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

CATHY FINK

Recording and Performing Artist

PUBLIC VERSION

October 2005

Public Version

DECLARATION OF CATHY FINK

Introduction

I am a musician, recording artist, songwriter, music producer, teacher, author, artist member of SoundExchange and long-time member of the American Federation of Musicians. My partner, Marcy Marxer, and I have performed, recorded and produced a wide range of music – including folk, old time country, swing, bluegrass and children's music that exemplifies all these styles and more – as a duo for the past twenty years. We have been Grammy finalists ten times and won the Grammy award for Best Musical Album for Children in 2004 and 2005.

Our music is a creative art that requires talent, practice, hard work, inspiration, connection to tradition and contemporary expression. Our music is also our living, and it requires us to engage in a broad range of business activities and patch together as many different income streams as possible in order to survive. I appreciate the opportunity to explain the intense effort that musicians devote to our art and to our businesses. I believe that all recording artists deserve fair compensation when their creative works are used by others. I hope that my testimony will help to make clear why fair compensation for streaming by webcasters and broadcasters is necessary to enable artists like me to continue to create recorded music.

Background and Qualifications

I have worked as a musician for over 30 years. I played music as a child, but it was as a student at McGill University in Canada in the 1970's that I was first exposed to the folk and traditional music that inspired me to make music my life's work. From the beginning, I was passionate about music but had no illusions that a musician's life was glamorous or easy. I worked incredibly hard to develop my musicianship on the guitar and as a vocalist, and to learn new instruments like the Appalachian dulcimer. I didn't wait for a big break or for gigs to knock

on my door. I worked for a grant to bring music into institutions like nursing homes and prisons, and that grant funded many, many performances by me and other musicians. I went through the phone book and made cold calls to see whom I could talk into having a performance. I joined the union because it gave me professional credibility and support, a rational rate structure, and assistance if a purchaser failed to pay for my work. I left college and invested my time, talent and energy into honing my art and developing my career.

I began playing with Marcy Marxer in 1980 and we formed a full-time duo in 1984. Like my early career, my creative and business partnership with Marcy has two strong foundations – a commitment to high-quality musicianship and creative expression, on the one hand, and, on the other hand, the hard work and entrepreneurship required to engage in a wide range of music businesses including live performances, touring, recording, songwriting, producing, teaching, merchandising and any other opportunity that we can find or make.

Our repertoire includes traditional and contemporary folk, old-time country, bluegrass and swing music, as well as a wide variety of styles and genres that we perform in making children's music. In addition to vocals, we play many instruments, including acoustic and electric guitar, five-string banjo, mandolin, pennywhistle, hammered dulcimer, percussion and others. I like to say that just as a painter wants all the colors as her tools, we need varied and high-quality instruments – and the ability to play them all – as the tools for our expression.

We have played over four thousand shows in concert halls, schools, festivals and clubs throughout the United States, Canada, Great Britain, Japan, Australia, New Zealand and Israel. Locally, we have played at Wolf Trap in Vienna, VA, the Kennedy Center's "Women in Jazz" festival, and we recently served as artists in residence for the month of October 2005 at Strathmore Hall in Bethesda, Maryland. During our performances we sing, yodel, harmonize,

spin tales, play instrumentals and reach out to our audience to involve them in the music. We delight in not fitting neatly into one niche, and we enjoy diverse musical interests, finding ways to bring the traditional and contemporary, folk, bluegrass, swing and unclassifiable music together into our shows. We also love to collaborate with other artists. We have toured with Tom Paxton and shared the stage with Pete Seeger, John McCutcheon, Si Kahn, Grace Griffith, Bonnie Rideout, Bill Harley and Mary Chapin Carpenter, among many others.

Recording is an incredibly important part of our career. We have released eight country/folk albums and fifteen children's and family albums in which we are the principal performers, and we have produced many more recordings of other artists. Our 2002 release, *Postcards*, embraced the versatility that is so important to us, and won a Grammy nomination for "Best Traditional Folk Album." In the late 1980s, at a time when women in bluegrass had not yet received the recognition they deserved, we produced the *Blue Rose* CD with Laurie Lewis, Sally Van Meter and Molly Mason. In 2001, we broke new barriers in collaboration with Polka rockers, Brave Combo, releasing *All Wound Up: A Family Music Party*, a children's CD that adults love, too. Information about our folk recordings and other traditional genres is attached to this declaration. *See* SX Ex. 227 DP. I am also attaching reviews of our folk music. *See* SX Ex. 228 DP; SX Ex. 229 DP.

We are committed to creating children's music that is fun, educational and of the highest musical quality. As I noted above, two of our children's albums were Grammy award winners, *Bon Appetit!* in 2004, and *cELLAbration! A tribute to Ella Jenkins* in 2005. Our 2005 release, *Scat Like That: A Musical Word Odyssey*, is a themed album that is full of tongue-twisters, word-play, limericks, riddles and Pig Latin, designed to teach kids reading and language skills such as phonemic awareness, pronunciation, vocalization, vowels and consonants, and homonyms and

synonyms. In addition to our two Grammy awards, we have also won numerous other awards for children's and family music from The Parents' Choice Foundation, the Oppenheim Toy Portfolio, the American Library Association, Early Childhood News, and the Washington Area Music Association. Information about our children's music is attached to this declaration. *See* SX Ex. 223 DP. I am also attaching reviews of our children's music. *See* SX Ex. 224 DP; SX Ex. 225 DP; SX Ex. 226 DP.

We write most of the songs we record, and we have won acclaim for our song writing. One song that I wrote, "Names," which is an anthem for the AIDs Memorial Quilt, has been recorded by over 30 artists internationally and won a Mid-Atlantic Songwriter's Association Award. Marcy's song, "Count to Ten and Try Again," was a second place winner out of 1,500 entries in the John Lennon Songwriting Competition. We also have written music for television and film scores for National Geographic, PBS and independent film makers.

In addition to making music, we teach music-making. We have released eight instructional videos and CDs and ten books, and we serve as instructors at summer music workshops such as Steve Kaufman's Acoustic Camp, the Augusta Heritage Workshops, the Swannanoa Gathering and California Coast Music Camp. Through the years, we have also supported numerous causes and organizations with benefit concerts and volunteer work. After we toured with Si Kahn in the 1980s for the Clean Water Action Project, we published a book teaching grassroots organizations how to raise funds with concerts and concert-related fundraising.

We engage in all of these activities because we love to make music and are committed to our art form. We also engage in all of these activities because we need them all to support ourselves and our art. Because the use of sound recordings is at the heart of this proceeding, I

will explain in some detail the artistic, human and economic investments that we make in our sound recording creations.

Creating a Sound Recording

Each recording is unique, and there is no one process by which sound recordings are made. But our 2003 album, *Bon Appetit!* exemplifies many of the different aspects of the recording process. As noted above, *Bon Appetit!* was a 2004 Grammy award winner. Promotional material describing the album is attached to this declaration. *See* SX Ex. 230 DP.

Spontaneous moments and a feeling of freshness are important to live and recorded performances, but spontaneity alone will never result in a full-length album. Our audiences may never be aware of just how long an idea must germinate in an artist's creative consciousness – or subconscious – before it is ripe for expression. Equally, they may never be aware of just how much planning and effort is required to make a concrete product out of the expression.

Bon Appetit! provides a good example. The idea for this themed album really arose fifteen years ago when a friend at the World Bank suggested the need for a children's album about nutrition and healthy eating. The idea stuck with me for years, but not until five years ago did a realistic funding opportunity for the album arise, when the Micronutrient Initiative, a Canadian non-profit organization that addresses malnutrition, expressed an interest in the project. It took another year and a half of discussions and negotiations to work out the funding and establish the economic basis for the project. By and large today, a recording artist must work at being the sort of manager and businessperson who can find ways to make their projects happen.

The creative development of *Bon Appetit!* had several components. Because the album was intended to be educational, we established an advisory committee of experts, including people from the World Bank, U.S. Department of Agriculture and the Center for Science and the

Public Interest, and also did a lot of research to determine what nutrition messages could and should be conveyed. We went back to our advisors several times as we defined and refined nutritional messages that could be put to music.

We wrote thirteen of the sixteen songs that ultimately were recorded on *Bon Appetit!*. Most of those went through many revisions – some as many as fifteen or twenty – before we were satisfied with them. For each song we recorded, we wrote another two that didn't make the cut. That is not unusual. You have to invest a lot of time and be willing to try things that don't pan out in order to be open to and able to develop the best artistic ideas. It is hard to predict how long it will take to write a song. Sometimes we sit down and write a song in an hour, other times it can take days or weeks. We spent months choosing and writing songs for *Bon Appetit!*. It might have taken longer, except for the fact that we've spent years honing our command of language and music, and learning how to let artistic ideas percolate in our heads so that when the time is right to develop them fully we are not really starting completely from scratch.

Once we had our songs, we created a simple demonstration recording, or demo, to run past our advisors and to aid us in our further planning. On a demo, a song is in its simplest form of melody and lyrics. It still needs much more work and creative energy before it reaches its final recorded form. Each song presents its own challenge and calls for its own "dream arrangement" of style and instrumentation. For *Bon Appetit!*, as for many of our albums, we wanted to record in many different genres, including Latin, Celtic, Caribbean, jazz, big band swing, rock and roll, and folk. For example, "Breakfast Power" was influenced by Duke Ellington and the arrangement includes saxophones, clarinet, drums and piano, "Big Strong Muscles" has a blues tone, and the visions we had for other songs included a Caribbean treatment with a steel drum band for "Bananas," a big band sound with horns for "Hula Hoop,"

and a rap arrangement to "Aeriobics." For most songs, we wrote arrangements and worked out instrumentation, for a few we hired an arranger to expand our musical knowledge and be true to each musical style.

Recording so many different styles in one album involves logistical complications and a huge amount of preparation. We have to choose which instruments we wanted to play in each song – on *Bon Appetit!* we played acoustic and electric guitar, banjo, ukulele, dulcimer, flutes and whistles, percussion, accordion and mandolin, in addition to singing. Then we determine which musicians to hire for the rest of the tracks. On *Bon Appetit!*, we hired other musicians to play keyboards, drums, acoustic and electric bass, horns, and a full steel drum band. Because we want our audience to hear music performed by human beings – not by computers – we use live musicians to play virtually all of the music on our albums. The only exception is for genres, such as rap music, that typically use computer-generated sounds.

We must also decide what to record in our home studio and what to record in the commercial studio where we rent time. We also create schedules to make efficient use of people's time, prepare chord charts and lyric charts, and generally choreograph every detail necessary to bring the multiple pieces and persons together. I usually handle that end of our work, and use grids and calendars to coordinate it all. I can easily spend eighty to one hundred hours organizing and managing logistics for a recording project like *Bon Appetit!*

When it comes to the actual recording, new technologies give us tremendous flexibility. We have invested in a home studio where we do most of our vocal recording and a great deal of our instrumental recording as well. For some elements of our recordings, however, such as percussion, we can get superior sound quality in a commercial studio, so we also rent commercial studio time. Advances in technology have enabled us to record instruments and

vocals on many more separate recorded tracks and to layer and blend more of those tracks on each song than was possible in years past. But today's technological advances have also caused us to devote more time to recording our songs and have allowed us to be more compulsive in perfecting them. For *Bon Appetit!* I would estimate that we spent eighty to one hundred hours recording in our home studio, seven days with musicians in the commercial studio and an additional day in the commercial studio with a children's chorus. We also must spend time learning new technologies and, of course, we have to spend money purchasing top-notch recording gear so that our home recordings match up to those made in the commercial studio.

We like to use a children's chorus on some songs because we have found that having children sing on an album helps children in the audience connect with the music. *Bon Appetit!* features a children's chorus, and when we work with kids we give them a demo and plenty of time to rehearse on their own and then to rehearse with us. We strive to make this an exciting experience for the kids and their parents, and The University Park Children's Ensemble has now sung on ten Grammy-nominated albums and two albums that have won Grammy Awards.

Recording with professional musicians is a more flexible process. We may come into the session with chord and lyric charts as well as the demo to show them what we want; or we may simply bring in the players, work out the details with them on the spot and then record right away while what we've created is as fresh as possible.

Recording vocal and instrumental performances is far from the end of the project. The final recorded version of each song can be composed of many tracks of recorded music and vocals, so we must listen to and choose from all the material we have recorded, choose what works best and mix them together. For example, we may include sixteen tracks of the children's chorus on one song; the song "Banana" on *Bon Appetit!* contains 48 tracks of instrumental and

vocal performances. The ability to layer sound with more and more tracks allows us to create a richer sound, but it also means that mixing has become more complex and time-consuming. It is not unusual to spend twelve hours mixing one song, although a simpler song may be done faster. We do some mixing at home, and some in the commercial studio with a professional engineer.

Once each song is mixed, we create the master recording. We determine the sequence of the songs on the album, and work with an engineer to adjust tones and volumes, fix the fades and endings of each song, clean up any clicks or odd sounds, and ensure that each piece will sound good in every circumstance including on car stereos and on good home equipment. The technical parts of mastering the whole project can be a long day in the studio, followed by shorter visits to make changes as needed.

Although the creation of the sound recording is completed with the creation of the master, our creative work does not end. We oversee every aspect of the artwork and packaging of our CDs, from choosing the graphic artist and picking the cover art to preparing the liner notes and lyrics for the CD. We also work with our record labels to develop marketing and publicity plans. For *Bon Appetit!*, for example, we pursued getting the album featured on the Food Channel, and we were able to get several songs played on NBC's *Today* show and on the *Early Show* on CBS.

The Economics of Our Art

I hope that the description above makes clear what a huge investment of time, talent and energy goes into making a career as a recording artist. Like any other entrepreneur, we also make financial investments. I mentioned our home studio. It is a great aid to us and gives us a lot of freedom to experiment with musical arrangements. But a home studio – even one like ours that is not elaborate – is not cheap to create or maintain. It requires purchasing and upgrading

sound recording equipment, including high quality microphones and pre-amplifiers, which can be quite expensive. I estimate that we have invested about $40,000 in our home studio.

All of our recording projects also require us to rent time in commercial studios – at about $100 per hour – and to pay engineers who do the studio work. And when we hire musicians to work on an album, as we did on *Bon Appetit!*, we must pay them as well.

Although I do a tremendous amount of organizational work myself, and find it to be integral to the creative process, certain more routine administrative tasks – paperwork associated with hiring musicians, taxes, booking tour engagements, handling mail orders, public relations for concerts – can be done by someone else and so for the last ten years we have freed up creative time by hiring a full-time office manager. We pay her a salary and provide health benefits. We also pay rent on the office space she occupies. The office is equipped with phone, fax, computer, high-speed Internet, furniture, inventory and office supplies, all of which we must pay for. We also pay for business insurance costs.

Another investment that people often overlook is in our instruments. Because we play so many different instruments on our albums, we have a large collection, many of which are expensive. For example, a well made acoustic guitar can cost from $2,000 to $10,000, and a top quality five-string banjo can cost approximately $2,500 to $5,000. Homeowner's insurance does not cover our recording equipment and instruments, and we must purchase separate insurance to protect these tools of our trade.

Despite our major investments of time, hard work and financial resources, it is not easy to make a living as a musician. We have been able to do it by pursuing a wide range of professional activities. Live performances are certainly an important part of our income as well as of our art. We perform anywhere from 75 to 250 shows per year. Many of them involve

travel and they all involve certain costs, but they also provide the opportunity to connect with live audiences – and to sell our CDs in person.

Recording income is also important to us. As I hope I have made clear, recording is an expensive activity both in terms of our time and money, and CD sales are essential to us in order to pay the costs of the recordings we have made and to allow us to invest in new projects. We strive to sell CDs in every way that we can. Whether we produce a recording on our own label or license it to a label like Rounder or Smithsonian Folkways, we participate in the marketing and distribution of the album and do everything we can to help make it successful. Like other artists, we sell CDs on our website and at the back of the hall whenever we perform.

Sales income from CDs is critical to continuing our career as recording artists, but it is not enough to support us. Our best-selling CD, *Get Set for School*, has sold approximately [redacted] copies since it was released in October 2003. The sales of this CD were unusually high for us, however, because the album was produced in conjunction with a school curriculum, "Handwriting Without Tears," which helped drive the sales numbers. More typically, one of our CDs sells between [redacted] and [redacted] copies in a year. It can take several years to recoup the costs for each project. We receive advances for our CDs, but that money is used to cover the costs associated with a project. It is gross income, not net profit.

We also rely on a variety of other income streams. Because we are songwriters, we receive performance royalties and mechanical royalties for the performance or sale of the songs we have written. We consult and produce for other musicians, earn commissions for projects like the children's country music show we are creating for the Kennedy Center, create and sell instructional books and CDs, and work as session musicians sometimes for other artists.

Unlike the stereotype of recording artists, I am not rich. I earn a modest living as a full-time musician and recording artist – a tremendous achievement. It takes a lot of drive, effort and concentration to do it, as well as a love of the art. My description of the process that went in to making *Bon Appetit!* left out one important point. I practically never have the luxury of doing one thing at a time. All the while I was working on *Bon Appetit!*, I was also working on other projects that were in all stages of production from mere glimmers of inspiration to near-completion. I feel fortunate that, together with Marcy, I have been able to devote all my professional energy to building and maintaining a music career. I also feel fortunate that I have been able to work in a union context in which I can build up a pension through the American Federation of Musicians and Employers' Pension Fund. But make no mistake, it takes every form of income we can come up with to make a full-time go of this career.

The royalties that we have begun to receive from SoundExchange over the last several years have been very welcome and valuable to us. To date, the payments we have received have been fairly modest, but they are growing steadily. For example, we received [[redacted]] in 2003, [[redacted]] in 2004, and [[redacted]] to date in 2005. These amounts make a real difference to us. For example, the amount we've received from SoundExchange this year can cover a major expense, such as the annual cost of insuring our equipment and instruments.

The Importance of a Fair Royalty Rate

It is important to me that we receive a fair market rate when our sound recordings are streamed on the Internet by webcasters, whether they be large or small services. Like most musicians, we are essentially a small business. Our music – songwriting, performing, recording, and merchandising – forms the core of our business. We've had a long and successful career in this business and I hope it will continue for many years to come. It has by no means been easy

and we certainly have not earned a fortune, but creating and performing children's music that entertains and captivates kids, as well as folk music that entertains music fans of all ages, is what we love to do. We hope and believe that our music can enrich the lives of children and adults alike, and we are committed to preserving traditional American musical genres, including folk, bluegrass, old-time country and swing.

As I explained above, there is no one revenue stream that supports our careers. Rather, we generate revenue in a variety of ways related to our music. We also incur substantial expenses, including the costs of buying and insuring studio equipment and instruments, employing a manager, renting office space, paying for studio time, and hiring back-up musicians. We pay market rates for our expenses and don't receive discounts just because we are a small business. In addition, we invest a huge amount of time in our careers – time for which we receive no salary.

Our business involves a substantial degree of risk. I cannot predict where the inspiration for the next album will come from, whether our products will continue to sell, or if the audience for our performances will shrink over time. Thus, as with any small businesses, we must develop new streams of revenue as a hedge against a drop off in any of our existing streams of revenue.

Webcasters have founded their businesses on our music and the music of thousands of other musicians. Our music is the core of their business. Without our songs, they would have no content to stream on the Internet. We are critical to their success, and I believe that we should be fairly compensated for it. Fair compensation, however, does not simply mean that we should get paid when a service is profitable. If a service chooses to use our music in an attempt to generate profits or contributions, then we should be compensated for the use of our music, whether or not

the service is successful in its efforts. Our music is our business, and we rely on it to generate revenue for us. Because it is a business, we need to be paid by those who use our music for their own benefit.

I also understand that the webcasters have argued in past proceedings that their services promote the sale of sound recordings. I am not aware of any evidence that shows that webcasting promotes the sale of music. But even if such evidence existed, I do not believe that it would justify setting a low royalty rate. We rely on our music to earn a living, and we should not have to share it with others at a discount, nor should we be required to subsidize another business – whether it's a large corporation or a small, independent webcaster – that uses our intellectual property.

SoundExchange

Finally, I would like to say a few words about SoundExchange. We have chosen SoundExchange as the agent to collect and pay us the digital performance royalties under the compulsory licenses created by Congress. The SoundExchange Board is composed of nine artist representatives and nine copyright owner representatives, including independent label and major label members, and my union, the American Federation of Musicians, has a seat on the Board. I am confident that as an entity jointly controlled by artists and copyright owners, SoundExchange will protect my interests and ensure the fair and efficient distribution of license income. Indeed, I am particularly impressed with the lengths to which SoundExchange goes to locate artists so that it can pay them their royalties.

With regard to SoundExchange's work, my understanding is that some webcasters want permission to report their use of sound recordings to SoundExchange based on samples of actual performances of songs. Royalty distributions from SoundExchange are based on reports of use.

Because music such as ours may not be played as frequently as music that is more mainstream, I am concerned that sample reports may omit performances of our music and result in our not being paid for performances of our songs. If sample reporting will not accurately reflect webcasters' actual use of our work, I urge the Board to reject it. It is not enough that some artists will be paid for the use of our music; it is only fair that we all should be paid for the uses of our recordings so that we can continue to create music.

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

10/24/05
Date

Cathy Fink
Cathy Fink

Exhibits Sponsored by Cathy Fink

223 DP	Publicity information for children's music
224 DP	Time Out New York Kids review of "Scat Like That"
225 DP	Washington Post review of "Bon Appetit!"
226 DP	Los Angeles Times article about concert (Aug. 17, 2002)
227 DP	Publicity information for folk music
228 DP	Washington Post review of "Postcards"
229 DP	Folking.com review of "Postcards"
230 DP	Publicity information for "Bon Appetit!"