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

In the Matter of	)	
	)	
DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	)	Docket No. 2005-1 CRB DTRA

TESTIMONY OF

JONATHA BROOKE

Recording and Performing Artist

October 2005

DECLARATION OF JONATHA BROOKE

I am very pleased to have the opportunity to testify in this proceeding. I am a singer, guitarist, songwriter, recording artist and the owner of my own independent record label, Bad Dog Records. I am an artist and label member of SoundExchange, and a long time member of the American Federation of Radio and Television Artists, the union that represents recording vocalists. I hope that my broad range of experiences will help you to understand the incredible work and effort that artists invest in their recordings, the frightening financial risks that we take in order to pursue our art, and the consequent importance to us of being paid marketplace compensation when webcasters stream our recordings on the Internet. I join with SoundExchange in asking you to set a royalty rate in this proceeding that will provide a fair, and much-needed, income stream for recording artists.

Background

I began playing the guitar when I was twelve years old. By the time I was a junior at Amherst College, I was writing songs and performing professionally with my friend Jennifer Kimball as the folk duo called *The Story*. *The Story* entered into a recording contract with Elektra Records and released two major label albums, *Grace in Gravity* in 1991 and *The Angel in the House* in 1993. By the mid-1990s, I was pursuing a solo career. I released two more major label albums, *Plumb* under MCA's Blue Thumb label in 1995 and *10 Cent Wings* under MCA's Refuge label in 1997.

In 1998, MCA and I parted company and I entered into a new phase of my career. I was touring at the time, and I decided to record a live album on the tour and release it on my own label. The label I created, Bad Dog Records, released *Jonatha Brooke Live* in

1999 and *Steady Pull* in 2001. *Steady Pull* was released both as a traditional CD and also in a two-sided DVD Audio/DVD Video version. My Bad Dog Records label also released my most recent album, *Back in the Circus*, in 2004.

Throughout my career I have been fortunate to receive enthusiastic reviews of my live performances and of my recordings. I have included as exhibits several representative reviews including a *Billboard* review of my album, *10 Cent Wings* (SX Exhibit 220 DP), a *Billboard* review of the single, "I'll Try," from the soundtrack of the Disney film *Return to NeverLand* (SX Exhibit 217 DP), a review of *Steady Pull* that appeared in *The Wall Street Journal* (SX Exhibit 218 DP), and a review of *Jonatha Brooke Live* from *Rolling Stone* (SX Exhibit 219 DP). I have also included a collection of press quotes and publicity material from Bad Dog Records (SX Exhibit 222 DP), and a concert review from the *New York Times* (SX Exhibit 221 DP). While I've had great press and I'm lucky enough to have an audience, I've never had a "hit" record. And I think I am representative of the vast majority of working songwriter/recording artists.

What It Means to Be A Successful Mid-Level Artist

A lot of people have a naïve idea of what it means to be a performer or a recording artist today. It is all too easy for them to assume that someone like me, with seven albums and an active touring career, must be "loaded" and living a celebrity's life of ease and glamour. Certainly, there are a handful of recording artists who, in effect, win the lottery and achieve incredible fame and wealth. But by far the great majority of artists do not get anywhere near that financial place. They are more like me: facing a scary financial picture every day, wondering how best to piece together a living, build a

career, pay for health insurance, save for retirement, and continue to develop their talent and share their music with old fans and new ones.

I do count myself as a successful artist, and I believe that is how others would view me as well. I no longer have to clean houses, waitress, work as a nanny or a housepainter for money – all of which I did – and I don't have to work at Starbucks or any other kind of "day job" in order to keep going. I make my living as a recording artist and performer, and that alone counts for a real level of success in this tough business. My music has been well-received critically, as the reviews I have attached to this testimony show. I have a true and loyal fan base that buys my recordings and comes to my concerts. I love to perform. I have toured all over the United States and Europe, and wherever I go, people come to listen and to share with me the excitement of live music. It is hard for me to say so many glowing things about myself, but I do so for a good reason – to highlight the true condition of the majority of recording artists today. Most of us are "mid-level" artists who have careers, fans and a burning desire to make music – but do not have mega-stardom or financial security.

My Investment in My Work

Even before I became an independent artist with my own label, I was making a huge investment in my music. The labels to which I was signed provided financial support for the effort, but only artists provide the voices, the instrumental skill and the creative inspiration that are at the heart of making music. Creating a song is an intense and painful process. Once in a while, a song arrives like a ten-minute gift – melody, chords, lyrics all there – and I thank the Muse for the package. But most of the time it is hard work. I try countless ideas and throw most of them away. I sift through stupid ideas

and false starts, and even once something catches my fancy I work hard and long to bring it to completion. I work on my voice and my guitar – my two instruments – in order to have the skill and ability to give life to the songs. It is not glamorous, and it is not easy. Self-expression is wonderful, but it is frightening, too. I put my whole self into my work, and live with the vulnerability that comes from opening my soul to the world.

The kind of emotional, spiritual and psychological investment in music that I have just described is, by its nature, also a financial investment. After all, all that time, energy and heart that goes into music is not going into another career or opportunity. Now that I am an independent artist with an independent label, I am also making the other kind of financial investment – the investment of dollars in my career. There are no advances, tour support, publicity or marketing coming from a major corporation. Everything I need, I pay for. If I want a band – and I do want to perform with other musicians – I must pay the musicians. I love to tour and my fans want to hear me live – but that means that I must pay for transportation, insurance, hotels and all the related costs for me and my band. I need to record, but that means that I must pay for studio time, mixing, engineering, musicians, manufacturing, distribution and marketing. I pay for promotion and publicity. The reality of the business means that I am in debt most of the time and juggling expenses all of the time. The largest portion of what I earn must go back into Bad Dog Records.

Perhaps the hardest thing about building a recording career in music is that there is just no formula for how to do it. You believe in yourself. You gamble, big time. You lose your shirt and hope it comes back to you. If you're lucky you find other people to believe in you and gamble with you, and you hope that you can repay them. You try new

things – like my DVD Audio release of *Steady Pull* – and hope they work out. You refine your judgments, you worry, and you work, work, work.

My Income from My Work

Just as there is no formula for how to invest in your career, there is also no one income stream that is sufficient to meet your personal and artistic needs. CD sales are a major component of my livelihood. But of necessity, most of what comes in from sales goes back into Bad Dog Records. For example, I am struggling now to put together enough money to make my next CD. Most of the revenue I earn must go toward that goal, or I will not have a new product.

Income from touring is a mixed bag. I may just break even after I pay the band and all of our expenses. Most of the time I lose money. But I still must tour. For an artist like myself, without the exposure that comes from MTV, videos, and pop radio, touring is the only way to maintain a presence and a profile.

I'd like to share an experience with you that underscores the dilemma I face when I tour. I have recently been touring in Europe with the recording artist, Joe Cocker. He is the featured artist on the tour and I am the opening performer – I play a thirty minute solo set at the beginning of each concert. It is easy for people to see only the glamorous side of such a gig, and it is true that when I tour with Joe Cocker I get to play in bigger venues – just me and my guitar in front of 10,000 people.

What people don't see is the part that is very costly and far from glamorous. The tour itself pays me anywhere from nothing to, if I'm lucky, 500 dollars per show. However, that money is quickly eaten up by what I must pay the sound man, the lighting designer, the monitor mixer and the guitar technician each night. On top of that, I pay for

my airfare to and from Europe and for flights within Europe, I pay to rent a car to drive myself from one show to the next, and I pay for all of my own expenses, which include hotels, meals and gas. At the end of each performance, I stand in the lobby or another area of the venue and hope that someone will approach me to buy CDs. That will be the only money I make on the tour, and hopefully it will be enough to cover my expenses.

Because I am a songwriter, I receive some public performance license money from the airplay of my musical works. In the last several years, I have been able to license some recordings for television programming including *Dawson's Creek*, *Once and Again* and *Providence*, and that provides another bit of income. Now there is a *Providence* soundtrack CD, and I hope to earn some small income from that because my song, "Linger," appears on that CD. In 2002, I sang two songs on the soundtrack to Disney's Peter Pan movie, *Return to Neverland.* One was my own composition, "I'll Try," and the other was "Second Star to the Right." These are the kinds of opportunities that can really make a difference and help me dig out of the financial hole in which I often find myself. Hopefully, this kind of work will lead to new income as well.

The digital performance right in sound recordings has opened up a new and very welcome income stream for me. I now receive royalty checks from SoundExchange for the digital performance of my sound recordings on non-interactive streaming services that use satellite, cable or Internet methods of distribution, including the webcasting services that are the subject of this proceeding. No one check from SoundExchange is huge, but each is an increasingly important component of how I earn my living as a full-time creator. I also receive some revenue from legal downloads of my music on iTunes.

In short, it takes all of these varied income streams – CD sales, live performances and touring, license income for my musical works, licensing recordings for television and movies when possible, digital performance royalties, and yes, I sell t-shirts, too – to piece together a living, and to manage to continue existing as a creative artist. As I hope I have made clear, even putting together all these income streams, the financial picture for a successful mid-level artist like me remains precarious, risky and frightening.

Why the Royalties from Webcasting Matter to Me

If I receive a fair income stream from the use of my recordings on the Internet, that will be an enormous help. The difference this money makes can be huge. When I receive a royalty check in the mail from SoundExchange for a few hundred dollars, my eyes light up. That is money that matters to me. It can help to free me, and other artists, from having to nickel and dime on studio time, allow us to pay our musicians closer to what they deserve, help us to pay our debts, make our music, and maybe even, once in a while, pay ourselves.

A fair royalty rate for the webcasting of my music has become even more critical as new technologies are changing the way in which people think about and listen to music. The digital streaming services like the ones in this proceeding offer people a different way to listen to music – hundreds of channels playing thousands of artists performing every genre and type of recording. As more people use webcasting sites, fans will get more of their music by listening to various kinds of streaming services rather than by purchasing music in the form of CDs or legal digital downloads. It seems plain to me that when businesses are built upon playing my recordings, I should be compensated in a way that is sufficient to help me keep going as a creator. Just as a

grocery store pays a market price to stock its shelves with food, so should a webcaster pay a market rate to stock its site with music.

Some of the recent advances in technology are, of course, positive developments and provide artists with new tools to reach out to fans, but there are risks associated with these new technologies as well. About a year and a half ago, I chose to make some of my sound recordings available as streams on my own web site. I thought that if I allowed visitors to the site to hear my music for free, it would spark more interest and more sales. I had safeguards installed to prevent stream-ripping, limited the sound quality of the sound recordings on the site, and surrounded the streaming options with positive messages that encourage loyalty and urge listeners to buy.

The net result after my year and a half experiment is, in fact, that I'm selling fewer CDs than I was before. Moreover, although I took measures to prevent stream-ripping from my site, I've had several fans approach me at shows to happily tell me that they are able to rip the streamed music and "thank you very much." The fact that a music fan can listen to a streamed webcast, and rip it as well, highlights the importance of the digital performance royalty for me and artists like me.

I try to teach my fans about the economic realities of my art and the fact that I need their support to keep going. But the availability of free music on the Internet cuts into my (and other artists') ability to sell music, and thus reduces our income in ways that we can ill afford. The ability to make *unauthorized* digital copies of recordings on peer-to-peer sites has fostered the idea in the minds of many that music should be "free," and the corresponding willingness to take music without permission instead of buying it.

This reality was brought home to me recently when I was selling CDs after a concert in Europe. A middle-aged woman approached me and told me how much she loved my music and how exciting it was to meet me. I smiled and asked if she'd like to buy my new CD. She brazenly explained that she didn't need to buy my CD because she "downloads for free," and that I didn't really need the money anyway because I was certainly making plenty of money opening for Joe Cocker. Her audacity stunned me. I assured her that selling CDs was the only way I earned money on the tour. I think I caught her off guard, and she was sheepishly apologetic, but she still didn't buy my CD. She was a fan of my music, but she wasn't prepared to pay for something she could get for free.

Finally, the royalty rate must not overlook the value of music in people's lives. I was at the MIDEM music conference in France in 2003. In a series of panels involving independent artists and students, one thing kept coming out. The students said over and over that they "couldn't live without music." Sadly, not one of them was actually buying music. They were unanimous in their statement that they didn't see the need to pay for music since they could get it for free. They were completely unable to correlate their need for music with the creators' need to make a living. It's a dangerous disconnect, whether it's a student in the south of France, a concert-goer in Holland or a webcaster – large or small, commercial or non-commercial – here in the United States. For all of them, music is essential, but no one wants to pay a fair market price for it.

Music fans want to hear sound recordings, and it isn't just any music they want to hear. It is *our* music, the music created by the talent and hard work of musicians, singers, writers and recording artists of all types and genres. *We* are the reason people tune in to

the radio and Internet webcasting. *Our* artistic product is what is at the heart of webcasters' business. How crazy it seems that I sit here with my hat in my hand, trying to convince you, and rationalize why I, and others like me, should be fairly compensated for the use of our work in a growing multi-million dollar webcasting industry that simply would not exist without the product we create. It is essential that webcasters pay a fair market rate for the ability to stream our work – works of art made with our hearts and souls – to build and enhance their businesses.

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

10/27/05
Date

Jonatha Brooke

Exhibits Sponsored by Jonatha Brooke

217 DP	Billboard review of "I'll Try," from the "Return to NeverLand" soundtrack
218 DP	Wall Street Journal review of "Steady Pull"
219 DP	Rolling Stone review of "Jonatha Brooke Live"
220 DP	Billboard review of "10 Cent Wings"
221 DP	New York Times concert review
222 DP	Bad Dog Records publicity material