Before the
COPYRIGHT ROYALTY JUDGES
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

REBUTTAL TESTIMONY OF

BARRIE KESSLER

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July 2007

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I. INTRODUCTION

I am submitting this rebuttal testimony to respond to some of the terms proposals that XM and Sirius submitted in connection with their direct case in this proceeding. SoundExchange believes that stringent terms are necessary to ensure timely payment and accurate reporting by licensees and, in turn, timely and accurate distributions to performers and copyright owners. In this proceeding, XM and Sirius have proposed terms that are, on the whole, less strict than the terms adopted by the Copyright Royalty Judges in Docket No. 2005-1 CRB DTRA, and that would undermine the fair and efficient administration of the statutory license.

As set forth in greater detail below, SoundExchange proposes the adoption of many of the same terms in this proceeding as the Judges adopted in Docket No. 2005-1, subject to the revisions described below, with regard to late fees, confidentiality, and audits and verification of payments. Although the Judges did not rule in SoundExchange's favor on all of the terms issues raised in Docket No. 2005-1 CRB DTRA, the Judges clearly recognized many of SoundExchange's concerns and the terms adopted in that case represent an important step forward. We of course will not be able to fully assess the effectiveness of those terms until we have experience receiving reports of use, statements of account and payments under the new terms. Nonetheless, we also recognize the value in having consistency of terms across licenses. This is particularly true in this proceeding where the licensees (XM and Sirius) are subject to multiple statutory licenses. We believe that consistency among the terms regulations of the various licenses will make SoundExchange's administration of the statutory licenses and the SDARS' compliance with the licenses simpler and more efficient. For example, it will create administrative ease for all involved parties if the SDARS are subject to the same late fees for

their SDARS services as they are for their webcasting services and their digital audio services offered over satellite television.

SoundExchange has concerns about some of the recordkeeping and definition of revenue proposals that the SDARS have made in this proceeding, and, as explained below, proposes terms that will ensure the fair and accurate collection and distribution of royalties. In addition to my testimony, SoundExchange is submitting with its Second Amended Rate Proposal a complete set of proposed terms in regulatory language format. I have reviewed those proposed regulations and believe they are fair, reasonable and will aid SoundExchange's efficient administration of the statutory license.

Finally, I am aware of the Judges' preference that the parties to this proceeding submit stipulated terms for as many (or all) of the terms issues as possible. SoundExchange will work with XM and Sirius to reach agreement on terms issues and, in the event that the parties are able to stipulate to some or all of the terms, will submit stipulated terms on or before the date the proceeding is finally submitted to the Judges for decision.

II. TERMS ISSUES

A. Late Fees

The SDARS propose late fees of 0.50% per month for a licensee's failure to make payment. *See* XM and Sirius Rates and Terms Proposal § 26_.3(c).[1] The SDARS, however, offer no evidence in support of this proposal. SoundExchange now proposes that the Court adopt the same late fee -- 1.5% per month -- as it adopted in Docket No. 2005-1 CRB DTRA and as set forth in 37 CFR § 380.4(e). As the Court explained in its Final Determination of Rates and

[1] XM and Sirius have submitted Proposed Rates and Terms that are substantially identical and that use parallel numbering for the sections and subsections. I thus cite to them in this testimony as "XM and Sirius Rates and Terms Proposal" for ease of reference, except in footnote 2 where I discuss a difference between the two proposals.

Terms in that proceeding, the "best evidence" in the record, including marketplace agreements entered into by various services in that proceeding, supported a rate of 1.5%. *See id.* at 89-91.

Late fees are critical to SoundExchange's mission of collecting and distributing royalty payments in a timely manner. Absent an infringement action, late fees are the only remedy available to combat late payments by licensees. When licensees do not pay on time, performers and copyright owners are deprived of revenue to which they are entitled. Nor do late fees impose any burden on licensees who pay timely -- they are of course only assessed against untimely payments.

The SDARS' terms proposal omits reference to late fees for untimely submission of statements of account. In Docket No. 2005-1 CRB DTRA, this Court adopted late fees for statements of account, observing that "timely submission of a statement of account is critical to the quick and efficient distribution of royalties," and that regulations implementing other statutory licenses require the payment of late fees for failure to submit timely statements of account with royalty payments. *See* Final Determination of Rates and Terms, Docket No. 2005-1 CRB DTRA, at 92. For the same reasons, and for the reasons I set forth in my written direct statement in Docket No. 2005-1 CRB DTRA (which was designated in this proceeding and admitted into evidence as SX Trial Exhibit 56), SoundExchange in this proceeding proposes late fees of 1.5% for late statements of account. *See* 37 CFR § 380.4(e).

The SDARS' terms proposal also fails to mention late fees for the untimely submission of reports of use. As a threshold matter, timely, accurate and complete reporting is essential to SoundExchange's ability to distribute royalties. Although many services operating under statutory licenses have not been submitting reports of use, SoundExchange's experience with those that have is that licensees' reporting is often inaccurate or incomplete.

SoundExchange has substantial experience with widespread inaccuracy in reporting by the SDARS. This is true with respect to, among other things, release dates of sound recordings played provided as part of reports of use. Whatever the claims the SDARS make about pre-1972 sound recordings, the reality is that in a significant number of cases, the SDARS do not report any release date at all or report a release date that is obviously false, e.g., reporting a pre-1972 release data for albums released by artists who were born or formed bands after 1972 or reporting a 1971 release date for a huge percentage of the sound recordings that they play.

Although the Court did not adopt late fees for untimely reports of use in Docket No. 2005-1 CRB DTRA, SoundExchange believes that late fees of 1.5% per month are appropriate here as well. The basis for this request is the same as the basis for the request for late fees on the untimely submission of statements of account. When reports of use are submitted late or are inaccurate or incomplete in material ways when submitted, it delays SoundExchange's ability to process and pay royalties to performers and copyright owners. Late fees are a necessary incentive to ensure that licensees submit reports of use in a timely fashion.

B. Confidentiality

The SDARS propose that statements of account and information pertaining to statements of account should be treated as confidential information and that access to the information should be limited to (i) SoundExchange's employees, agents, consultants and independent contractors engaged in collecting and distributing royalties who are not also employees or officers of sound recording copyright owners or performers, and (ii) independent auditors who are not employees or officers of sound recording copyright owners or performers. *See* XM and Sirius Rates and Terms Proposal, § 26_.5(d).

SoundExchange believes that the SDARS seek to limit access to information in statements of account to too narrow a group of people. SoundExchange proposes that the Court adopt the same confidentiality provisions that it adopted in Docket No. 2005-1 CRB DTRA and as set forth in 37 CFR § 380.5, which would allow copyright owners and performers, and their agents (as well as attorneys, consultants and authorized agents in future proceedings), to review confidential information included in and pertaining to statements of account, subject to appropriate confidentiality agreements. As discussed in this Court's Final Determination of Rates and Terms in Docket No. 2005-1 CRB DTRA, at 95, and in my written direct statement in that proceeding (which has been admitted into evidence in this proceeding as SX Trial Exhibit 56, at 30-35), access to this information is necessary for copyright owners and performers to make informed judgments about whether licensees are complying with their statutory obligations and making accurate payments and in making auditing and enforcement decisions. Copyright infringement actions are extremely expensive and resource intensive to bring. As such, SoundExchange and its members must make enforcement decisions with an eye to the amount of royalties at stake in a particular action.

C. Audits and Verification of Payments

The SDARS propose that SoundExchange should be allowed to conduct audits "no more than once every three (3) years, and no more than once in any given year," and that an audit of any year may be conducted only once. *See* XM and Sirius Rates and Terms Proposal, § 26_.4(a). The precise meaning of this proposal is unclear. SoundExchange proposes that the Court adopt the same audit and verification provisions that it adopted in Docket No. 2005-1 CRB DTRA and as set forth in 37 CFR § 380.6. In particular, these verification provisions make clear that a

licensee must maintain its books and records for the three calendar years prior to the current year.

D. Notice and Recordkeeping

As I discussed in my written direct statement in this proceeding, SoundExchange requests census reporting of each sound recording played on each channel by the SDARS. *See* Kessler WDT at 17-18. *See also* SX Trial Ex. 56, at 25 (Kessler designated written direct statement from Docket No. 2005-1 CRB DTRA). The SDARS propose that their reports of use "shall include a Licensee's intended or actual playlist for each channel and each day of the reported month, except that no reporting requirement shall apply to channels reasonably classified as news, talk or sports." *See* XM and Sirius Rates and Terms Proposal, § 26_.6(d).

This proposed provision raises two issues. First, although the SDARS' proposal does not use the phrase "census reporting," SoundExchange interprets it to mean census reporting. It thus appears that the parties are in agreement on this issue. Census reporting is important to SoundExchange because accurate data is critical to the integrity of SoundExchange's collection and distribution of royalties.

Second, SoundExchange opposes the SDARS' proposal not to report sound recordings played on "channels reasonably classified as news, talk or sports." Nothing in the statutory license suggests that licensees are entitled not to report the use of sound recordings, including music, comedy or spoken word simply because they play those recordings on so-called non-music or news, talk or sports channels. *See* 17 U.S.C. § 114(f). Section 114(f)(4)(A) provides that copyright owners are entitled to "receive reasonable notice of the use of their sound recordings." The statute does not carve out exceptions for the use of sound recordings on news, talk or sports channels, and the Court should make clear that XM and Sirius are required to

report all performances of sound recordings, regardless of the channels on which they are played. Absent complete and accurate reporting of sound recordings played on all of the XM's and Sirius's channels, SoundExchange cannot provide copyright owners and performers with accurate payments for the use of their sound recordings.

The SDARS' proposal not to report sound recordings played on news, talk or sports channels is especially troubling when read in conjunction with the SDARS' proposed definition of "Music Channel." The SDARS propose that "'Music Channel' means a channel on a Licensee's SDARS on which sound recordings are performed under the provision of 17 U.S.C. § 114(d)(2)(B), and on which such performances constitute 50% or more of the programming." *See* XM and Sirius Rates and Terms Proposal, § 26_.2(f). But if a music channel is defined in this way, then channels on which music constitutes 49% of the programming presumably would be defined as "news, talk or sports" channels. And because the SDARS propose not to report their use of sound recordings on such channels, it follows that they are proposing not to report what could be a substantial number of performances of sound recordings. As I explained above, the amount of sound recordings that a channel plays should make no difference in whether XM or Sirius is required to report those performances. Nor does requiring the SDARS to report performances of sound recordings on channels on which music constitutes 49% or less of the programming impose an undue burden on the SDARS -- indeed, Section 114(f)(4)(A) requires them to report their use of sound recordings.

Similarly, the SDARS propose that they should not be required to report sound recordings played on the SDARS that are included in programming provided to them by third parties. *See* XM and Sirius Rates and Terms Proposal, § 26_.6(d)(2). Again, this proposal is contrary to the statutory requirement that the SDARS provide notice to copyright owners of the

sound recordings they use. 17 U.S.C. § 114(f)(4)(A). And as discussed above, SoundExchange cannot provide copyright owners and performers with accurate payments for the use of their sound recordings if the SDARS fail to provide reports of use for the sound recordings they play, regardless of whether as part of original programming or programming provided by third parties.[2] To the extent that sound recordings are used in programs provided by third parties, the SDARS can simply and easily pass the obligation to identify such recordings on to the third party provider.

E. Definition of Revenue

XM and Sirius propose to pay royalties that are a percentage of "Gross Revenues resulting from Residential services in the United States." *See* XM and Sirius Rates and Terms Proposal, § 26_.3(a). They propose a definition of "Gross Revenues," however, that excludes a host of revenue sources. *See* XM and Sirius Rates and Terms Proposal, § 26_.2(d). If the Court adopts a rate that is based in whole or part on a percentage of the SDARS' revenue, SoundExchange believes that the Court should define "Gross Revenues" in a way that is simpler and fairer than the SDARS' proposed definition. The revenues upon which any rate is based should include all revenues paid or payable to the SDARS that arise from the operation of their direct-to-consumer SDARS services, including but not limited to subscription revenue, advertising and sponsorship revenue, and all other revenues related to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10).

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[2] In addition, XM (but not Sirius), proposes not to provide certain label, catalog, International Standard Recording Code (ISRC), copyright owner and release year information for certain albums "during the period beginning on June 1, 2004, and ending on May 31, 2005." The inclusion of this proposal appears misplaced. The referenced time period is of course long since passed, and this Court is setting rates and terms for the time period 2007-2012, not 2004 or 2005. *See* XM Rates and Terms Proposal, § 26_.6(d)(1)(F), (G), (H), (I) & (L).

SoundExchange is also proposing that royalties be based on revenues paid or payable to the SDARS services. We are specifically requesting royalties based upon "payable" revenues because the SDARS should not be able to avoid their royalty obligation merely through a failure, deliberate or otherwise, to collect revenues. Our performers and copyright owners should not be denied fair compensation for their works simply because a licensee failed to collect revenues for some other business purpose. We therefore believe revenues "payable" to the SDARS should be included in the definition of revenue.

I want to draw attention to one aspect of the SDARS' proposed definition of "Gross Revenues" in particular. The SDARS define "Gross Revenues" to exclude advertising and sponsorship revenue attributable to non-music channels. *See* XM and Sirius Rates and Terms Proposal, § 26_.2(d)(1)(ii). As I noted above, XM and Sirius define a "Music Channel" as any channel on which music constitutes 50% or more of the programming. That means that in their definition of "Gross Revenues," the SDARS are proposing not to count advertising or sponsorship revenue attributable to stations on which as much as 49% of the programming could be music. That is nothing if not unfair. More importantly, the SDARS generate advertising and sponsorship revenue for all of their channels in large part because music programming draws subscribers to their services. Regardless of how much or little of a channel's programming is music, music contributes to the SDARS' ability to generate advertising and sponsorship revenue. Indeed, even when a channel plays no music programming, music contributes to attracting and retaining subscribers to the SDARS' services generally, and copyright owners and performers are entitled to share in the revenue attributable to advertising and sponsorships.

III. CONCLUSION

SoundExchange believes that the terms adopted by this Court in Docket No. 2005-1 CRB DTRA represent an important step in the right direction, and hopes that those terms will result in more timely and accurate reporting. While SoundExchange has not had enough experience with the new terms to evaluate how effective they will be, we nonetheless favor adopting many of the same terms with some minor changes (as discussed above) in the interest of consistency across licenses and administrative efficiency and ease for SoundExchange and licensees alike.

SoundExchange is submitting a complete set of proposed terms with its rebuttal case. Prior to the final submission of this case to the Judges for their determination, we will seek to work with XM and Sirius to stipulate to as many terms issues as possible.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.

Barrie Kessler

Date: 7/23/07