands to powerful celebrity brands, sports franchises, or other similar entities are in a position to realize significant value. Particularly in the world of music, entertainment, fashion, and sports, consumers choose to express elements of their self-conception that echo, or directly mirror, the self-expression that influential individuals, also called influencers or opinion leaders, develop through the products they use and promote.[95] As a result, brands associated with influencers have a greater likelihood of finding success in the wider market. Influencers also play a pivotal role in building a community of loyal users of the brand, as they engender interactive

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[93] *See* "Oprah & XM" presentation (Dec. 7 2005), XMCRB00141745.

[94] *See* News Releases, Sirius Satellite Radio to Launch Exclusive Martha Stewart Channel, Apr. 18, 2005, http://investor.sirius.com/releaseprint.cfm?releaseid=160512.

[95] ED KELLER AND JON BERRY, THE INFLUENTIALS (Free Press 2003).

opportunities through fan clubs, chat rooms, and online discussion forums. The influencer strategy has long been employed by all types of companies, from athletic companies such as Nike that sign influential sports heroes as spokespersons and endorsers and then develop product lines around their personalities,[96] to retailers like Kmart and Macy's, which, as noted, have entered into successful partnerships with Martha Stewart to develop lines of household products.

73. The mere fact that the SDARS entered into agreements with the Non-Music Content Providers enhanced the credibility of the SDARS and, arguably, breathed life into what could have been stillborn businesses. In December 2003, the same month that Sirius inked its deal with the NFL, it had 261,000 subscribers.[97] That figure tripled after Sirius added NFL to its roster of sports programming – the number of subscribers rose to 662,000 in September 2004.[98] Prior to the NFL deal, Sirius had an insignificant number of subscribers and was not on the radar screen of anyone except those in the radio industry and early technology adopters. Sirius' association with the NFL gave it instant credibility. Similarly, its agreement with Howard Stern has been referred to as a life-saving deal for the company, bringing Sirius into the limelight and enhancing its reputation as a serious and viable business. In the fourth quarter of 2004, right after Stern announced his move from terrestrial to satellite radio, subscribers

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[96] RANDALL ROTHENBERG, WHERE THE SUCKERS MOON 205-07 (Knopf 1994).

[97] *See* News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2003 Financial and Operating Results,* Jan. 28, 2004, http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=157236&cat=&newsroom=.

[98] *See* News Releases, *Sirius Satellite Radio Announces Third Quarter 2004 Financial and Operating Results*, Oct. 27, 2004, http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=150206.

increased to 1.14 million.[99] A year later, in the fourth quarter of 2005, the figure jumped to 3.3 million;[100] the number continued to rise as Stern's Sirius debut approached, reaching nearly 4.08 million in the first quarter of 2006.[101] The Stern effect continued to produce results in the second quarter of 2006 as he settled in, with subscribers increasing to 4.67 million.[102] As of the first quarter of 2007, Sirius had more than six million subscribers.[103] The same can be said for XM's deal with Oprah and the SDARS' various other deals with major celebrities and sports franchises.

74. Such credibility is not simply a matter of pride for the SDARS or a morale booster for their employees. Rather, this credibility makes it much more likely, for example, that car manufacturers will support satellite radio and that key retailers will stock and promote the SDARS' hardware. These benefits would be highly valued by any company, but they are critical to businesses like Sirius and XM that sell new and highly innovative products.

CONCLUSION

75. In summary, I conclude that the deals entered into by the SDARS with the Non-Music Content Providers bring tremendous brand value to the SDARS beyond that of the content

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[99] *See* News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2004 Financial and Operating* Results, Jan. 26, 2005, http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=154690.

[100] *See* News Releases, *Sirius Satellite Radio Reports Record Subscriber Growth and Revenue for Fourth* Quarter *and Full-Year 2005*, Feb. 17, 2006, http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=187963.

[101] *See* News Releases, *Sirius Satellite Radio Reports Strong First Quarter 2006* Results, May 2, 2006, http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=194903&cat=&newsroom=.

[102] *See* News Releases, *Sirius Reports Strong Second Quarter 2006* Results, Aug. 1, 2006, http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=205864&cat=&newsroom=.

[103] *See* News Releases, *SIRIUS Satellite Radio Reports Strong First Quarter 2007* Results, May 1, 2007, http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=240128&cat=&newsroom=.

that sound recordings alone simply cannot. This added dimension greatly enhances the value of the Sirius and XM brands, which positions them for significant future value creation. Unless this added dimension of value is accounted for, it is simply inappropriate to use the Non-Music Content as a benchmark for the sound recording performance right.

Certification

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
July 24, 2007

Erich Joachimsthaler, Ph.D.

Full Resume, Publications, Academic Credentials and Past Expert Testimony List

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Education

Post-Doctoral Research Fellow	1987 - 1988	Harvard Business School
Doctor of Philosophy	1981 - 1985	University of Kansas Business Administration Specialization: Marketing and Quantitative Methods
Master of Science	1980 - 1981	University of Kansas Marketing Research
Vordiplom	1979 - 1980	University of Frankfurt Economics
Diplom Betriebswirt	1976 - 1979	Fachhochschule Giessen-Friedberg Business Administration and Computer Science/

Doctoral Dissertation "Lp-Norm Estimation in Discriminant Analysis."
Chairs: John L. Lastovicka and Kenneth O. Cogger

Academic Experience

2004 - Visiting Professor of Business Administration
Department of Marketing, Instituto Estudios Superios de la Empresa (IESE), Barcelona

1994 - 1998 Rust Visiting Professor of Business Administration

	Colgate Darden Graduate School of Business Administration University of Virginia, Charlottesville
1989 - 1994	Associate Professor of Marketing Department of Marketing, Instituto Estudios Superios de la Empresa (IESE), Barcelona
1985 - 1987	Assistant Professor of Marketing Department of Marketing, University of Houston, Houston
1982 - 1984	Adjunct Professor of Management Institute of Safety and Systems Management, University of Southern California, Los Angeles
1981 - 1985	Graduate Instructor in Marketing School of Business and School of Journalism, University of Kansas, Lawrence

Work Experience

1999	Founder and Chief Executive Officer, Vivaldi Partners, New York, London, Amsterdam, and Munich.
1998 - 1999	Chairman, Prophet Brand Strategy, New York and San Francisco.
1995 - 1998	Aaker-Joachimsthaler & Partners (AJ&P), Charlottesville and Berkeley. AJ&P was acquired by Prophet Brand Strategy in January of 1999.
1990 - 1994	Alza Limited - Strategic Marketing and Reseach Consultancy, Barcelona.

Professional Memberships

American Marketing Association (AMA)
The Institute of Management Science (TIMS) - Marketing College
The Conference Board
European Academy of Marketing (EAM)
European Society for Opinion and Marketing Research (ESOMAR)

PERSONAL INFO

Erich is married to Daniela Gomez. Daniela was born in Santa Fe, Argentina and is an audiologist with a specialty for hearing disorders. They have two daughters, Sara, and Sophia and one son, Julian.

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Consor

PUBLIC VERSION

Before the
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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

WRITTEN REBUTTAL TESTIMONY OF DARYL MARTIN AND RUSSELL L. PARR

INTRODUCTION

CONSOR® Intellectual Asset Management ("CONSOR") has been engaged by counsel for Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM") (the "SDARS" or "Services") to respond to SoundExchange, Inc. expert Dr. Michael Pelcovits' contention that the amounts paid by the SDARS for non-music programming provide a reasonable benchmark for the value of the sound recording performances covered by the statutory license at issue in this proceeding. We also have been asked to respond to the questions from the Court as to the valuation of the promotional and other aspects of the non-music programming contracts put at issue by SoundExchange in this proceeding.

BACKGROUND AND QUALIFICATIONS

This report has been prepared by the team of professionals at CONSOR. The firm is being compensated at a rate of $395 per hour for its work. The experts designated to testify in this matter are Daryl Martin and Russell L. Parr. Each of their respective qualifications is discussed below and in their curricula vitae, attached hereto.

Daryl Martin, Vice President, CONSOR Intellectual Asset Management

Mr. Martin oversees the valuation division at CONSOR® Intellectual Asset Management in La Jolla, California. He is responsible for analyzing various types of intellectual property and intangible assets including trademarks, copyrights, patents, trade secrets, domain names, mailing lists, and customer databases. With over ten years of financial analysis and valuation experience, Mr. Martin has worked on over 150 valuation projects. Mr. Martin's extensive background includes valuing intangible assets for the purposes of loan securitization, mergers and acquisitions, joint ventures, licensing transactions, transfer pricing, bankruptcy filings, and litigation support.

Mr. Martin's broad experience includes time as a Senior Financial Analyst for ConAm Management, a real estate investment company, where he supervised all valuation activity for the Asset Management Division. While there, he was responsible for detailed asset valuations and financial reporting functions on syndicated real estate investment portfolios.

Prior to joining ConAm Management, Mr. Martin performed mutual fund valuation and financial reporting as a Financial Reporting Analyst for the Franklin Templeton Group. During his tenure, Mr. Martin was responsible for preparing revenue projections and financial statements, performing budget analyses, and generating monthly financial packages for management.

Mr. Martin is an honors graduate of San Diego State University with his undergraduate degree in Business Administration and his Masters in Finance. His curriculum vitae is attached hereto as SDARS-Consor Ex. 1.

Russell L. Parr, CFA, President, IPRA, Inc.

Mr. Parr is a consultant to Consor and President of IPRA, Inc., an intellectual property valuation consulting firm. He is lecturer and publisher on intellectual property valuation and exploitation matters. His books are published in English, Japanese, Korean, Italian, Chinese and Russian. He is dedicated to the development of comprehensive methods for accurately defining the value of intellectual property.

Mr. Parr has completed complex consulting assignments involving the valuation and pricing of patents, trademarks, copyrights and other intangible assets. His opinions are used to support licensing transactions, mergers, acquisitions, transfer pricing, litigation support, collateral-based financing, and joint ventures. Mr. Parr also conducts customized research into industry specific factors that drive royalty rates. He advises banks about the use of intangible

assets as loan collateral and has served as an expert witness regarding intellectual property infringement damages.

Mr. Parr has published three royalty rate resource books, which have been sold all over the world. These books are dedicated to reporting detailed information about the economic aspects of intellectual property transactions including licensing and joint ventures.

Mr. Parr's assignments have included the valuation of the Dr. Seuss copyrights and the patent portfolio of AT&T. He has also conducted valuations and royalty rate studies for pharmaceuticals, semiconductor process and product technology, agricultural formulations, automotive battery technology, biotechnology, camera technology, chemical formulations, communications technology, computer software, cosmetics, consumer and corporate trademarks, drug delivery systems, flowers, incinerator feed systems, lasers, medical instrument technology, and motivational book copyrights.

Mr. Parr is a graduate of Rutgers University with an undergraduate degree in Electrical Engineering and his Masters in Business Administration. His curriculum vitae is attached hereto as SDARS-Consor Ex. 2.[1]

OVERVIEW

In this report, we analyze and value the intangible brand asset components of several important non-music programming contracts entered into by XM and Sirius. Based on our collective experience in the field of intellectual property and intangible asset valuation and consulting, we reviewed the contracts, researched the commercial aspects of the relationship they

[1] The team of Consor professionals that contributed to this report include Weston Anson, David Drews, and Fernando Torres, MSc. Their curricula vitae are attached hereto as SDARS-Consor Ex. 3.

established, and applied appropriate valuation techniques to the value components of each contract.

MATERIALS REVIEWED

In the course of performing this engagement, we reviewed the original and amended written testimony of Dr. Pelcovits dated October 2005 and May 14, 2007. Moreover, we reviewed additional exhibits and documentation relating to the SDARS and SoundExchange submitted in these proceedings. We conducted extensive research of public licensing transaction databases, as well as more general searches of Internet resources, including publicly available SEC filings of Sirius and XM, and the web sites of the content providers included in our analysis. A detailed listing of materials reviewed is attached hereto as SDARS-Consor Exhibit 4. We also conducted interviews with XM and Sirius management.

BACKGROUND

Sirius and XM operate subscription satellite radio services in the United States. They offer a diverse array of music, talk, news, and sports programming, and have grown to over fourteen million subscribers, collectively, over the approximately five years that their services have been deployed. Satellite radio and its individual participants compete in a broader market for audio entertainment against, primarily, traditional terrestrial-based radio. Within the satellite radio segment, Sirius and XM compete with each other to acquire subscribers and to attract content providers to their respective platforms.

In securing the rights to content, the SDARS are not concerned exclusively with the programming content itself but must also consider their appeal to the universe of audio entertainment consumers and the potential for accelerated adoption of the new platform in the broadcasting market. To accomplish this vital objective, high-value mass-market brands associated with the content are of paramount importance. The market for such properties is

relatively constrained on the supply side, and highly competitive on the demand side. These conditions give rise to exclusivity and other premiums in pricing the properties in addition to the licensing fees for the use of trademarks and brand asset bundles that prevail, particularly among consumer oriented firms.

In the last five years, Sirius and XM have had to appeal to a wide spectrum of consumers to seek the mass subscriber base necessary to become viable businesses. The SDARS quickly found that commercial-free music by itself was not sufficient to build the subscriber base needed to support the deployment of a completely new delivery platform. Introducing new brands in the broader market and competing against rival platforms are expensive endeavors that typically require several years of intense marketing expense and public relations efforts. One way of reducing the time and resources necessary to optimize marketing expenditures to build a new brand such as Sirius or XM is to associate the new brand with established brands that have strong appeal among the targeted audience. This association is akin to the endorsement of products by celebrities, and other public figures. This practice has grown steadily over the last fifty years and typically commands significant premiums over conventional professional and performance fees.

In pursuing such a strategy, the SDARS have entered into contracts with a wide array of non-music content providers in order to effectively build customer awareness and support for their innovative new services. These programming agreements provide not only the right to broadcast news, sports, and talk content, but also establish the important brand association needed to build the business. The brand association consists of a series of attributes possessed by the existing content provider brands, including (i) the ability to quickly capture customers' attention, foster customer loyalty, and prompt purchasing decisions[2] and (ii) communicating a

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[2] The central conceptual role of brands as intangible economic assets, and trademarks as specific intellectual property, is to reduce search costs and uncertainty for consumers, according to Judge Posner's seminal analysis on

clear core purpose or identity, as well as a specific set of supporting values to both customers and potential customers.

Some brands typically extract pricing premiums in negotiations where the licensee potentially may have more to gain from the relationship than the licensor. Additional premiums accrue to most valuable brands when the terms of the contract require a measure of exclusivity in the relationship, because the net value of alternative opportunities foregone (the opportunity costs) must be incorporated into the pricing of the relationship.

METHODOLOGY FOR VALUATION OF BRAND ASSOCIATION

Our analysis centered on seven significant non-music branded contracts across the talk and sports categories: Howard Stern (Sirius), Oprah (XM), Martha Stewart (Sirius), Major League Baseball (XM), NFL (Sirius), NASCAR (Sirius), and Opie & Anthony (XM).

The valuation approach we performed consisted of the following series of steps:

1. Analysis of the contracts to determine the total cost of the contract to the SDARS on a present-value basis as of the effective date of the contract;

2. Identification of the appropriate royalty rate or licensing fee typically paid for comparable trademark licensing agreements;

3. Identification of actual endorsement fees for comparable transactions to determine a representative endorsement value for each property.

4. Determination of exclusivity premiums applicable to each contract; and

5. Valuation of the key components of value for each contract: (i) the trademark royalty for the use of the brand in connection with the content; (ii) the endorsement fee for the

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the subject: Richard A. Posner; William M. Landes, "Trademark Law: An Economic Perspective," *Journal of Law and Economics*, Vol. 30, No. 2. (Oct. 1987), at 265-309.

value conferred on the SDARS for the implied endorsement and/or use of the brand in connection with the marketing of the platform/service; (iii) the exclusivity premium; and (iv) the residual value attributable to the branded programming covered by the contract, among other factors.

SUMMARY OF CONCLUSIONS

Based on the brand licensing and endorsement research we have performed and the contract review and analytical valuation framework we have applied, we have formed the following opinions:

1. The branded properties provide significant value to the SDARS for which the branded properties extract significant fees, beyond the value of the content itself;
2. The calculated value of the content provided by the branded contracts examined is, typically, a small proportion of the total contract cost. In the aggregate, a range from 78.8% to 86.8%, with a median of 82.8% of the contract compensation typically represents the value of the brand, endorsement and exclusivity components identified in this analysis; and
3. The average economic value of the underlying content of the analyzed contracts represents no more than 13.2% to 21.2% of the branded programming contract costs incurred by the SDARS, with a median of 17.2%.

ANALYSIS

The SDARS have to meet the needs of at least two different groups in order to succeed; (i) consumers (subscribers) who look for entertainment and information services delivered conveniently at a competitive price; and (ii) content providers that require avenues to promote,

grow and monetize their intellectual property, be it newscasts, sportscasts, commentary, or music.

In contracting with individual content providers, Sirius and XM compete against a variety of well-established outlets for these properties. Their negotiated content contracts reflect market conditions that vary significantly, ranging from unique properties such as "Howard Stern" to increasingly ubiquitous programming such as newscasts. Each of these properties entails specific negotiation challenges, and the true cost of the content broadcast must be deduced from the total compensation provided for in the contracts after taking account of the various elements of the bundle of rights being licensed, such as:

- the market royalty fees compensating the use of the brand assets being licensed, in this case the trademarks and other intangibles branding the programming, which are calculated using comparable royalty rates;
- the endorsement value provided to the SDARS by the content provider, calculated on the basis of comparable endorsement arrangements; and
- the degree of exclusivity of the content provided, which is calculated on the basis of the value to the licensee of excluding the competing service from offering specific programming.

The following sections analyze the agreements with key non-music content providers and explain our analysis and valuation of each contract.

I. HOWARD STERN

The following analysis of compensation paid to Howard Stern ("Stern") by Sirius for the exclusive right to Stern's radio broadcast is based on evaluating the contributory value of the key elements comprising Stern's total compensation package. Based upon a comprehensive review of the value elements contained within the Stern deal, we believe the following elements to be of critical importance:

- Brand value contribution
- Endorsement value contribution
- Exclusivity
- Content value

We calculated the value of each of the non-content value elements as of the effective date of the contract and stated it in then-present value terms.

A. Net Present Value of Contract Cost

In order for the analysis of the various contract components' contributory value to be accurate, the compensation packages for each of the properties need to be expressed on a present value basis. Accordingly, the guaranteed cash flows encompassed within the compensation package are mapped to the corresponding payment due dates and the present value is then calculated as of the effective date of the contract. These calculations are performed using a discount rate of 15.0%,[3] which is applied using the appropriate recognition convention for each payment (mid-period, end-of-period, etc.). For Howard Stern, the net present value of his guaranteed compensation, as of October 1, 2004, is $245.9 million (*see* SDARS-Consor Ex. 5).

B. Brand Value Contribution Analysis

The first step in the analysis considers the attribution of total compensation paid which is attributable to the "Howard Stern" brand assets. The valuation of the "Howard Stern" brand is based upon an analysis of comparable market-based brand royalty rate transactions. Based on this research and analysis, we have concluded that the "Howard Stern" brand typically would command royalty rates in the 12% - 16% range for usage of the brand to sell products and services—calculated on a wholesale revenue basis. Moreover, as most royalty rate comparables

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[3] For SIC code 4832, Radio Broadcasting Companies, the median cost of equity is 12.5%. There is a premium of 2.5% added to the cost of equity to account for the additional risk associated with intellectual capital.

are pegged to non-exclusive arrangements, the royalty rate range must be adjusted upward to reflect the exclusive nature of the Stern contract. Thus, a 25% premium[4] has been incorporated to reflect this element—for an adjusted range of 15% - 20%. (*see* SDARS-Consor Ex. 6).

The comparable royalty rate transactions are based on rates charged against net wholesale sales. Wholesale revenue is typically the cost of goods manufactured grossed up by the profit margin and delivered to the retailer for ultimate sale to the consumer. For example, in a trademark license for t-shirts, the revenue base would be the wholesale revenues that the licensed manufacturer obtains from the t-shirt retailers. For this analysis, the cost of goods manufactured is comparable to the acquisition cost of the branded programming. Thus, the application of an industry average operating margin results in an equivalent wholesale revenue basis. Once the equivalent wholesale revenue basis is determined, it is multiplied by the appropriate market-based royalty rate to arrive at the estimated fair market value of the brand usage by Sirius—which is then deducted from the total compensation paid to Stern.

Based on this methodology, we conclude that the range of value attributable to the exclusive use of the "Howard Stern" brand assets by Sirius is $50.3 million to $67.0 million in net present value terms (*see* SDARS-Consor Ex. 7).

C. Endorsement Value Contribution Analysis

The next adjustment is to account for the endorsement value that Howard Stern brings to Sirius. Endorsement value is a separate component of the value package covered by the compensation paid to the various properties. In addition to allowing the SDARS to use their brands, the properties are providing an endorsement of the satellite radio service, essentially stating that they believe in the quality, effectiveness and value of the service being provided to

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[4] It is well documented that licensors will pay a premium to control the exclusive rights to a property. In our experience, on average, licensees will pay 25% or more to acquire exclusivity.

satellite radio consumers, not to mention the "hip" factor that several of the properties convey. The payments associated with similar endorsement programs are well documented, with dozens of sports stars and celebrities taking advantage of the value of their opinions among certain target demographics. The best way to measure this endorsement component is to analyze the market value of concurrent endorsements provided by similar properties or by well-known personalities in similar fields. It is important to assess the relative strength or popularity of the subject property in juxtaposition to the comparable data being utilized. This way an accurate indication of the market value of the subject property's endorsement can be established.

The value of an endorsement is embodied in the fact that people tend to emulate celebrities and sports stars and have a desire to dress like them, visit the places that they visit, and do the things that they do. As a result, products and services that are endorsed by these celebrities and sports stars (and the sports leagues themselves) are imbued with credibility and cachet.

Prior to Stern, Sirius was evaluating marketing alternatives to accelerate subscriber acquisition. Their initial unique selling proposition was centered around the distribution of commercial-free music. Although the signing of the NFL contract predates the Stern contract and was the first significant acquisition for Sirius, the program offering did not possess the breadth and full "Star Power" needed to capture the attention of a larger audience. Management recognized this deficiency and sought to remedy the situation by associating with marquee performers and properties in order to bring credibility to the Sirius brand and the platform. The acquisition of Howard Stern, along with other key properties, brought enhanced credibility and cachet to the full spectrum of Sirius program offerings. The value of that enhanced credibility and status is a significant part of the overall compensation paid to Mr. Stern.

Based on our review of endorsement/sponsorship agreements compensation to marquee performers, such as Howard Stern, we conclude that comparable compensation structures range from a low of $4.1 million to $5.0 million annually. Projecting these annual endorsement payments over the life of the Howard Stern contract provides us with an endorsement value carve-out range of $16.3 million to $19.9 million in net present value terms (*see* SDARS-Consor Exs. 7 and 8).

D. Exclusivity

The final adjustment is to calculate the value of the exclusivity premium. Exclusivity applies to all components of the total contract cost: brand value, endorsement value, and content value. As we have already accounted for the brand and endorsement values on an exclusive basis, here we calculate the exclusivity premium as it applies to the residual cost of the contract after the brand and endorsement value adjustments. Hence, this avoids a double-counting of the exclusivity factor.

The agreement provides Sirius with the exclusive rights to Howard Stern's radio broadcast for not only the satellite radio platform but for all broadcast media, including terrestrial and Internet radio. The exclusivity clause incorporated into the Stern agreement precludes any other radio broadcasting vehicle from carrying the Howard Stern branded content.[5] This provision is one of the key value drivers in the determination of fair market compensation, as it prevents Stern from earning income from other operators in the broadcasting space. This foregone income came at a steep price, or opportunity cost. Typically, in licensing arrangements, the licensee must pay a significant premium to the brand and content owner to secure the exclusive rights to a property. The premium is paid to compensate the property owner for the inability to leverage the property across multiple platforms/opportunities.

[5] As per the "Audio Distribution" clause of the agreement (SIR00010472).

A complementary key value driver in the Stern deal was the lack of similar content providers/personalities in the marketplace. Howard Stern is an unique property, with tremendous consumer awareness and a loyal customer base. He is a marquee performer who is compensated at the upper end of the range for celebrity performers/brands. Consequently, Mr. Stern's contract has an implicit premium for this uniqueness, which Sirius must have considered when analyzing the total compensation paid to Mr. Stern—particularly in light of the fact that Sirius could have lost the broadcast rights to XM.

To value the exclusivity provision, we performed an analysis of satellite subscriber shares among Sirius and XM, for the quarter preceding the effective date of the Stern contract (third quarter of 2004). At that time, Sirius had a 20.8% subscriber share, and XM the remaining 79.2%.

As a base scenario, we assume that prospective Stern fans would otherwise be proportionately distributed between the services, so that the maximum satellite subscriber share that Sirius could gain as a result of the exclusivity would be XM's existing share of the prospective subscribers at the time of the launch (79.2%). Thus, by securing exclusivity, Sirius can earn up to 379.9% more (79.2%/20.8%) by capturing 100% of the satellite subscribers and, therefore, would pay up to 79.2% (100% - 20.8%) less for the equivalent non-exclusive programming rights. In other words, up to 79.2% would be the exclusivity discount factor that must be carved out to represent an equivalent, non-exclusive valuation of the programming content (*see* SDARS-Consor Ex. 7).

In an alternative scenario, it is recognized that there are several market factors that may keep Sirius from capturing 100% of the potential satellite subscriber base available under an exclusive arrangement. These factors include: (i) the possibility that existing XM subscribers may not readily move from one satellite system to the other, particularly if new equipment is

necessary; and, (ii) the possibility that some new subscribers only would have signed up if XM were the provider, due to its other programming offerings. As a conservative assumption, we considered a scenario where the exclusive relationship can be leveraged by capturing only 75% of the potential subscriber share enjoyed by XM. In this case, the exclusive subscriber share would increase to only 80.2% of the total market [20.8% + (0.75 x 79.2%)]. The premium in this case is 284.9% [(0.75 x 79.2%) / 20.8%] and, therefore, Sirius would pay up to 74.0% [(100% - (20.8% / 80.2%)] less for the equivalent non-exclusive programming rights. In other words, up to 74.0% would be the exclusivity discount factor that needs to be carved out to represent a competitive, non-exclusive valuation of the programming content (*see* SDARS-Consor Ex. 7).

Based on the above two scenarios, we conclude that Sirius was willing to pay a steep premium to acquire the exclusive rights to Howard Stern. Applying the corresponding discounts of 74.0% to 79.2% to the brand and endorsement value adjusted contract costs to arrive at a range of fair market value of the exclusivity attribute of the contract, in dollar terms, the adjustment is estimated to range from $125.9 million to $132.8 million (in net present value terms). (*see* SDARS-Consor Ex. 7).

E. Summary Compensation Attribution

After carving-out the value attributable to the three embedded components – brand value, endorsement value, and exclusivity – we conclude that the residual non-exclusive contract cost ("RNECC") for the Stern programming agreement ranges from $33.1 million to $46.6 million. In other words, the RNECC represents between 13.5% and 18.9% of the total cost of the Stern contract (*see* SDARS-Consor Ex. 7). This analysis is summarized as follows:

Element	Lower Value ($000s)	Upper Value ($000s)
NPV of Contract Cost	$ 245,932	$ 245,932
Brand	67,021	50,266
Endorsement	19,895	16,314
Exclusivity	125,881	132,759
RNECC	**$ 33,136**	**$ 46,594**
RNECC as % of Contract Cost	**13.5%**	**18.9%**

II. MAJOR LEAGUE BASEBALL CONTRACT

Similar to the Howard Stern Program analysis above, the analysis of compensation paid to Major League Baseball ("MLB") by XM for the exclusive right to broadcast MLB content is based upon evaluating the contributory value of the key elements comprising MLB's total compensation package. Based upon our review of the value elements contained within the MLB deal, we believe the following elements are of critical importance:

- Brand value contribution
- Endorsement value contribution
- Exclusivity
- Content value

We calculated the value of each the non-content value elements as of the date the contract was signed and stated it in then-present value terms.

A. Net Present Value of Contract Cost

The net present value of the contract cost for the MLB contract as of October 15, 2004, is [[ ]] (*see* SDARS-Consor Ex. 5).

B. Brand Value Contribution Analysis

As set forth in the Stern analysis above, the adjustment for the value contribution of the MLB brand is based upon an analysis of comparable market-based brand royalty rate transactions. Based on this research and analysis, we have concluded that the MLB brand

typically would command royalty rates in the range of 10.1% - 13.0% of wholesale revenue. Moreover, as most royalty rate comparables are pegged to non-exclusive arrangements, the royalty rate range must be adjusted upward to reflect the exclusive nature of the MLB contract. Thus, a 25% premium has been incorporated to reflect this element—for an adjusted range of 12.63% - 16.25%. (*see* SDARS-Consor Ex. 6).

The wholesale revenue basis is equivalent to the competitive cost of the branded content grossed up by an appropriate profit margin, which is based on broadcast radio industry data. The equivalent wholesale revenue basis is then multiplied by the appropriate market-based royalty rate to arrive at an estimated fair market value of the brand usage by XM, which is then deducted from the total compensation paid to MLB. Applying the 12.63% to 16.25% range of royalty rates to the equivalent wholesale revenue basis leads to an indicated brand value of $48.2 million to $62.0 million in net present value terms (*see* SDARS-Consor Ex. 9).

C. Endorsement Value Contribution Analysis

The next adjustment is to account for the endorsement value that MLB brings to the XM program offering. As discussed above, endorsement value is a separate component of the value package covered by the compensation paid to the various properties. In addition to allowing the SDARS to use its brand, MLB is providing an endorsement of the XM satellite radio service. In addition, [[

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As stated above, the best way to measure this endorsement component is to analyze the market value of concurrent endorsements provided by similar properties or by well-known personalities in similar fields. It is important to assess the relative strength or popularity of the subject property in juxtaposition to the comparable data being utilized. This way an accurate

indication of the market value of the subject property's endorsement can be brought forth. MLB is obviously one of the strongest sports brands in existence and its endorsement is very valuable.

Based on our analysis of comparable endorsement/sponsorship agreements, compensation to properties in the sports field range from $125,000 to $8 million annually. Marquee properties, such as MLB, are found in the upper quartile, which ranges from $5.5 million to $8.0 million annually. Applying this range of compensation over the eight-year contract term leads to an indication of fair market value of the MLB endorsement of $24.7 million to $35.9 million in net present value terms (*see* SDARS-Consor Exs. 8 and 9).

D. Exclusivity

The contract with MLB grants XM exclusive rights to **[[**

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As with Howard Stern, a key value driver associated with MLB is the concept of MLB being an unique property, with tremendous consumer awareness and a loyal customer base. Consequently, the MLB contract has an implicit premium for this uniqueness, which XM must consider when analyzing the total compensation paid.

According to the contract, **[[**

]] In dollar terms, the adjustment is estimated to range from $127.5 million to $145.0 million in net present value terms. (*see* SDARS-Consor Ex. 9).

E. Summary of MLB Compensation Value Attribution

After carving-out the value attributable to the three embedded components – brand value, endorsement value, and exclusivity – the residual non-exclusive contract cost ("RNECC") for the MLB programming agreement is calculated to range from $54.6 million to $62.1 million. In other words, the RNECC represents between 19.5% and 22.2% of the total cost of the MLB contract (*see* SDARS-Consor Ex. 9). This analysis is summarized as follows:

Element	**Lower Value ($000s)**	**Upper Value ($000s)**
NPV of Contract Cost	$ 279,993	$ 279,993
Brand	61,996	48,166
Endorsement	35,899	24,680
Exclusivity	127,469	145,003
RNECC	**$ 54,630**	**$ 62,144**
RNECC as % of Contract Cost	**19.5%**	**22.2%**

III. NATIONAL FOOTBALL LEAGUE CONTRACT

The analysis of compensation paid to the National Football League ("NFL") by Sirius for the exclusive right to broadcast NFL content is very similar to the analysis for MLB. The key elements comprising their total compensation packages are similar and the methodology for calculating the value of the various deal elements are roughly the same. As with the MLB contract, we believe the following elements are of critical importance:

- Brand value contribution
- Endorsement value contribution
- Exclusivity

- Content value

We calculated the value of each the non-content value elements as of the date the contract was signed and stated it in then-present value terms.

A. Net Present Value of Contract Cost

The net present value of the contract cost for the NFL contract as of December 2, 2003, is [[ ]] (*see* SDARS-Consor Ex. 5).

B. Brand Value Contribution Analysis

The adjustment for the value contribution of the NFL brand is based upon an analysis of comparable market-based brand royalty rate transactions. Based on this research and analysis, we have concluded that the NFL brand typically would command royalty rates in the range of 10.1% - 13.0% of wholesale revenue. Moreover, as most royalty rate comparables are pegged to non-exclusive arrangements, the royalty rate range must be adjusted upward to reflect the exclusive nature of the NFL contract. Thus, a 25% premium has been incorporated to reflect this element—for an adjusted range of 12.63% - 16.25%. (*see* SDARS-Consor Ex. 6).

The wholesale revenue basis is equivalent to the competitive cost of the branded content grossed up by an appropriate profit margin, which is based on broadcast radio industry data. The equivalent wholesale revenue basis is then multiplied by the appropriate market-based royalty rate to arrive at an estimated fair market value of the brand usage by Sirius, which is then deducted from the total compensation paid to NFL. Applying the 12.63% to 16.25% range of royalty rates to the equivalent wholesale revenue basis leads to an indicated brand value of $21.0 million to $27.0 million in net present value terms (*see* SDARS-Consor Ex. 10).

C. Endorsement Value Contribution Analysis

The NFL is one of the strongest sports brands in the world. In addition to allowing Sirius access to this powerful brand, the NFL provides an endorsement of the Sirius satellite radio

service, including participation in various partner promotions. In addition, [[

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As stated above, the best way to measure this endorsement component is to analyze the market value of concurrent endorsements provided by similar properties or by well-known personalities in similar fields. Based on our analysis of comparable endorsement/sponsorship agreements, marquee properties, such as the NFL, are found in the upper quartile, which ranges from $5.5 million to $8.0 million annually. Applying this range of compensation over the seven-year contract term leads to an indication of fair market value of the NFL endorsement of $22.9 million to $33.3 million in net present value terms (*see* SDARS-Consor Exs.8 and 10).

D. Exclusivity

The contract with the NFL grants Sirius [[

]] In dollar terms, the adjustment is

estimated to range from $55.6 million to $70.4 million in net present value terms (*see* SDARS-Consor Ex. 10).

E. Summary of NFL Compensation Value Attribution

After carving-out the value attributable to the three embedded components – brand value, endorsement value, and exclusivity – the residual non-exclusive contract cost ("RNECC") for the NFL programming agreement is calculated to range from $6.2 million to $7.8 million. In other words, the RNECC represents between 5.1% and 6.4% of the total cost of the NFL contract (*see* SDARS-Consor Ex. 10).This analysis is summarized as follows:

Element	Lower Value ($000s)	Upper Value ($000s)
NPV of Contract Cost	$ 122,118	$ 122,118
Brand	27,039	21,008
Endorsement	33,283	22,882
Exclusivity	55,616	70,406
RNECC	**$ 6,180**	**$ 7,823**
RNECC as % of Contract Cost	**5.1%**	**6.4%**

IV. ANALYSIS OF THE NASCAR CONTRACT

The analysis of compensation paid to the National Association for Stock Car Auto Racing, Inc. ("NASCAR") by Sirius for the exclusive right to broadcast NASCAR content is very similar to the analysis for other sport properties. We believe the following elements are of critical importance for this analysis:

- Brand value contribution
- Endorsement value contribution
- Exclusivity
- Content value

We be calculated the value of each the non-content value elements as of the date the contract was signed and will be stated in then-present value terms.

A. Net Present Value of Contract Cost

The net present value of the contract cost for the NASCAR contract as of February 18, 2005, is [[ ]] (*see* SDARS-Consor Ex. 5).

B. Brand Value Contribution Analysis

Founded in 1948, NASCAR is the largest sanctioning body of motor sports in the United States.[6] Today, its economic significance has surpassed expectations and developed beyond the bounds of an event organizer. Over the last 25 years,[7] NASCAR as a brand of mass market sports events has outgrown its traditional roots in the southeastern states, and developed into a widely recognized marketing powerhouse in North America. It is widely estimated that nearly 75 million fans purchase over $2 billion annually in licensed merchandise on and off the track. It is also widely recognized that NASCAR fans are the most brand loyal in all of professional sports.[8] Most primary sponsors in NASCAR's national series are global brands and/or FORTUNE 500 companies. Brands currently associated with NASCAR (aside from car manufacturers Ford, Chevrolet, Dodge and Toyota) include Red Bull, ExxonMobil, DuPont, UPS, Anheuser Busch, Home Depot, MBNA, Lowe's, General Mills and Sara Lee, as well as all branches of the U.S. military (Navy, Army, Air Force, Coast Guard and the National Guard).

The association of new or established brands with NASCAR is a very valuable asset, which is recognized throughout corporate America. When Sirius reached the agreement to broadcast NASCAR programming, such value was not only recognized by the parties, but also [[ ]]

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[6] NASCAR consists of three major national series (NASCAR NEXTEL Cup Series, NASCAR Busch Series and the NASCAR Craftsman Truck Series) as well as eight regional series and one local grassroots series. NASCAR Sanctions 1,500 races at over 100 tracks in 35 U.S. States, Canada and Mexico (http://www.nascar.com/guides/about/nascar/).

[7] Essentially since the flagship event, the "Daytona 500," was first televised live by CBS in 1979. NASCAR events are now televised in 150 countries during its 10-month long season. (http://www.nascar.com/guides/about/nascar/).

[8] (http://www.nascar.com/guides/about/nascar/)

Based on the research and analysis of publicly available information of representative licensing contracts, we have concluded that the NASCAR brand typically would command royalty rates in the 12% - 16% range for usage of the brand to sell products and services — calculated on a wholesale revenue basis. This range represents the quartile just above the median rates, as it reflects the characteristics of the NASCAR brand, one of the most recognizable and popular brands in the U.S. economy. Moreover, as most royalty rate comparables are pegged to non-exclusive arrangements, the royalty rate range must be adjusted upward to reflect the exclusive nature of the NASCAR contract. Thus, a 25% premium has been incorporated to reflect this element—for an adjusted range of 15% - 20%. (*see* SDARS-Consor Ex. 6).

The wholesale revenue basis is equivalent to the competitive cost of the branded content grossed up by an appropriate profit margin, which is based on broadcast radio industry data. The equivalent wholesale revenue basis is then multiplied by the appropriate market-based royalty rate to arrive at an estimated fair market value of the brand usage by Sirius, which is then deducted from the total compensation paid to NASCAR. Applying the 15% to 20% range of royalty rates to the equivalent wholesale revenue basis leads to an indicated brand value of $12.4 million to $16.5 million in net present value terms (*see* SDARS-Consor Ex. 11).

C. Endorsement Value Contribution Analysis

The endorsement value reflects the market assessment of the benefits Sirius derives from NASCAR using Sirius' trademarks, from using NASCAR's influence in the market to open new opportunities for Sirius, and the added goodwill to Sirius transferred from the implied and explicit endorsement of NASCAR.

Besides the SDARS category exclusivity, **[[**

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To estimate this value, which is embedded but not quantified in the contract, we researched similar endorsement relationships in the NASCAR environment. The value of the comparable endorsement association was determined to be an appropriate proxy for this purpose as the sponsorship relationship is so prevalent in NASCAR. The association of a primary car sponsor with the fans, the marketing opportunities it provides, and the brand recognition and transference of consumer loyalty from racing to the brand is a valuable asset that scores of companies pay for every year. The annual sponsor fees we determined to be the most appropriate estimator for the endorsement value of NASCAR range from $4.0 million to $6.0 million. Applying this range of compensation over the seven-year contract term indicates a fair market value of the NASCAR endorsement of $16.6 million to $25.0 million in net present value terms (*see* SDARS-Consor Exs. 8 and 11).

D. Exclusivity

The NASCAR programming by Sirius is exclusive in the satellite radio platform, and much of it (e.g. 10 dedicated channels of driver-to-pit crew communications) is not available anywhere else in broadcast media. This provision is a key value driver in the determination of fair market compensation. Because it is not explicitly segregated in the contract, a proxy calculation must be undertaken to estimate the value of exclusivity, and carve it out of the brand and endorsement value adjusted cost of the programming contract to arrive at the residual value of the non-exclusive content.

To value the exclusivity provision, we utilized the same methodology utilized in the Stern analysis above by applying the calculated discount range, 67.9% to 73.9%, to the brand and endorsement value adjusted contract cost to calculate the range of fair market value of the exclusivity attribute of the contract. In dollar terms, the adjustment is estimated to range from $14.1 million to $21.4 million in net present value terms. (*see* SDARS-Consor Ex. 11).

E. Summary of NASCAR Compensation Value Attribution

The residual non-exclusive contract cost ("RNECC") for the NASCAR programming agreement is calculated to range from $5.0 million to $10.1 million. In other words, the RNECC represents between 8.2% and 16.7% of the total cost of the NASCAR contract (*see* SDARS-Consor Ex. 11).This analysis is summarized as follows:

Element	Lower Value ($000s)	Upper Value ($000s)
NPV of Contract Cost	$ 60,560	$ 60,560
Brand	16,504	12,378
Endorsement	24,963	16,642
Exclusivity	14,101	21,426
RNECC	**$ 4,993**	**$ 10,114**
RNECC as % of Contract Cost	**8.2%**	**16.7%**

V. ANALYSIS OF THE MSO (MARTHA STEWART) CONTRACT

Martha Stewart is a business magnate, author, editor and homemaking advocate. Over the last two decades, Ms. Stewart has built a publishing and broadcasting content company, leveraging her mass market recognition and solid place in the market being the author of several books, hundreds of articles on the domestic arts, editor of a national home keeping magazine, host for two popular daytime television programs, and commercial spokeswoman for K-Mart. Her company, Martha Stewart Living Omnimedia, Inc. ("MSO") consolidates the content library she has generated throughout her career, and went public with much fanfare in 1999. One month after Ms. Stewart was released from prison where she served a well-publicized sentence stemming from an obstruction of justice conviction, MSO entered into the programming contract with Sirius.

The analysis of compensation paid by Sirius for the right to broadcast MSO content is very similar to the analysis for the other properties. We believe the following elements are of critical importance for this analysis:

- Brand value contribution
- Endorsement value contribution
- Exclusivity
- Content value

We calculated the value of each the non-content value elements as of the date the contract was signed and stated it in then-present value terms.

A. Net Present Value of Contract Cost

The net present value of the contract cost for the MSO contract as of April 12, 2005, is [[ ]] (*see* SDARS-Consor Ex. 5).

B. Trademark Licensing Brand Value Contribution Analysis

The adjustment for the value contribution of the Martha Stewart ("MS") brand is based upon an analysis of comparable market-based brand royalty rate transactions. Based on this research and analysis, we have concluded that the MS brand typically would command royalty rates in the range of 8% - 12% of wholesale revenue. Moreover, because most royalty rate comparables are pegged to non-exclusive arrangements, we adjusted the royalty rate range upward to reflect the exclusive nature of the MSO contract. Thus, we incorporated a 25% premium to reflect this element—for an adjusted range of 10% - 15%. (*see* SDARS-Consor Ex. 6).

The wholesale revenue basis is equivalent to the competitive cost of the branded content grossed up by an appropriate profit margin, which is based on broadcast radio industry data. We multiplied the equivalent wholesale revenue basis by the appropriate market-based royalty rate to arrive at an estimated fair market value of the brand usage by Sirius, which we deducted from the total compensation paid to MSO. Applying the 10% to 15% range of royalty rates to the equivalent wholesale revenue basis leads to an indicated brand value of $2.8 million to $4.2 million in net present value terms (*see* SDARS-Consor Ex. 12).

C. Endorsement Value Contribution Analysis

Having accounted for the brand value attribution, the next adjustment refers to the endorsement value that the MS brand provides to the Sirius brand itself. With the association of

such a well known endorser, the brand recognition and transference of consumer loyalty from MSO to the Sirius brand is a valuable asset, albeit one that may have lost significant value in the 2004-2005 period leading up to the contract negotiation, due to Ms. Stewart's personal legal troubles.

As stated above, the best way to measure this endorsement component is to analyze the market value of concurrent endorsements provided by similar properties or by well-known personalities in similar fields. Based on our analysis of comparable endorsement agreements, at the time of the contract signing, the appropriate endorsement value associated with MS would fall in the second quartile of the distribution, which ranges from $3.0 million to $4.1 million annually. Applying this range of compensation over the four-year contract term leads to an indication of fair market value of the MS endorsement of $8.6 million to $11.7 million in net present value terms (*see* SDARS-Consor Exs. 8 and 12).

D. Exclusivity

MSO programming is exclusive in the satellite radio platform. This provision is a key value driver in the determination of fair market compensation. Because it is not explicitly segregated in the contract, we undertook a proxy calculation to estimate the value of exclusivity, and carve it out of the brand and endorsement value adjusted cost of the programming contract to arrive at the residual value of the non-exclusive content.

We applied the calculated discount range, 66.1% to 72.2%, to the brand and endorsement value adjusted contract cost to calculate the range of fair market value of the exclusivity attribute of the contract. In dollar terms, the adjustment is estimated to range from $3.5 million to $6.2 million in net present value terms. (*see* SDARS-Consor Ex. 12).

E. Summary of the MSO Compensation Value Attribution

After carving-out the value attributable to the three embedded components – brand value, endorsement value, and exclusivity – the residual non-exclusive contract cost ("RNECC") for the MSO programming agreement is calculated to range from $1.3 million to $3.2 million. In other words, the RNECC represents between 6.4% and 15.3% of the total cost of the MSO contract (*see* SDARS-Consor Ex. 12). This analysis is summarized as follows:

Element	**Lower Value ($000s)**	**Upper Value ($000s)**
NPV of Contract Cost	$ 20,774	$ 20,774
Brand	4,246	2,831
Endorsement	11,705	8,565
Exclusivity	3,484	6,202
RNECC	**$ 1,339**	**$ 3,177**
RNECC as % of Contract Cost	**6.4%**	**15.3%**

VI. ANALYSIS OF THE HARPO RADIO (OPRAH WINFREY) CONTRACT

Oprah Winfrey is best known as television's highest rating talk show host in history. The enormous success of her show has anchored a growing business, conducted under privately-held Harpo Entertainment ("Harpo"), and allowed for her well-publicized philanthropy.

Harpo is an intellectual property business, generating content for its multiple outlets in television, motion pictures, publishing and, beginning in 2006, satellite radio through XM.

The analysis of compensation paid by XM for the right to broadcast Harpo content is very similar to the analysis for the other properties. We believe the following elements are of critical importance for this analysis:

- Brand value contribution
- Endorsement value contribution
- Exclusivity
- Content value

We calculated the value of each the non-content value elements as of the date the contract was signed and stated it in then-present value terms.

A. Net Present Value of Contract Cost

The net present value of the contract cost for the Oprah Winfrey contract as of January 31, 2006, is [[ ]] (*see* SDARS-Consor Ex. 5).

B. Brand Value Contribution Analysis

The adjustment for the value contribution of the Oprah Winfrey ("OPRAH") brand is based upon an analysis of comparable market-based brand royalty rate transactions. Based on this research and analysis, we have concluded that the OPRAH brand typically would command royalty rates in the range of 12% - 16% of wholesale revenue. Moreover, as most royalty rate comparables are pegged to non-exclusive arrangements, the royalty rate range must be adjusted upward to reflect the exclusive nature of the Harpo contract. Thus, we have incorporated a 25% premium to reflect this element—for an adjusted range of 15% - 20%. (*see* SDARS-Consor Ex. 6).

As noted, the wholesale revenue basis is equivalent to the competitive cost of the branded content grossed up by an appropriate profit margin, which is based on broadcast radio industry data. We multiplied the equivalent wholesale revenue basis by the appropriate market-based royalty rate to arrive at an estimated fair market value of the brand usage by XM, which is then deducted from the total compensation paid to Harpo. Applying the 15% to 20% range of royalty rates to the equivalent wholesale revenue basis leads to an indicated brand value of $8.6 million to $11.5 million in net present value terms (*see* SDARS-Consor Ex. 13).

C. Endorsement Value Contribution Analysis

Having accounted for the brand value attribution, the next adjustment refers to the endorsement value that the OPRAH brand provides to the XM brand itself. The association with

such an influential personality, and the diverse group of consultants and subject matter experts associated with the programming, the brand recognition and transference of consumer loyalty from OPRAH and the other content in publishing and television to the XM brand is a valuable asset.

As stated above, the best way to measure this endorsement component is to analyze the market value of concurrent endorsements provided by similar properties or by well-known personalities in similar fields. Based on our analysis of comparable endorsement agreements, at the time of the contract signing, we conclude that the appropriate endorsement value associated with OPRAH would fall in the upper quartile of the distribution, which ranges from $4.1 million to $5.0 million annually. Applying this range of compensation over the three-year contract term leads to an indication of fair market value of the OPRAH endorsement of $9.4 million to $11.4 million in net present value terms (*see* SDARS-Consor Exs. 8 and 13).

D. Exclusivity

The agreement gives XM **[[**

]] Because it is not explicitly segregated in the contract, we carried out a proxy calculation to estimate the value of exclusivity, and carve it out of the brand and endorsement value adjusted cost of the programming contract to arrive at the residual value of the non-exclusive content.

To value the exclusivity provision, we applied the same methodology utilized in the Stern analysis, above. As such, we applied the calculated discount range, 29.5% to 35.9%, to the brand and endorsement value adjusted contract cost to calculate the range of fair market value of the exclusivity attribute of the contract. In dollar terms, we estimate the adjustment to range from $6.9 million to $7.2 million in net present value terms. (*see* SDARS-Consor Ex. 13).

E. Summary of the Harpo Compensation Value Attribution

After carving out the value attributable to the three embedded components – brand value, endorsement value, and exclusivity – we calculated the residual non-exclusive contract cost ("RNECC") for the Harpo programming agreement to range from $12.4 million to $17.1 million. In other words, the RNECC represents between 29.3% and 40.4% of the total cost of the Harpo contract (*see* SDARS-Consor Ex. 13). This analysis is summarized as follows:

Element	**Lower Value ($000s)**	**Upper Value ($000s)**
NPV of Contract Cost	$ 42,216	$ 42,216
Brand	11,505	8,628
Endorsement	11,416	9,361
Exclusivity	6,919	7,157
RNECC	**$ 12,377**	**$ 17,070**
RNECC as % of Contract Cost	**29.3%**	**40.4%**

VII. ANALYSIS OF THE "OPIE & ANTHONY" CONTRACT

The Opie & Anthony ("O&A") agreement with XM was signed in August of 2004. **[[**

]] The same value elements important in the other analyses are important to this relationship as well:

- Brand value contribution
- Endorsement value contribution
- Exclusive use of the brand, endorsement and content
- Content value

We calculated the value of each the non-content value elements as of the date the contract was signed and stated it in then-present value terms.

A. Net Present Value of Contract Cost

The net present value of the contract cost for the O&A contract as of August 2, 2004, is [[ ]] (*see* SDARS-Consor Ex. 5).

B. Brand Value Contribution Analysis

Although the O&A brand had been off the air and out of the public eye for over a year by the time this contract was negotiated with XM, the exposure and notoriety enjoyed by O&A provided some degree of brand strength protection. This is evident in the terms of the agreement. A significant driver for negotiating with O&A in the first place was the existing awareness held by the brand in several key markets, including New York, Chicago, Philadelphia and Boston.

The first step in the analysis considers the portion of total compensation paid that is attributable to the exclusive use of the O&A brand in XM's marketing and promotional activities.

The valuation of the O&A brand is based upon an analysis of comparable market-based brand royalty rate transactions. Based on this research and analysis, we have concluded that the O&A brand typically would command royalty rates in the range of 8% - 12% of wholesale revenue. Moreover, as most royalty rate comparables are pegged to non-exclusive arrangements, the royalty rate range must be adjusted upward to reflect the exclusive nature of the O&A contract. Thus, we have incorporated a 25% premium to reflect this element—for an adjusted range of 10% - 15%. (*see* SDARS-Consor Ex. 6).

The wholesale revenue basis is equivalent to the competitive cost of the branded content grossed up by an appropriate profit margin, which is based on broadcast radio industry data. The equivalent wholesale revenue basis is then multiplied by the appropriate market-based royalty rate to arrive at an estimated fair market value of the brand usage by XM, which is then deducted

from the total compensation paid to O&A. Applying the 10% to 15% range of royalty rates to the equivalent wholesale revenue basis leads to an indicated brand value of $1.7 million to $2.6 million in net present value terms (*see* SDARS-Consor Ex. 14).

C. Endorsement Value Contribution Analysis

The next step is to calculate the value of the exclusive endorsement of the XM system by O&A to account for the endorsement by O&A of the XM satellite radio service. In addition, O&A are obligated under their contract [[

]]

As stated above, the best way to measure this endorsement component is to analyze the market value of concurrent endorsements provided by similar properties or by well-known personalities in similar fields. O&A are obviously well-known in certain markets, but the awareness of the brand, and therefore its value as an endorsement vehicle, may be limited in other markets across the nation.

Based on our analysis of comparable endorsement agreements, at the time of the contract signing, the appropriate endorsement value associated with O&A would fall within the third quartile of comparable endorsement deals, which ranges from $2.0 million to $2.5 million annually. Applying this range of compensation over the five-year contract term leads to an indication of fair market value of the O&A endorsement of $6.7 million to $8.4 million in net present value terms (*see* SDARS-Consor Exs. 8 and 14).

D. Exclusivity

As stated above, the contract with O&A grants XM [[

]] This provision is a key value driver in the determination of fair market compensation. Because it is not explicitly

segregated in the contract, we must undertake a proxy calculation to estimate the value of exclusivity, and carve it out of the brand and endorsement value adjusted cost of the programming contract to arrive at the residual value of the non-exclusive content.

To value the exclusivity provision, we applied the same methodology utilized in the Stern analysis above. As such, we applied the calculated discount range, 14.6% to 18.6%, to the brand and endorsement value adjusted contract cost to calculate the range of fair market value of the exclusivity attribute of the contract. In dollar terms, the adjustment is estimated to range from $0.3 million to $0.6 million in net present value terms. (*see* SDARS-Consor Ex. 14).

E. Summary of O&A Compensation Value Attribution

After carving-out the value attributable to the three embedded components – brand value, endorsement value, and exclusivity – the residual non-exclusive contract cost ("RNECC") for the O&A programming agreement is calculated to range from $1.3 million to $3.5 million. In other words, the RNECC represents between 10.4% and 28.1% of the total cost of the O&A contract (*see* SDARS-Consor Ex. 14). This analysis is summarized as follows:

Element	**Lower Value ($000s)**	**Upper Value ($000s)**
NPV of Contract Cost	$ 12,543	$ 12,543
Brand	2,564	1,709
Endorsement	8,380	6,704
Exclusivity	298	605
RNECC	**$ 1,301**	**$ 3,525**
RNECC as % of Contract Cost	**10.4%**	**28.1%**

CONCLUSION

Based on the brand licensing and endorsement research we have performed and the contract review and analytical valuation framework we have applied, we have determined the following upper and lower bounds for the composition of the net present value of the programming contracts considered:

Contract Cost Composition (Upper Bound)

Contract (Date of PV)	Net Present Value (NPV) of Contract Cost ($000's)	Exclusive Brand Value Carve-out	Exclusive Endorsement Value Carve-out	Exclusivity Value Carve-out	Residual Non-Exclusive Contract Cost (RNECC)
Stern (10/04)	$ 245,932	$ 50,266	$ 16,314	$ 132,759	$ 46,594
MLB (10/04)	279,993	48,166	24,680	145,003	62,144
NFL (12/03)	122,118	21,008	22,882	70,406	7,823
NASCAR (2/05)	60,560	12,378	16,642	21,426	10,114
STEWART (4/05)	20,774	2,831	8,565	6,202	3,177
HARPO (1/06)	42,216	8,628	9,361	7,157	17,070
O & A (8/04)	12,543	1,709	6,704	605	3,525

Contract Cost Composition (Lower Bound)

Contract (Date of PV)	Net Present Value (NPV) of Contract Cost ($000's)	Exclusive Brand Value Carve-out	Exclusive Endorsement Value Carve-out	Exclusivity Value Carve-out	Residual Non-Exclusive Contract Cost (RNECC)
Stern (10/04)	$ 245,932	$ 67,021	$19,895	$ 25,881	$ 33,136
MLB (10/04)	279,993	61,996	35,899	127,469	54,630
NFL (12/03)	122,118	27,039	33,283	55,616	6,180
NASCAR (2/05)	60,560	16,504	24,963	14,101	4,993
STEWART (4/05)	20,774	4,246	11,705	3,484	1,339
HARPO (1/06)	42,216	11,505	11,416	6,919	12,377
O & A (8/04)	12,543	2,564	8,380	298	1,301

On this basis, we have formed the following opinions:

1. The branded properties provide significant value to the SDARS for which the branded properties extract significant fees , beyond the value of the content itself;
2. The calculated value of the content provided by the branded contracts itemized is, typically, a small proportion of the total contract cost. In the aggregate, the value of the brand, endorsement, and exclusivity components identified in this analysis range from 78.8% to 86.8%, with a median of 82.8% of the contract compensation; and
3. The average economic value of the underlying content represents no more than 13.2% to 21.2% of the branded programming contract costs incurred by the SDARS, with a median of 17.2%.

Before the
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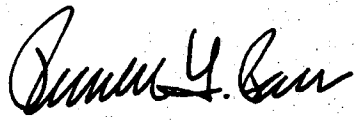
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	**Docket No. 2006-1 CRB DSTRA**
Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services	)	

DECLARATION OF RUSSELL L. PARR

I, Russell L. Parr, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned matter are true and correct to the best of my knowledge, information and belief. Executed this 24th day of July 2007.



Russell L. Parr

Before the
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LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	**Docket No. 2006-1 CRB DSTRA**
Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services	)	

DECLARATION OF DARYL MARTIN

I, Daryl Martin, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned matter are true and correct to the best of my knowledge, information and belief. Executed this 24th day of July 2007.

Daryl Martin

Daryl Martin

SDARS – Consor Ex. 1

Curriculum Vitae

Daryl Martin, Vice President

Mr. Martin oversees the valuation division at CONSOR® Intellectual Asset Management in La Jolla, California. He is responsible for analyzing various types of intellectual property and intangible assets including trademarks, copyrights, patents, trade secrets, domain names, mailing lists, and customer databases. With over 10 years of financial analysis and valuation experience, Mr. Martin has worked on over 150 valuation projects. Mr. Martin's extensive background includes valuing intangible assets for the purposes of loan securitization, acquisitions/mergers, joint ventures, licensing transactions, transfer pricing, bankruptcy filings, and litigation support.

Mr. Martin's broad experience includes time as a Senior Financial Analyst for ConAm Management, a real estate investment company, where he supervised all valuation activity for the Asset Management Division. While there, he was responsible for detailed asset valuations and financial reporting functions on syndicated real estate investment portfolios.

Prior to joining ConAm Management, Mr. Martin performed mutual fund valuation and financial reporting as a Financial Reporting Analyst for the Franklin Templeton Group. During his tenure, Mr. Martin was responsible for preparing revenue projections and financial statements, performing budget analyses, and generating monthly financial packages for management.

Mr. Martin is an honors graduate of San Diego State University with his undergraduate degree in Business Administration and his Masters in Finance.

PROFESSIONAL ASSOCIATIONS

- American Bankruptcy Institute
- Association of Insolvency & Restructuring Advisors
- CFA Institute
- International Trademark Association
- Licensing Executives Society
- Turnaround Management Association

SPEECHES & PRESENTATIONS

- "Patent Valuation" – Patent Law Institute – San Francisco, California; January 2007
- "Intellectual Property: Damages and Lost Profits" – National Association of Certified Valuation Analysts (NACVA) Annual Meeting – San Diego, California; December 2006 (Instructor)
- "Leveraging the Brand: How Intellectual Property is Changing Turnarounds" – Turnaround Management Association Annual Meeting – Orlando, Florida; October 2006
- "Fundamentals of Intellectual Property Valuation" – IP Licensing Summit – New York, New York: August 2006
- "Perfecting Security Interests in Intellectual Property" – HSBC and Phillips Lytle – New York, New York; March 2006

- "Effective IP Litigation Support and Valuation" – LeBoeuf, Lamb, Greene & MacRae, LLP – New York, New York; February 2006 (CLE Presentation)
- "Opening the Black Box: IP Valuation, Securitization and Disposition Unveiled" – The Commercial Finance Association – San Diego, California; November 2005
- "Effective IP Litigation Support and The Use of Valuation Tools" – Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP– Los Angeles, California; October 2005 (CLE Presentation)
- "Corporate Identity Value: The Valuation of Goodwill and Trademarks" – The American Bar Association Section of Intellectual Property Valuation – Arlington, Virginia; April 2005
- "IP Valuation and Licensing: Understanding The One To Facilitate The Other" – San Diego Telecom Council IPSIG & San Diego Chapter of the Licensing Executives Society – San Diego, California; February 2005
- "MasterCard Brand and Technology Valuation Framework" – Presented to the Brand Strategy Management Team – Purchase, New York; September 2004
- "360 Degree Brand Stewardship – Brand Valuation, Licensing/Leverage and Management" – Ogilvy & Mather – New York, New York; September 2004
- "Cross Border Transaction Issues in Electronic Commerce and Internet Licensing Transactions" – San Diego Chapter of the Licensing Executives Society – La Jolla, California; October 2003
- "Valuing and Leveraging of the Powerball Brand" – Presented to the Multi-State Lottery Association Board of Directors – New Orleans, Louisiana; September 2003
- "Identifying and Accurately Valuing IP and Intangible Assets" – GE Capital – La Jolla, California; June 2003
- "Intellectual Asset Management – Valuation of Intellectual Property and Intangible Assets" – San Diego Bar Association – La Jolla, California; December 2002
- "Intellectual Asset Management" – Gray Cary – San Diego, California; February 2002

PUBLICATIONS

- "Intellectual Property Valuation Techniques," The Licensing Journal, October 2006
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- "Intellectual Property Valuation: Context is Critical," *The Secured Lender*, September 2005
- "Intellectual Property: Collateral for Securitization or Lending," *The Secured Lender*, July 2005
- "Accurate IP Valuation in Multiple Environments," *IAM - Intellectual Asset Management*, February/March 2004
- "Understanding the Value and the Risk," *ABF Journal*, January 2004
- "What's It Worth? Context Continuum," *The Licensing Journal*, September 2002

LITIGATION SUPPORT EXPERIENCE

LOUIS VUITTON MALLETIER, v. DOONEY & BOURKE, INC., Case No. 04 Civ. 2990, United States District Court, Southern District of New York; expert report regarding trademark infringement and dilution damages (litigation pending).

ARONCHICK / INKINE v. WOLF BLOCK, ET AL., Court of Common Pleas, Philadelphia County, PA. Civil Action 0712 (Nov. Term, 2004); expert report regarding customs and practices and economic damages stemming from lost patent royalties in the pharmaceutical industry (litigation pending).

WORLD TRIATHLON CORPORATION, INC. v. DAWN SYNDICATED PRODUCTIONS ET AL., Case No. 8:05 CV-983-T27 EAJ, United States District Court Middle District of Florida, Tampa Division; expert report related to intellectual property customs and practices, valuation, and calculation of damages; specifically federal trademark infringement, false designation of origin and dilution, as well as Florida common law trademark infringement (litigation pending).

CYCLONE USA, INC. v. LL&C DEALER SERVICES, LLC, Docket No. CV-03-0992 WMB (JWJx), United States District Court for the Central District of California; expert witness testimony and report regarding calculation of damages (February 2006).

RICHARD BACH AND RUSSELL MUNSON v. FOREVER LIVING PRODUCTS U.S., INC., ET AL., Case No. C05-0970P, Second Amended Complaint, U.S. District Court for Western District of Washington at Seattle; expert report related to valuation of damages for the infringement of trademarks and copyrights (case settled).

DON FELDER v. EAGLES LTD., ET AL., Case No. BC244814, Superior Court of the State of California for the County of Los Angeles, Central District; expert report prepared for the purpose of, and for use in, mediation as it related to the fair market value of the damages stemming from wrongful termination of employment and breach of fiduciary duty. Active participation in mediation providing qualitative and quantitative analysis to provide mediator with a framework for resolution of dispute over trademark damages (July 2006).

DIGITAL ENVOY INC. v. GOOGLE INC., Case C 04 01497 RS, U.S. District Court of the Northern District of California, San Jose Division; expert report regarding calculating damages, specifically Breach of Non-Disclosure Agreement and Trade Secret Misappropriation (April 2006) (Case settled)..

HAMBRECHT WINE GROUP, L.P. D/B/A BELVEDERE WINERY, L.P. v. MILLENNIUM IMPORT, LLC., Case No. C-5 4625, United States District Court, Northern District of California; expert report provided rebuttal discussion and opinions in the area of intellectual property valuation and damages calculations (litigation pending).

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NATIONAL BEVERAGE CORP. EVERFRESH BEVERAGES, INC., FAYGO BEVERAGES, INC. AND HOME JUICE CORP. F/K/A HJMP CORP. v. GARDEN FOODS, INC., AND FRESH-PURE SPLASH JUICE COMPANY, Civil Action No. 01-73158, United States District Court for the Eastern District of Michigan Southern Division; expert report regarding dilution and trademark confusion (May 2003).

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CREATIVE COMPUTING d/b/a INTERNET TRUCKSTOP v. GETLOADED.COM LLC AND/OR CODIFIED CORPORATION, AND JACK C. MARTIN, Civil Action No. CIV 00-476-S-BLW, United States District Court for the District of Idaho; expert report regarding valuation and infringement (November 2001).

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GENESCO, INC. v. MUDD, LLC, Case No. 3:2000-cv-00641, United States District Court for the Middle District Of Tennessee; expert report regarding licensing, royalty rates, and valuation (August 2001).

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Professional Qualifications of Russell L. Parr, CFA

Mr. Parr is President of IPRA, Inc. He is a consultant, lecturer and publisher on intellectual property valuation and exploitation matters. His books are published in English, Japanese, Korean, Italian, Chinese and Russian. He is dedicated to the development of comprehensive methods for accurately defining the value of intellectual property.

Mr. Parr has completed complex consulting assignments involving the valuation and pricing of patents, trademarks, copyrights and other intangible assets. His opinions are used to accomplish licensing transactions, mergers, acquisitions, transfer pricing, litigation support, collateral-based financing, and joint ventures. Mr. Parr also conducts customized research into industry specific factors that drive royalty rates. He advises banks about the use of intangible assets as loan collateral and has served as an expert witness regarding intellectual property infringement damages.

Mr. Parr also publishes three royalty rate resource books, which have been sold all over the world. These books are dedicated to reporting detailed information about the economic aspects of intellectual property transactions including licensing and joint ventures.

Past assignments have included the valuation of the Dr. Seuss copyrights and the patent portfolio of AT&T. Mr. Parr has also conducted valuations and royalty rate studies for pharmaceuticals, semiconductor process and product technology, agricultural formulations, automotive battery technology, biotechnology, camera technology, chemical formulations, communications technology, computer software, cosmetics, consumer and corporate trademarks, drug delivery systems, flowers, incinerator feed systems, lasers, medical instrument technology, motivational book copyrights.

I. Education

Masters Business Administration, Rutgers University, 1981;

Bachelor of Science in Electrical Engineering, Rutgers University, 1976;

Coursework toward Ph.D. in the International Business Management Program at Rutgers University.

II. Professional Designations and Honors

Chartered Financial Analyst (CFA), CFA Institute

Rutgers Alumni Association – Class of '31 Award.

Rutgers Alumni Association – Loyal Sons Award.

III. Professional Affiliations

Innovation Asset Group, Inc. – Advisory Board

Intangible Asset Valuation Standards Committee of the American Society of Appraisers - Member

Licensing Executives Society – Member

Licensing Economics Review – Editorial Board

The Licensing Journal – Advisory Board

American Society of Appraisers, Past President, Princeton Chapter

Rutgers University Alumni Association, Past Board Director

IV. Publications - Books

Royalty Rates for Licensing Intellectual Property, author, John Wiley & Sons, Hoboken, New Jersey, 2007

Royalty Rates for Technology, Third Edition, Intellectual Property Research Associates, Yardley, Pennsylvania, 2003.

The Royalty Rate Report for Pharmaceuticals & Biotechnology, Fifth Edition, Intellectual Property Research Associates, Yardley, Pennsylvania, 2002.

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Investing In Intangible Assets: Finding and Profiting From Hidden Corporate Value, author, John Wiley & Sons, Hoboken, New Jersey, 1991.

Intellectual Property: Licensing and Joint Venture Profit Strategies, Third Edition, annually supplemented, co-author, John Wiley & Sons, Hoboken, New Jersey, 2004.

Intellectual Property Infringement Damages: A Litigation Support Handbook, Second Edition, annually supplemented, author, John Wiley & Sons, Hoboken, New Jersey, 1999.

V. Publications - Articles

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IRS White Paper On Intercompany Pricing, co-authored, Trademark World, February 1989, page 28.

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The Inefficient Market for Intellectual Property: An Update on the Global Scene, The Journal of Proprietary Rights, February 1990, page 17.

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No Name. No Gain, Personal Investor, May 1990, page 27.

An Economic Approach to Royalty Rate Determination Part I of III, co-authored, The Journal of Proprietary Rights, June 1990, page 19.

An Economic Approach to Royalty Rate Determination Part II of III, co-authored, The Journal of Proprietary Rights, August 1990, page 17.

How To Make Money By Investing In Innovative Leaders, Boardroom Reports, August 1, 1991, page 14.

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Intellectual Property Takes Center Stage, Multimedia and Technology Licensing Law Report, July 1994, page 1.

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VI. Conferences Presentations

Determining Royalty Rates, presented at the SW Washington and Oregon Licenseing Executive Society Chapter Meeting, Portland Oregon, November 17, 2006.

Royalty Rates In and Out of Litigation, presented at the Law Seminars International conference titled Complex Intellectual Property Licensing, Philadelphia, Pennsylvania, May 19, 2005.

Valuation of Patents Using the Relief from Royalty Approach, presented at the National Association of Certified Valuation Analysts Twleve Annual Consultants' Conference, Philadelphia, Pennsylvania, June 2, 2005.

Recent Royalty Rate Trends in Technology Licensing, presented to the Licensing Executives Society Annual Conference, San Diego, California, Illinois, September 24, 2003.

Calculating Royalty Rates, presented to the Licensing Executives Society Annual Conference, San Diego, California, Illinois, September 23, 2003.

Royalty Rate Derivation Methods, presented to the Licensing Executives Society Annual Conference, Chicago, Illinois, October 2002.

Royalty Rates for Technology, presented to the Licensing Executives Society Chicago Chapter, Chicago, Illinois, February 26, 2002.

Valuation and Royalty Rate Methods for Pharma and Biotech, presented at the Strategic Research Institute conference titled Pharma Biotech: Intellectual Property and Business Development, Crowne Plaza Hotel, San Francisco, California, April 23, 2001.

Patent Valuation and Royalty Rate Development, presented at the 2000 Licensing Executives Society Conference, Toronto, Ontario, Sheraton Centre, September 11, 2000

Intellectual Property Valuation Issues and Strategies, presented at the Singapore-WIPO Joint Training Course for Asian and Pacific Region on Intellectual Property and Technopreneurship Development, November 16, 1999, Hotel Rendezvous, Singapore, Jointly sponsored by World Intellectual Property Organization and the Government of Singapore.

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Methods for the Valuation of Intellectual Property, presented at Seminario Internaional sobre Valorization de la Propiedad Intelectual, November 19 and 20, 1998, Sheraton Hotel, Lima Peru, sponsored by INDECOPI of Peru and the World Intellectual Property Organization, of the United Nations.

Methods for the Valuation of Intellectual Property, presented at Seminario Internaional sobre Valorization de la Propiedad Intelectual, November 19 and 20, 1998, Sheraton Hotel, Lima Peru, sponsored by INDECOPI of Peru and the World Intellectual Property Organization, of the United Nations.

Valuing Intellectual Property: What's it Worth? presented at the American Conference Institute's conference titled Intellectual Property in Business Transactions, The Park Lane Hotel, New York City, January 30, 1997.

Economic Factors for Intellectual Property Portfolio Management presented at the Licensing Executives Society E4 Committee Winter Conference titled Portfolio Management Strategies, Crystal Gateway Marriott, Crystal City, Virginia, December 12, 1996.

Basic Intellectual Property Valuation for Licensing Executives presented at the 1996 Licensing Executives Society Conference, El Conquistador Resort, Fajardo, Puerto Rico, September 30, 1996.

Intellectual Property Valuation and Licensing, presented to the Office of Corporate Relations and Technology Transfer of Rutgers University, co-hosted with Michael J. Lennon of Kenyon & Kenyon, Piscataway, New Jersey, June 26, 1996.

Establishing Royalty Rates for Business Transactions, presented at the conference titled The Basics of Licensing and Licensing Law, sponsored by The Licensing Journal, Kent Press, The University Club, New York, New York, March 27, 1996.

Computation of Damages, presented at the conference titled The Basics of Intellectual Property Litigation, sponsored by The IP Litigator, Kent Press, The University Club, New York, New York, March 28, 1996.

Intellectual Property Valuation, presented at the American Intellectual Property Law Association, 19th Mid-Winter Institute - The Law of Computer Related Technology IV, La Quinta Resort Hotel, Palm Springs, California, January 26, 1996.

A Conflicted Global Economy, presented at the 1995 Licensing Executives Society Annual Conference, Marriott's Orlando World Conference Center, Orlando Florida, October 24, 1995.

Technology Licensing Strategies, presented at the 1995 Licensing Executives Society Annual Conference, Marriott's Orlando World Conference Center, Orlando Florida, October 25, 1995.

Panel Discussion on Valuing Preclinical Trial Biodiagnostic Technology, presented at the 1995 Licensing Executives Society Annual Conference, Marriott's Orlando World Conference Center, Orlando Florida, October 26, 1995.

Valuation of Intellectual Property, presented at the First Annual Licensing Seminar of the New Jersey Intellectual Property Law Association, Woodbridge Hilton, Iselin, New Jersey, October 19, 1995.

Intellectual Property Valuation, presented at the Advanced Licensing Institute of the Franklin Pierce Law Center, Concord, New Hampshire, July 26, 1995.

New Trends in Intellectual Property, presented at the Intellectual Property Conference, Cooper Union, New York, New York, April 27, 1995

Intellectual Property Infringement Damages, presented at the American Society of Appraisers, Philadelphia Chapter, Business Valuation Conference, Sheraton of Bucks County, Fairless Hills, Pennsylvania, April 21, 1995.

Technology, Royalty Rates & Investment Risk, presented at the 1994 Licensing Executives Society Annual Conference, Hilton Waikoloa Village, Waikoloa, Hawaii, October 19, 1994.

Quantifying and Valuing Royalties for Intellectual Property presented at the annual conference of The Intellectual Property Institute for Corporate Counsel at Le Meridien Hotel, Chicago, Illinois, September 26, 1994.

Royalty Rate Negotiations, presented to the New Jersey Entrepreneurial Network, Princeton, New Jersey, June 1, 1994.

Valuing Intellectual Property presented at the American Society of Appraisers conference titled Current Topics in Business Valuation '94 at The Warwick Hotel, New York City on May 17, 1994.

Valuation of Intellectual Property Rights presented at the Fourth Annual American Law Institute-American Bar Association Course of Study titled Trademarks, Copyrights, and Unfair Competition for the General Practitioner, Stouffer Concourse Hotel, Washington, DC, April 15, 1994.

Technology Royalty Rates presented at the Association of Federal Technology Transfer Executives at the Los Angeles Airport Marriott, January 26, 1994.

The Wall Street Perspective - Brand Values presented at the conference titled Brands sponsored by Strategic Research Institute at The Grand Hyatt Hotel, New York, New York, November 10-11, 1993.

Quantifying and Valuing Royalties for Intellectual Property presented at the annual conference of The Intellectual Property Institute for Corporate Counsel at the Hyatt Regency, San Francisco, September, 30, 1993.

The New Role of Intellectual Property in Commercial Transactions presented as part of the Executive MBA Seminar Series at the Leonard N. Stern School of Business, New York University, New York City, March 26, 1993 and June 21, 1993.

Royalty Rates in Licensing & Litigation presented to the New Jersey Intellectual Property Law Association at the Forrestal Center Marriott Hotel, Princeton, NJ on January 14, 1993.

Technology Valuation presented at the conference titled Appraising Intellectual Property, sponsored by the American Society of Appraisers at Hyatt Regency at Reunion, Dallas, Texas, January 11, 1993.

Valuation and Royalty Rate Determination presented at the conference titled Licensing Opportunities in the Pharmaceutical and Biotechnology Industries sponsored by The Institute for International Research, Park Hyatt Hotel, Washington DC, December 2, 1992.

Hidden Corporate Assets and Royalties, presented at the Third Annual Invention Convention, The Pasadena Convention Center, Pasadena Ca., September 5, 1992.

Co-Chairman of the Conference titled Strategies for Intellectual Property Valuation, Exploitation and Underwriting sponsored by the Institute for International Research presented at the Park Lane Hotel, New York on May 18-19, 1992.

Valuation of Technology presented at the conference titled Joint Ventures and Other Cooperative Business Arrangements sponsored by Prentice Hall Law & Business and presented at the Loews-Summit Hotel on October 30-31, 1990.

Valuation of Technology presented at the conference titled Joint Ventures and Other Cooperative Business Arrangements sponsored by Prentice Hall Law & Business and presented at the Four Seasons Clift Hotel on November 9-10, 1991.

Advanced Valuation of Intellectual Property presented at the International Conference of the American Society of Appraisers in Washington DC on June 15, 1987.

Court Testimony, 1991 to Present

Case: Monsanto, Inc. v. Bayer Crop Science Civil Action No. 4:00CV01915 ERW, United States District Court for the Eastern District of Missouri
Issue: Infringement damages regarding agricultural-genetic patented invention.
Client: Bayer Crop Science

Case: Freedom Wireless, Inc. v. Boston Communications Group, Inc. et al, No. 00-CV-12234 EFH, United States District Court for the District Massachusetts
Issue: Infringement damages regarding prepaid wireless phone services
Client: Freedom Wireless

Case: PharmaStem Therapeutics, Inc. v. ViaCell, Inc., et al Civil Action No. 02-148-GMS, United States District Court for the District of Delaware
Issue: Infringement damages regarding cord blood collection and storage
Client: PharamStem

Case: Tulip Computers International B.V. v. Dell Computer Corp. Civil Action No. 00-981-Jordan United States District Court for the District of Delaware
Issue: Infringement damages regarding personal computer Form Factor.
Client: Tulip

Case: Honeywell International v. Hamilton Sundstrand, Inc. Civil Action No. 99-309-GMS (Sleet), United States District Court for District of Delaware.
Issue: Infringement damages regarding auxiliary power unit engine technology.
Client: Honeywell

Case: BioNumerik Pharmaceuticals, Inc. v. M. Gopal Nair, American Arbitration Association, No. AAA 70 181 0030900, Austin, Texas.
Issue: Damages to intellectual property and business value from failure to perform contracted obligations.
Client: BioNumerik

Case: Plant Genetics Systems v. DeKalb ., Civil Action No. 3:96CV02015, United States District Court for Connecticut, East Hartford.
Issue: Infringement damages regarding glufosinate resistant (Liberty herbicide) corn seeds.
Client: Plant Genetics Systems

Case: Plant Genetics Systems v. Novartis, Civil Action No. 96-459, United States District Court for the District of Delaware, Judge Farnan.
Issue: Infringement damages regarding agricultural-genetic patented invention.

Client: Plant Genetics Systems

Case: Pocklington Foods, Inc. v. Her Majesty the Queen in Right of the Province of Alberta as Represented by the Provincial Treasurer of Alberta, Court of Queens, Bench of Alberta, Judicial District of Alberta.
Issue: Appropriate methods for valuing expropriated trademarks.
Client: Pocklington Foods

Case: CFMT, Inc. and CFM Technologies, Inc. v. Steag Microtech, Inc. Civil Action No. 95-442 (McKelvie), United States District Court for the District of Delaware.
Issue: Infringement damages regarding semiconductor manufacturing equipment patent.
Client: CFMT, Inc.

Case: The Procter & Gamble Company v. Paragon Trade Brands, Inc., C.A. No. 94-16-LON, United States District Court for the District of Delaware, Wilmington, Delaware.
Issue: Infringement damages regarding disposable infant diaper patents.
Client: P&G

Case: Ensco Inc. v. Komar Industries, No. LR-C-93-159, United States District Court, Eastern District of Arkansas, Western Division, Little Rock, Arkansas.
Issue: Infringement damages regarding incinerator conveyor system.
Client: Ensco

Case: Gardner v. Ford Motor Company, United States District Court, District of Washington, Seattle, Washington.
Issue: Infringement damages regarding exhaust gas recovery system for automobiles and trucks.
Client: Gardner

Case: GNB Technologies, Inc. v. Exide Corporation, C.A. No. 88-407, United States District Court, District of Delaware, Wilmington, Delaware, Roderick P. McKelvie presiding.
Issue: Infringement damages regarding automotive battery terminal configuration.
Client: Exide

Case: In Re IA Holdings, Delaware County Court of Common Pleas, No. 86-14981, Media, Pennsylvania, Edward S. Lawhorne presiding.
Issue: Valuation of public company shares for dissenting shareholder lawsuit.
Client: Delaware County Court, Media, Pennsylvania

Case: Warner Lambert v. American Safety Razor, Civil Action No. 91-11, United States District Court, District of Delaware, Wilmington, Delaware, Joseph J, Farnan, Jr. presiding.
Issue: Infringement damages regarding placement of polyox strip on razor blade cartridges.
Client: American Safety Razor

Case: Wojick v. Wojick, Family Law Matter, No. 92-FA-836797, Cheyenne, Wyoming.
Issue: Valuation of closely held business, Cheyenne Outfitters, for divorce proceedings.
Client: Husband and wife.

VII. Deposition Testimony, 1991 to Present

Case: NEBL, Inc. and Jeffrey Dann, MD v. American Medical Systems, Inc., Civil Case No. 04-CV-12482 RGS, United States District Court District of Massachusetts
Issue: Infringement damages regarding urinary incontinence
Client: NEBL, Inc.

Case: Smith & Nephew, Inc. and John O. Hayhurst, MD v. Arthrex, Inc., Civil Case No. CV04 0029 SI, United States District Court District of Oregon
Issue: Infringement damages regarding shoulder anchors used in surgery
Client: Arthrex, Inc.

Case: Procter & Gamble v. The United States, Civil Case No. 1:05cv355 United States District Court District for the Southern District of Ohio Western Division
Issue: Value of technology given as a charitable donation
Client: Procter & Gamble

Case: Paul Cozza v. Network Associates, Inc., Civil Action No. 02-11135 RGS, United States District Court District of Massachusetts
Issue: Anti-virus software invention
Client: Network Associates, Inc.

Case: Lear Corporation v. Harness, Dickey & Pierce, PLC et al, Case, No. 03-054226-CK, State of Michigan, Circuit Court fo the County of Oakland
Issue: Attorney Malpractice – loss of patent rights for interior automotive door manufacturing process
Client: Lear Corp.

Case: Cedars-Sinai Medical Center et al v. Mitchell, Silberberg & Knupp, Case, No. BC 297823, Superior Court for the State of California for the County of Los Angeles
Issue: Attorney Malpractice – loss of patent rights for laser eye surgery invention
Client: Cedars-Sinai

Case: Wesleyan Company v. US Army, ASBCA No. 53896, Armed Services Board of Contract Appeals
Issue: Taking of technology regarding On-The-Move Soldier Hydration System
Client: Wesleyan

Case: Freedom Wireless, Inc. v. Boston Communications Group, Inc. et al, No. 00-CV-12234 EFH, United States District Court for the District Massachusetts
Issue: Infringement damages regarding prepaid wireless phone services
Client: Freedom Wireless

Case: Edwards LifeSciences v. Sulzer Carbomedics, Inc. Civil Action No. 02-508-SLR United States District Court for the District of Delaware
Issue: Infringement damages regarding heart value ring repair products
Client: Edwards LifeScience

Case: Novamedix Ltd. v. Kinetic Concepts, Inc. Civil Action No. SA-92-CA-0177 United States District Court for the Western District of Texas San Antonio Division
Issue: Infringement damages regarding compression therapy foot pump for DVT prevention
Client: KCI

Case: PharmaStem Therapeutics, Inc. v. ViaCell, Inc., et al Civil Action No. 02-148-GMS, United States District Court for the District of Delaware
Issue: Infringement damages regarding cord blood collection and storage
Client: PharmaStem

Case: Tulip Computers International B.V. v. Dell Computer Corp. Civil Action No. 00-981-Jordan United States District Court for the District of Delaware
Issue: Infringement damages regarding personal computer Form Factor.
Client: Tulip

Case: Monsanto, Inc. v, Bayer Crop Science Civil Action No. 4:00CV01915 ERW, United States District Court for the Eastern District of Missouri
Issue: Infringement damages regarding agricultural-genetic patented invention.
Client: Bayer Crop Science

Case: Edwards LifeSciences Corp and Edwards Lifesciences LLC v. Medtronic, Inc. Civil Action No. 00-621-SLR, United States District Court of Delaware
Issue: Infringement damages regarding patented technology used in artificial heart valves

Client: Edwards LifeScience

Case: Dr. George S. Allen. v. Howmedica Leibinger, Inc. et al, Civil Action No. 98-613 (JIF), United States District Court of Delaware
Issue: Misrepresentation of patent position regarding surgical imaging systems and markers.
Client: Dr. Allen

Case: Revlon Consumer Products Corp. v. The Estee Lauder Companies, Inc. et al, Civ. No. 00-CIV-5930 (RMB), United States District Court Southern District of New York
Issue: Infringement damages regarding patented technology used in makeup foundations.
Client: Estee

Case: Honeywell International, Inc. v. Hamilton Sunstrand Corporation, Civil Action No. 99-309 (GMS), United States District Court for the District of Delaware.
Issue: Infringement damages patented technology used in jet aircraft auxiliary power units.
Client: Honeywell

Case: Nova Biomedical Corporation v. iStat Corporation., Civil Action No. 95-11396-RGS, United States District Court District Court of Massachusetts.
Issue: Infringement damages regarding patented blood gas medical instrument.
Client: Nova

Case: Plant Genetics Systems v. DeKalb ., Civil Action No. 3:96CV02015, United States District Court for Connecticut, East Hartford.
Issue: Infringement damages regarding glufosinate resistant (Liberty herbicide) corn seeds.
Client: Plant Genetics Systems

Case: Crystal Semiconductor Corporation v. Opti, Inc. and TriTech Microelectronics, Inc., Civil Action No. 97-CA-026-SS, United States District Court for the Western District of Texas, Austin Division.
Issue: Noise reduction technology used in PC audio analog to digital converters.
Client: TriTech

Case: American Online, Inc. v. AT&T Corp., Case No. 98-1821-A, United States District Court for the Eastern District of Virginia.
Issue: Trademark infringement.
Client: Defendant

Case: Fort James Corporation v. Sweetheart Cup Company, Inc., Civil Action No. 97-C-1221, United States District Court for the Eastern District of Wisconsin.
Issue: Infringement of paper plate manufacturing technology.
Client: Fort James

Case: Plant Genetics Systems v. Novartis, Civil Action No. 96-459, United States District Court for the District of Delaware, Judge Farnan.
Issue: Infringement damages regarding agricultural-genetic patented invention.
Client: Plant Genetics Systems

Case: Evans Medical Ltd., Medeva Plc., and SmithKline Beecham v. American Cyanamid Company, 96 Civ. 3529 (WCC), United States District Court for the Southern District of New York.
Issue: Infringement damages regarding pertusis antigene (69k) patent.
Client: American Cyanamid

Case: Plant Genetics Systems v. Ciba Seeds and Mycogen Plant Science Inc., Civil Action No. 1:95CV00741, United States District Court for the Middle District of North Carolina, Durham Division.
Issue: Infringement damages regarding agricultural-genetic patented invention.
Client: Plant Genetics Systems

Case: Gerald L. Terwilliger v. York International, United States District Court, District of Richmond Virginia.
Issue: Employee compensation for patented invention
Client: Terwillinger.

Case: Thiokol Corporation v. Alliant Techsystems, Inc. and Hercules Inc., Case No. 95-706 (JJF), United States District Court, District of Delaware
Issue: Infringement damages regarding rocket motor insulation.
Client: Alliant.

Case: Nova Biomedical Corporation v. Mallinckrodt Sensor Systems, Inc., Case No. 94-12288-PBS, United States District Court, District of Massachusetts
Issue: Infringement damages regarding blood gas medical instrument.
Client: Nova.

Case: Mobil Oil Corporation v. Exxon Corporation, Case No. 96-1603-A, United States District Court for the Eastern District of Virginia, Alexandria Division
Issue: Infringement damages regarding plastic film resins.
Client: Mobil.

Case: Logan Farms v. Pravel et al., Harris County Court, Houston Texas
Issue: Patent attorney malpractice
Client: Logan Farms.

Case: CFMT, Inc. and CFM Technologies, Inc. v. Steag Microtech, Inc. Civil Action No. 95-442 (McKelvy), United States District Court for the District of Delaware.
Issue: Infringement damages regarding semiconductor manufacturing equipment patent.
Client: CFMT.

Case: Chemtron, Inc. v. Diversey US Holdings, Inc. et al., Civil Action No. 95-1722-A, United States District Court, Eastern District of Virginia, Alexandria Division.
Issue: Infringement damages regarding detergent dispensing system for institutional warewash.
Client: Chemtron.

Case: Gilbarco, Inc. v. Octel Communications Corp., Case No. C-94-20780-JW, United States District Court, Northern District of California, San Jose Division.
Issue: Infringement damages regarding voice information processing patents.
Client: Gilbarco.

Case: The Procter & Gamble Company v. Paragon Trade Brands, Inc., C.A. No. 94-16-LON, United States District Court for the District of Delaware, Wilmington, Delaware.
Issue: Infringement damages regarding disposable infant diaper patents.
Client: Paragon

Case: Ensco Inc. v. Komar Industries, No. LR-C-93-159, United States District Court, Eastern District of Arkansas, Western Division, Little Rock, Arkansas.
Issue: Infringement damages regarding incinerator conveyor system.
Client: Ensco

Case: GNB Technologies, Inc. v. Exide Corporation, C.A. No. 88-407, United States District Court, District of Delaware, Wilmington, Delaware, Roderick P. McKelvy presiding.
Issue: Infringement damages regarding automotive battery terminal configuration.
Client: Exide

Case: Allied Materials and Equipment Company, Inc. v. Pappa Geppetto's Toys Victoria, Ltd., Case No. 92-2030-0, United States District Court, District of Kansas.
Issue: Infringement damages regarding copyright toy - *The Squish.*
Client: Papa Geppe5tto's

Case: Kinetic Concepts, Inc. v. Support Systems International, Inc., Civil Action No. SA-91-CA-0927, United States District Court, Western District of Texas.
Issue: Infringement damages regarding hospital bed therapeutic systems
Client: KCI

Case: Pfizer, Inc. v. Astra
Issue: Infringement damages associated with trademark suffix - XL.
Client: Pfizer

Case: Susan M. Maxwell v. K Mart Corp., Melville Corp., Morse Shoe Inc. and Shopko, Inc., Civil Action No. 4-93-525, United States District Court, District of Minnesota.
Issue: Infringement damages regarding system to tie together pairs of shoes for rack display.
Client: Defendant

Case: Davis-Lynch, Inc. v. William Norvell
Issue: Damages regarding failure to obtain foreign patents for well-drilling equipment.
Client: Davis-Lynch

SDARS – Consor Ex. 3

CONSOR Professionals Curricula Vitae

Qualifications of Weston Anson

I am Chairman of CONSOR, a licensing/consulting firm specializing in trademark, patent, and copyright licensing and valuations, including some work in giving expert testimony. The firm is headquartered in La Jolla, California, has offices in New York and London, and serves licensing clients in North America, Europe and Japan, as well as Australia and Latin America.

I have served for six years as Vice President of the Licensing Industry Merchandisers' Association (LIMA) and am a lifetime member of the Board of Advisors. With its main office in New York, LIMA is a non-profit organization of licensors, manufacturers and support organizations working to advance professionalism in licensing. Its main objectives are to institute and maintain a standard of ethical business practices in the licensed merchandise industry, and to establish and promote the industry within the government, the business community, other associations, the public, and the trade and consumer media.

An active member of the Licensing Executives Society (LES), I am a past Chairman of the Valuation Committee, the Internet Licensing E-Commerce Committee under the Business and Industry Sectors, and the Trademark Licensing Committee, a position that I resumed for the 2001-2002 term. In addition, I now sit on the LES International Board of Delegates. LES functions as a non-profit professional and educational society, encouraging high standards and ethics among persons engaged in the domestic and international licensing of intellectual property rights.

In addition, I belong to the International Trademark Association (INTA), which is an association of trademark owners, attorneys, and other professionals worldwide. INTA is dedicated to the support and advancement of trademark and related intellectual property concepts. The organization serves the common purposes of its worldwide members through advocacy, communication, and education to members.

I have also served on the Board of Directors of the French Licensing Association, MICEL, as well as being active in the American Intellectual Property Law Association, The American Society of Appraisers, and The Institute of Property Taxation. I have also been named as an official arbitrator/mediator for the World Intellectual Property Organization.

I speak on a regular basis to industry and appraisal associations. The Internal Revenue Service has invited me to speak on a number of occasions to both their national and international economists on the subject of intellectual property royalty rates and valuation. I have extensive background and experience involving all aspects of intellectual property licensing. I received my MBA (honors) from Harvard University, after which I served with the management-consulting firm of Booz-Allen & Hamilton. While there, I managed consulting projects in consumer products and services that involved several Fortune 500 companies.

Subsequently, I was the youngest Vice President and corporate officer at Playboy Enterprises, Inc., where I launched many of their licensing programs. These programs involved approximately 100 licensees in 20-plus countries and generated royalty income in the tens of millions of dollars annually.

I was also Senior Vice President of Hang Ten International, which grew to about 150 licensees in 30 countries under my direction. Since founding CONSOR in 1980, I have developed numerous licensing strategies for major corporations and have performed valuations of thousands of intellectual property components.

CONSOR is dedicated to helping clients establish and build the value of their intellectual property. Establishing or rebuilding licensing programs and income for clients requires effective positioning and leveraging to maximize value and cash flow. CONSOR provides consulting services to our clients in the licensing process to establish effective plans and maintain competitive focus while minimizing risk. Whether for new or established brands, CONSOR determines market strengths and values and identifies extension opportunities and issues. We control an unparalleled proprietary resource of information about licensing and valuation transactions and data. This data has been compiled over 18 years, supporting our financial and litigation support for over a thousand trademarks and other intangibles.

Over the years, some of the clients I have served as licensing agent and/or licensing consultant include the following companies:

AAA	General Foods Corporation	MGM
Alex Brown	General Motors Corporation	Nestlé
America's Cup	Greyhound Corporation	Norman Rockwell
American Heart Association	Harry Winston	Ocean Pacific
Anheuser-Busch	Hewlett-Packard	Ocean Spray
AT&T Consumer Products	Hilton Hotels	Paramount Communications
Borax	IBM	PepsiCo.
Bristol-Myers	Jane Fonda	Pillsbury
Burger King	Kraft-General Foods	Procter & Gamble
Caterpillar, Inc.	LA Gear	Rolex
Christian Bros.	Labatts	Sara Lee
Ciba-Geigy	Levi Strauss & Company	Sesame Street (CTW)
Clorox Company	L.L. Bean, Inc.	Singer Sewing Company
CPC Best Foods	L'Oreal	Smith & Wesson
DuPont	Louisville Slugger	Smith-Corona
Eastern Airlines	Lucasfilm, Ltd.	SONY Corporation

Equitable Insurance	M&M/Mars	The Olympics
Esquire Magazine	Macy's	Toys R US
Estate of Dr. Seuss	Major League Baseball	Vatican Library
Ford Motor Company	Mattel, Inc.	Welch's
Frito Lay	McDonald's Corp.	Western Union
General Electric	Mennen Co.	Xerox Corporation

I, along with other members of my firm, concentrate on three primary areas: 1) Developing effective licensing strategies for established licensors, 2) Assisting in developing licensing programs for major companies just entering the arena; and, 3) Establishing specific market values for trademarks, brands and other intangible assets. Our firm is often retained by legal and financial advisors such as Goldman, Sachs & Co., Ernst & Young, Baker & Hostetler, Bank of America, and Chemical Bank.

I have published over 90 articles worldwide and I am active in all of the major international trademark and licensing associations as a speaker and/or an officer. I travel extensively, counseling major multi-national corporations and small companies in the US and overseas.

LIST OF PUBLICATIONS

BOOKS AND BOOK CHAPTERS

- The Intangible Assets Handbook – Maximizing Value from Intangible Assets (The ABA Section of Business Law, 2007, published by the American Bar Association)
- Fundamentals of Intellectual Property Valuation – A Primer for Identifying and Determining Value (The ABA Section of Intellectual Property Law, 2005, published by the American Bar Association)
- "Accurately Valuing Trademarks and IP in Multiple Environments" (INTA Leadership Conference Paper, Forum Course Handbook, November, 2003)
- "Valuing Intellectual Property and Licensing Agreements" (Advanced Licensing Agreements for the New Economy 2001, Forum Course Handbook, Practising Law Institute, March 2001)
- "Chapter 2: Defining and Building the Brand" (Trademark Law Basics, Basics of Trademark Law Forum Coursebook, International Trademark Association, February 2001)
- "Chapter 9: Section 1: Business Aspects of Licensing" (Trademark Law Basics, Basics of Trademark Law Forum Coursebook, International Trademark Association, February 2001)

- "An Arm's Length View of Transfer Pricing" (The 1999 Guide to the World's Leading Transfer Pricing Advisors, Euromoney Institutional Investor PLC, December 1999)

- Hidden Value: Profiting from the Intellectual Property Economy (Copyright 1999, co-authored by Weston Anson) "Intellectual Asset Management: Leveraging Intangibles" (Handbook of Business Strategy, 1999)

- "Chapter 15: Managing Corporate Intellectual Capital" (Hidden Value: Profiting from the Intellectual Property Economy, Euromoney Publications, 1999)

- "Chapter 13: Valuing Intangible Assets: The Big Pot of Goodwill" (Mergers And Acquisitions Handbook For Small And Midsize Companies, Copyright 1997, co-authored by Weston Anson)

- "Setting Global and Regional Strategies" (The 1996 Licensing Resource Directory)

- What's It Worth? Valuation Of Technology (The Business Valuator, The Canadian Institute of Chartered Business Valuators, Number 4, Volume 18, December 1994)

- Pharmaceutical Licensing: Maximizing the Bundle of Rights with A Pan European Strategy" (EPLC, November 1992)

PUBLISHED ARTICLES

- "A Business Person's Perspective On Setting Marketplace Royalty Rates For Intangibles" (Tax Management Transfer Pricing Report, September 6, 1995)

- "A Letter From Moscow" (North American Licensing Tribune, May 1990)

- "A Licensing Retrospective And Glimpse Into The Future" (The Merchandising Reporter, June/July 1984)

- "A New and More Effective Technique To Prove Confusion And Damages In Trademark Litigation" (The Licensing Journal, November/December 1992)

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Valuation of Technology	November/December 1994; reprinted in The Business Valuator, December 1994; and in Money & Family Law, February 1995
"What's It Worth?"	February 1995; April 1995
"What's It Worth?" by Weston Anson and Kristina Sheridan	November/December 1995
"Determining The Value Of The Umbrella Corporate Brand"	April 2000
"Valuing Internet Brands: The Internet Value Equation	September 2000
"Intangible Asset Valuation Techniques" by Weston Anson and Mario Serrano	January 2001
"Accounting And IP Valuation: New Merger Accounting Rules Impact The Value And Valuation Of Trademarks And Other Intangible Assets"	March 2001
"Taking Stock of Corporate Intellectual Property: Quantifying Value"	April 2001
"New Economy Brand Building"	May 2001
"Building the Value of Hospitality Brands	June/July 2001
"2010: The Future of Licensing"	August 2001
"Traditional Valuation Methodologies of Intellectual Property"	September 2001
"Proprietary Valuation Techniques for Intellectual Property"	October 2001
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"What's It Worth?" – Series of Articles in The Licensing Journal	
"Borrowing on Your Good Name" by Richard Schioldager and Weston Anson	June/July 2002
"Context Continuum" by Daryl Martin and Weston Anson	September 2002

Expert Witness and Legal Experience (Deposition and/or Trial) ***2001 – Present***

1. MGM Grand Hotel v. Studio 54 Corporation, et al.
   United States District Court
   District of Nevada
   Docket No. CV-S-98-00372-HDM (RJJ)
   Expert Report 2001

2. Genesco, Inc. v. Mudd LLC
   United States District Court
   Middle District of Tennessee
   Docket No. 3-00-00641
   Expert Report 2001

3. Heidi Ott AG, Heidi Ott v. Target Corporation
   United States District Court
   District of Minnesota
   Trademark
   Docket No. 99-CV-01170
   Deposition 2001

4. Hearts on Fire Company v. Alexander M. Waldman Diamond Company, Inc.
   United States District Court
   Southern District of New York
   Docket No. 01 CV 4628(HB)
   Expert Report 2001

5. Amazon.com, Inc., a Delaware Corporation v. Von Eric Lerner Kalaydjian, d/b/a Amazon Cosmetics and Tan Products
   United States District Court
   Central District of California
   Docket No. CV 01-02041 R (AIJx)
   Expert Report 2001

6. WE Media, Inc. v. Cablevision Systems Corp., et al.
   United States District Court
   Southern District of New York
   Docket No. 01-CV-00424 (VM)
   Expert Report 2001

7. Creative Computing d/b/a Internet Truckstop v. Getloaded.com LLC and/or Codified Corporation, and Jack C. Martin
United States District Court
District of Idaho
Docket No. 00-00476-S-BLW
Expert Report 2001

8. Furtherfield Partnership, LP, v. Ronald O Perelman, M&F Worldwide Corp, et al.
Court of Chancery of the State of Delaware
In and for New Castle County
Case No. 18502NC
Expert Report 2001

9. San Francisco Network v. Salisbury Manufacturing Corporation; FAB Industries, Inc.; et al.
United States District Court
Northern District of California
Docket No. C99-5022 CRB (JL)
Expert Report 2001

10. YKK Corporation and YKK (U.S.A.), Inc. v. Jungwoo Zipper Co., Ltd., and YPP (U.S.A.), Inc.
United States District Court
Central District of California
Docket No. C00-05731 FMC (RCx)
Expert Report and Deposition 2002

11. Marcel Fashions Group, Inc. v. Lucky Brand Dungarees, Inc. et al.
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Southern District of Florida
Docket No. 01- CV-7495
Expert Report 2002

12. Fish Bones-Sandlake Road, Inc. v. Outback Steakhouse, Inc., Bonefish Grill, LLC, OS SEA, Inc and International Market Place
United States District Court
Middle District of Florida Orlando Division
Docket No. 6:02-CV-671-ORL-31JGG
Expert Report 2002

13. Oakland Raiders v. National Football League, et al.
Superior Court of the State of California
County of Santa Clara
Docket No. 1-96-CV 756194
Expert Report 1998
Deposition 2003

14. Cyclone USA, Inc. v. LL&C Dealer Services, LLC
United States District Court

For the Central District of California
Docket No. CV-03-0992 WMB (JWJx)
Expert Report 2004
Deposition 2004

15. Monster Cable Products, Inc. v. Discovery Communications, Inc.
United States District Court
Northern District of California
Case No. 03-CV-3250 (WHA)
Expert Report 2004
Deposition 2004

16. Corbis Corporation v. Amazon.com, Inc. et al.
United States District Court
Western District of Washington
Case No. CV-03-1415L
Expert Report 2004
Deposition 2004

17. Fleetwood Enterprises, Inc., and Fleetwood Folding Trailers, Inc., v.The Coleman Company, Inc., and Coleman Holdings, Inc.
District Court, Sedgwick County, Kansas
Case No. 03 DV 2029
Expert Report 2004
Deposition 2004

18. Rosa Parks v. Laface Records
State of Michigan in the Circuit Court for County of Wayne
Case No. 99-76405
Video Deposition 2004

19. Ken's Food, Inc. v. Ken's Steak House, Inc.
United States District Court
District of Massachusetts
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Expert Report 2004

20. Jimmy Dean v. Sara Lee Corporation
United States District Court
Northern District of Texas, Lubbock Division
Case No. 5-04CV0039-C
Expert Report 2005

21. Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc. et al.
United States District Court
District of Colorado
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Expert Report 2005
Deposition 2005

22. Precision Replacement Parts Corp. v. Auto Glass Components, Inc.
United States District Court
Western District of Washington at Seattle
Case No. 04-CV-566L
Expert Report 2005

23. Kevin Trudeau et al. v. George Lanoue, et al.
United States District Court
Northern District of Illinois
Eastern Division
Civil Action No. 04C-7165
Expert Report 2005
Litigation pending

24. Collins & Aikman Corporation, et al.
United States Bankruptcy Court
Eastern District of Michigan
Southern Division
Case No. 05-55927 SWR
Expert Report 2006

25. Terance Dunn v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, LLP
Professional Negligence Arbitration
Los Angeles, California
Expert Report 2006
Deposition 2006
Testimony at Arbitration 2006

26. Richard Bach and Russell Munson v. Forever Living Products U.S., et al.
United States District Court
Western District of Washington at Seattle.
Case No. C05-0970P
Expert Report 2006
Litigation Pending

27. El Comandante Management Company LLC, et al.
United States Bankruptcy Court
District of Puerto Rico
Cast No. 04-10938 (ESL)
Expert Report 2006

28. Aronchick / InKine v. Wolf Block, et al.
Court of Common Pleas, Philadelphia County, PA.
Civil Action 0712 (Nov. Term, 2004)

Expert Report 2006
Litigation Pending

29. World Triathlon Corporation v. Dawn Syndicated Productions, et al.
United States District Court
Middle District of Florida
Tampa Division
Case No. 8:05cv983-T27-EAJ
Expert Report 2006
Deposition 2006
Litigation Pending

QUALIFICATIONS OF DAVID DREWS

I am currently a Director at CONSOR Intellectual Asset Management. Prior to that, I was the founder and president of IPMetrics LLC. I have over twenty years experience as a financial analyst, primarily concentrated in valuing intellectual property of all types, including trademarks, copyrights, patents, know-how, trade secrets and domain names. My valuation experience includes projects involving use of the assets as collateral, transaction due diligence, joint venture negotiations, licensing, transfer pricing and bankruptcy / reorganization.

I have performed valuations on assets as diverse as apparel, financial services, retail, automotive, processed food, non-profit organizations, entertainment, sports and consumer brand trademarks; mechanical, chemical and electrical patents, processes and trade secrets; customer lists; non-compete agreements; and entertainment industry characters, trademarks and copyrights. I have also been called upon to calculate damages related to infringement of intellectual property in numerous litigation and arbitration proceedings.

Prior to concentrating on intellectual property, I was responsible for the analysis and valuation of a broad range of credit applicants and investment vehicles for California Commerce Bank. Before joining California Commerce, I performed research at William O'Neil & Co. My responsibilities at O'Neil included in-depth analyses of companies in many different industries, including pharmaceuticals, retail, processed foods, apparel, biotechnology, computer software, financial services and scientific instruments, among others. I hold a Bachelor of Science degree in business administration / economics from the University of Nebraska.

In addition to regularly publishing articles for numerous journals, industry publications and websites, I am a frequent lecturer on IP valuation issues. I have taught several courses for intellectual property valuation and related topics, including the *Intellectual Property Damages* course for the National Association of Certified Valuation Analysts, the *Valuation of Intellectual Property* course offered by the National Technology Transfer Center in Wheeling, West Virginia and the *Intellectual Property Valuation* course at the NASA Langley Research Center in Hampton, Virginia.

I have served on the Valuation and Taxation Committee and the Trademarks Committee of the Licensing Executives Society.

I. PROFESSIONAL INSTRUCTION

- National Association of Certified Valuation Analysts (NACVA) – Instructor
  Course: Intellectual Property: Calculating Damages and Lost Profits
- NASA Langley Research Center – Guest Instructor
  Course: Valuation of Intellectual Property
- National Technology Transfer Center – Past Instructor
  Course: Valuation of Intellectual Property

II. PRESENTATIONS

- Due Diligence Symposium 2007 – Iselin, NJ
- BIO IPCC Spring Meeting 2007 – San Diego, CA
- ACI IP Due Diligence 2007 – San Francisco, CA
- NACVA Advanced Valuation Class 2006 – Coronado, CA
- SRI Monetization of Intellectual Property 2006 – Boston, MA
- IP Licensing Summit 2006 – New York, NY
- AIPLA Spring Meeting 2006 – Chicago, IL
- PhillipsLytle / HSBC IP Securitization Conference 2006 – New York, NY
- Commercial Finance Association Annual Conference 2005 – San Diego, CA
- LINK New York 2005 – New York, NY
- FindLaw IP Strategies in Deals 2004 – Palo Alto, CA
- Sterling Intellectual Property Issues Seminar 2004 – San Diego, CA
- LES Annual Meeting 2000 – Toronto, Canada
- Glasser Legalworks 11th Annual Institute 2000 – San Francisco, CA
- LES Annual Meeting 1999 – San Antonio, TX
- Corporate Reorganizations 1999 – Chicago, IL
- Glasser Legalworks 10th Annual Institute 1999 – Los Angeles, CA
- IP Business Seminar 1998 – San Diego, CA
- Dow Chemical IP Donation Seminar 1998 – Midland, MI

III. PROFESSIONAL ASSOCIATIONS

- CFA Institute (CFA)
- CFA Society of San Diego (CFASSD)
- Intellectual Property Management Institute (IPMi)
- Licensing Executives Society (LES)
- San Diego Intellectual Property Law Association (SDIPLA)

IV. PUBLICATIONS

- **The Intangible Assets Handbook – Maximizing Value from Intangible Assets (Co-editor)**
  (American Bar Association, March 2007)
- **Patent Valuation Techniques**
  (*les Nouvelles*, March 2007)
- **Intellectual Property Valuation Techniques**
  (*The Licensing Journal*, October 2006)
- **Calculating Questions: Accepted Approaches to Patent Valuation**
  (*Patent World*, September 2006)
- **The Secured Lender (Second Installment)**
  (www.ipfrontline.com, March 2006)

- **The Secured Lender (Parts I & II)**
  (www.ipfrontline.com, January 2006)
- **The Impact of SFAS 141 & 142 on Intangible Asset Management**
  (*The Secured Lender*, November / December 2005)
- **Intellectual Property Valuation: Context is Critical**
  (*The Secured Lender*, September 2005)
- **Intellectual Property: Collateral for Securitization or Lending**
  (*The Secured Lender*, July 2005)
- **IP Valuation Techniques**
  (*IP Strategies in Deals 2004*, October 2004)
- **Intellectual Property Valuation** (Updated)
  (*Chapter 23 - Drafting License Agreements, Fourth Edition*, 2004 Supplement, September 2004)
- **Valuing for Charitable Donation**
  (*Chapter 19 – Fundamentals of Intellectual Property Valuation Primer*, American Bar Association, July 2004)
- **Patent License Evaluation**
  (*Patent & High Technology Licensing 2004*, May 2004)
- **Intangible Asset Valuation Techniques**
  (*Intellectual Property Issues*, October 2003)
- **Leveraging Intellectual Property via the Capital Markets**
  (*Intellectual Property Issues*, September 2003)
- **Intellectual Property Valuation**
  (*Chapter 23 - Drafting License Agreements, Fourth Edition*, September 2002)
- **The Benefits of Patent Donation**
  (www.corporateintelligence.com, February 2001)
- **The Cost Approach to IP Valuation: Its Uses and Limitations**
  (www.corporateintelligence.com, January 2001)
- **Value v. Fair Market Value**
  (www.corporateintelligence.com, December 2000)
- **Situations Where Valuation Comes Into Play**
  (www.corporateintelligence.com, November 2000)
- **A-Bundling We Will Go: When It Comes to Intangible Assets, the Sum is Often Greater Than its Parts**
  (www.corporateintelligence.com, October 2000)
- **Donating Idle Patents**
  (*Patent Strategy & Management*, August 2000)
- **Giving Away Your Patents: How to Squeeze Tax Advantages from Unused IP Rights**

(IP*Network.com, September 1999)

- **Intellectual Property - The Key to Lower Risk and Higher Margins**
  (*les Nouvelles*, June 1999)
- **An Overlooked Way to Exploit Patents**
  (*The Intellectual Property Strategist*, April 1999)

Expert Witness and Legal Experience
Deposition and/or Trial Testimony
January 1999 through June 2007

1. Fruit of the Loom Bankruptcy Filing

   United States Bankruptcy Court
   District of Delaware
   Case No. 99-4497 (PJW)
   Expert Report, December 1999
   Courtroom Testimony 1999

2. Purebred Company, Inc. v. Purebred Pet Products, Inc., et al.
   United States District Court
   District of Colorado
   Civil Action No. 98 D 2392
   Expert Report 1999
   Deposition Testimony 2000

3. Gae Sharp Richardson, et al. v. The Boyds Collection, Ltd.
   United States District Court
   Northern District of Iowa
   Civil Action No. C96-344
   Expert Report 2000
   Deposition Testimony 2000

4. Warrior and Ultimate Creations v. Titan Sports, Inc. Diamond Company, Inc.
   Superior Court of the State of Arizona
   Maricopa County
   Civil Action No. CV96-15377
   Deposition Testimony 2000

5. Harry A. Ratner, et al. v. Stanley E. Foster, et al.
   Superior Court of the State of California
   San Diego County
   Case No. 732482
   Expert Report 2000
   Deposition Testimony 2000
   Trial Testimony 2000

6. Funimation Productions, Inc.
   v. ABC International Traders d/b/a MGA Entertainment
   American Arbitration Association
   Case No. 71 133 00559 99
   Expert Report 2000
   Deposition Testimony 2001

7. Purebred Company, Inc.
   v. Star-Kist Foods, Inc. d/b/a The Nature's Recipe Company
   United States District Court
   District of Colorado
   Civil Action No. 00 D 665
   Expert Report 2001
   Deposition Testimony 2001
   Trial Testimony 2002

8. Lollar Enterprises, et al. v. Medtech Capital Markets, LLC, et al.
   District Court for Arapahoe County
   State of Colorado
   Civil Action No. 00 CV 1875
   Expert Report 2002
   Deposition Testimony 2003
   Trial Testimony 2004

9. World Triathlon Corp. v. Dawn Syndicated Productions, et al.
   United States District Court
   Middle District of Florida – Tampa Division
   Case No. 8:05 CV 983-T27 EAJ
   Expert Report 2006
   Deposition Testimony 2006

10. Adidas America, Inc., et al. v. Payless Shoesource, Inc.
    United States District Court
    District of Oregon
    Case No. CV01-1655 RE
    Expert Report 2007
    Deposition Testimony 2007

11. Hambrecht Wine Group, L.P. d/b/a Belvedere Winery, L.P.
    v. Millennium Import LLC
    United States District Court
    Northern District of California – San Jose Division
    Case No. C 05-4625 JW HRL
    Expert Report 2007
    Deposition Testimony 2007

Expert Witness and Legal Experience
Expert Reports without Deposition or Trial
January 1999 through November 2006

1. 21st Century Film Corp. et al. v. Carolco Pictures, Inc., et al.
   Superior Court of the State of California
   Los Angeles County
   Case No. BC 079359
   Expert Report 1999

2. Trovan Ltd., et al. v. Pfizer, Inc.
   United States District Court
   Central District of California
   Civil Action No. 98-0094
   Expert Report 1999

3. Heidi Ott AG, Heidi Ott v. Target Corporation
   United States District Court
   District of Minnesota
   Docket No. 99-CV-01170
   Expert Report 2000

4. Kristian Erik Grimland, petitioner v. Debra Grimland, respondent
   District Court for Elbert County
   State of Colorado
   Case No. 02DR4, Division A
   Expert Report 2003

5. Precision Replacement Parts Corp. v. Auto Glass Components, Inc.
   United States District Court
   Western District of Washington at Seattle
   Case No. 04-CV-566L
   Expert Report 2005

6. Kevin Trudeau v. Electronic Retailing Association, et al.
   Superior Court of the State of California
   County of Ventura
   Civil Action No. CIV 236364
   Expert Report 2006

7. Collins & Aikman Corporation, et al.
   United States Bankruptcy Court
   Eastern District of Michigan
   Southern Division
   Case No. 05-55927 SWR
   Expert Report 2006

8. Digital Envoy, Inc. v. Google, Inc.
United States District Court
Northern District of California
Case No. C-04-01497 RS
Expert Report 2006

9. Terance Dunn v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, LLP
Professional Negligence Arbitration
Los Angeles, California
Expert Report 2006

10. Richard Bach and Russell Munson v. Forever Living Products U.S., et al.
United States District Court
Western District of Washington at Seattle.
Case No. C05-0970P
Expert Report 2006

11. Michael Hanna on behalf of Estate of Ken Hanna v. Ken's Foods, Inc., et al.
Superior Court for the Commonwealth of Massachusetts
Middlesex
Docket No. 03-3815
Expert Report 2006

12. Louis Vuitton Malletier v. Dooney & Bourke, Inc.
United States District Court
Southern District of New York
Case No. 04 Civ. 2990
Expert Report 2007

13. Luppen Holdings, Inc. v. Pitney Bowes, Inc.
United States District Court
Central District of California
Case No. 98-5336-RJK (CWx)
Expert Report 2007

Fernando Torres, MSc – Senior Economist

Mr. Torres is Senior Economist at CONSOR®, an intellectual asset consulting firm headquartered in La Jolla, California.

Mr. Torres has over 25 years of experience in Economics, Financial Analysis, and Business Management in the U.S. and Mexico.

He holds a B.A. in Economics from the Metropolitan University in Mexico City (1980), a Graduate Diploma from the University of East Anglia (U.K., 1981), and a Master's Degree specializing in Econometrics from the University of London, England (1982).

Mr. Torres is a member of the National Association of Forensic Economics, and of the Western Economics Association International, as well as a founding board member of the San Diego chapter of the National Society of Hispanic MBAs.

His career has spanned from academia, to branches of government, to private industry and consulting. In Mexico, he was Professor of Economics at his Alma Mater from 1982 through 1990, teaching courses on Economic Policy, Economic Growth, Microeconomics, and Quantitative Methods. During 1983 – 1988, he also served as Director of Studies, Methods, and Policy for the Ministry of Energy and Nationalized Industries (SEMIP) playing a major part in the adoption and implementation of inflation-recognition accounting standards, and productivity tracking systems.

Since 1988, his career has centered on Financial Analysis and Management, having been instrumental in launching several business ventures in the computer services and the health care industry.

In the last decade, Mr. Torres developed a financial advice practice in the San Diego area, as a licensed general securities representative (NASD Series 7) and a registered investment advisor representative (NASD Series 65) working for AXA Advisors, LLC. In 2005 he joined CONSOR, where he has been applying his finance and business experience and skills in quantitative analysis, to the valuation of intangible assets.

Mr. Torres has made presentations regarding intangible asset valuation topics in various venues, many of which qualify for CLE credit in most states. He has published several articles on economic and financial analysis, during the past ten years his publications are:

1. "Establishing Licensing Rates through Options," in: ipFrontline.com, September 12, 2006 (http://www.ipfrontline.com/depts/article.asp?id=12586&deptid=3).

2. "Options: Unique Approach to Accurate Licensing Rates and Patent Values," Chapter 9 in: Practicing Law Institute, Patent Law Institute

2007: The Impact of Recent Developments on Your Practice, Course Handbook (March 19, 2007).

As Senior Economist, Mr. Torres has led consulting teams at CONSOR valuing trademarks, patents, and enterprises, as well as assessing economic damages arising in a variety of intellectual property litigation cases, which include the expert reports in the following cases:

1. Fleetwood Enterprises, Inc., and Fleetwood Folding Trailers, Inc., v. The Coleman Company, Inc., and Coleman Holdings, Inc.
   District Court, Sedgwick County, Kansas
   Case No. 03 DV 2029

2. Jimmy Dean v. Sara Lee Corporation
   United States District Court
   Northern District of Texas, Lubbock Division
   Case No. 5-04CV0039-C

3. Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc. et al.
   United States District Court
   District of Colorado
   Case No. 04-D-329 CBS

4. Precision Replacement Parts Corp. v. Auto Glass Components, Inc.
   United States District Court
   Western District of Washington at Seattle
   Case No. 04-CV-566L

5. Kevin Trudeau et al. v. George Lanoue, et al.
   United States District Court
   Northern District of Illinois
   Eastern Division
   Civil Action No. 04C-7165

6. Collins & Aikman Corporation, et al.
   United States Bankruptcy Court
   Eastern District of Michigan
   Southern Division
   Case No. 05-55927 SWR

7. Richard Bach and Russell Munson v. Forever Living Products U.S., et al.
   United States District Court
   Western District of Washington at Seattle.
   Case No. C05-0970P

8. El Comandante Management Company, LLC, et al. Debtors
United States Bankruptcy Court
District of Puerto Rico
Case No. 04-10938 ESL

9. World Triathlon Corporation, Inc. v.
Dawn Syndicated Productions Et Al.,
United States District Court
Middle District of Florida, Tampa Division;
Case No. 8:05 CV-983-T27 EAJ

Documents Reviewed:

1. Testimony of Dr. Michael Pelcovits, 7/9/2007 Hearing
2. Written Direct Testimony of David J. Frear, 10/30/2006
3. Direct Testimony of Eric Logan, 10/30/2006
4. Final Subscriber Chart (PDF)
5. Direct Testimony of Gary Parsons, 10/30/2006
6. Written Direct Testimony of Jeremy M. Coleman, 10/30/2006
7. Written Direct Testimony of Mel Karmazin, 10/30/2006
8. Opening Statements
9. Witness Testimony and Exhibits Jointly Submitted by Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc., 1/17/2007 (Public Version)
10. Oprah & XM Powerpoint dated 12/7/2005 (XMCRB00141745 – XMCRB00141760
11. Amended Testimony and Exhibits of Michael Pelcovits, 5/14/2007 (Public and Restricted Versions) **(Relevant Contracts Included)**
12. Testimony of Michael Pelcovits, with Exhibits and Appendices, 10/27/2006 (CV also)
13. Testimony of Michael Pelcovits, 10/31/2005
14. Witness Testimony for XM Satellite Radio, Inc., 1/17/2007 (Public Version)
15. Introductory Memorandum to the Written Direct Statement of Sirius Satellite Radio Inc. (Public Version)
16. Introductory Memorandum to the Written Direct Statement of Sirius Satellite Radio Inc. (Restricted Version)
17. Sirius –Expert-Attachments (PDF)
18. Expert Report of Dr. John R. Woodbury, 10/30/2006 (Public Version)
19. Pelcovits Testimony, 5/15/06 (soundex-pelcovits-5-15-16-open.pdf)

20. Direct Testimony of Stephen R. Cook, 10/30/2006

21. Written Direct Testimony of Steve Cohen, 10/27/2006

22. Written Direct Statement of SoundExchange, Inc., 10/30/2006

23. Soundex-Exh60.pdf

24. Soundex-Exh62.pdf, *Arbitron Edison Media Research – Internet 9: The Media and Entertainment World of Online Consumers*

25. Soundex-Exh70.pdf, *An extract from The 2005 Handbook of Competition Economists, June 2005*

26. Written Direct Statement of XM Satellite Radio, Inc., 1/17/2007 (Public Version)

27. Testimony of Sean Butson, CFA, 10/26/2006

28. XM Custom Study

29. XM Subscribership by Quarter_#247133 (links to press releases)

30. XM – MLB press clippings

31. XM – O&A press clippings

32. XM – Oprah press clippings

33. Sirius Quarterly Press Releases (20024Q – 20071Q)

34. Howard Stern – Sirius press release, 10/6/2004

35. Martha Stewart – Sirius press release, 4/18/2005

36. NASCAR – Sirius press release, 2/22/2005

37. NBA – Sirius press release, 12/13/2005

38. NCAA – Sirius press release, 11/29/2004

39. NFL – Sirius press release, 12/16/2003

40. Stern debut – Sirius press release, 1/9/2006

41. NFL Promotional Rights Agreement, 1/31/2004

42. Satellite Radio Rights Agreement by and between NFL Enterprises LLC and Sirius Satellite Radio, Inc., 1/31/2004

43. NFL Warrants Spreadsheet, 11/22/2006

44. Talent Agreement (O&A and XM), 8/2/2004, with Executive Summary and Exhibits/Analyses

45. Amendment 1 to Talent Agreement (O&A and XM), 4/20/2006, with Exhibit (CBS Agreement)

46. MLB Market Opportunity Executive Summary and Analyses (XM), 10/4/2004

47. Oprah – Programming & Marketing Investment Summary and Analyses (XM), 10/12/2005

48. Martha Stewart Living Omnimedia, Inc., Form 10-K, 12/31/2006

49. Martha Stewart Living Omnimedia, Inc., Form 10-Q, 3/31/2007

50. "Insight Information Co. Negotiating and Drafting Licensing Agreements Patent, Trade Secret and Technology Licensing: Key Elements," Prof. Karl F. Jorda, New York City, 11/2/1998

51. "Factors to Consider in the Relief from Royalty Method to Valuing Pharmaceutical Patents," Willamette Management Associates

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62. "Hilary Duff Shows a Taste For Candie's," money.cnn.com, 6/8/2005

63. "Beyonce Signs Endorsement Deal with L'Oreal," advertising.about.com, 8/30/2004

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66. "The Golf Digest 50," www.golfdigest.com, 3/5/2005

67. "Purse Is Just the Start For Golf's Major Winners," www.washingtonpost.com, 7/13/2005

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71. www.nascar.com

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SDARS – Consor Ex. 5

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

SDARS – Consor Ex. 6

Satellite Radio
Comparable Market-based License Agreements
Various Celebrities and Media

Celebrity	Licensee	Media / Format	Exclusive	Dates	Territory	Royalty Rate	Royalty Base	Other Compensation	Additional Notes
Bob Glidden	Glidden Performance	Drag Racing	No	1989	NA	8.00% - 8.00%	Gross sales		$2.5 million in damages for unauthorized use of Glidden's name by an automotive parts company.
Britney Spears	Famous Fixins, Inc.	Recording Artist	No	1999 - 2002	Global	9.00% - 9.00%	Net sales	$150,000 upfront fee, automatic reset to match any higher royalty rates paid to other celebrities	License for bubble gum with packaging featuring Britney Spears' name, logo, images, autographs and approved likenesses.
Britney Spears	Elizabeth Arden	Recording Artist	No	2004	NA	6.00% - 6.00%	Net sales		Royalty on sales of perfume, skincare goods, cosmetics.
Claudia Schiffer	PTN Media, Inc.	Model	No	1998	NA	20.00% - 60.00%	Net sales	$75,000 advance royalty	Name, likeness, photographs, voice recordings and endorsement of Claudia Schiffer for promoting 16 month calendar.
Estella Warren	PTN Media, Inc.	Model	No	1999	Global	20.00% - 20.00%	Net sales	$30,000 advance royalty	Name and likeness of Estella Warren for use on websites and downloadable electronic calendars.
Ingrid Bergman	Artisan House, Inc.	Actress	No	1995	NA	5.00% - 5.00%	Net sales	$1,000 upfront fee	Name, image, likeness, voice and signature of Ingrid Bergman for use on metal wall-mounted sculptures.
Princess Diana	Various	Royalty	No	1998	NA	30.00% - 30.00%	Net sales		Name or image of Princess Diana for use on t-shirts, mugs, other gifts, etc.
Tony Stewart	Famous Fixins, Inc.	Auto Racing	No	2000	US	15.00% - 15.00%	Net sales		Name, likeness and signature of Tony Stewart and likeness of #20 Winston Cup car used on mints.
Tony Stewart	PTN Media, Inc.	Auto Racing	No	2002	US	12.00% - 12.00%	Net sales	$10,000 advance	Name and likeness of Tony Stewart in conjunction with Palm computer.
Marilyn Monroe	World Doll Celebrity Collection	Actress	No	1983	NA	12.50% - 12.50%	Net sales		18 inch replicas of Marilyn Monroe.
Marilyn Monroe	Clay Art	Actress	No	1988	NA	7.00% - 10.00%	Net sales		47 ceramic gift products featuring Marilyn Monroe.
Marilyn Monroe	Backflips	Actress	No	1986	NA	7.00% - 7.00%	Net sales		Swimwear and cover-up apparel.

1st Quartile	16.3% - 60.0%
2nd Quartile	11.0% - 16.3%
3rd Quartile	7.0% - 11.0%
4th Quartile	5.0% - 7.0%
Minimum	5.0%
Maximum	60.0%
Mean	14.4%
Median	11.0%

Sources: LER, RoyaltySource, RoyaltyStat, various 10-K reports

Satellite Radio
Comparable Market-based Compensation Agreements
NFL, NBA, CFL, MLB

Licensor	Licensee	Exclusive	Date	Territory	Royalty Rate	Royalty Base	Product Category	Additional Notes
NBA Europe	Nasco Products International, Inc.	No	1998	International	13.00% - 13.00%	Net sales	Sports bags, backpacks, waist packs	Minimum guarantees range from $7,000 to $40,000 over the life of the contract.
NFL Properties	Fotoball USA, Inc.	No	2000	NA	10.00% - 10.00%	Net sales	Team logo footballs, commemorative footballs, etc.	Minimum guarantees are $50,000 in year 1 and $65,000 in year 2. Advance payments are $30,000 in year 1 and $35,000 in year 2.
NFL Properties	JC Penney	No	1997	NA	10.00% - 10.00%	Net sales	Men's and children's body-care segment	Each of 30 NFL teams has a line of products.
ESPN Enterprises	OnHealth Network Co.	No	1994	NA	10.00% - 10.00%	Net sales	Sports fitness CDs	$425,000 advance payment
Canadian Football League	Collegiate Licensing Co.	No	2003	NA	5.00% - 10.00%	Net sales	Vintage uniforms, hats, pennants	
MLB Properties, Inc.	Nasco Products International, Inc.	No	1998	International	10.00% - 10.00%	Net sales	backpacks, tote bags, etc.	Use of team trademarks.
MLB Players Association	Fotoball USA, Inc.	No	2003	NA	5.00% - 10.00%	Net sales	Photo baseballs, pins, magnets, bobblehead dolls, mini baseball gloves, etc.	Promotional products provided to baseball clubs.
NBA Properties, Inc.	MacGregor Promotion Corp.	No	1988	NA	7.50% - 10.50%	Net sales	Various apparel items	Minimum guarantees range from $100,000 in the first year to $200,000 in the fifth year.
NBA Properties, Inc.	Innovo Group, Inc.	No	1998	NA	12.00% - 12.00%	Net sales	Various textile products	$12,500 advance payment.
National Football League Alumni	American Sports History	No	1996	NA	8.00% - 8.00%	Net sales	Historical sports magazines	Minimum royalties of $1,500,000 over six years.

1st Quartile	10.1% - 13.0%
2nd Quartile	10.0% - 10.1%
3rd Quartile	9.5% - 10.0%
4th Quartile	5.0% - 9.5%
Minimum	5.0%
Maximum	13.0%
Mean	9.7%
Median	10.0%

Sources: LER, RoyaltySource, RoyaltyStat, various 10-K reports

Satellite Radio
Comparable Market-based Compensation Agreements
NASCAR

Licensor	Licensee	Exclusive	Date	Territory	Royalty Rate	Royalty Base	Product Category	Additional Notes
Redline Sports Marketing, Inc.	Padova International	No	2005	NA	12.00% - 12.00%	Net sales	Various sporting apparel	Name, likeness and signature of Bobby Labonte, likeness of #18 Nextel Cup car.
Bob Glidden	Glidden Performance	No	1989	NA	8.00% - 8.00%	Gross sales	Automotive parts	$2.5 million in damages for unauthorized use of Glidden's name by an automotive parts company.
Tony Stewart	Famous Fixins, Inc.	No	2000	US	15.00% - 15.00%	Net sales	Mints	Name, likeness and signature of Tony Stewart and likeness of #20 Winston Cup car.
Tony Stewart	PTN Media, Inc.	No	2002	US	12.00% - 12.00%	Net sales	Palm computer accessories	Name and likeness of Tony Stewart - $10,000 advance.
NASCAR	Oxboro Outdoors, Inc.	No	1999	NA	17.00% - 17.00%	Net sales	Fishing tackle	Use of names of NASCAR drivers.
NASCAR	Sam Bass Illustration & Design	Yes	~ 2000	NA	15.00% - 20.00%	Net sales	Paintings, other art	Official artist of NASCAR.
Carl Haas Racing Teams, Ltd.	CART	No	1997	NA	25.00% - 25.00%	Gross sales	CART merchandise	CART pays promoter (Haas) 25% of gross sales after taxes.

1st Quartile	17.0% - 25.0%
2nd Quartile	15.0% - 17.0%
3rd Quartile	12.0% - 15.0%
4th Quartile	12.0% - 12.0%
Minimum	8.0%
Maximum	25.0%
Mean	15.2%
Median	15.0%

Sources: LER, RoyaltySource, RoyaltyStat, various 10-K reports

Satellite Radio
EPM Communications - The Licensing Letter Trends Report (2007)
Average Royalty Rates for Sports and Celebrity Properties

Property Type	2001	2002	2003	2004	2005	2006	Range	Average
Celebrities / Estates	9.6%	8.4%	6.3%	10.0%	10.1%	10.3%	3 - 14%	9.0%
Entertainment / Character	11.0%	10.8%	11.4%	11.0%	11.0%	11.0%	4 - 17%	10.9%
Sports	10.0%	8.3%	9.5%	8.8%	7.8%	9.2%	6 - 15%	8.9%
Trademarks / Brands	7.8%	8.1%	9.5%	8.2%	7.2%	7.7%	5 - 12%	7.8%

Selected Product Categories	Sports Royalty Rate Range	Celebrity Royalty Rate Range
Apparel / Accessories	8% - 12%	10% - 14%
Domestics	8% - 10%	8% - 12%
Food / Beverage		3% - 5%
Health / Beauty		12% - 14%
Gifts / Novelties	9% - 12%	
Sporting Goods	8% - 10%	
Toys / Games	8% - 10%	

Source: The Licensing Letter Royalty Trends Report, EPM Communications, 2007

SDARS – Consor Ex. 7

Satellite Radio
Howard Stern Compensation Analysis
July 24, 2007

COST OF TALENT	**Min.**	**Max.**
Net Present Value (NPV) of Contract Cost ($000's)	$ 245,932	$ 245,932
BRAND VALUE CARVE-OUT		
NPV of Contract Cost	$ 245,932	$ 245,932
Industry Operating Profit @ 26.61% Profit Margin	89,171	89,171
Equivalent Wholesale Revenue Basis	$ 335,104	$ 335,104
Brand Royalty Rate (based on comparable transactions)	20.0%	15.0%
Exclusive Brand Value Carve-out	$ 67,021	$ 50,266
NPV of Contract Cost Adjusted for Brand Value	$ 178,912	$ 195,667
ENDORSEMENT VALUE CARVE-OUT		
Annual Endorsement Value (Exclusive Basis)	$ 5,000	$ 4,100
PVIFA (15%, 6.5 years)	3.98	3.98
Exclusive Endorsement Value Carve-out	$ 19,895	$ 16,314
NPV of Contract Cost Adjusted for Brand and Endorsement Value	$ 159,017	$ 179,353
EXCLUSIVITY VALUE CARVE-OUT		
NPV of Contract Cost Adjusted for Brand and Endorsement Value	$ 159,017	$ 179,353
Imputed Discount for Exclusivity (%)	*79.2%*	*74.0%*
Exclusivity Value Carve-out	$ 125,881	$ 132,759
RESIDUAL NON-EXCLUSIVE CONTRACT COST (RNECC)	**$ 33,136**	**$ 46,594**
RNECC AS % OF NPV OF CONTRACT COST	**13.5%**	**18.9%**

Satellite Radio
Howard Stern Compensation Analysis
July 24, 2007

Exclusivity Premium Analysis			
100% Capture of XM Subscribers	**SIRIUS**	**XM**	**TOTAL**
Subscribers (Q3 2004)	662,289	2,516,023	3,178,312
Average Subscriber Share	20.8%	79.2%	100.0%
Exclusive Subscriber Share:			
Base Subscriber Capture	20.8%		
XM Subscriber Capture @ 100%	79.2%		
Exclusive Subscriber Share	100.0%		
Exclusive Value	245,932		
Non-Exclusive Value	51,247		
Premium	**379.9%**		
Discount	**79.2%**		

75% Capture of XM Subscribers	**SIRIUS**	**XM**	**TOTAL**
Subscribers (Q3 2004)	662,289	2,516,023	3,178,312
Average Subscriber Share	20.8%	79.2%	100.0%
Exclusive Subscriber Share:			
Base Subscriber Capture	20.8%		
XM Subscriber Capture @ 75%	59.4%		
Exclusive Subscriber Share	80.2%		
Exclusive Value	245,932		
Non-Exclusive Value	63,891		
Premium	**284.9%**		
Discount	**74.0%**		

SDARS – Consor Ex. 8

Satellite Radio
Comparable Market-based Compensation Agreements
Celebrity Endorsements

Celebrity	Sponsor	Media / Format	Date	Territory	Compensation
Julia Roberts	Gianfranco Ferré	Print	2006	Outside US and Canada	$5 million for one year
Catherine Zeta-Jones	T-Mobile	Print / TV	2002	Global	$10 million / year for two years
Celine Dion	Chrysler	Print / TV	NA	Global	$14 million over three years
Brad Pitt	Heineken	TV	2005	Global	$4.5 million for one ad / two years outside the US
Fergie	Candie's	TV / etc.	NA	Global	$4 million for use of "Candie's" in song lyrics
Nicole Kidman	Chanel No. 5	Print / TV	2004	Global	$4 million / year for three years
Sean Combs	Guthy-Renker	TV	NA	Global	$3 million for one year
Alicia Keys	Guthy-Renker	TV	NA	Global	$3 million for one year
Gwyneth Paltrow	Estée Lauder	Print / TV	2005	Global	$3 million / year for multiple years
Jessica Simpson	Guthy-Renker	TV	2005	Global	$2.5 million / year for three years
Catherine Zeta-Jones	Elizabeth Arden	Print / TV	NA	Global	$8 million over four years
Scarlett Johansson	L'Oreal	Print / TV / Internet / POS	2005	Global	$2 million / year for two years
Penelope Cruz	L'Oreal	Print / TV / Internet / POS	2005	Global	$2 million / year for two years
Charlize Theron	Dior	Print / TV	2004	Global	$2 million / year for three years
Hilary Duff	Candie's	Print / TV	2005	Global	$1 million for one year
Beyonce Knowles	L'Oreal	Print / Appearances	2004	Global	$4.7 million over five years

Sources: Adweek, press releases, magazine articles

Annual Payments in Millions

1st Quartile	$4.1 - $5.0
2nd Quartile	$3.0 - $4.1
3rd Quartile	$2.0 - $3.0
4th Quartile	$0.8 - $2.0
Mean	$3.04
Median	$3.00

Satellite Radio
Comparable Market-based Compensation Agreements
Sports Endorsements

Sports Star	Sponsor	Date	Products	Compensation
Serena Williams	Puma	1997	Tennis products	$12 million over five years
Tiger Woods	Accenture	2003	Business services	$8 million annually
Venus Williams	Reebok	2000	Tennis products	$38 million over five years
Tiger Woods	American Express	2000	Financial services	$7 million annually
Tiger Woods	Titleist	1996	Golf products	$1 million annually over three years
Tiger Woods	Buick	2004	Cars	$7 million annually
Tiger Woods	Disney	2004	Cars	$5 million annually
Tiger Woods	TLC Laser Eye Centers	2000	Laser surgery	$3 million annually
Tiger Woods	Tag Heuer	2002	Watches	$2 million annually
Jim Furyk	Argent	NA	Software	$1.5 million annually
Yao Ming	Unicom	NA	Business services	$3 million over three years
Jim Furyk	Hershey / Reese's	NA	Candy	$2 million over two years
Jim Furyk	Exelon Energy	NA	Energy products	$1 million annually
Michael Phelps	AT&T Wireless	NA	Business services	$250,000 for one year
Michael Phelps	Speedo	NA	Swimwear	$500,000 over four years
Michael Phelps	Argent Mortgage	NA	Software	$250,000 over two years

Sources: Adweek, press releases, various magazines.

Annual Payments in Millions

1st Quartile	$5.5 - $8.0
2nd Quartile	$1.8 - $5.5
3rd Quartile	$1.0 - $1.8
4th Quartile	$0.0 - $1.0
Mean	$3.00
Median	$1.75

Satellite Radio
Primary Car/Team Sponsorships
NASCAR

Corporate Owner	Sponsor	Team	Annual Fee	Sponsor Since	Sponsor Category
Busch Series					
Swedish Match AB	Timber Wolf Moist Snuff	Brewco Motorsports - #37 Timber Wolf team	$1 million	1996	Tobacco
Regis Corp.	Supercuts	FitzBradshaw Racing - #8 Supercuts team	$1 million-plus	2002	Services
U.S. Marine Corps	U.S. Marine Corps	Rensi Motorsports - #25 Team Marines	$1 million-plus		Government
Rockwell Int'l Corp.	Rockwell Automation	Richard Childress Racing - #21 Rockwell Automation team	$1.5 million-plus	2000	Machinery & Parts
U.S. Air Force Auxiliary	Civil Air Patrol	Lewis Motorsports - #46 Civil Air Patrol team	$2 million	2002	Government
General Motors Corp.	ACDelco	Richard Childress Racing - #2 ACDelco team	$3 million		Automotive – Aftermarket
Bayer AG	Bayer / Alka-Seltzer	BACE Motorsports - #33 Bayer / Alka-Seltzer team	$750,000-plus	1993	Pharmaceutical
Craftsman Truck Series					
Waterloo Industries, Inc.	Waterloo Tool Storage	Mittler Brothers Racing - #63 Waterloo Tool team	$2 million		Tools
NEXTEL Cup Series (Previously WINSTON Cup)					
General Motors Corp.	GM Goodwrench Service Plus	Richard Childress Racing - #29 GM Goodwrench team	$12 million	1988	Automotive – Aftermarket
Home Depot Inc.	Home Depot	Joe Gibbs Racing - #20 Home Depot team	$12 million	1999	Retail – Hardware / DIY Store
Pfizer Inc.	Viagra	Roush Racing - #6 Pfizer / Viagra team	$12 million	2001	Pharmaceutical
E. I. du Pont de Nemours & Co. Inc.	DuPont Automotive Finishes	Hendrick Motorsports - #24 DuPont Automotive Finishes team	$15 million	1992	Automotive – Aftermarket
United Parcel Service, Inc.	UPS	Robert Yates Racing - #88 UPS team	$16 million	2001	Mailing & Shipping
Anheuser-Busch Cos., Inc.	Budweiser	DEI Racing - #8 Budweiser team	$2 million	1992	Beverages – Beer
Eastman Kodak Co.	Kodak MAX Film	Morgan-McClure Motorsports - #4 Kodak MAX Film team	$4 million-plus	1986	Photo Supplies / Services
Interstate Batteries System of America, Inc.	Interstate Batteries	Joe Gibbs Racing - #18 Interstate Batteries team	$5 million	1997	Automotive – Aftermarket
ALLTEL Corp.	ALLTEL	Penske Racing - #12 ALLTEL team	$5 million-plus		Telecommunications
Caterpillar, Inc.	Caterpillar	Bill Davis Racing - #22 Caterpillar team	$5 million-plus	1997	Heavy Equipment
ChevronTexaco Corp.	Texaco / Havoline	Robert Yates Racing - #28 Texaco / Havoline team	$5 million-plus	1987	Fuel / Automotive – Aftermarket
CITGO Petroleum Corp.	CITGO Supergard	Roush Racing - #99 CITGO Supergard team	$5 million-plus		Fuel
Conseco, Inc.	Conseco	AJ Foyt Racing - #14 Conseco team	$5 million-plus	1999	Financial Services – Insurance
Ford Motor Co.	Motorcraft	Wood Brothers Racing - #21 Ford Motorcraft team	$5 million-plus	1992	Automotive – Aftermarket

Satellite Radio
Primary Car/Team Sponsorships
NASCAR

Corporate Owner	Sponsor	Team	Annual Fee	Sponsor Since	Sponsor Category
Genuine Parts Co.	NAPA Auto Parts	DEI Racing - #15 NAPA Auto Parts team	$5 million-plus	1995	Retail – Auto Parts
Georgia-Pacific Corp.	Georgia-Pacific / Sparkle	Petty Enterprises - #44 Georgia Pacific team	$5 million-plus	2001	Lumber & Paper Products
Jasper Engines & Transmissions	Jasper Engines	Jasper Motorsports - #77 Jasper team	$5 million-plus	1995	Automotive – Aftermarket
Kellogg Co.	Kellogg's Corn Flakes, Raisin Bran, Frosted Mini-Wheats	Hendrick Motorsports - #5 Kellogg's team	$5 million-plus	1992	Food – Cereal
Mars, Inc.	M&M / Mars	MBV Motorsports - #36 M&M's team	$5 million-plus	1997	Food – Candy
Newell Rubbermaid, Inc.	Sharpie	Roush Racing - #97 Rubbermaid / Sharpie Rubbermaid team	$5 million-plus		Office Equipment & Supplies
Pennzoil - Quaker State Co.	Pennzoil	DEI Racing - #1 Pennzoil team	$5 million-plus	1998	Automotive – Aftermarket
RealTree, Inc.	RealTree Camouflage	Dave Marcis Racing - #71 RealTree Camouflage team	$5 million-plus	1997	Apparel – Athletic
Sara Lee Corp.	Hills Bros. Coffee	Bill Davis Racing - #23 Hills Bros. team	$5 million-plus	2002	Beverages – Coffee
Adolph Coors Co.	Coors Light / Original Coors	Chip Ganassi Racing - #40 Coors Light team	$6 million-plus		Beverages – Beer
Sprint Corp.	Sprint	Petty Enterprises - #45 Sprint team	$6 million-plus (Incl. #43 & #44 Petty teams)	1999	Telecommunications – Long Distance
Procter & Gamble Co.	Tide	PPI Motorsports - #32 Tide team	$7 million-plus	2000	Cleaning Products
General Mills, Inc.	Cheerios / Betty Crocker / Chex / Pop Secret Popcorn	Petty Enterprises - #43 Cheerios team	$7.5 million	2000	Food – Cereal
Philip Morris Cos. Inc.	Miller Lite	Penske Racing - #2 Miller Lite team	$8 million-plus	1992	Beverages – Beer
AOL Time Warner Inc.	America Online (AOL)	Richard Childress Racing - #30 AOL team	$8 million-plus (Incl. Jeff Green Busch Series car)	2002	Internet – Service Provider

Source: IEG Sponsorship (Publisher: IEG LLC at www.sponsorship.com)

Annual Payments in Millions

1st Quartile	$6.0 - $16.0
2nd Quartile	$5.0 - $6.0
3rd Quartile	$4.0 - $5.0
4th Quartile	$0.8 - $4.0
Minimum	$0.8
Maximum	$16.0
Mean	$5.6
Median	$5.0

SDARS – Consor Ex. 9

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

SDARS – Consor Ex. 10

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

SDARS – Consor Ex. 11

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

SDARS – Consor Ex. 12

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

SDARS – Consor Ex. 13

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

Silverman

PUBLIC VERSION

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**

WRITTEN REBUTTAL TESTIMONY OF BRUCE G. SILVERMAN

INTRODUCTION

1. My name is Bruce G. Silverman. I am a marketing, advertising, and media consultant. I have been retained by counsel for Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Inc. ("XM") (collectively, "SDARS" (satellite digital audio radio services) or "Services") to provide expert testimony in this proceeding as a rebuttal witness. The focus of my testimony is the contention by SoundExchange's expert Dr. Michael Pelcovits that agreements entered into by Sirius and XM with non-music content providers should be used as a benchmark for the sound recording performance royalty rate to be set in this proceeding. Specifically, I will discuss why it is not appropriate to rely upon such agreements as benchmarks for the sound recording performance royalty rate without first adjusting for the many benefits conveyed by these agreements to Sirius and XM above and beyond the value of the non-music content itself. I will then discuss in detail one specific such benefit – namely, the valuable publicity that Sirius and XM received from these agreements – and will quantify at least a portion of the costs that

Sirius and XM would have had to incur had they purchased equivalent publicity in the marketplace.

BACKGROUND AND EXPERIENCE

2. I have spent my entire forty-year professional career in the marketing, advertising, and media industry. I landed my first advertising job in 1967 at the Ogilvy & Mather agency in New York City as a messenger and, over the course of the next thirteen years, rose through the ranks to the position of Senior Vice President/Executive Creative Director and member of the agency's U.S. Council of Directors. While at O&M, I created a number of very successful advertising campaigns, including "Don't Leave Home Without It" for American Express, "Merrill Lynch is Bullish on America," "Come to Shell for Answers," and "The Best Engineered Car in the World" for Mercedes Benz. In addition, I headed teams on the Lever Brothers, Panasonic, Nabisco, Owens-Corning Fiberglas, TWA, International Paper, and Mattel accounts.

3. In 1981, I joined Bozell & Jacobs, a large national advertising agency, as Executive Vice President/Executive Creative Director. At Bozell, I led creative teams on American Airlines, Greyhound, Quaker Oats, Zale Corporation, Ryder, Jaguar, Southwestern Bell, Armour, Minolta, and Pace Foods. I also led the team that created the AAdvantage Program for American Airlines, the industry's first frequent flyer program.

4. I headed Batten, Barton, Durstine & Osborne's (BBDO) western operations as Executive Vice President from 1984 to 1986. While at BBDO, which is part of the global marketing communications holding company Omnicom, I managed such accounts as Apple Computer International, Union Bank of California, Sizzler Restaurants, Dodge, Sebastiani Vineyards, and Coldwell Banker.

5. Following BBDO, I joined an entrepreneurial Los Angeles agency called Asher/Gould as President, COO, and partner. During my eleven years at Asher/Gould, the agency grew to become a top 100 shop, handling such clients as Suzuki, Pizza Hut, Baskin-Robbins, Pabst, SunAmerica Insurance, and the California Department of Health Services.

6. In 1997, I joined Initiative Worldwide (then known as Western International Media Corporation), the world's largest media planning and buying agency, eventually becoming President and CEO of the Initiative Partners division, which handled the bulk of the firm's U.S. business. Initiative planned and placed over $11 billion in media each year in the United States (including $1.5 billion in radio) for more than 500 clients, including the Walt Disney Company, Johnson & Johnson, Unilever, The Home Depot, Albertson's, Taco Bell, Bally's Total Fitness, and Six Flags.

7. In 2004, I became President and partner at an agency called WongDoody (named for its founders, Tracy Wong and Patrick Doody), an entrepreneurial group, which at the time had offices in Los Angeles, Seattle, and Dallas. The agency's accounts included MGM Home Video, Alaska Airlines, Sony Digital Entertainment, the Los Angeles Dodgers, Clif and Luna bars, Autodesk, UCLA Anderson Graduate School of Business, Nordstrom, and divisions of the Bank of America. I retired from WongDoody in 2005 to focus on a media company I had helped found two years earlier called 24/6, Inc. and my consulting practice.

8. I have served as a member of the Board of Directors of the American Association of Advertising Agencies, as Vice Chairman of the AAAA Western Region, and as Vice President of the Los Angeles Advertising Agency Association. I have been the recipient of nearly every significant advertising award, including two Gold Lions from the Cannes International Advertising Festival. I have guest lectured on advertising, marketing, and media at UCLA, the

University of Southern California, Pepperdine University, Stanford University, California State University San Diego, Cal State Los Angeles, Cal State Northridge, Rice University, the University of Houston, and the University of Texas. I have been interviewed countless times by advertising journals, and I have appeared many times on radio and television as a commentator on advertising and media-related issues.

9. I have served as an expert witness on a number of occasions on marketing, advertising, and media issues in cases involving trademark infringement, unfair competition, publicity rights, and breach of contract between advertisers, agencies, and media companies. A copy of my curriculum vitae is provided as Appendix 1, which is attached to my testimony.

ASSIGNMENT AND SUMMARY OF CONCLUSIONS

10. My testimony responds to the assertion by Dr. Pelcovits that the amounts paid by Sirius and XM pursuant to non-music programming agreements, including Sirius' deal with Howard Stern, should be used as a benchmark for the sound recording performance royalty being established in this proceeding. In particular, I have been asked to discuss, based on my decades of expertise in advertising and marketing, the SDARS' marketing rationale for entering into big-money news/talk/sports[1] agreements and to quantify the publicity value of a number of these agreements, including those with Howard Stern, Oprah Winfrey, the National Football League ("NFL"), Major League Baseball ("MLB"), Opie & Anthony, and Martha Stewart – significant value (as I show) generated for XM and Sirius over and above the right to transmit the content.

[1] Although programming such as that offered by Howard Stern, Oprah Winfrey, and Martha Stewart is sometimes referred to as "entertainment" programming, for simplicity, I will refer to the non-music programming I discuss in my testimony as "news/talk/sports" programming.

11. Based on my analysis, I conclude that it is not appropriate to use the amounts paid by Sirius and XM pursuant to news/talk/sports programming agreements as a guidepost for the amount that those services should pay to play sound recordings. That type of direct comparison does not properly take into account (i) the difference between recorded music, which is available from many sources including from free terrestrial radio, and the SDARS' news/talk/sports channels and shows, most of which are, to varying degrees, exclusive to the services or (ii) the related, and extremely valuable, strategic role Sirius' and XM's news/talk/sports programming has played (and continues to play) in their marketing efforts, a role that sound recordings do not and cannot, by themselves, play.

12. There is an old Scottish expression that applies as much to marketing as it does in its original context: "You can't save souls in an empty church." The first and perhaps most important step in any marketing campaign is to generate awareness: to "fill the church." The second step is to help consumers rationalize a decision to buy by positively differentiating the product or service. My testimony will illustrate how Sirius' and XM's investments in news/talk/ sports were much more than programming expenses; they have generated millions of dollars worth of publicity that has increased awareness about the unique attributes and benefits of satellite radio. The publicity engendered by the news/talk/sports deals entered into by Sirius and XM has helped to differentiate the two services from each other and from terrestrial radio and has provided millions of consumers with a rationale to pay for a service – radio – that they historically had gotten for free.

13. The materials I reviewed in the course of my assignment are listed in Appendix 2, which is attached to my testimony.

ANALYSIS

14. Dr. Pelcovits has proposed Sirius' agreement with Howard Stern as a benchmark for the royalties that record companies and performing artists should receive from the satellite radio services for the right to perform sound recordings. In his amended written direct testimony, he contends more broadly that the hundreds of millions of dollars paid out annually by Sirius and XM in connection with their various news/talk/sports programming deals should, as a percentage of revenue, be used as a benchmark for a "fair" sound recording performance royalty. This contention that the sound recording royalty rate should be based on amounts paid by the Services for non-music deals is misguided.

I. THE STRATEGIC IMPORTANCE OF THE SERVICES' NON-MUSIC DEALS

15. As an initial matter, news/talk/sports, on one hand, and music, on the other, play very different roles in the listener experience and, even more importantly, in creating awareness for the SDARS and in differentiating them from terrestrial radio and from each other. These different roles have profound consequences for the proper valuation of these deals.

16. Recorded music is ubiquitous. The recorded music that is played on the Services (with the exception of certain specially licensed programming such as Sirius' Metropolitan Opera channel) is readily available on, among other sources, terrestrial radio. It is not exclusive. And recorded music is about to become even more ubiquitous as (free) terrestrial "HD" digital radio expands. One of the key aspects of Sirius' and XM's original consumer proposition – i.e., specialized channels offering unique music formats such as country, reggae, show tunes, etc. – already is being emulated and offered for free (albeit with commercials) by many terrestrial radio stations in "HD" format, thus undermining one of the key initial consumer benefits of satellite radio.

17. By contrast, much of the news/talk/sports programming that Sirius and XM offer *is* exclusive to at least some degree. Sirius' Howard Stern and Martha Stewart cannot be heard on terrestrial radio or on XM. XM's Oprah Winfrey cannot be heard on terrestrial radio or on Sirius. Every NFL game cannot be heard on radio in every market throughout the country – with the listener's favorite announcers providing the play-by-play and analysis – anywhere except on Sirius, nor can a 24/7 NFL channel such as the channel offered on Sirius be heard anywhere on the radio except on Sirius. New York Yankees or Boston Red Sox fans living in Los Angeles, Dallas, or Detroit cannot hear all of the broadcasts of their favorite team on terrestrial radio, but they are available – exclusively – on XM. NASCAR, rapidly becoming America's most popular sport, is not available on terrestrial radio in all U.S. markets, but it is on Sirius, which offers a 24/7 NASCAR channel, a show by NASCAR champion Tony Stewart, and multiple channels during NASCAR races featuring pit-to-driver conversations. The list goes on and on. Moreover, virtually all of this exclusive programming involves major media personalities, stars, sports leagues, or news entities – in essence, "brands" that by association add value to the Sirius and XM brands, as I understand Dr. Erich Joachimsthaler explains in his rebuttal testimony. The exclusive nature of Sirius' and XM's news/talk/sports programming is a key differentiator for the Services vis-à-vis terrestrial radio and vis-à-vis each other. Non-exclusive sound recordings cannot – and do not – play a comparable role.

18. Both satellite radio services recognized this reality early on, when their efforts to acquire and retain subscribers with marketing campaigns that focused principally on commercial-free music were not working well enough to drive the growth they needed to achieve long-term viability. XM, which began service in September 2001, finished 2003 with 1,360,228

subscribers.[2] Sirius, which did not start service until July 2002, finished 2003 with 261,061 subscribers.[3] Together, the combined total subscribers across the entire country (approximately 1,621,000) represented fewer listeners than the combined audience of a couple of middle-ranked Los Angeles FM radio stations. It was clear that the satellite radio services had to re-gear their product offerings and consumer marketing strategies to survive.

19. Thus, the news/talk/sports "arms race" began. By focusing their marketing efforts on news/talk/sports programming, Sirius and XM were able to benefit in at least two ways: first, from the differentiation that each provided vis-à-vis terrestrial radio and from its satellite radio competitor; and second, from the publicity that the non-music deals generated.

20. Sirius fired the first shot when it signed its blockbuster seven-year deal with the National Football League in December 2003.[4] XM quickly responded, initiating MSNBC news programming in February 2004, followed by the launch of an Instant Traffic and Weather Channel a month later, both critical missing elements in the eyes of consumers who were accustomed to getting news, traffic, and weather information on their terrestrial radio dials.[5] XM

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[2] *See* Form 10-K, XM Satellite Radio Inc., at 32 (Mar. 1, 2007), available at http://media.corporate-ir.net/media_files/IROL/11/115922/reports/10K307.pdf.

[3] *See* News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2003 Financial and Operating Results* (Jan. 28, 2004), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=157236&cat=earnings&newsroom=.

[4] *See* News Releases, *Sirius and NFL Announce Multi-Year Broadcast and Marketing Agreement* (Dec. 16, 2003), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=152378&cat=&newsroom=.

[5] *See* News Releases, *XM Satellite Radio Adds New Talk Radio Programs and MSNBC to Programming Lineup* (Jan. 28, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1226; News Releases, *XM Launches Radio's First Advanced Instant Traffic & Weather Service for Major Markets*

later that year added National Public Radio programming, former Public Radio star commentator Bob Edwards, and the "shock jock" duo Opie & Anthony.[6]

21. The "arms race" escalated dramatically on October 6, 2004, when Sirius announced that Howard Stern, one of the highest profile, most listened-to voices on terrestrial radio, would move to Sirius in early 2006.[7] This announcement generated massive news coverage and publicity as Stern made appearance after appearance on major media outlets, proclaiming the wonders of Sirius. He even touted Sirius incessantly on his daily CBS Radio show. Consumers began to get the message: satellite radio must be "for real" if the self-described "King of All Media" was making it his new radio home. The Stern signing also caught the attention of Madison Avenue. Major media planning and buying agencies, which had virtually ignored satellite radio to that point – and in some cases, predicted an early demise for the concept – revised their thinking. Advertisers were now being told to "pay attention to satellite radio." As a case in point from my personal experience, I was President of the WongDoody advertising agency in Los Angeles at the time the Stern/Sirius deal was made public. I recall a conversation with my former colleague, Lucy Hughes, Research Director of Initiative Media (where I had been President for six years prior to joining WongDoody), in

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Nationwide (Mar. 1, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1224.

[6] *See* News Releases, *XM Radio's Bob Edwards Named 2004 Radio Hall of Fame Inductee* (Aug. 17, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=867; News Releases, Talk Radio Stars Opie and Anthony to Join XM Satellite Radio (Aug. 5, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=870.

[7] *See* News Releases, *Howard Stern and Sirius Announce the Most Important Deal in Radio History* (Oct. 6, 2004), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=151947&cat=&newsroom=.

which she told me that Initiative's "Crystal Ball" PowerPoint presentation (which I had co-authored with her, and which was used to update clients on how technology and fragmentation were affecting the media landscape and to predict future trends in media) had been revised – virtually overnight – to go from "bearish" to "bullish" about satellite radio as a direct result of Howard Stern's announcement that he was moving to Sirius. XM added to the newfound excitement about satellite radio by announcing its long-term deal with Major League Baseball in late October 2004.[8]

22. The "arms race" continued when Sirius followed up its Howard Stern deal by announcing that NASCAR would be switching from XM to Sirius and that multimedia powerhouse Martha Stewart – and her loyal female following – would be premiering on the Sirius service in 2006.[9] XM added programming by, among others, the well-known radio psychologist Dr. Laura Schlessinger, the Indy Racing League, and Air America.[10] Recorded

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[8] *See* News Releases, *Major League Baseball Partners with XM Satellite Radio for 11-Year, $650 Million Broadcast and Marketing Agreement* (Oct. 20, 2004), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1209.

[9] *See* News Releases, *NASCAR Selects Sirius as New Home on Satellite Radio* (Feb. 22, 2005), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=156582; News Releases, *Sirius Satellite Radio to Launch Exclusive Martha Stewart Channel* (Apr. 18, 2005), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=160512&cat=programming%20announcements&newsroom=.

[10] *See* News Releases, *XM Satellite Radio Expands 2005 Talk Programming Lineup with Dr. Laura and G. Gordon Liddy* (Jan. 5, 2005), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1203; News Releases, *XM Satellite Radio, Indy Racing League Announce Multi-Year Broadcasting and Marketing Agreement* (Mar. 3, 2005), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1195; News Releases, *XM and Air America Radio Announce Long Term Agreement; XM to Be Official Satellite Radio Network of Air America* (Apr. 11, 2005), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=819.

music, because of its "commodity" nature, was reduced to playing a secondary role in how the Services positioned themselves and in their marketing mix.

23. The marketing power of the Howard Stern-Sirius deal manifested itself almost immediately. Despite the fact that Howard Stern was not going to start broadcasting on Sirius for another fifteen months, Sirius' subscriber base jumped by nearly half a million subscribers in the fourth quarter of 2004 (an increase dwarfing all previous individual quarterly increases), bringing the year-end tally to 1,143,258.[11] The marketing benefit of the Howard Stern deal became even more apparent when Stern began broadcasting on Sirius in January 2006. In the fourth quarter of 2005, Sirius added a record 1,142,640 net subscribers, and another 761,187 net subscribers came onboard in the first quarter of 2006.[12] Sirius finished 2006 with 6,024,555 subscribers, nearly double its total of a year earlier.[13] XM, which continued to add news/talk/sports programming throughout the year – including an exclusive channel featuring America's top female media personality, Oprah Winfrey – had 7,628,552 subscribers as of

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[11] *See* News Releases, *Sirius Satellite Radio Announces Fourth Quarter and Year-End 2004 Financial and Operating Results* ((Jan. 26, 2005), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=154690&cat=&newsroom=; News Releases, *Sirius Satellite Radio Announces Third Quarter 2004 Financial and Operating Results* (Oct. 27, 2004), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=150206&cat=&newsroom=.

[12] *See* News Releases, *Sirius Satellite Radio Reports Record Subscriber Growth and Revenue for Fourth Quarter and Full-Year 2005* (Feb. 17, 2006), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=187963&cat=&newsroom=; News Releases, *Sirius Satellite Radio Reports Strong First Quarter 2006 Results* (May 2, 2006), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=194903&cat=&newsroom=.

[13] *See* News Releases, *Sirius Reports Fourth Quarter and Full Year 2006 Results* (Feb. 27, 2007), available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=231374&cat=&newsroom=.

December 31, 2006.[14] The marketing intent and effect of the exclusive news/talk/sports (and exclusive music) programming deals entered into by Sirius and XM was by no means incidental. It is clear from internal company documents that such effects were considered at the highest levels of management. For example, **[[**

]]." *See* "The First Sustainable Advantage," SIR00039438 at SIR00039442 (Oct. 23, 2003). Similarly, a Sirius document presented to the Board concerning Howard Stern states that Stern will **[[**

]]." "Howard Stern" Sirius document, SIR00038000, at SIR00038011. It further stated that Sirius "**[[**

]]." *Id.* A copy of this document is attached as SDARS-Silverman Exhibit 1.

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[14] *See* News Releases, *"Oprah & Friends" Exclusive Radio Channel to Launch on XM Satellite Radio* (Feb. 9, 2006), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1155; News Releases, *XM Adds Nearly 1.7 Million New Subscribers in 2006 for Total of More than 7.6 Million Subscribers, Achieves Positive Cash Flow from Operations During Fourth Quarter 2006* (Jan. 5, 2007), available at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1409.

24. Similarly, XM **[[**

]]:

[[

]].

See "Oprah & XM" presentation (Dec. 7, 2005), XMCRB00141745 at XMCRB00141749.

25. The Oprah deal **[[**

]]. *See* XM/Harpo Agreement, XMCRB 00034928 at XMCRB 00034932-41 (SX Ex. 132 DR).

26. The XM/Oprah deal, **[[**

]], is a prime example of how XM's and Sirius' non-music

programming deals support – indeed, are integral to – the Services' marketing efforts. In my opinion, XM actually substantially understated Oprah's value to it as a marketing resource when it allocated "only" **[[ ]]** million of her annual fee to its marketing budget. According to Harpo, Oprah's "normal" personal appearance fee for a one-day event runs anywhere from $750,000 to $1.5 million (depending on the nature of the appearance); therefore, just one of the many marketing-use provisions of the XM/Harpo deal – **[[**

]] – has a "street value" of $1.5 million to $3 million. These explicit and integral components of the deal have no analogue with respect to the right to play sound recordings. XM's license from SoundExchange does not, for example, commit Barry Manilow, Sting, or Beyonce Knowles to personally urge radio listeners to hear their music on XM.

27. Similarly, XM's deal with Opie & Anthony calls for **[[**

]]."

See XM/Opie & Anthony Agreement, 2005-5 XM CRB 00014180 at XMCRB 00014183-84. Opie & Anthony also must **[[**

]]." *See id.*

28. Another example of how marketing components are integrated into the various news/talk/sports deals is Sirius' deal with the National Football League, which lists a number of options (specifics to be determined over time) as to how the league would **[[**

]]. *See* Sirius/NFL Agreement, SIR00040084 at SIR00040098 (SX Ex. 129 DR).

29. Similarly, Sirius' deal with the National Basketball Association spells out the many ways the service would be merchandised in **[[**

]]. *See* Sirius/NBA Agreement, SIR00028029 at 00028037-38 (SX Ex. 131 DR).

30. Martha Stewart's deal with Sirius also called for promotional tie-ins with various Martha Stewart Omnimedia entities, including **[[**

]]." *See* Sirius/Martha Stewart Omnimedia Agreement, SIR00027583 at 00027591 (SX. Ex. 128 DR).

31. In fact, nearly all of the news/talk/sports deals that I have reviewed in connection with my assignment go beyond programming to discuss the marketing aspects/requirements of the relationship.

32. Only one conclusion can be reached about the relative marketing power of non-exclusive sound recordings versus news/talk/sports programming: recorded music is a commodity, but news/talk/sports programming – especially *exclusive* news/talk/sports

programming, as costly as it may be – is the difference-maker from a marketing standpoint. "Displaced" baseball fans (people who do not live in the market where their team's games are available on terrestrial radio) will be attracted to XM; "displaced" NFL football fans will be attracted to Sirius. Oprah Winfrey and Martha Stewart fans, unable to find comparable programming on terrestrial radio, will be attracted to XM or Sirius. Howard Stern fans, now unable to hear him on terrestrial radio, will be attracted to Sirius.

II. THE DOLLAR VALUE OF PUBLICITY GENERATED BY SIRIUS' AND XM'S NEWS/TALK/SPORTS DEALS

33. Some of the most powerful evidence of the marketing and promotional benefits of the Services' financial commitment to – and consumer interest in – news/talk/sports programming is the publicity generated by the announcements, on-air debuts, and other newsworthy aspects of Sirius' and XM's "star" news/talk/sports channels. In order to convey to the Judges a sense of the magnitude of this publicity, I was asked to tabulate and value some of the "media impressions" generated by some of the Services' key non-music deals, including XM's agreements with MLB, Oprah Winfrey, and Opie & Anthony and Sirius' agreements with the NFL, Howard Stern, Martha Stewart, and NASCAR.

A. Methodology

34. Under my direction, the Précis division of Millward Brown, a major market research firm located in Chicago, conducted research to capture a record of certain television and print media "hits" (i.e., television appearances by personalities, news or entertainment programming mentions, and magazine and newspaper articles) that resulted from Sirius' and XM's deals with certain talk personalities and sports leagues to help determine the marketing/promotional value of that programming. Specifically, Précis measured "hits" for

Sirius' deals with Howard Stern, Martha Stewart, the NFL, and NASCAR and XM's deals with Oprah Winfrey, MLB, and Opie & Anthony. This research, which I describe more fully below, was conducted in accordance with industry-accepted standards with which I am familiar. I believe the results are illuminating regarding the important strategic role that the various deals played in Sirius' and XM's marketing efforts.

35. Television hits were provided to Précis by VMS, a video monitoring service that downloads "closed-captioned" text and video descriptions of television programming running nationally on the major broadcast and cable networks as well as local programming from stations in the top twenty U.S. markets into its database.[15] Using Boolean search methodology, VMS was able to "link" television mentions of Sirius and Howard Stern, Sirius and the NFL, Sirius and Martha Stewart, Sirius and NASCAR, XM and MLB, XM and Oprah Winfrey, and XM and Opie & Anthony so as to deliver "hits" that fit defined parameters. These "hits" were reported by date, time, network/channel, content (in text form), and length. Our search parameters required Précis to provide "hit" data for each Sirius and XM talk/sports deal from around the time each deal was announced (e.g., Sirius/Stern, 10/6/2004) through June 30, 2007. Television "hits" were reported from the top twenty U.S. markets.

[15] The top twenty United States television markets are New York, Los Angeles, Chicago, Philadelphia, Boston, San Francisco/Oakland/San Jose, Dallas/Fort Worth, Washington, D.C., Atlanta, Houston, Detroit, Tampa/St. Petersburg, Seattle/Tacoma, Phoenix, Minneapolis/St. Paul, Cleveland/Akron, Miami/Ft. Lauderdale, Denver, Sacramento/Stockton/Modesto, and Orlando/Daytona Beach. Major broadcast networks tracked include CBS, NBC, ABC, Fox, WB (during the period it operated), UPN (during the period it operated), and CW (since it started operating in 2007). Cable networks tracked include CNN, CNN Headline News, CNNfn, MSNBC, Fox News, Bloomberg, E! Entertainment Television, ESPN, ESPN2, and TechTV. The system also tracks nationally syndicated programming such as Entertainment Tonight, Access Hollywood, Oprah Winfrey and Dr. Phil.

36. Newspaper and magazine hits were provided to Précis by Factiva (a division of Dow Jones), a monitoring service which loads full text from newspapers in the top 100 U.S. markets and major national news and business magazines (e.g., *Time*, *Newsweek*, *U.S. News and World Report*, etc.) into its searchable database. A Boolean search methodology again was used to identify "linked" Sirius and XM news/talk/sports programming stories from the newspapers and magazines tracked during the time periods identified above. In addition, Précis ran a narrower search for the NFL, MLB, NASCAR, and Oprah deals using the Lexis-Nexis "Major U.S. Newspapers" and "Magazine Stories, Combined" databases for the time period beginning on the first day of the month that each such deal was announced and ending on the last day of the following month in order to pick up certain articles that Factiva missed. Précis then sorted through all the television, newspaper, and magazine data collected to eliminate duplicates and hits that were not properly characterized as publicity associated with the deals being analyzed.

37. The second major step in the process consisted of calculating what the "advertising cost" of each "hit" would have been had the time or space been purchased by Sirius or XM. Précis managed this step internally under my direction. For television, the time of each "hit" was calculated and converted into television commercial units, i.e., 30-second, 15-second, or 10-second "spots." For example, if a television news report about XM signing Oprah Winfrey ran 63 seconds, it was considered the equivalent of two 30-second commercials on the show in which the "hit" occurred. Précis is a subscriber to the Spot Quotations and Data Service ("SQAD"), an advertising industry-supported service that collects and reports on national ("network") and local ("spot") market television commercial pricing. SQAD data is considered the "standard" by which agencies and advertisers can measure how well they execute television

media buys relative to the industry as a whole. Utilizing SQAD data, Précis calculated the equivalent commercial cost of each "hit."

38. Précis also maintains a computerized database of advertising rates for the 100 top newspapers in the United States, as well as of the magazines that are tracked by Factiva. Précis calculated the size and/or lineage of each newspaper or magazine "hit" by converting the number of words in an article to column inches in newspapers and page widths in magazines, thus allowing identification of an equivalent advertising (size) unit in the publication in which it appeared. Précis then calculated what the cost of that unit would have been had Sirius or XM purchased it based on each publication's "open" rate.

39. The third major phase of the process involved determining the monetary marketing value of each "hit." Précis provided me with reports and back-up (the full text of each newspaper or magazine article and a summary of the content of each television news story or on-air appearance by one of the satellite service personalities) for each "hit." I enlisted a team of qualified individuals under my supervision to perform a second check on top of Précis' initial check to verify that every "hit" was in fact news coverage or a personal appearance that was prompted by a Sirius or XM deal with one of the specific news/talk/sports programs or personalities under analysis. In order to be counted as a "marketing value" hit, either the thrust of the news story or TV report or appearance had to be the result of one of the programming deals, or one of the deals had to factor in an important way in the substance of the coverage. For example, a newspaper article reporting on XM's deal with MLB would qualify as a "marketing hit." Another test we applied to qualify "hits" was to evaluate whether or not Sirius or XM would have been mentioned in the story at all were it not for the service's relationship with the personality or league. To achieve this level of verification, the content of every "hit" was

checked for relevance by a team of well-qualified individuals I recruited and supervised. Each news article or TV mention or appearance was only counted once, even if more than one program that we were accounting for was mentioned. I personally spot-checked the work of each team member.

40. As noted above, Précis, and its vendor, Factiva, are only able to gather magazine "hits" from publications that upload all of their editorial content to the Internet. Unfortunately, many of the magazines (including such entertainment-oriented publications as *Esquire, New York, Sports Illustrated, People,* and *US Weekly*) that carried stories about the various news/talk/sports deals fell into the "not uploaded" category. The public relations departments of Sirius and XM both maintain "clip files" that include copies of magazine articles about their respective services. Those "clip files" were reviewed internally at the two Services, and copies of relevant articles were made available to us. Using basically the same approach as Précis (we downloaded media rate cards for the magazines in question from the Internet), we applied an advertising cost to the relevant articles that appeared in those publications and had not already been identified as "hits."

41. The final step in the process was to convert the "advertising cost" to "marketing value." Public relations professionals refer to publicity as "advertising that money can't buy." But it can be valued.

42. "Straight advertising cost" understates the value of publicity because, as media and other marketing communication professionals long have recognized, consumer attention to advertising is far less than attention to and viewership of television programming or newspaper and magazine *editorial* content. (And new technologies, such as TiVo, that make it easy for viewers to skip commercials are exacerbating the problem, making TV an ever less effective

advertising media choice.) Recognizing this, most major public relations agencies, including Fleishman Hilliard, Edelman, The Rogers Group, and Ruder & Finn (all of whom I queried on this issue, as well as the Public Relations Society of America and the Association of Public Relations Firms) use anywhere from a 3x to 9x commercial cost multiplier to establish the "marketing value" of TV "publicity hits." I chose to use the most conservative multiplier, 3x, for this analysis.

43. In developing a "content versus advertising" multiplier for newspaper and magazine "hits," I based my calculations on longstanding advertising industry readership research, which reveals that written editorial content is read, on average, five times more closely than even the best performing advertising in the same media. *See* Journal of Marketing Research, Vol XXV, at 168-77 (May 1988).

44. In sum, I tripled the estimated commercial cost to establish a "marketing value" for each television "hit," and I used a 5x multiplier to establish a "marketing value" for each newspaper or magazine "hit."

B. Conservative/Understated Nature of Calculations

45. The methodology we used resulted in a very conservative estimate of the marketing value of the deals we analyzed. As noted above, we only reported television "hits" from the top twenty U.S. markets; this was done for time and technology reasons. The financial result would have been much greater had we been able to report "hits" from all 211 U.S. markets. Further, not all television channels are monitored, and not all programming is closed-captioned (which, as noted, is the only programming for which text may be downloaded). Consequently, the television values reported below likely are quite understated.

46. For similar reasons, the marketing value of newspaper and magazine exposure is significantly understated. We were unable to retrieve information from most of the "glossy" magazines that focus on entertainment or from most advertising, broadcast, and media industry trade publications. Finally, the technology we used does not factor in the added value of a photograph; it simply counts lines or inches. Yet, as the old expression goes, "a picture is worth a thousand words." In the personality-driven world of entertainment marketing, a picture is undoubtedly worth twice that.

47. Finally, we did not attempt to project publicity yet to be generated by any of the various deals, further understating their publicity value.

48. Ironically, the venue that probably has the most potential marketing/promotion value for Sirius and XM – terrestrial radio (with its millions of potential satellite radio subscribers) – is nearly impossible to track effectively. For that reason, I have not included terrestrial radio in my analysis except for one personality (and that only in a very limited way), as described below. Given the television, newspaper, and magazine coverage we were able to gather on the deals, it is extremely likely that Sirius' and XM's talk/sports announcements generated heavy radio coverage as well, particularly in major media markets such as New York, Los Angeles, and Chicago. I did not include, for example the extensive coverage that Sirius gets on NFL Radio. The fact that I did not include the value of this radio coverage in my analysis is yet another reason why the numbers in my report are significantly understated.

49. Although the Internet is a searchable medium, it is so extensive that it is impractical for cost reasons to assign a marketing value to publicity regarding the talk/sports deals that appeared online. It is very likely that the satellite services benefited greatly from online publicity, given America's fascination with Howard Stern, Oprah Winfrey, Martha

Stewart, the NFL, Major League Baseball, NASCAR, and the other media personalities and entities that were part and parcel of the deals. This coverage was not quantified and included in my numbers. For example, a specific page on Martha Stewart's website is devoted to her radio show on Sirius,[16] and Howard Stern's interview on "60 Minutes" remains available for viewing on the Internet.[17] Likewise, Oprah Winfrey's promotion on her television show of her deal with XM can be viewed online.[18] It is highly probable that the most undercounted publicity is in the sports programming area; each of the sports deals I reviewed included extensive cross-promotion activity, in which Sirius or XM would be promoted at baseball and football stadiums, at racetracks, on league websites, in game or race coverage, etc. I did not attempt to quantify the value of such promotional activity.

50. Based on my experience, I estimate with reasonable certainty that the total marketing/promotional value of the publicity generated by Sirius' and XM's news/talk/sports deals is at least fifty percent greater than the calculated totals stated below.

* * *

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[16] *See* Martha Stewart Radio on the Sirius Satellite Radio Network, at http://www.marthastewart.com/portal/site/mslo/menuitem.4af27a8e9e64e1611e3bf410b5900aa0/?vgnextoid=971acf380e1dd010VgnVCM1000005b09a00aRCRD&vgnextchannel=971acf380e1dd010VgnVCM1000005b09a00aRCRD&rsc=navigationcorporate_Homepage_Homepage&lastnavigatedchannel=c479cf380e1dd010VgnVCM1000005b09a00aRCRD.

[17] *See* Howard Stern . . . on 60 Minutes, at http://60minutes.yahoo.com/segment/2/howard_stern.

[18] *See* XM on the Oprah Winfrey Show, at http://www.orbitcast.com/archives/video-xm-on-the-oprah-winfrey-show.html.

Sirius/Howard Stern Deal

51. From his earliest days on terrestrial radio, Howard Stern has been a self-promoting publicity juggernaut. His move from terrestrial to satellite radio proved to be a publicity bonanza for Stern and Sirius. Stern himself launched the publicity barrage early on the morning of October 6, 2004, when he announced his deal with Sirius on his nationally syndicated CBS Radio show.

52. Since then, Stern repeatedly has appeared on national and major market television shows, personally and actively promoting his relationship with Sirius. On November 17, 2004, Stern was the featured guest on the nationally broadcast "David Letterman" late-night show on CBS television, spending the better part of 14 minutes talking about his move to Sirius. This show was rebroadcast on December 27, 2004. One year later, on November 17, 2005, he returned to the Letterman show, this time for seven minutes, spending most of the time literally handing out Sirius radios to members of the studio audience. Stern also was featured on "60 Minutes," one of America's premier television news magazines, in a fourteen-minute interview with Ed Bradley on December 4, 2005, a program that "60 Minutes" later reported was its "best delivery in adults 18-49 since Dec. 19, 2004" and led to "its highest adults 25-54 rating since Oct. 31, 2004." *See* CBS Press Release, "'*60 Minutes' Scores Highest Rating in Adults 18-49 in a Year*" (Dec. 6, 2005). On January 5, 2006, Larry King devoted an entire show – forty-two minutes of programming time on CNN – to Stern and his relationship with Sirius. Stern also appeared for eight minutes on NBC's "Today" show on January 9, 2006 touting Sirius.

1. TV Hits

53. I estimate that Stern's twenty-three-minute appearance on "Letterman" would have cost Sirius more than $1.6 million had it purchased that amount of time during the

Letterman show to run commercials to promote its service, making the "marketing value" of that Letterman appearance approximately $4.8 million. (This figure is based on the methodology explained above.)

54. Stern's appearance on 60 Minutes had a "marketing value" of $5.2 million. His "Larry King" appearance was worth $2.5 million. His "Today" appearance was worth nearly $5 million.

55. Totaling all of Stern's Sirius-related television "hits" that we were able to gather and validate since his jump to satellite radio was announced in October 2004, I calculate that he garnered over $95 million in marketing/publicity value for Sirius just in the subset of TV markets analyzed.

2. Newspaper/Magazine Hits

56. Howard Stern's move to Sirius also received enormous print coverage in both newspapers and magazines, particularly in New York, "the advertising capital of the world." For example, *Esquire*, *New York*, *Wired*, and *Billboard* all published extensive cover stories. Sample cover pages for these stories are attached as SDARS-Silverman Exhibit 2. Similarly, the news of Stern's jump to Sirius received front-page coverage in *The New York Times*, *New York Post*, *New York Daily News*, and *USA Today*. The *Wall Street Journal* gave the story prominent display as well.

57. Using the methodology described above, I calculate conservatively that Stern's relationship with Sirius has garnered a total of $59,353,785 in marketing value just in the subset of newspapers and magazines measured in this analysis as a result of magazine and newspaper coverage of Sirius since 2004. (In the chart that follows, I list both the "straight advertising value" of the "hits" as well as the "marketing value" I have assigned to them.)

3. Radio Hits

58. As discussed earlier, radio proved nearly impossible to track for purposes of this report. There are more than 11,000 terrestrial radio stations in America, and I am aware of no service that monitors content (except on a custom-contracted basis) from the stations. I was, however, able to gauge at least some of the marketing value of Stern's nearly non-stop discussions about his move to Sirius on his CBS Radio Show from October 6, 2004, when he announced that he was moving, to the end of 2005, when he last appeared on terrestrial radio. Stern's production company owns the tapes of his CBS Radio programs, and summaries of each show were available for analysis.

59. The summaries are broken down by topic and are time-coded. For example, the summary for the October 6, 2004 program begins at time-code 06:01 a.m., and the content of the program is summarized to 06:08 a.m. The content includes a "tease" about "the important announcement that Howard is going to make later in the program." The next section, from 06:06 to 06:08, is about David Letterman's comments about Jay Leno's announcement that he planned to step down as host of the NBC "Tonight" show in five years. That was followed by a three-minute segment on the Vice Presidential debates, which apparently had taken place a day or two earlier.

60. Using these summaries, I was able to estimate the "advertising" and "promotional" value of the time Stern spent on the show talking about his move to Sirius. According to a recent Advertising Age article, the national rate for a 60-second commercial on the CBS Radio Howard Stern show (with the copy read by Stern) was $30,000. *See* Advertising Age, Sept. 24, 2006. I calculated the "Stern on Stern moving to Sirius" content of his shows as if

it were advertising copy using that rate. I did not apply a "marketing value" multiplier to the "estimated advertising cost" of this content because it is unique.

61. We were able to analyze the content of all of Stern's shows (245 episodes, each four hours long) for the period during which he promoted his move to Sirius on CBS Radio. Anecdotal information suggests that he devoted fairly long chunks of every show every day to the move. In fact, his on-air discussions about the move reached a point where CBS management prohibited him from using the word "Sirius," so from that point on, he referred to Sirius on his show as "eh, eh, eh." I have calculated the value of Stern's on-air mentions during that fifteen-month period to be $52,860,000. As we were using summaries, rather than full transcriptions of the Stern shows, I was particularly conservative in determining which segments should be considered "promotional" and which were not, and how much time to allocate to these mentions.

62. Further insight into the "promotional value" of Stern talking about his move to Sirius can be gleaned from the complaint filed in February 2006 by CBS Radio when it sued Howard Stern, Stern's production company, his agent/manager, and Sirius for, among other things, misappropriation of CBS's broadcast time. To quote from the complaint:

> Stern's incessant promotion of Sirius also included the denigration of terrestrial radio. For example, on his October 7, 2004 Program, fifteen months before the expiration of the Agreement with CBS Radio, Stern and two of his staff proclaimed the benefits of moving to Sirius satellite radio and how it has hundreds of channels, and touted many of the specific channels available on Sirius. They also extolled how Sirius satellite radio has channels for everyone, including CNN, NBC, and a channel that carries NFL coverage.

Complaint, *CBS Radio Inc. v. Stern*, Index No. 06600672, ¶ 51 (N.Y. Sup. Ct. filed Feb. 28, 2006).

63. The complaint continues: "On October 8, 2004, Stern again urged his audience to move to satellite radio with him, and he even endorsed Sirius' monthly fee as a bargain." *Id.* ¶ 52. The complaint concludes: "This type of promotion of Sirius by Stern was extensive and continued over the last 15 months of the Agreement." *Id.* CBS alleged that "the dollar value of free advertising that Stern had been performing for Sirius . . . is conservatively estimated at approximately $100 million." *Id.* ¶ 70. As CBS may have been able to calculate the time Stern spent "promoting Sirius" on its air more precisely than I was, its estimate (which is roughly double mine) may not be farfetched.

64. A 2004 document presented to Sirius' Board of Directors includes, as one of the stated benefits of the Howard Stern deal, the following: "**[[**

]]." *See* "Howard Stern" Sirius document, SIR00038000, at SIR00038011. It appears Sirius achieved that objective; altogether, I very conservatively estimate the marketing/promotional value to Sirius of the Stern deal (since it was announced to date, and only on the impressions I measured) as follows:

SIRIUS/HOWARD STERN			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	2,121	$19,034,680	$95,173,399
Newspapers and Magazines	913	$11,870,757	$59,353,785
Radio	1,762 Minutes	$52,860,000	$52,860,000
TOTALS	--	$83,765,437	$207,387,184

Sirius/NFL Deal

65. As with the Sirius/Stern deal, I have approximated the marketing/promotional value of the publicity generated by Sirius' and XM's deals for other talk/sports programming, including the National Football League. The NFL is America's number one sports league. It has millions of fans across the country, and the league and its teams receive heavy coverage in newspapers and magazines and on television, radio, and the Internet. Sirius' deal with the NFL was widely reported and commented on. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the Sirius/NFL deal as follows:

SIRIUS/NFL			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	47	$53,126	$159,378
Newspapers and Magazines	32	$225,697	$1,128,485
TOTALS	79	$278,823	$1,287,863

Sports deals – even deals as big as Sirius' NFL deal – rarely generate huge press coverage. But they do result in ongoing publicity that constantly reminds prospects and subscribers that their favorite team – regardless of where they live – is available to them on satellite radio. The Sirius/NFL deal generated (and continues to generate) a constant stream of positive mentions in important sports-news venues for the service. For example, in March 2006, an off-season month for NFL news (with NCAA March Madness, MLB spring training, and NBA regular season

news all competing for attention), Sirius was mentioned in 36 sports columns published in papers across the nation. In many of these, the NFL beat writers, unable to contact players and coaches in the off-season, were able to glean valuable information from interviews broadcast on Sirius and use quotes from Sirius' programming in their columns, crediting Sirius as the source. As *New York Daily News* media columnist Bob Raissman wrote on March 26, 2006, "With the opening of baseball just a week away, NFL freaks may not get the comprehensive off-season coverage the sport has received up to this point. So if your head is made of pigskin, you should check out the offerings of Sirius Satellite Radio's NFL Network. This is the best place to hang your hat in the days leading up to the draft." Finally, as discussed earlier, in addition to expected publicity, there is enormous value to the cross-promotions that are built into the various sports deals that Sirius and XM have entered into, such as stadium signage, logos on websites, mentions during television programming, etc.

Sirius/Martha Stewart Deal

66. The Martha Stewart deal was a part of Sirius' marketing strategy to provide "tie-breaker" reasons beyond music to subscribe to its service. The Martha Stewart Living Radio Channel targets a demographic that is typically not well served by terrestrial talk radio and complements nicely the demographic that Sirius reaches through its Howard Stern programming. Martha Stewart arguably is one of the most famous and admired female media personalities in the country, and Sirius hoped that her "star power" would engender heavy promotional benefits for Sirius. Using the methodology described earlier, I estimate the marketing/promotional value of the publicity generated by the Sirius/Martha Stewart deal (again, only in the limited media that I have measured) as follows:

SIRIUS/Martha Stewart			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	291	$961,041	$2,883,123
Newspapers and Magazines	78	$1,057,198	$5,285,990
TOTALS	369	$2,018,239	$8,169,113

In addition to publicity, Sirius also has benefited from mentions on Martha's television show, on her website, and on other Martha Stewart Omnimedia properties. For example, Martha devoted a segment on an episode of her nationally syndicated television show to "How to Set Up a Sirius Satellite Radio."

Sirius/NASCAR Deal

67. NASCAR is America's fastest growing sport. It has millions of fans across the country, and its races receive heavy coverage in newspapers and magazines, and on television, radio, and the Internet. Sirius' deal with NASCAR was widely reported and commented on. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the Sirius/NASCAR deal in the measured media as follows:

SIRIUS/NASCAR			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	78	$54,286	$162,858
Newspapers and Magazines	24	$279,207	$1,396,035
TOTALS	102	$333,493	$1,558,893

Because automotive and racing enthusiast magazines were not trackable for purposes of my analysis, this chart understates the number of hits and value of publicity that resulted from the NASCAR deal. Coverage of the NASCAR/Sirius relationship and information about the NASCAR Channel and racing coverage on the service has been widely and regularly reported in the enthusiast press. In addition to the consumer marketing value of these unreported hits, they also undoubtedly impact the automotive industry, thus supporting Sirius' OEM marketing efforts as well.

XM/MLB Deal

68. Baseball is "America's Game," and XM gives "disenfranchised" baseball fans across the country access to play-by-play exploits of their favorite teams. XM's 24/7 MLB Channel provides year-round coverage of baseball for XM subscribers. MLB and its teams receive heavy coverage on television and radio, in newspapers and magazines, and on the Internet. XM's deal with MLB was widely reported and commented on. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the XM/MLB deal in measured media as follows:

XM/Major League Baseball			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	101	$62,640	$187,920
Newspapers and Magazines	30	$265,831	$1,329,155
TOTALS	131	$328,471	$1,517,075

XM/Oprah Winfrey Deal

69. There is a widely recognized marketing phenomenon in America called "The Oprah Effect." When Oprah endorses a book, a movie, a play, or a product on her daily syndicated television show, her legions of fans flock to stores and theaters, turning Oprah-endorsed books, movies, plays and products into "hits." Like Martha Stewart, Oprah's appeal is primarily to women, an audience that is under-served by terrestrial talk radio. Thus, in addition to its pure programming value and exclusivity, XM's deal with Oprah, which includes an extensive list of marketing activities, was intended to tap into "The Oprah Effect." Using the

methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the XM/Oprah deal in the measured media as follows:

XM/OPRAH WINFREY			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	353	$1,855,328	$5,565,984
Newspapers and Magazines	77	$613,823	$3,069,115
TOTALS	430	$2,469,151	$8,635,099

XM/Opie & Anthony Deal

70. Much like Howard Stern, "shock jocks" Opie & Anthony pushed the envelope on their daily terrestrial radio show to the point that the stations that carried them risked being fined by the FCC. And that made "uncensored" XM a perfect home for them. Originally exclusive on XM, Opie & Anthony later returned to being syndicated on terrestrial radio as well (although in a more censored version vis-à-vis what the pair airs on XM) as part of a deal with CBS that XM entered into in part for its promotional benefits. The Opie & Anthony deal and their continued relationship with XM has generated quite a lot of media coverage. Using the methodology described earlier, I conservatively estimate the marketing/promotional value of the publicity generated by the XM/Opie & Anthony deal on the measured media as follows:

XM/OPIE & ANTHONY			
Media Venue	Number of Hits	"Straight Advertising Value"	"Marketing Value"
Television	163	$685,279	$2,055,837
Newspapers and Magazines	220	$1,886,346	$9,431,730
TOTALS	383	$2,571,625	$11,497,567

* * *

71. The charts above only reference marketing publicity hits that we were able to track using the methodology discussed earlier. These totals do not include the value of Internet hits, which we were unable to measure. With the exception of Howard Stern, they also do not include the value of radio hits. Nor do they include the numerous other hits on television, in newspapers and magazines, at sports venues, and at point-of-sale that we were not able to document. And, of course, it does not include the value of marketing/publicity generated by other Sirius and XM news/talk/sports programs that I did not undertake to analyze in detail.

72. While, as shown above, both Sirius and XM undoubtedly benefited from "general" news coverage during the period surveyed, *virtually no coverage that could be characterized as having marketing value was specifically generated by the services' "generic" music programming.*

CONCLUSION

73. The foregoing analysis helps to demonstrate that news/talk/sports programming is the engine powering awareness of and preference for the satellite radio services. To equate music and news/talk/sports in terms of dollar-for-dollar value is to ignore the fact that, as is the

case in marketing any product, branding is all about differentiation. "Commercial-free music" is not unique, not as promotable, and not as potent from a marketing and sales standpoint as exclusive news/talk/sports programming. The ultimate success of Sirius and XM will be the result of their exclusive news/talk/sports deals powering their consumer marketing programs.

74. The publicity generated by the presence of Stern, Oprah, MLB, the NFL, et al. on Sirius and XM also "rang Madison Avenue's bell," thus creating a potentially powerful additional revenue stream for the services that simply playing sound recordings – however creatively programmed – cannot deliver.

75. In his testimony on July 9, 2007, the following exchange took place between Dr. Pelcovits and Mr. Handzo, counsel for SoundExchange:

> Q: Now, Dr. Pelcovits, in basing this analysis on the deal between Howard Stern and Sirius, did you have any concerns that Howard Stern is just not typical?
>
> A: I am not concerned about that. I believe that, in fact, Howard Stern is a very appropriate benchmark to look at to set the royalty on music. Howard Stern is certainly very important, attracts a significant percentage of customers, but I have seen nothing that would indicate he is more important than, let's say, the music catalog of Universal Music Group or Sony BMG.

7/9/07 Tr. 72:8-20 (Pelcovits).

76. Dr. Pelcovits' answer belies common sense and the facts, and underscores just how "apples-to-oranges" his analysis is. Howard Stern is a star. Oprah Winfrey is a star. The NFL is a "star." Major League Baseball is a "star." And stars drive entertainment. It has been that way since the days of Douglas Fairbanks and Mary Pickford. It is why Tom Hanks can "open a movie," and a lesser-known actor cannot. It is why radio stations pay ordinary salaries to some deejays and millions of dollars annually to others – who play exactly the same music as

their less compensated brethren. Stars get the big bucks because they generate attention – publicity. By signing Howard Stern, Oprah Winfrey, the NFL, MLB, Opie & Anthony, Martha Stewart, NASCAR, and other "high marketing value" news/talk/sports programming, Sirius and XM bought themselves far more than programming; they bought the marketing power of publicity. That is why Howard Stern was worth $500 million to Sirius. And it is why he, and Sirius' and XM's other exclusive or unique news/talk/sports programming, cannot be compared to music that can be found almost everywhere.

Appendix: Materials Reviewed

- the Introductory Memoranda to the Written Direct Statements of XM Satellite Radio Inc. and Sirius Satellite Radio Inc.;
- the original and amended Written Direct Testimony of Michael Pelcovits;
- the Written Direct Testimony and hearing testimony of various Sirius and XM witnesses;
- Sirius' agreements with Howard Stern, the NFL, Martha Stewart, NASCAR, the NBA, and Fox News;
- XM's agreements with MLB, Oprah Winfrey, Opie & Anthony, and Fox News;
- XM and Sirius presentations relating to the deals analyzed;
- Various Sirius market research documents;
- XM's and Sirius' websites;
- figures showing Sirius and XM subscriber growth by quarter;
- various Sirius press releases announcing key statistics and programming deals for Sirius;
- charts prepared by XM reflecting the Services' programming history and subscriber growth by quarter from Q1 2002 to Q1 2007;
- financial data for XM and Sirius;
- the "Binding Memorandum of Understanding" between Learfield Communications, Inc. and XM Satellite Radio Inc.;
- the complaint in *CBS Radio, Inc. v Howard Stern, et al.*, filed by CBS Radio, Inc. in the Supreme Court of the State of New York, dated February 28, 2006; and

- copies of newspaper and magazine articles referencing Sirius and XM programming deals.
- An Advertising Age magazine article referencing the rate CBS Radio charged for The Howard Stern show
- Advertising rate cards posted on publication web-sites for certain publications

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

In the Matter of	)	
	)	
	)	**Docket No. 2006-1 CRB DSTRA**
Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services	)	

DECLARATION OF BRUCE SILVERMAN

I, Bruce Silverman, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned matter are true and correct to the best of my knowledge, information and belief. Executed this 23rd day of July 2007.

Bruce Silverman

Appendix 1

BRUCE SILVERMAN

EXPERIENCE

May 05 - Present

BRUCE SILVERMAN CONSULTING
Principal

Adviser to a number of major advertising and public relations agencies, media properties, marketing services firms and international companies. Chairman and CEO of Pocket Billboards, Inc., a company that places advertising on telephone calling cards. Expert witness for law firms representing clients in cases where marketing, advertising or media is at issue.

January 2004 - April, 2005

WONGDOODY ADVERTISING (Los Angeles)
President

Clients included Alaska Airlines, Autodesk, MGM Home Entertainment, Sony Pictures, Los Angeles Dodgers, Alpine Electronics, Clif Bar, Inc., UCLA/Anderson School of Management.

April, 1997 – Dec., 2003

INITIATIVE PARTNERS (Los Angeles)
President/CEO

Management responsibility for U.S. unit of world's largest ($22BB+) advertising media agency. Accounts included Walt Disney Company (all divisions), CKE Restaurants (Carl's Jr.,), Unilever, United Paramount Network, Arco, Tosco, E*Trade, Albertson's, Baskin-Robbins, Cisco Systems, HealthNet, The Home Depot, Taco Bell plus more than 100 advertising agencies operating throughout the United States and Canada

January 86 - March'97

ASHER/GOULD ADVERTISING, INC. (Los Angeles)
Partner/President/Chief Creative Officer/Chief Operating Officer

Clients included Suzuki cars and trucks; Pabst Brewing Company, Southern California Cable Association; Pizza Hut; Sanyo/Fisher; ITT/Sheraton; State of California Department of Health Services; American Savings Bank; Baskin-Robbins U.S.A.; SunAmerica,

BRUCE SILVERMAN CONSULTING
MARKETING/ADVERTISING/MEDIA
5168 DOÑA MEMA PLACE/STUDIO CITY, CA 91604-4264
(323) 654-7659/BGSLA@ROADRUNNER.COM

Avery Dennison, Wherehouse Entertainment, The Men's Wearhouse, Aaron Brothers

January 84 - December 86 **BBDO/WEST, INC. (Los Angeles, San Francisco)**
Executive Vice President; General Manager and Chief Creative Officer

Accounts included Apple Computer International, Coldwell Banker, Sizzler, PIP Printing, Hughes Supermarkets, Fisher Stereo, Southern California Dodge Dealers

January 81 - December 83 **BOZELL & JACOBS, SOUTHWEST, INC. (Dallas)**
Executive Vice President; Creative Head of B&J operations in Dallas, Houston, Phoenix

Accounts included American Airlines, Greyhound, Zale Corporation, Pace Foods, Quaker Oats, Armour Foods, Ryder Trucks

August 67 - December 80 **OGILVY & MATHER, INC. (New York)**
Senior Vice President; Executive Creative Director, O&M New York. Also ECD, Los Angeles (1977-80); Houston (1974-77); Associate Creative Director, OBM London (1974), O&M New York (1972-74).

Accounts included American Express, Shell, Merrill Lynch, Mercedes Benz, Panasonic, Maxwell House, Nabisco cookies and crackers, Post cereals, Imperial Margarine, Dove soap, Smith Barney, Mattel, Universal Studios, Trailways, Opryland USA, Ringling Bros. Barnum & Bailey Combined Shows, Korean Airlines, TWA, KLM, Puerto Rico Tourism, British Tourism, French Tourism, Nickelodeon, MTV

EDUCATION

June 1966 BA, Adelphi University, Garden City, New York

INDUSTRY

Vice Chairman, Western Region - American Association of Advertising Agencies (industry trade association)

National Board of Directors – American Association of Advertising Agencies

Vice President – Los Angeles Advertising Agencies Association

Member and Peer Group Chairman – Academy of Television Arts & Sciences

OTHER

Author: *How to Create Tobacco-Use Prevention Advertising That Works*; University of Florida Press, 1996

Instructor: UCLA Extension, Pepperdine University

Guest Instructor: University of Southern California, University of Texas, Rice University

Awards: Multiple Clios, One Show "Pencils," multiple Beldings, two Gold Lions at Cannes International Advertising Festival

PERSONAL

Married
Excellent Health

Appendix 2

THIS APPENDIX CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

SDARS – Silverman Ex. 1

THIS EXHIBIT CONTAINS RESTRICTED INFORMATION PURSUANT TO THE DECEMBER 20, 2006 PROTECTIVE ORDER AND THEREFORE WAS OMITTED FROM THIS PUBLIC VERSION

SDARS – Silverman Ex. 2

A

Enlightenment • Illumination • The Smell of Bacon

The Meaning of Life

Esquire

MAN AT HIS BEST

JANUARY 2006

FIGHTING WORDS & DAMN GOOD ADVICE FROM...

Howard STERN

Rips Us a New One

Neil Young
Jerry Lewis
B.B. King
Alyssa Milano
John Kerry
Ron Howard
Bob Saget
Salman Rushdie
& the Mayor of New Orleans

WITH A VERY, VERY SPECIAL APPEARANCE BY TONY CURTIS

$3.50 U.S.
$4.50 Canada
$4.50 Foreign
www.esquire.com

0 75470 08276 4 01>

Ziyi ZHANG

A WOMAN WE 爱

(PAGE 120)

SDARS-Silverman
Ex. 2-a

B

THE ABORTION TRAIN DESTINATION: NYC

SPEED-SHOPPING FOR HOLIDAY SLACKERS

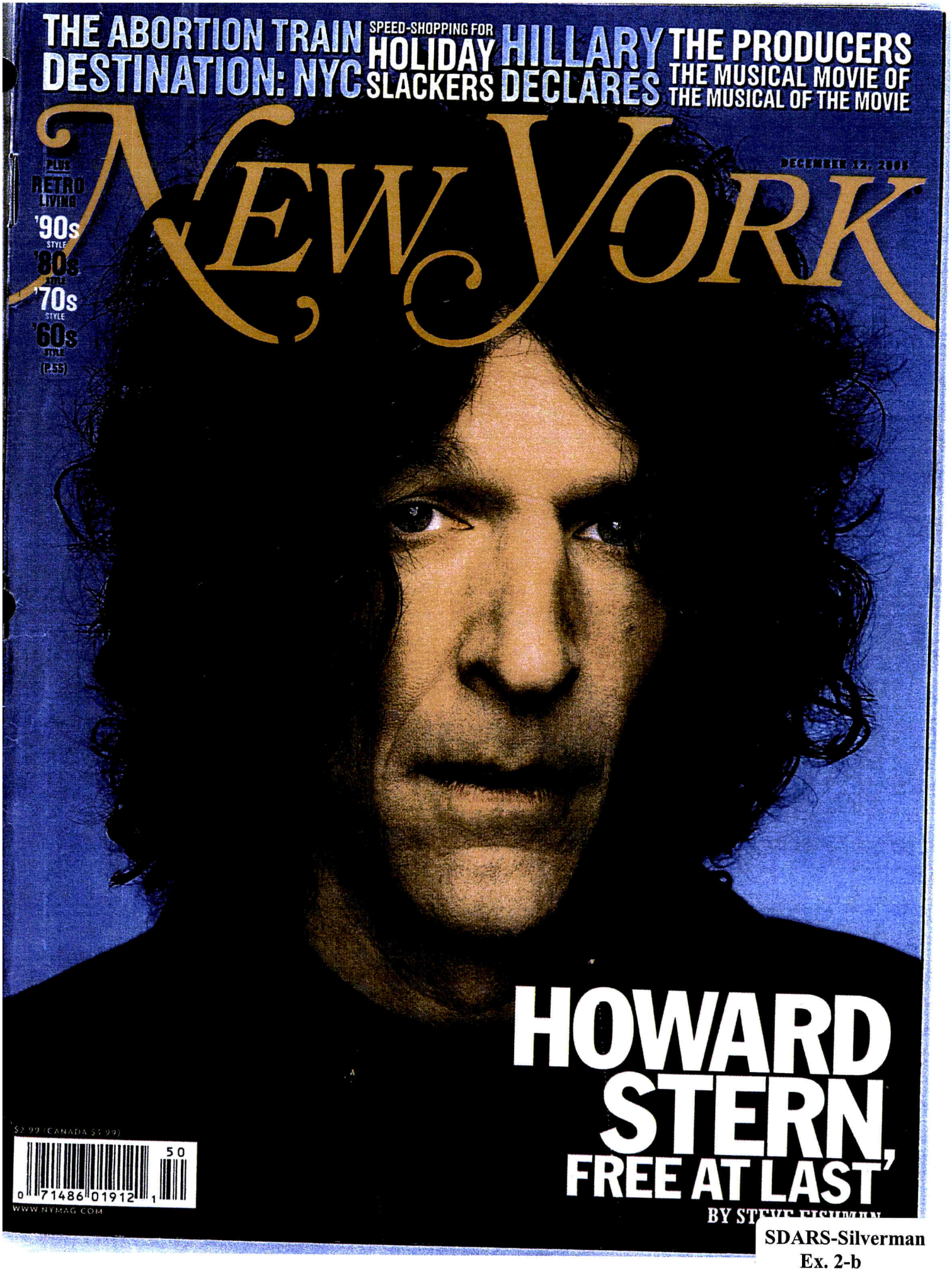
HILLARY DECLARES

THE PRODUCERS THE MUSICAL MOVIE OF THE MUSICAL OF THE MOVIE

NEW YORK

DECEMBER 12, 2005

PLUS RETRO LIVING '90s STYLE '80s STYLE '70s STYLE '60s STYLE (P.55)



HOWARD STERN, FREE AT LAST

BY STEVE FISHMAN

$2.99 (CANADA $3.99)

50

0 71486 01912 1

WWW.NYMAG.COM

SDARS-Silverman
Ex. 2-b

C

Billboard Radio Monitor

WEEK OF NOVEMBER 25, 2005

2Y9112210021
BM105525 T4 HDNY
PATRICK REILLY
SIRIUS SATELLITE RADIO
1221 AVENUE OF THE AMERICAS
NEW YORK, NY 10020-1011

HOWARD STERN: TRAILBLAZER IN TRANSITION

HEY NOW! HOWARD STERN COLLECTOR'S ISSUE

EXCLUSIVE: BABA BOOEY OPENS HIS MINDMND

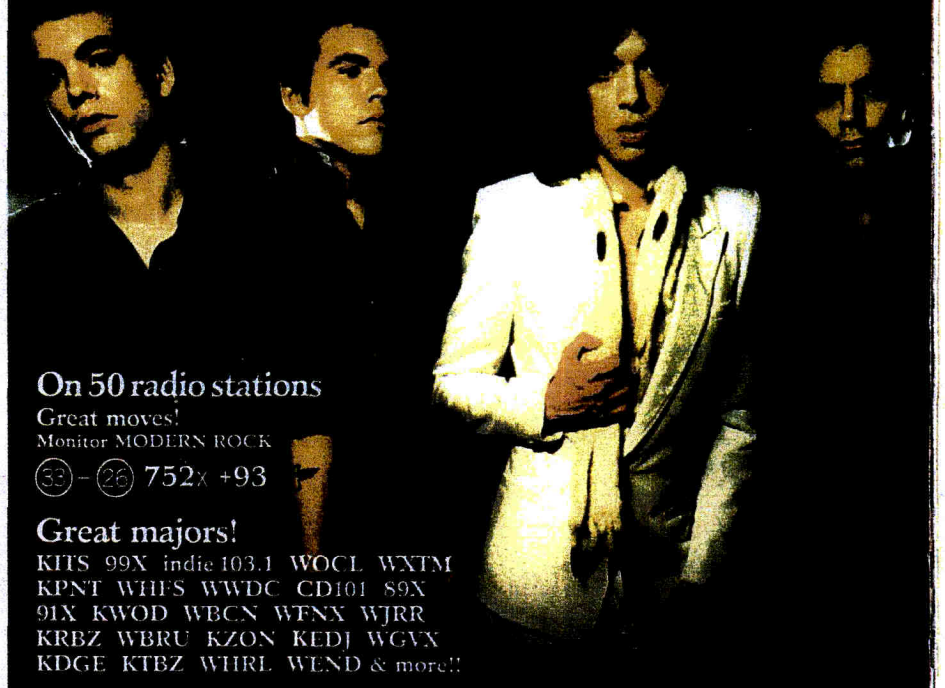
SUPER AGENT DON BUCHWALD DISHES ON THE DEALS

FINE LINE HOWARD'S BRUSHES WITH THE FCC

STERN'S LEGACY

PASS ME ON:
PD _____ GM _____ MD _____
PROMO _____ NEWS DIR. _____

Living Things



On 50 radio stations
Great moves!
Monitor MODERN ROCK
33 - 26 752x +93

Great majors!
KITS 99X indie 103.1 WOCL WXTM
KPNT WHFS WWDC CD101 89X
91X KWOD WBCN WFNX WJRR
KRBZ WBRU KZON KEDJ WGVX
KDGE KTBZ WHRL WEND & more!!

Cingular wireless iPod commercial starts in December

★★★★ *Rolling Stone* ★★★★ *Blender* B+ *Spin* ★★★★ *Maxim*

"Living Things are a band of fighters determined to make us feel like winners."
— David Fricke, *Rolling Stone*

"Everybody whines that there aren't enough driven, inspiring, hot, rock songs out there. Well now you have the Living Things...so shut up already."
— Sean Demery, KITS

Add!! fuse

WWW.LIVINGTHINGSMUSIC.COM

SDARS-Silverman
Ex. 2-c

D

THE 2005 WIRED RAVE AWARDS

15 MAVERICKS & DREAMERS REINVENTING BUSINESS, SCIENCE, BLOGS, MOVIES & MORE!

WIRED

MARCH 2005 STAY TUNED

THE END OF RADIO

(AS WE KNOW IT)

THE COMING DIGITAL BOOM

HOWARD STERN & THE SATELLITE WARS

YOUR GUIDE TO PODCASTING, RADIO TIVO & THE HD REVOLUTION

SDARS-Silverman
Ex. 2-d

Fisher

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

Testimony of

William W. Fisher III
Wilmer Hale Professor of Intellectual Property Law, Harvard Law School

July 24, 2007

1. I have been asked to present testimony in the rebuttal phase of this proceeding. Specifically, I have been asked to address: (1) the function of compulsory licenses in the copyright system; (2) the considerations that should guide the application of sections 114(f)(1) and 801(b)(1) of the copyright statute to the determination of the fees paid by eligible preexisting satellite digital audio radio services ("SDARS"); and (3) the relevance to the present proceeding of the manner in which section 111(d) of the statute has been applied in the past to the determination of the compulsory-license fees paid by cable television systems in exchange for the privilege of making secondary transmissions of programs broadcast over the airwaves.

2. I have read much of the testimony submitted in the principal phase of this proceeding. I have paid especially close attention to the submissions of Prof. Janusz Ordover and Dr. Michael Pelcovits on behalf of SoundExchange. Both of those experts have asserted, in their written submissions and in their oral testimony, that the Court should strive to select "a rate that would be established by the parties in a marketplace free of regulatory compulsion and other distortions that could impede the parties from reaching efficient outcomes."[1] In my professional judgment, this claim reflects a serious misunderstanding of the purposes of the copyright system as a whole and the manner in which sections 114 and 801 are designed to advance those purposes. The principal purpose of my testimony is to rebut the contentions of Prof. Ordover and Dr. Pelcovits,

[1] Testimony of Janusz Ordover at 4. See also Testimony of Michael Pelcovits at 5: "I adopt Dr. Ordover's view that here, the policy objectives set out by Congress [in 801(b)] are most fully satisfied by rates that would be the likely outcome of marketplace negotiations among the individual record companies and the individual SDARS."

offering in their stead an interpretation of the governing statutory provisions that better accords with the language, history, and policy objectives of those provisions.

I. Professional Qualifications

3. I am the Wilmer Hale Professor of Intellectual Property Law at Harvard Law School, where I have taught for 23 years. My principal fields of specialization are Copyright and Patent Law. I am also the Director of the Berkman Center for Internet and Society, a research center at Harvard Law School committed to the study and exploration of the Internet and its accompanying laws.[2] Finally, I am the Chairman of the Board of Directors of Noank Media, Inc., a recently formed company that seeks to solve the current crisis in the entertainment industry by obtaining voluntary blanket licenses from copyright owners and then making their works available, for fees, to students in participating universities and to the subscribers of participating Internet service providers.[3]

4. My academic credentials include a J.D. and a Ph.D. in the History of American Civilization from Harvard University and a one-year fellowship at the Center for Advanced Study in the Behavioral Sciences. Before beginning my teaching career, I served as a law clerk for Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit and for Justice Thurgood Marshall of the United States Supreme Court.

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[2] Additional details concerning the Berkman Center may be found at http://cyber.law.harvard.edu/home/.

[3] Additional details concerning Noank Media may be found at http://www.noankmedia.com/.

5. I have published widely. My principal publications in the field of copyright law are listed in the margin.[4] I have given invited presentations concerning the changing shape of music-related copyright law in many settings. A representative sample of the venues are listed in the margin.[5] I have also provided advice to the governments of several countries – Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, and the

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[4] My primary publications pertaining to copyright are:

Reconstructing the Fair Use Doctrine, 101 HARV. L. REV. 1659 (1988);

Property and Contract on the Internet, 73 CHI.-KENT L. REV. 1203 (1999);

The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States, published (in German translation) in EIGENTUM IM INTERNATIONALEN VERGLEICH 265-91 (Vandenhoeck & Ruprecht, 1999);

Theories of Intellectual Property, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (S. Munzer ed., Cambridge Univ. Press, 2001) (Mandarin translation, 1 CHINESE INTELLECTUAL PROPERTY REVIEW 1 (2002));

"Copyright," "Patent," and "Intellectual Property," ENCYCLOPÆDIA BRITANNICA (2004 and current edition);

PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (Stanford University Press, 2004);

"The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age" (with William McGeveran) (August 2006), available at http://cyber.law.harvard.edu/media/files/copyrightandeducation.html.

[5] Some of the venues in which I have given lectures on the subject of music-related copyrights are:

Digital Distribution and the Music Revolution, Queensland Parliament House, Brisbane, Australia, July 1999;

"Digital Music," United States Embassy, Stockholm, Sweden (at the invitation of the United States Information Agency), September 1999;

Signal to Noise: The Future of Music on the Net, Harvard Law School, February 25, 2000 (http://cyber.law.harvard.edu/events/netmusic.html);

Conference on *A Free Information Ecology in the Digital Environment*, New York University School of Law, March 30 - April 2, 2000;

"Digital Music," Annenberg School for Communication, University of Southern California, June 14, 2000;

International Congress on Intellectual Property, Rio de Janeiro, Brazil, August 10-11, 2000;

First International Conference on Cyberspace Law, Sao Paulo, Brazil, November 6-7, 2000;

The Future of Music Policy Summit, Washington D.C., January 10-11, 2001 (http://www.futureofmusic.com/);

Keynote Address, *OECD Conference on The Future Digital Economy: Digital Content Creation, Distribution, and Access*, Rome, January 30-31, 2006;

"The Path of Copyright in a User Generated World," Brisbane, Australia, March 7, 2007;

Keynote Address, *International Federation of Musicians Annual Meeting*, Nashville, Tennessee, May 18, 2007;

Keynote Address, "Copyright Utopia: Alternative Visions, Methods & Policies," *Center for Intellectual Property*, Adelphi, Maryland, May 21-23, 2007.

United Kingdom – concerning the shape or application of their intellectual property laws.[6]

6. Some years ago, I submitted testimony to a Copyright Arbitration Royalty Panel in a proceeding that set the rates for eligible nonsubscription webcasting services. More recently, I testified before the Subcommittee on Twenty-First Century Competitiveness of the House Committee on Education and the Workforce concerning the responsibilities of universities to reduce the frequency with which their students engage in unlawful file-sharing.

7. A copy of my curriculum vitae is attached to this document as Appendix A.

II. The Copyright System and the Role of Compulsory Licenses

8. The copyright system has two fundamental, compatible purposes: to create incentives for the production and dissemination of "original works of expression"; and to provide the creators of those works a fair return for their labor. It achieves those ends by protecting the creators against competition in the reproduction, distribution, modification, and performance of their works.[7]

---

[6] The principal documents embodying my recommendations are: CENTROAMÉRICA EN EL SIGLO XXI: UNA AGENDA PARA LAW COMPETITIVIDAD Y EL DESARROLLO SOSTENIBLE (Harvard Institute for International Development 1999); Martha Field & William Fisher, LEGAL REFORM IN CENTRAL AMERICA: DISPUTE RESOLUTION AND PROPERTY SYSTEMS (John F. Kennedy School of Government 2000); *The Impact of "Terminator Gene" Technologies on Developing Countries*, in COSTS AND BENEFITS TO THE LIVELIHOODS OF THE RURAL AND URBAN POOR ARISING FROM THE APPLICATION OF SO-CALLED "TERMINATOR GENES" AND SIMILAR TECHNOLOGIES IN DEVELOPING COUNTRIES (Report to the United Kingdom Department for International Development, 1999).

[7] See, e.g., Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985) ("The monopoly created by copyright … rewards the individual author in order to benefit the public"), quoting Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 477 (1984) (dissenting opinion); Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 349-50 (1991).

9. But the legislators and judges who have crafted the copyright system – and the scholars who have assessed it – have long recognized that the entitlements it establishes can sometimes be abused. In other words, if unconstrained, the exercise of the rights it confers on creators can sometimes frustrate, rather than advance, the underlying purposes of the system.[8]

10. To prevent such abuses, legislators and judges have built into the copyright system a variety of provisions that set limits on creators' rights.[9] The most obvious is the term limit; unlike other property rights, copyrights are limited in time – currently, to the life of authors plus 70 years.[10] Another important general limitation is the fair-use doctrine, which prevents copyright owners from blocking uses of their works, such as criticism and parody, that have important social benefits.[11] Other limiting provisions are more specific, creating safe harbors for particular unauthorized uses of copyrighted works that redound to the benefit of the public. An example is the privilege of teachers to perform copyrighted works in their classrooms.[12]

---

[8] See, e.g., Peter Menell & Suzanne Scotchmer, *Intellectual Property*, in A. Mitchell Polinsky & Steven Shavell, HANDBOOK OF LAW AND ECONOMICS, VOLUME 2 (forthcoming 2007) (available from the Social Science Research Network, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=741424), at 3.

[9] See, e.g., Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) ("Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible."); Sony Corporation of America v. Universal City Studios, 464 U.S. 417, 431-32 (1984) ("The limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative 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. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'") (quoting Twentieth Century Music v. Aiken, 422 U.S. 151, 156 (1975)).

[10] 17 U.S.C. §302(a). The term limit for anonymous works, pseudonymous works, and works made for hire is calculated on a different basis. See 17 U.S.C. §302(c).

[11] See 17 U.S.C. §107.

[12] See 17 U.S.C. §110(1). Other exemptions are contained in other subsections of §110.

11. An important subset of these public-regarding privileges consists of compulsory licenses. Unlike outright exemptions – such as the fair-use doctrine and the classroom-performance provision – compulsory licenses do not permit people to use copyrighted works without permission for free. Rather, they take an intermediate position. They permit copyright owners to collect fees when people engage in specified uses of their materials, but they forbid copyright owners to deny permission altogether, and they limit how much copyright owners can charge. For that reason, compulsory licenses are commonly and accurately described as "compromises" between the interests of copyright owners and copyright users.[13]

12. Congress has used compulsory licenses to strike such compromises in a wide variety of contexts. One of them redounds to the benefit of the recording industry: section 115 of the statute limits the amount that the owners of copyrights in musical works can charge recording artists or record companies that wish to make and distribute sound recordings that consist of "covers" of songs that have already been released by other artists. Another – section 118 – benefits public broadcasters. Still another (to which I will return at the end of my testimony) benefits cable television systems.

13. A recurring situation in which Congress has repeatedly employed compulsory licenses is where the advent of a new technology for distributing or performing copyrighted works both offers copyright owners a new potential revenue stream and offers the public a more convenient or flexible way of gaining access to those works. In such circumstances, Congress has frequently taken the position that, while copyright owners should certainly reap a benefit from the new technology, they ought not be

[13] See, e.g., Julie E. Cohen et al., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 439 (2006); Robert A. Gorman and Jane C. Ginsburg, COPYRIGHT 45 (2002).

permitted to charge so much for the right to make use of their works as to stunt the deployment of the new technology – or to reduce incentives for the development in the future of analogous technologies.

14. The case before us falls into this subcategory. The technology at issue is satellite radio – a remarkably efficient way of delivering large quantities of high-quality digital audio programming to consumers in their cars and homes. In the late 1990s, when Congress was confronted with the question of how to deal with this new system (which had not yet been implemented), it recognized the potentially large benefits to copyright owners (as well as to the public) of the technology. On the other hand, it recognized the enormous cost required to develop and deploy the technology, purchase the necessary licenses from the FCC, and build a consumer base. Indeed, as testimony submitted in the primary phase of this processing makes clear, after many years, neither of the two pioneering systems – Sirius and XM – is profitable.

15. Accordingly, Congress adopted a compromise. On one hand, the pioneering satellite services (unlike traditional radio stations) were required to pay for the right to broadcast sound recordings. On the other hand, the owners of the copyrights in those sound recordings were not permitted to determine the amount of the royalty payments. Rather, a government body – originally a Copyright Arbitration Royalty Panel, now this Court – would determine the fee.

16. The standard that Congress selected for determining the amount of the compulsory fee reflects that compromise – in other words, manifests and achieves Congress' desire to balance several goals. Sections 114(f)(1) and 801(b)(1) provide, in pertinent part:

> §114(f)(1)(A): Proceedings under chapter 8 [17 U.S.C. §§ 801 et seq.] shall determine reasonable rates and terms of royalty payments for subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services[14] specified by subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced....
>
> §114(f)(1(B): In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)
>
> §801(b)(1): The rates applicable under sections 114(f)(1)(B) ... shall be calculated to achieve the following objectives:
>
> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The purpose of the present proceeding is to set the rates that the SDARS will pay for the next six-year period, relying on these guidelines.

17. Experts on behalf of SoundExchange – specifically Prof. Ordover and Dr. Pelcovits – have urged the Court in effect to ignore both the language of the governing statutory provisions and the aspirations of the compulsory licensing system as a whole. As indicated above, they contend that the Court should strive to select "a rate that would

[14] "Preexisting satellite digital audio radio services" are defined in section 114(j)(10) of the statute. There is no dispute that the parties to this proceeding fall within that definition.

be established by the parties in a marketplace free of regulatory compulsion and other distortions that could impede the parties from reaching efficient outcomes."[15] In other words, they argue that the Court should select the rate that would emerge from voluntary transactions among the parties – i.e., the rate that would arise if a compulsory license did not exist.

18. The approach they propose suffers from several fatal defects. First and most obviously, it ignores the plain language of the governing statutory provisions. Section 801(b)(1) expressly instructs the Court to consider such matters as "maximiz[ing] the availability of creative works to the public," "minimiz[ing] any disruptive impact" on the satellite-radio industry, the relative contributions made and risks borne by the SDARS and the copyright owners in creating this new industry, and providing *both* copyright owners and the SDARS "fair" returns. The methodology the SoundExchange experts urge upon the Court would reduce all of these statutory factors to surplusage. Indeed, the approach they propose would render the entire compulsory license pointless. If our goal were to mimic the market, we should dispense with this expensive administrative apparatus and simply let the market work. Plainly, Congress had something else in mind.

19. Second, the approach proposed by the SoundExchange experts ignores the history of interpretations of section 801(b)(1). In several other settings governed by that same statutory provision, administrative tribunals and courts have expressly considered the factors that the SoundExchange experts now seek to read out of the statute. No tribunal or court called upon to construe the provision has focused exclusively upon what the parties, left to their own devices, would negotiate on their own. On the contrary, each

[15] See note 1, supra, and accompanying text.

one, when offered such a construction, has rejected it.[16] Congress, when it decided to give the SDARS the benefit of a rate-setting procedure governed by section 801(b)(1), was certainly aware of the way in which it had been construed in the past. To repudiate that construction now would be to flout Congress' intent.

20. Finally and most fundamentally, the approach of the SoundExchange experts misunderstands both the nature of the copyright system as a whole and the roles played within it by compulsory licenses. Copyright law deliberately departs from the "free market." It confers upon authors a power not enjoyed by sellers in the overwhelming majority of markets – namely the power to suppress competition with respect to the relevant product or service. In other words, copyright law (like patent law) intentionally grants the creators of innovations (for which there do not exist good substitutes)

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[16] See Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1, 21-23 (D.C. Cir. 1982) ("[S]ome of the statutory factors require the Tribunal to estimate the effect of the royalty rate on the future of the music industry.... [O]ther statutory criteria invite the Tribunal to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users.... Finally, the statutory factors pull in opposing directions, and reconciliation of these objectives is committed to the Tribunal as part of its mandate to determine "reasonable" royalty rates."); Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144, 1157-58 (7th Cir. 1982), cert. denied, 459 U.S. 907 (1982); Recording Industry Association of America v. Librarian of Congress, 176 F.3d 528, 533-34 (1999) ("RIAA's claim that the statute clearly requires the use of "market rates" is simply wrong. Section 801(b)(1) requires only that arbitration panels set "reasonable copyright royalty rates." The statute does not use the term "market rates," nor does it require that the term "reasonable rates" be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a "market rate" may not be "reasonable," and vice versa."); Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 888-89 (Copyright Royalty Tribunal 1981) (tempering attention to "marketplace parallels" with analysis of the four 801(b)(1) factors); Adjustment of Royalty Payable under Compulsory License for Making and Distributing Phonorecords, 46 FR 10466, 10479-81 (Copyright Royalty Tribunal 1981) (holding that, "[b]ased on our review of the entire record in this proceeding and the legislative history of the Act, we have determined that a reasonable adjustment of the statutory rate must look to the application and operation of the regulatory system of which it is an integral part," and then deriving from an analysis of the four 801(b)(1) factors a "reasonable" rate); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 FR 25394, 25409 (Librarian of Congress 1998) (hereinafter "1998 Librarian Decision") ("A statutory rate, however, 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.").

monopoly power.[17] Those monopolies have, to repeat, very important social purposes: to stimulate innovation and to provide innovators fair rewards. But it must not be forgotten that they are monopolies nevertheless. Monopolies, it has been recognized for centuries, are dangerous. If abused, they can undermine the very purposes they are designed to advance. Compulsory licenses are one of the tools used to prevent abuse – to ensure that, in sensitive social and economic contexts – the interests of the public are adequately protected. They do so by *preventing* copyright owners from charging whatever the market will bear – in other words, by "compelling" them to license their works for less than they otherwise would be inclined and able to charge. The methodology proposed by Prof. Ordover and Dr. Pelcovits fails to appreciate that.

III. The Relevant History

21. The previous section established, I hope, the proposition that, in setting the rates applicable to the SDARS, the Court should take seriously the factors enunciated in section 801(b)(1). How should those factors be applied in the present context? In answering that question, the primary source of guidance, of course, should be the language of the statute itself. But, before turning to that language, it will help us to explore in somewhat more detail the history that lies behind section 114(f)(1) and its cross-references to section 801(b)(1).

22. Prior to 1972, federal copyright law provided no protection for sound

[17] See, e.g., Sony Corporation v. Universal City Studios, 464 U.S. at 429 n. 10 ("'In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public?'") (quoting H. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)); William Fisher, *Reconstructing the Fair Use Doctrine*, supra note 4, at 1699-1701. Cf. Graham v. John Deere Co., 383 U.S. 1, 5-7 (1966); Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813 (1984) (analyzing patent law in similar terms).

recordings. Musical works were included in the list of works shielded by the statute, but not the recordings in which they were often embodied. On several occasions beginning in the 1920s, groups involved in the production and distribution of sound recordings requested that Congress fill what they regarded as a gap in the coverage of the statute, but Congress refused, partly because of doubts concerning the amount of creativity involved in producing sound recordings, and partly because various state statutes seemed to be providing adequate protection against verbatim "piracy" of recordings.

23. In 1972, a sense that the "piracy" problem had become more serious[18] prompted Congress finally to extend federal copyright protection to sound recordings, but in doing so Congress limited the newly created right in two crucial respects. First, sound recordings were shielded against reproduction and the preparation of derivative works only when the copies or derivative works at issue "recapture" or "alter" the "actual sounds" of the originals.[19] In other words, imitations of sound recordings – unlike imitations of all other types of works – continued to be permissible. Second, again unlike all other types of works, sound recordings did not enjoy protection against "public performances" or "displays."

24. The principal reason for the latter limitation was Congress' recognition that many public performances of sound recordings – most importantly, broadcasts by radio stations – benefited the producers of those recordings by bringing them to the attention of potential purchasers of records, tapes, and compact discs embodying them.[20] (The best

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[18] See S. REP. NO. 72, 92nd Cong., 2d Sess. (1971), at 3.

[19] See 17 U.S.C. §114(b).

[20] See, e.g., Debates on S. 1361, 93rd Cong., 2d Sess. (1974), 120 Cong. Rec. at 30479 (Remarks of Sen. Hruska), 30480-81 (Remarks of Sen. Gurney). Recognition of the promotional benefit of radio broadcasts to the producers of sound recordings invites a follow-up question: Why, then, do the owners of copyrights

evidence of that promotional benefit is that, at the time, the record companies routinely paid radio stations substantial sums – many millions of dollars per year – in the form of "payola" to include specific recordings in the stations' broadcasts.[21]) Unconvinced by this consideration, the record companies in ensuing years frequently sought a public-performance right, but for two decades Congress denied their requests.[22]

25. What disrupted this economic and statutory equilibrium was the development during the 1990s of technologies facilitating new kinds of public performances that, in the judgment of the record companies, threatened to corrode sales of sound recordings more than they promoted such sales. In 1995, in the Digital Performance Rights in Sound Recordings Act (DPRA), Congress agreed to address this hazard, not by granting the record companies' renewed request for a general public-performance right, but rather by creating a narrowly crafted right, on the part of the owners of sound-recording copyrights, against public performances in the form of "digital audio transmissions."[23]

26. In shaping this new right, Congress paid close attention to the magnitude of the potential "substitution effects" of specific forms of digital audio transmission – in other words, the hazard that such transmissions would cause listeners to purchase fewer copies of sound recordings. With respect to transmissions that seemed to pose especially

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in musical works enjoy a public-performance right? Don't they too enjoy a promotional benefit when recordings embodying their works are broadcast? The traditional answer: The revenues that the owners of copyrights in musical works can collect when "mechanical copies" of their works are sold are usually capped by the compulsory license contained in section 115 of the statute (see paragraph 12, supra). Providing them adequate sources of revenue thus requires that they also be able to derive income from public performances.

[21] See Fisher, PROMISES TO KEEP, supra note 4, at 58-59.

[22] See S. REP. NO. 128, 104th Cong., 1st Sess. 10-13 (1995) (hereinafter "Senate DPRA Report").

[23] See H. REP. NO. 274, 104th Cong., 1st Sess. (1995) (hereinafter "House DPRA Report"), at 13 (describing the DPRA as "a narrowly crafted response to one of the concerns expressed by representatives of the recording community, namely that certain types of subscription and interaction [sic] audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for use of their work"). To the same effect, see Senate DPRA Report, at 15.

serious risks of substitution effects, Congress left the new right unqualified. In other words, a person who wished to engage in such activities would have to obtain from the sound-recording copyright owners freely negotiated, voluntary licenses. The chief example of such a technology is interactive webcasting services, which enable Internet users to request performances of specific songs.[24] At the opposite end of the spectrum are types of digital audio transmissions – for example, background-music services – that seemed to pose minimal danger of substitution effects.[25] As to these, Congress granted an outright exemption from the new public-performance right. In between these poles were various types of digital audio transmission that carried with them moderate "substitution" risks. One of the members of this intermediate category was digital satellite radio. To govern these, Congress used its now familiar "compromise" strategy – i.e., the imposition of a compulsory licensing system.

27. In so doing, Congress sought to balance several competing concerns. On one hand, it wanted to protect copyright owners from injury caused by consumers' substituting such services for purchases of sound recordings and to "provide copyright holders of sound recordings with the ability to control the distribution of their product." On the other hand, it wanted to avoid "hampering the arrival of new technologies" from which consumers derived important benefits.[26] The standard that, in Congress' judgment, would make possible reconciliation of these competing considerations was section 801(b)(1), supplemented by attention to the terms of voluntary licenses obtained for comparable services.

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[24] See House DPRA Report at 14; Senate DPRA Report at 16. "Interactive services" are defined in 17 U.S.C. §114(j)(7).

[25] Senate DPRA Report at 14-15.

[26] See House DPRA Report at 12-14; Senate DPRA Report at 14-15.

28. In 1998, the emergence of still more digital technologies prompted Congress, in the Digital Millennium Copyright Act (DMCA), to adjust this scheme yet again. In making those adjustments, Congress preserved the basic statutory structure it had employed in the DPRA, but tuned it in various ways. In particular, noninteractive webcasters and new subscription services were subjected to a new compulsory-licensing standard (currently embodied in section 114(f)(2)(B)) that more closely approximated a "willing buyer, willing seller" approach. When making this change, however, Congress "grandfathered" the existing satellite radio services (as well as existing subscription services), making clear that they would continue to be governed by section 801(b)(1).[27]

29. With this history in mind, we turn our attention to the language of the statute itself. At various points, as we will see, the history will provide us assistance in determining how best to construe open-ended provisions.

IV. Interpreting 801(b)(1)

30. The text of section 801(b)(1) appears in paragraph 16, above. It directs the Court to consider four factors, set forth in subsections (A) through (D). The statutory factors overlap to some extent. Boiled down and rearranged slightly, they point toward the following considerations:

Maximizing the availability of creative works to the public.

31. This is the first factor identified in the statute.[28] Its prominence is not

[27] See H. REP. NO. 105-796, CONFERENCE REPORT TO ACCOMPANY H.R. 2281, 105th Cong., 2d Sess. (1998) (hereinafter "DMCA Conference Report"), at 85.

[28] See 17 U.S.C. §801(b)(1)(A).

surprising. The ultimate goal of the copyright system, as we have seen, is to stimulate creative activity – *and then make the fruits of that activity available to the public.*[29] Pursuit of that objective in the present context would seem to require the selection of a statutory rate that simultaneously accomplishes two things: first, provide appropriate incentives for the creation of new works; and, second, provide appropriate incentives for the development and maintenance of delivery services, like the SDARS, that afford customers convenient access to those works.

32. Prior interpretations of subsection 801(b)(1)(A) – most notably, the 1998 ruling of the Librarian of Congress in the Preexisting Services CARP -- provide ample precedential support for attention to the first of these variables.[30] SoundExchange will likely point to the same ruling to urge the panel to go further and to ignore altogether the second variable.[31] As a result, SoundExchange may contend, this statutory factor tilts entirely in their favor.

33. Whatever the merits of SoundExchange's likely position as applied to 801(b)(1) in general, it seems unbalanced in the present context. Recall that, when adopting the DPRA and then amending it in the DMCA, Congress recognized the ways in which the recently developed delivery systems for digital audio recordings increased the availability of those recordings to the public:

> 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

[29] See the sources cited in note 7, supra.

[30] 1998 Librarian Decision at 25406.

[31] See id., at 25407 ("[T]he Register concludes that the record companies and the performers make the greater contribution in maximizing the availability of the creative works to the public, a conclusion consistent with past CRT precedent.")

> selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords.[32]

A central objective of the compulsory licensing system that Congress created (and then tuned) in those statutes was to ensure the continued deployment of the new technologies, which had such manifest public benefits.[33] It would thus be distinctly odd to exclude from the statutory factor that calls for "maximizing the availability of creative works to the public" consideration of the financial incentives necessary to sustain the new delivery systems, whose principal virtue, in Congress' judgment, was precisely to increase the availability of sound recordings to the public.

34. In short, this first factor, fairly applied, requires selection of a statutory rate that both encourages the development of new sound recordings and ensures the viability of the SDARS.

Minimizing Disruption of the Industry

35. This goal is made explicit in the fourth of the statutory factors.[34] It points in the same direction as the preceding theme. It counsels the Court to select a rate that will enable the SDARS services to earn a reliable profit and thus avoid either the collapse of those companies or the disruption inevitably associated with financial restructuring. To achieve that end, the Court should strive to predict the shoals that XM and Sirius must navigate in the next five years – and should then choose a compulsory rate that would enable them to avoid those hazards.

36. The manner in which subfactor (D) was construed in the 1998 Librarian

[32] Senate DPRA Report at 14; House DPRA Report at 12.

[33] See S. REP. NO. 190, 105th Cong., 2d Sess. 2, 8 (1998).

[34] See 17 U.S.C. §801(b)(1)(D).

Decision clearly supports this interpretation. In that case, which involved analogous circumstances, the Librarian ruled that the three remaining factors [of section 801(b)(1)], especially the fourth factor, which requires that the rate be set "[t]o minimize any disruptive impact on the structure of the industries involved," see 17 U.S.C. 801(b)(1)(D), compels the Register to consider the economic health of the digital audio transmission industry."[35] Attention to the same factor here should prompt the Court to select a rate that will preserve the health of the satellite radio industry.

Relative Contribution

37. Subsection (C) of 801(b)(1) instructs the Court to select a rate that will "reflect the relative roles of the copyright owner and the copyright user" in generating and making available to the public creative works. This objective has deep roots in the copyright system as a whole. The Supreme Court has often emphasized that one aspiration of that system – an aspiration fully compatible with the project of maximizing the widespread dissemination of creative works – is giving the contributors to that project what, as a matter of fairness, they are "due." For example, in *Mazer v. Stein*, the Court insisted that, "Sacrificial days devoted to . . . creative activities deserve rewards commensurate with the services rendered."[36]

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[35] 1998 Librarian Decision at 25410 (emphasis added).

[36] 347 U.S. 201, 219 (1954). For many examples of similar statements, see Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO STATE L.J. 517 (1990); and Lloyd Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1211-54 (1998). The compatibility of this goal with the larger aspiration of widespread dissemination of creative works was insisted upon by the Supreme Court in *Harper & Row*: "We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." Harper & Row v. Nation Enterprises, 471 U.S. 539, 545-46

38. Pursuit of this goal in contexts of the sorts governed by 801(b)(1) is tricky, because more than one entity has contributed to providing the public access to creative materials. Both thus "deserve" a fair return of the income generated by the activity at issue. How, then, should the pot be divided? The answer the statute provides is: Each contributor deserves a share proportional to his or its "relative contribution" to the project. This distribution principle also finds support both in copyright law and in the American political system in general. Social psychologists long ago discovered, through experimentation and surveys, that the large majority of Americans believe that the various contributors to an enterprise deserve shares of its output proportional to their contributions.[37] Many legal rules in various settings reflect that fundamental conviction.[38]

39. But how, exactly, does one measure the relative contribution of the record companies and the SDARS in making available to the public the rich collection of recordings, commentary, and other programming carried by the SDARS? The answer is

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(1985).

[37] See J. Stacey Adams, *Toward an Understanding of Inequity*, 67 JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 422, 424 (1963); Reinhard Selten, *The Equity Principle in Economic Behavior*, in HANS GOTTINGER & WERNER LEINFELLNER, EDS., DECISION THEORY AND SOCIAL ETHICS (1978); Elizabeth Hoffman and Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEG. STUD. 259 (1985).

[38] One such rule is the doctrine of accession, which has been well summarized as follows: "Recognized since before the time of Blackstone's Commentaries, the law of accession deals with the ownership of property made up of materials of one person, combined with materials and/or labor of another. Whether the law of accession applies to a piece of property is determined by a number of principles, including whether the property of one individual can be separated or removed from the unified article, or whether the nature or identity of an individual's property has been transformed by the skill and labor of another. If the law of accession applies, a series of rules determine the ownership of the combined or transformed property and allocate its value and control. In short, accession vests title and control of a combined piece of property in the owner of its principal parts or in its primary transformer. Accession then directs the title holder to reimburse the owner of the secondary parts of a combined piece of property or its secondary transformer for her lesser contribution." Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U.L. REV. 271, 321 (1998) (footnotes omitted).

not obvious. Fortunately, the statute itself provides us guidance on that score. It identifies six dimensions with respect to which the relative contributions of the record companies and the SDARS themselves should be assessed:

- "creative contribution";
- "technological contribution";
- "capital investment";
- "cost";
- "risk"; and
- "contribution to the opening of new markets for creative expression and media for their communication."

40. At first glance, the first of these six subfactors would seem to tilt strongly in favor of the record companies. After all, much of the programming carried by the satellite services consists of recorded music, to which the record companies plainly have made important creative contributions. The balance on this subissue would thus seem to tilt clearly in their favor. Much of the force of the foregoing inference, however, dissipates when one considers the following additional circumstances: (i) A large and growing percentage of the material carried by the satellite services consists of programming they have developed themselves.[39] (ii) Even with respect to the programming that consists of recorded music, the satellite services have added many additional creative features.[40] (iii) Finally, the record companies have contributed nothing *new* to the satellite services. All of the sound recordings at issue were generated by the record companies for distribution through other channels. By contrast, as just suggested, the SDARS have

[39] See, e.g., Written Testimony of Eric Logan, paragraphs 25-34.

[40] See, e.g., id., at paragraphs 41-61.

made important *new* creative contributions to the set of materials delivered to their customers -- and will be making even larger contributions in the near future.

41. These additional considerations would seem to render the implications of the first subfactor more equivocal. But whatever one's judgment on that score, it seems clear that all of the remaining five subfactors identified in subsection 801(b)(1)(D) tilt decisively in favor of the SDARS. It is they who have made the enormous "technological contribution[s]" and "capital investment[s]" necessary to create the satellite radio systems. They have borne all of the "cost[s]" and "risk[s]" associated with launching the services. And they alone have contributed to the "opening of new markets for creative expression and media for their communication."[41] On balance, therefore, it seems apparent that attention to the parties' "relative contribution" should prompt the Court to be especially solicitous of the interests of the SDARS.

Fairness

42. We come, finally, to the most encompassing of the statutory factors: Subsection 801(b)(1)(B) directs the Court to "afford the copyright owner a *fair* return for his or her creative work and the copyright user a *fair* income under existing economic conditions."[42] As indicated above, treating all parties "fairly" is surely one of the main goals of the copyright system as a whole. One important implication of that objective in this particular context was discussed at length in the immediately preceding subsection: ensuring that both the record companies and the SDARS receive revenues proportional to their relative contributions to the satellite services. To review, the record companies have

[41] Cf. 1998 Librarian Decision at 25407 (coming to similar conclusions in analogous circumstances).

[42] 17 U.S.C. §801(b)(1)(B) (emphasis added).

made important "creative" contributions to those services, and the SDARS have also made important "creative" contributions, as well as major contributions in the form of technology, investment, cost, risk, and the opening of new markets. The ratio between the amount of money collected by the record companies in the form of statutory fees and the amount of money retained by the SDARS after the payment of those fees should, from this standpoint, approximate the ratio between the record companies' total contributions and the SDARS' total contributions.

43. But if subsection (B) is not to become mere surplusage, it must include additional aspects of "fairness" – i.e., aspects of fairness over and above rewarding the parties in proportion to their relative contributions. What might those additional aspects encompass? The following themes, though not dictated by the statutory language, seem consistent with that language, particularly when read against the background of the pertinent legislative history:

44. Providing investors returns commensurate with the risks they assume. People and firms that invest money in high-risk enterprises customarily expect returns much larger than those that invest in well-established enterprises. That practice is both efficient and fair. Over the long haul – taking into account the larger proportion of risky ventures that (by definition) fail – it provides the investors reasonable rates of return. Attention to this dimension of "fairness" should prompt the Court to try to avoid hindsight. In other words, the Court should not select a rate that will enable investors in the SDARS to earn only enough to match the returns they could have reaped by investing in electric companies or banks. Rather, it should select a rate that will enable the investors to reap returns commensurate with the high risks they undertook when they made their

investments.[43]

45. Rewarding pioneers. Latent in many aspects of the American legal system, including copyright and patent law, is the principle that pioneers – people and firms that develop truly novel, socially valuable products and services – deserve rewards larger than ordinary businessmen and craftsmen.[44] Attention to this dimension of fairness should prompt the Court to acknowledge the vision and determination of the founders and backers of the SDARS by ensuring that they reap an appropriate financial reward.

46. Protecting reasonable reliance interests. Many aspects of the American legal system are designed to ensure that persons who reasonably rely upon the representations of others are protected against injury resulting from the repudiation of those representations. Examples of rules that express and enforce this principle are the doctrine of promissory estoppel in contracts,[45] the doctrine of easements by estoppel in property law,[46] and the constitutional prohibition upon the retraction of governmental promises exemplified by the *Kaiser-Aetna* case in constitutional law.[47] The legislative history of

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[43] The magnitude of those risks – and the concomitant legitimate expectations of the investors in the SDARS – are discussed in the testimony of Armand Musey. See Transcript of June 13, 2007, pp. 135-36, 149-50, 156-57.

[44] See, e.g., In re Horgan, 559 F.2d 595, 606 (C.C.P.A. 1977) (acknowledging that "pioneers" deserve broad patent claims to their inventions); Lawrence Becker, *Deserving to Own Intellectual Property*, 68 CHICAGO-KENT L. REV. 609 (1993) (contending that persons who engage in "creative" work deserve larger rewards than persons who engage in less creative work).

[45] See RESTATEMENT SECOND OF CONTRACTS §90 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

[46] See RESTATEMENT OF PROPERTY §519(4) (1944) ("A licensee under [an otherwise revocable license] who has made expenditures of capital or labor in the exercise of his license in reasonable reliance upon representations by the licensor as to the duration of the license, is privileged to continue the use permitted by the license to the extent reasonably necessary to realize upon his expenditures.").

[47] See Kaiser-Aetna v. United States, 444 U.S. 164, 180 (1979) ("While the consent of individual officials representing the United States cannot "estop" the United States, it can lead to the fruition of a number of expectancies embodied in the concept of "property" -- expectancies that, if sufficiently important, the

the DMCA suggests that Congress had exactly this principle in mind when in 1998 it decided to continue to give the SDARS the benefit of section 801(b)(1), rather than subject them to the less favorable standard now embodied in section 114(f)(2)(B): "The two preexisting satellite digital audio radio services ... have purchased licenses at auction from the FCC and have begun developing their satellite systems."[48] The most plausible reading of this statement is that Congress recognized the unfairness of changing the rules of the game after the SDARS had entered into contracts and made investments in reliance upon the prior regime. Applying the general principle underlying this recognition to the present proceeding, it suggests that the Court should avoid adopting a rate that frustrates legitimate expectations arising out of representations made by Congress when it first adopted DPRA. Among those representations, as we have seen, was an assurance that the compulsory license would not "hamper[] the arrival of new technologies."[49]

47. Credit for promotional benefits. Finally, a principle of fairness that has informed Congress' treatment of sound recordings for decades is that organizations that broadcast those recordings deserve credit for the promotional benefits they confer on the producers of those recordings. This principle, as we have seen, largely explains why, when Congress first extended copyright protection to sound recordings, it did not recognize a public-performance right. The primary reason why Congress in 1995 finally did recognize a public-performance right for selected types of digital audio transmissions is not that it had abandoned its recognition of the relevance of promotional benefits, but rather that it was concerned that substitution effects might, in some circumstances,

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Government must condemn and pay for before it takes over the management of the landowner's property.") (citations omitted).

[48] DMCA Conference Report, at 81.

[49] See note 26, supra, and the accompanying text.

exceed those promotional effects. Fidelity to Congress' stance on this issue should prompt the Court, when setting the statutory fees to be paid by the SDARS, to make sure that the SDARS are given appropriate credit for the promotional benefits that their services continue to confer on the record companies.

V. The Significance of Voluntary License Agreements by Comparable Services

48. It makes sense, when applying the 801(b)(1) factors, to consider the magnitude of the fees that comparable services have voluntarily paid in the past or are paying at present for permission to publicly perform sound recordings. The amount of those fees should surely not be determinative. As the Court of Appeals for the D.C. Circuit observed:

> The statute does not use the term "market rates," nor does it require that the term "reasonable rates" be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a "market rate" may not be "reasonable," and vice versa.[50]

But such voluntary agreements – if entered into by truly comparable parties in truly comparable circumstances – may cast some light on the magnitude of the prices that the services could afford or what other parties in the past may have considered fair.

49. A large portion of the testimony submitted in the principal stage of this proceeding has focused on the questions of (a) what voluntary agreements are truly "comparable" and (b) how much weight those agreements should be accorded. Much of the disagreement between the parties on those matters involves aspects of economics on which I have no expert knowledge – and, thus, as to which I cannot responsibly venture an opinion. But a few dimensions of the controversy implicate the relations among the

[50] Recording Industry Association of America v. Librarian of Congress, 176 F.3d 528, 533-34 (1999).

various parts of the copyright statute or the structure of the copyright system as a whole, matters on which I do have sufficient expertise to warrant expressing an opinion.

50. The first such issue concerns which is primary: the section 801(b)(1) factors; or the magnitude of fees paid voluntarily in comparable circumstances? The statute itself seems quite clear on this matter. The pertinent instruction in section 801(b)(1) is mandatory: "The rates applicable under sections 114(f)(1)(B) ... shall be calculated to achieve the following objectives..." (emphasis added). By contrast, the pertinent instruction in section 114(f)(1)(B) is permissive: "In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)." (emphasis added) A natural inference from this contrast is that the obligatory section 801(b)(1) factors are primary, and the optional comparable voluntary rates are secondary.

51. A second issue concerns the order in which the analysis should proceed. Should one begin with comparable voluntary rates and then "adjust" them in light of the section 801(b)(1) factors, or should one instead look first to the section 801(b)(1) factors and then supplement the fruits of that analysis with consideration of comparable voluntary agreements? Administrative practice on this issue has varied. I doubt that the sequence makes a great deal of difference, provided that one keeps in mind the relative importance of the two inquiries. But, for what it's worth, the statute itself, by authorizing the Court to consider voluntary fees "in addition to" the section 801(b)(1) factors, seems

to suggest that the section 801(b)(1) factors should come first.

52. A third issue concerns which voluntary fees are relevant. The statute seems to limit the appropriate set quite sharply. Section 114(f)(1)(B) directs the Court's attention to "the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)" (emphasis added). The referent for the underlined phrase seems to be the agreements mentioned in the third sentence of section 114(f)(1)(A): "Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings." This language is not crystal clear, but it appears to limit the set of voluntary licenses that the Court may consider to those between "owners of sound recordings" and "preexisting subscription services, or preexisting satellite radio services." Only one of the voluntary agreements that has been presented to the Court during the primary phase of this proceeding would seem to qualify under this definition – namely, the contract between Music Choice and SoundExchange voluntarily extending the terms of a prior CARP ruling.

53. The interpretation offered in the preceding paragraph, though seemingly the best reading of the pertinent statutory provisions, would have a radical impact on this proceeding. Much of the evidence submitted thus far would be rendered irrelevant. If the Court were not willing to go that far, it should seriously consider another implication of the statutory language. Notice that section 114(f)(1)(A) refers to licenses entered into by the "owners of sound recordings." The implication: contracts between the SDARS

and disk jockeys or radio personalities would fall outside the pale. There are good policy reasons, in addition to the statutory language, to adhere to such a limitation: the services of disk jockeys and radio personalities are, in practice, rivalrous. In other words, Howard Stern cannot simultaneously work for Sirius and KISS. By contrast, sound recordings (like all innovations shielded by copyright law) are nonrivalrous in character. In other words, they can be enjoyed by unlimited numbers of consumers simultaneously. (A recording of Layla can be played on Sirius, XM, and KISS at the same time.) The economic considerations applicable to the creation of optimal incentives for the production of rivalrous and nonrivalrous goods are fundamentally different.[51] It thus makes good sense for the statute to exclude from the Court's purview license agreements, no matter how voluntary, struck between the SDARS and suppliers of services like Howard Stern.

VI. The analogy to Section 111

54. The final issue that I have been asked to address in my testimony concerns a specific aspect of subsection 801(b)(1)(C). Judge Roberts, I have been told, has asked whether calculation of the "creative contributions" of the SDARS within the meaning of that subsection should be informed by the manner in which, during previous compulsory-license rate-setting proceedings, analogous creative contributions by broadcasters have been considered when applying section 111(d) of the copyright statute.

55. As Judge Roberts points out, the broadcasters' contributions have ordinarily

[51] See, e.g., Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STATISTICS 387 (1954); Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (1962); Menell and Scotchmer, supra note 8, at 1-3.

been treated as negligible in those proceedings. For example, in a 1986 decision, the Copyright Royalty Tribunal made the following finding:

> [In the proceeding before us,] NAB relitigated the question of compilation of the broadcast day, and the local broadcasters' share to an award for radio. In the 1978 proceeding, the Tribunal rejected NAB's claim to any value for the local broadcasters' compilation of the broadcast day. In the 1980 proceeding, we reached the same conclusion stating, "cable systems are interested in the programs on a distant signal which induce persons to subscribe, not in the scheduling and promotion." In this proceeding, NAB's witness Protter gave the Tribunal no new insight to modify our previously held views. In fact, he stated that a broadcast[er] designs his broadcast day for the local market and not for the distant market, and as a broadcaster, how his scheduling would appeal to others outside of his market was not his concern. We continue to hold to our view that NAB's compilation claim has no value.[52]

56. The more extensive discussion of the same issue by the Copyright Royalty Tribunal in the 1980 Proceeding, to which the foregoing passage refers, reads in pertinent part:

> We have made a total award of 4.5% to U.S. television broadcasters for their entitlement to royalty fees for distant carriage of station programming, and for sports programming. For lack of persuasive evidentiary justification we have not included in our award any sums for broadcast day compilations.
>
> Although the case of the commercial broadcasters during the 1979 and 1980 proceedings was presented with a degree of coherence lacking in the 1978 case, we have found no occasion to modify the findings made in our 1978 determination and affirmed in our 1979 determination. We reaffirm our previous findings concerning the application of the criteria to the record evidence relating to station programming.
>
> We have reviewed our previous findings in the light of the survey presented by NAB of cable operators attitudes toward different types of programming in attracting and keeping subscribers. Neither the SRI study nor any other evidence requires an alteration of our findings that station programming is only of "marginal value to cable operators." We have

[52] 1983 Cable Royalty Distribution Proceeding, 51 FR 12792, 12812 (1986) (citation omitted).

never asserted that station programming is of no value to cable operators, but the value of such programming is adequately compensated in our award to commercial television....

We have considered all of the evidence in our record related to the entitlement of commercial telecasters to share in the royalties for sports programming in the light of the decision of the U.S. Court of Appeals for the District of Columbia Circuit. While the character of the Court's explanation of its decision leaves room for improvement, we find nothing in that decision which requires more than our making a judgment (in the absence of relevant cable royalty contractual provisions) of the contribution of the broadcaster to the value and appeal of the sports programming to cable operators and subscribers. We find that for the purposes of cable royalty distribution, the contribution of the broadcaster as compared with that of the teams is minimal, and that it is reasonably reflected in a total award of 4.5% to the commercial television claimants.

We do not dispute that high quality production enhances the enjoyment of a sports telecast. We cannot accept, however, the NAB position that when functioning as the producer of the telecast, the broadcaster should receive one half of the sports royalties. We find no evidence in our record, including that of the NAB sports witnesses, establishing that the contribution of the broadcaster in any significant respect contributes to a cable operator's interest in sports programming, or the decision of an individual to subscribe to cable television....

NAB is seeking compensation in this proceeding for television broadcast compilations. In our 1978 royalty determination, we stated with regard to the evidence presented by NAB in justification of their claim to royalties for the broadcast day compilation:

> We find that this testimony and the record as a whole provides no basis for establishing the value of the broadcast day nor does it provide any basis for a distribution of royalties to broadcaster claimants on this theory.

We reach the same result in this proceeding. We have once again heard the NAB evidence. As with other elements of the NAB case, the packaging is better than the 1978 case but the box when opened is still empty. We find that broadcast day compilation is of no value to a cable system. We reject the argument of NAB that it is the broadcast compilation which creates "a station image which is highly promotable by cable operators." Cable systems are interested in the programs on a distant signal which induce persons to subscribe, not in the scheduling and promotion.[53]

[53] 1980 Cable Royalty Distribution Determination, 48 FR 9552, 9565-66 (1983) (citations omitted).

57. The skepticism reflected in these (and other) passages concerning the claims of the broadcasters might seem, as Judge Roberts suggested, to cast doubt on the claim by the SDARS that they deserve credit, under the auspices of subsection 801(b)(1)(C), for their "creative contributions" to the services they make available to the public. Two independent considerations, however, counsel against making this analogy.

58. First, the relevant statutory provisions are materially different. Subsection 111(d)(3), which governs the proceedings to which Judge Roberts has referred, provides:

> The royalty fees thus deposited shall, in accordance with the procedures provided by clause (4), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:
>
> (A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and
>
> (B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (1)(A); and
>
> (C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs. (emphasis added)

By contrast, subsection 801(b)(1)(C), which governs the present proceeding, does not limit the Court's attention to "copyright owners," but directs its attention to a broader array of parties:

> The rates applicable under sections 114(f)(1)(B) ... shall be calculated to achieve the following objectives: ...
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for

creative expression and media for their communication. (emphasis added)

59. This distinction is readily understandable when one considers the different purposes of the proceedings governed by the two provisions. With respect to every compulsory license, two questions must be answered: First, how much money must the beneficiary of the compulsory license pay to the owners of the copyrights in the material in question? Second, how should that pot of money be distributed among the various copyright owners? With respect to the compulsory license for secondary transmissions by cable television systems, the first question is answered by the statute itself. Subsections 111(d)(1)(B), (C), and (D) prescribe the amounts of money that eligible cable systems must pay. Only the second question is left to be determined by an administrative tribunal (in the absence of agreement among the parties), subject to (very limited) judicial review. It is thus unsurprising that section 111(d)(3) – and the jurisprudence interpreting it –concentrates on the relations among the copyright owners – a focus that, in turn, naturally suggests exclusive concern with the relative magnitude of their copyrightable contributions. By contrast, a proceeding under section 801(b)(1), like the present, is concerned with the first of the two questions. Again, it is thus unsurprising that the pertinent statutory provision casts its net wider. The bottom line: decisions interpreting and applying section 111(d)(3) have only limited value when interpreting and applying 801(b)(1).

60. The second, independent reason why the fate of the broadcasters' claims in section 111 proceedings does not undermine the SDARS' facially analogous claims is more fact-based. Crucial to the repudiation of the broadcasters' arguments were factual findings that the consumers of cable television services simply did not value the

broadcasters' contributions to the programming at issue. In other words, the primary basis of each of the pertinent ruling was a judgment that the broadcasters' contentions that they were contributing material that attracted cable customers lacked "evidentiary justification."[54] By contrast, in the present proceeding, witnesses have testified concerning both the extensive "creative contributions" made by the SDARS to the collection of recordings they make available to the public and the value of those contributions to their subscribers.[55]

61. In sum, for two separate reasons, the SDARS' position in this proceeding is not undermined by the ways in which the claims of the broadcasters have been resolved in prior §111 proceedings.

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[54] See 1980 Cable Royalty Distribution Determination, 48 FR 9552, 9566 n.260 (1983),

[55] See, e.g., Oral Testimony of Steven Blatter, Transcript of June 11, 2007, pp. 84-100.

I hereby declare under penalty of perjury that the foregoing is true to the best of my knowledge, information and belief.

William W. Fisher III

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Executed July 24, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that the Public Rebuttal Witness Testimony and Exhibits Jointly Submitted by Sirius Satellite Radio Inc. and XM Satellite Radio Inc. was served on July 27, 2007 via email without exhibits and via courier with exhibits on the following party:

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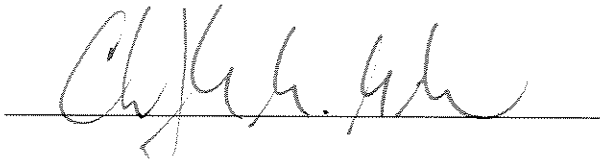
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