Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

CORRECTED TESTIMONY OF

DENNIS KOOKER

Executive Vice President, Operations
and General Manager, Global Digital Business and U.S. Sales
for Sony Music Entertainment

Witness for SoundExchange, Inc.

SX Trial Ex. 1
Public Version
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SONY MUSIC ENTERTAINMENT

Public Version
QUALIFICATIONS

My name is Dennis Kooker. I am currently Executive Vice President, Operations, and General Manager, Global Digital Business and U.S. Sales, for Sony Music Entertainment (“Sony”), a position I have held since October 2008. In this capacity, I am responsible for overseeing all aspects of the day-to-day operations of the Global Digital Business Group and the U.S. Sales Group. The Global Digital Business Group handles digital distribution and sales initiatives on behalf of each of Sony’s various label groups worldwide including the United States, and the U.S. Sales Group handles distribution and sales and marketing initiatives on behalf of each of Sony’s various label groups in the United States. The areas within the organization that report directly to me include Finance, Sales Reporting, Research, U.S. Supply Chain, and distributed labels such as IODA and RED. In addition, I have general oversight with respect to our artist website group and our direct to consumer sales group.

Before assuming my current role at Sony, I was Executive Vice President, Operations, Global Digital Business and U.S. Sales for Sony, where I oversaw physical sales and channel marketing as well as all aspects of finance for the division. In that role, I oversaw new product development and customer relationship management activities in relation to Sony’s artist websites, as well as developed and implemented key commercial strategies and policies for the physical and digital distribution of our repertoire. During this period of my career, the Finance, Sales Reporting, Research, and U.S. Supply Chain areas reported directly to me, while I had general oversight with respect to the artist website and direct to consumer sales groups.
From 2004 to 2007 I was Senior Vice President and Controller for SONY BMG MUSIC ENTERTAINMENT (Sony’s corporate predecessor). Prior to that, I was Senior Vice President for Finance at BMG Entertainment. From 2003 to 2004 I was Senior Vice President of BMG North America, and for the four years before that I worked in BMG’s United Kingdom and Ireland operations.

I hold a Bachelor of Science in Business Administration from Shippensburg University and an MBA from St. Joseph's University.

DISCUSSION

I. Sony’s Position in the Music Industry

Sony is a global recorded music company with a roster of current artists that includes a broad array of both local talent and international superstars. Sony’s vast catalog of recorded music comprises some of the most important recordings in history. It is home to premier record labels representing music from every genre, including American Recordings, Arista Nashville, Arista Records, Aware, Battery Records, Beach Street Records, Black Seal, BNA Records, Cinematic, Columbia Nashville, Columbia Records, Epic Records, Essential Records, Flicker Records, Fo-Yo Soul, GospoCentric, Hitz Committee Entertainment, J Records, Jive Records, LaFace Records, Legacy Recordings, Masterworks, Polo Grounds, RCA Records, RCA Nashville, RCA Red Seal, RCA Victor, Reunion Records, Slightly Dangerous, Sony Classical, Sony Music Latin, Star Time International, Verity Records, and Volcano Entertainment.

Sony is a wholly owned subsidiary of Sony Corporation of America and is currently the second largest record company in the United States. In August 2004, Sony Corporation of America and Bertelsmann AG formed a global recorded music joint venture
where each contributed its existing recorded music business — Sony Music Entertainment in the case of Sony Corporation of America, and BMG Music, in the case of Bertelsmann AG — to the venture. In October 2008, Sony Corporation of America purchased Bertelsmann AG’s fifty percent share of the joint venture. The combined company is called Sony Music Entertainment.

Sony’s year to date market share for CD albums in the U.S. is approximately 29.3% (including both owned and distributed repertoire), and its year to date digital marketshare for digital albums is approximately 23.5% (including both owned and distributed repertoire).

II. Sony’s Substantial Investment in the Creation, Marketing and Distribution of Music

Each year, Sony makes substantial investments in the creation, production, marketing, promotion and distribution of recorded music. These investments are and continue to be the life blood that the music industry — in the broadest possible sense, which extends well beyond just record companies — relies upon to find and develop musical talent and transform musical talent into important brands. Once established, the power of these brands goes far beyond just the sale and other exploitation of recorded music. The sale and other exploitation of recorded music alone is a vital function, for without that investment, it would not be possible to bring to the marketplace the new recordings, new artists and heritage recordings that the public clearly enjoys and continues to expect. But the power of these brands also drives other industries, such as webcasting and other digital services, live events and touring, the sale of branded or sponsored merchandise, endorsement opportunities, film and TV careers and music publishing, just to name a few. Each of these industries creates jobs, revenue and growth for a plethora of
interested parties and advisors, including the artists. However, it all starts with the substantial investment we make because the careers of these musical artists that eventually become brands begin with the initial financing we provide to record, market and promote the recorded works.

For Sony, the investment activity starts with the discovery of talent. Although talent discovery can occur in several different ways, the primary methodology is for members of our Artists and Repertoire (A&R) department to go to nightclubs and music festivals throughout the country, and spend countless hours listening to demonstration tapes. Out of the hundreds or even thousands of potential artists that our A&R department scouts, only a small handful of new artists get signed. In addition, Sony also invests in third parties who scout for talent under a range of different business arrangements such as so-called “P & D” deals, so-called “label deals”, joint ventures and distribution deals. To say the least, this time consuming and laborious “research and development” process involves the skills of an array of highly trained personnel who have a talent for finding that “needle in the haystack” that might become tomorrow’s superstar.

Once an artist is signed, we then spend considerable amounts of time and money in developing the repertoire to be recorded, recording the music and working closely with the artist on the branding and imaging that will be used by the artist for his or career generally, including the sale and exploitation of the resulting sound recordings. One of the most significant talent-related expenses are the recording costs and other artist advances, which enable the artist to make the best recordings possible and cover the artist’s living expenses during the recording process. We typically advance millions of dollars per year for these purposes. Over the long term, there is much of this investment that Sony often is unable to
recover, and many advances simply have to be written off. These recording costs include the cost of backup musicians, sound engineers, producers, and all of the other creative talent required to make a commercial sound recording. All told, our total expenditures for talent and recording in the most recent fiscal year, ending in March 2009, were roughly \( \text{[amount]} \). ¹ (This figure reflects only our out of pocket expenses on these activities. It does not include the salaries and other overhead costs that are required to locate and sign talent and to oversee the process of making a record, such as the A & R staff discussed above, which accounts for many millions of dollars more.)

Of course, making a sound recording is only the beginning. Once a recording is made, it has to be distributed and marketed, which includes manufacturing costs for physical products, marketing costs, promotion costs, and distribution costs (which is substantial even for digital distribution). We invest extraordinary amounts in all of these activities. In 2008, for example, we invested over \( \text{[amount]} \) on the manufacturing of records and over \( \text{[amount]} \) on distribution. Our marketing costs are even higher — in the most recent fiscal year alone, we invested over \( \text{[amount]} \) to sell and market our records, including our out of pocket marketing expenses and our selling and marketing overhead. In the year before that, those same activities required a combined investment of over \( \text{[amount]} \). Even with these substantial investments that would seemingly guarantee success, the vast majority of new releases are not profitable for the company.

¹ When we were co-owned by Bertelsmann AG, we reported on a calendar year. Now that we are again wholly owned by Sony Corporation of America, we have returned to our previous practice of reporting on a March year-end. Thus, our fiscal years 2005 through 2007 are equivalent to calendar years, but the next fiscal year (which we refer to in our records as “fiscal 2009”) is actually the year running from March 2008 to March 2009. For the sake of clarity, I will simply use “2008” in this statement to refer to that latter year.
III. The Recording Industry’s Transformation from Physical Products to Digital Distribution and Its Challenges

The recording industry is currently in a state of extraordinary flux and transformation. Historically, Sony’s revenues have been principally derived from the sale and distribution of pre-manufactured physical products, such as vinyl records, cassette tapes, VHS tapes and most recently CDs, DVDs and Blu-Ray discs. Unlike music publishers who have long enjoyed a public performance right and associated revenues every time their songs get played on the radio or TV, the recorded music industry has been almost entirely dependent on the revenues generated by the sale of these packaged goods.

Today, sales of these physical products have fallen precipitously year-over-year, and to satisfy the evolving needs of our consumers and the expectations of the marketplace, we have focused our energies and resources on the digital distribution of music. The challenges associated with this migration from physical to digital distribution are significant, as it significantly “changes the game” from a financial perspective.

The first challenge associated with this migration from physical to digital distribution is that for many consumers, digital formats — including streaming over the Internet — have replaced the consumption of physical products. As a result of this substitution of digital for physical, revenues from digital exploitations of our repertoire — including those attributable to statutory and other forms of licensing activities — are now viewed as a primary source of revenues (rather than “ancillary”) that must be maximized in order for the recorded music business to survive, and for Sony to keep making the various investments I have already discussed. Further, I believe that digital revenues will become even more critical as the sale of packaged media continues to decline in the future.
Digital revenues have grown steadily at Sony — both in absolute terms and also as a percentage of Sony’s revenues. This is no accident, as Sony has invested heavily in the infrastructure necessary to operate this component of its business. In 2007, for example, digital revenues were [ ] — about [ ] percent of total revenues. In 2008 (i.e., the year ending March 2009), digital revenues were [ ] — about [ ] of total revenues in that year. We expect that digital will make up an even higher proportion of our revenues in the future.

The second challenge associated with this migration from physical to digital distribution is that the marketplace is slowly migrating from a model based on “ownership” of digital music to “access” to digital music. While much of Sony’s digital revenue currently comes from a la carte and subscription sales of permanent digital downloads (such as iTunes or other similar online and over-the-air download services) which consumers purchase and own, we are seeing an increasing trend towards streaming services which enable users to “rent” or “access” music from their PC or mobile device without actually “owning” the music. For example, our online subscription revenue from various interactive streaming services such as Napster, Zune and Rhapsody has increased approximately [ ] from [ ] in 2005, to approximately [ ] in 2008.

The third challenge associated with this migration from physical to digital distribution is that consumers only have a finite amount of time to consume music in a day, and the types of interactive services previously mentioned — which generally speaking yield Sony more revenue on both a per user and per play basis — compete head-to-head with the services that operate under the statutory licenses covered by Sections 112 and 114 of the Copyright Act. Our performance revenues from those statutory licenses likewise
have risen steadily, from about [redacted] in each of 2005 and 2006 to [redacted] in 2008.

Thus, in a very real sense, Sony has come to depend on digital revenues from all sources, including the performance royalty income from statutory license. Accordingly, digital revenue is a “core” (not “incidental”) source of revenues that is increasingly vital in order to make the continued investment necessary to record, produce and market the recording stars of tomorrow.

IV. The Continuing Decline of Physical Sales and the Failure of Digital Distribution to Close the Gap Is Making It Harder for Record Companies to Recoup on Their Investments.

In light of the challenges I have discussed in section III, it has not been easy to recoup Sony’s substantial investments in the creation, production, marketing, promotion and distribution of recorded music. As the Judges well know by now, these challenges have thrust the recorded music industry into a 10-year downward spiral, and we do not believe that we have reached the bottom yet.

The retail sales figures collected and distributed by the RIAA bear that out. Those figures show that the total retail value of all music shipped in the United States in 2008 was $8.5 billion — down 18.2% from 2007, and down a full 42% from 1999. Breaking out that figure to see the trends in physical versus digital sales is instructive. In 1999, U.S. manufacturers distributed 938.9 million CDs for a total retail value of $12.8 billion. When other forms of distribution are taken into account, such as albums, singles and cassettes, the retail value of all shipments in that year was $14.5 billion. By 2007, CD shipments had fallen to 511.1 million units with a total retail value of $7.5 billion, and things have only
continued to get worse: in 2008, the retail value of CD shipments was down to $5.5 billion — a 26.6% drop from 2007, and about 38% of the 1999 figures.

While sales of traditional physical products have plummeted, Sony’s digital revenues have failed to close the gap. While some may have predicted that growth in digital sales would make up for the loss in physical sales by now, I want to stress that this has not yet happened. And the revenue trends I have observed based on the industry in general and Sony’s business in particular do not suggest that it will happen any time soon.

In 2008, the total retail value of digital music goods and services was $2.7 billion — which is well short of what would have been needed to offset the decline in traditional physical sales. Our experience at Sony is entirely consistent with these nationwide trends. Sony’s U.S. sales of physical product has fallen from [redacted] in 2005 to [redacted] in 2007, and [redacted] 2008 (i.e., the year ended March 2009). Over the same period, revenues attributable to digital products rose from [redacted] in 2005 to [redacted] in 2007, and only to [redacted] in 2008 — not nearly enough to make up for the loss in physical revenues.

Generally speaking, while our digital revenue is growing (though not nearly at the pace we would like to see), as the revenues from our physical records continue to decline, we are becoming increasingly reliant on our digital revenues in order to survive; make the substantial investments in creating, producing, marketing, promoting and distributing recorded music; and bring the public the stars and hits of tomorrow. Without a significant contribution from every conceivable source of those digital revenues — including performance royalties under the Sections 112 and 114 statutory licenses — these goals will not be attainable.
I declare under penalty of perjury that the foregoing is true and correct.

Date: 4/7/10

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AMENDED AND CORRECTED TESTIMONY OF

MICHAEL D. PELCOVITS

Principal, Microeconomic Consulting & Research Associates

Witness for SoundExchange, Inc.
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AMENDED AND CORRECTED TESTIMONY OF

MICHAEL D. PELCOVITS

Principal, Microeconomic Consulting & Research Associates

February 2010
1. INTRODUCTION AND QUALIFICATIONS

My name is Michael Pelcovits. I am a Principal of the consulting firm Microeconomic Consulting & Research Associates, Inc. (“MiCRA”), which specializes in the analysis of antitrust and regulatory economics. My business address is 1155 Connecticut Avenue, N.W., Washington, D.C. 20036.¹

Since joining MiCRA in 2002, I have provided consulting services and reports for major corporations on a wide range of applied microeconomic issues, including telecommunications and intellectual property. I have provided testimony before the Federal Communications Commission, many state regulatory commissions, the Office of Telecommunications (“Oftel”) in the United Kingdom, the European Commission, and the Ministry of Telecommunications of Japan, often in rate-setting proceedings. I have testified previously before this Court on behalf of SoundExchange on three occasions: Docket No. 2005-1 CRB DTRA (“Web II”); Docket No. 2006-1 CRB DSTRA (“SDARS”); and Docket No. 2005-5 CRB-DTNSRA. On each occasion, the Court has accepted me as an expert in applied microeconomics.

Prior to joining MiCRA, I was Vice President and Chief Economist at WorldCom. In this position, and in a similar position at MCI prior to its merger with WorldCom, I was responsible for directing economic analysis of regulatory and antitrust matters before federal, state, foreign, and international government agencies, legislative bodies, and the courts. Prior to my employment at MCI, I was a founding principal of a consulting firm, Cornell, Pelcovits & Brenner. From 1979 to 1981, I was Senior Staff Economist in the Office of Plans and Policy, Federal Communications Commission.

¹ A copy of my curriculum vitae is attached as Appendix I.
I have lectured widely at universities and published several articles on telecommunications regulation and international economics. I hold a B.A. from the University of Rochester (summa cum laude) and a Ph.D. in Economics from the Massachusetts Institute of Technology, where I was a National Science Foundation fellow.

2. OVERVIEW OF TESTIMONY

I have been asked by counsel for SoundExchange to analyze the market for Internet music services and provide my expert opinion on a range of reasonable rates for the compulsory license fee to be set in this proceeding for the digital audio transmission of sound recordings by Internet webcasters under the statutory licenses set forth in 17 U.S.C. §§ 112 and 114. My goal has been to develop a bundled rate for the Section 112 and Section 114 rights that fully comports with the statutory requirements that license rates should “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and willing seller.”

I have concluded that a range of reasonable rates can be derived from several types of evidence from the market. The first is the license fees for statutory services that recently were negotiated under the Webcaster Settlement Act (“WSA”) between SoundExchange and two groups of webcasters: broadcasters represented by the National Association of Broadcasters (“NAB”); and Sirius XM Satellite Radio (for its webcasting service). The second type of evidence from which I derive a rate is the license fees that have been negotiated in the recent past between willing buyers and willing sellers in the market for interactive, on-demand digital audio transmissions.

The WSA agreements and the on-demand digital service agreements each have important strengths as an evidentiary basis on which to establish rates in these proceedings. The WSA agreements are important evidence because they are very recent, voluntary agreements covering
precisely the statutory webcasting services at issue here, negotiated on both sides between
entities that have an important stake in establishing reasonable rates, and Section 114(f)(2)(B)
permits the Court to “consider the rates and terms for comparable types of digital audio
transmission services and comparable circumstances under voluntary license agreements.” The
interactive, on-demand service agreements are important evidence because they are marketplace
agreements negotiated, in many cases, between the very same companies that would be actors in
the hypothetical market in this case, and involve services that are very similar to statutory
webcasting except for the degree of interactivity that is offered to consumers.

Neither the WSA agreements nor the interactive, on-demand service agreements are perfect
benchmarks. With respect to the WSA agreements, among other things, consideration must be
given to the fact that these agreements were negotiated in the shadow of a regulatory
environment that prohibited the sellers from refusing to grant a license, and allowed both buyers
and sellers to seek a rate from this Court in the event that a rate could not be achieved through
negotiation. In contrast, the interactive, on-demand service agreements represent marketplace
transactions with no regulatory backstop for the parties, and in that sense offer a better
benchmark. With respect to the interactive, on-demand service agreements, however, certain
adjustments are necessary in order to derive a rate for statutory webcasting services. Most
importantly, an adjustment must be made to account for the value that consumers place on the
greater interactivity offered by the on-demand services compared to statutory services.

For the reasons stated in greater detail in later sections of this testimony, however, I believe
that evidence from the WSA agreements and the interactive, on-demand service agreements,
when properly adjusted, provides a very reliable basis from which I can derive a range of rates
that meet the statutory criteria applicable in this case. A table summarizing the range of possible outcomes based on this evidence appears below:

<table>
<thead>
<tr>
<th>Year</th>
<th>Average WSA Agreement Rates</th>
<th>Adjusted Interactive, On-Demand Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>$.00175</td>
<td>$.0036</td>
</tr>
<tr>
<td>2012</td>
<td>$.0020</td>
<td>$.0036</td>
</tr>
<tr>
<td>2013</td>
<td>$.00215</td>
<td>$.0036</td>
</tr>
<tr>
<td>2014</td>
<td>$.00225</td>
<td>$.0036</td>
</tr>
<tr>
<td>2015</td>
<td>$.00245</td>
<td>$.0036</td>
</tr>
</tbody>
</table>

I understand that SoundExchange is proposing a rate in this proceeding that is within the range set out above, beginning at $.0021 per performance in 2011 and increasing to $.0029 per performance in 2015.

This testimony is organized as follows. In Section 3, I review the statutory requirements and this Court’s precedent to provide a framework for the discussion of the evidence and analytical exercises contained in the testimony. In Section 4, I discuss the trends in the industry that create the backdrop for my analysis of the marketplace in which the statutory license is used. In Section 5, I present the rates from the recently negotiated agreements for the statutory license and explain how they can be used to assess the likely outcome of a free-market negotiation between willing buyers and willing sellers. In Section 6, I present the evidence from the agreements licensing sound recordings for use by interactive, on-demand music services; and I adjust the license fees from those agreements to derive the rates for the target market at issue here.

Pursuant to 37 C.F.R. § 351.4(c), I am amending this testimony based on new information received during the discovery process. Specifically, I have added footnote 27 to my testimony in
which I analyze certain data produced by Live365 in discovery. I have not otherwise amended this testimony.  

3. FRAMEWORK FOR ANALYZING RATES FOR STATUTORY WEBCASTING SERVICES

The statutory criteria for setting rates and terms for the Section 114 webcaster performance license are enunciated in 17 U.S.C. § 114(f)(2)(B), which provides in part that

the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.

This Court considered the application of those standards in its 2007 decision setting rates for statutory webcasting for the license period from 2006 through 2010. In the Matter of Digital Performance Rights in Sound Recordings and Ephemeral Recordings, Docket Number 2005-1 CRB DTRA, 72 Fed. Reg. 24084 (2007) (the “Web II Decision”). I have read that decision and the ruling of the U.S. Court of Appeals for the District of Columbia Circuit affirming that decision. In its Web II Decision, the Court made several key determinations on how the statutory standards should be applied, and I have applied the Court’s conclusions in my analysis here. Among those conclusions were:

• the “willing buyer/willing seller” standard is not defined by the two specific factors identified in Sections 114(f)(2)(B)(i) and (ii) and those factors are merely to be considered, along with other factors, to determine rates under the willing buyer/willing seller standard;

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In addition to this single amendment, I have undertaken a small number of corrections to the testimony. Specifically, I have corrected the graph on page 8, a number of the calculations in Section 6.d related to the effect of substitution, and the list of agreements that I reviewed in Appendix IV. These corrections were disclosed to opposing counsel before my deposition. I also corrected a minor mistake in the table on page 4 which was identified during my deposition.
Congressional intent was for “the Judges to attempt to replicate rates and terms that ‘would have been negotiated’ in a hypothetical marketplace;”

- the buyers in this hypothetical marketplace are the statutory webcasting services and this marketplace is one in which no statutory license exists; and
- the sellers in this hypothetical marketplace are record companies, and the products sold consist of a blanket license for the record companies’ complete repertoire of sound recordings.

In the Web II Decision, the Court also carefully considered the appropriate rate structure for the statutory license fees. For reasons that it detailed at length, the Court determined that a per-performance usage fee structure should be applied, and it rejected alternatives such as fees calculated as a percentage of the buyer’s revenue, a flat fee, or a per-subscriber fee. The per-performance fee structure was favored because it was directly tied to the nature of the right being licensed and the actual amount of usage of that right, and a per-performance fee also would avoid the significant measurement difficulties that could be associated with a percentage-of-revenue fee.

In light of the Court’s reasoning supporting the per-performance approach, I have followed the precedent established by this Court with respect to the rate structure. I propose only a per-performance fee, and I do not attempt to independently examine the merits of different rate structures. The goal of my testimony is to estimate the price of a per-performance license fee for statutory webcasting that would prevail in the hypothetical market as defined by this Court’s interpretation of the governing statute.

4. THE STATUTORY WEBCASTING MARKET
I developed considerable familiarity with the market for statutory webcasting and other
digital music services in connection with my work for SoundExchange in the Web II and
SDARS matters. In preparing this testimony, I took a number of steps to update my knowledge
of the relevant markets, and I studied the trends in the webcasting industry over the past four
years. This effort was undertaken to understand whether changes in the businesses of the willing
 buyers and sellers should alter how I conducted my benchmark analysis, and also to help
 understand the motivations of the webcasting services that negotiated settlements with the record
companies.

Among other things, I met in person with executives from Sony Music Entertainment,
Warner Music Group and EMI who are responsible for digital music markets, and I met by
video-conference with an executive from Universal Music Group. I reviewed dozens of recent
contracts between the major record companies and digital music services. My staff and I signed
up for and used many digital music services, and we conducted an extensive internet search for
recent information on the financial and technological developments in the market. My overall
conclusion is that the webcasting industry continues to grow, and there continues to be
significant change in the types of services and service providers that are succeeding in the
market.

a. The Growth and Maturation of Statutory Webcasting

The webcasting industry has evolved significantly since the Web II decision. Between 2005
and 2007 the number of visitors to webcasting sites increased substantially. One measure of this
increase is the CommScore Media Metrix reported by JPMorgan, which shows a compound
growth rate of 9.3% a month in the number of unique visitors from 15 million in January 2005 to
over 62 million in May 2006. This number leveled off between May 2006 and February 2008, according to the last report available from JP Morgan. Overall usage of statutory webcasting services, however, has continued to show significant growth. Based on usage reports from SoundExchange, the number of aggregate monthly performances reached 4.65 billion by May of 2009. The graph below shows the general usage trend from early 2006 until May of 2009.

The popularity of webcasting was noted in a study by Arbitron and Edison Media Research,

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which reported that in 2008 “online radio is the largest and most developed digital radio platform — compared to satellite radio, HD radio and podcasting — with about 33 million Americans, or 13% of the country’s population over 12 years of age, tuning in on a weekly basis.” More recently, Arbitron and Edison Media Research updated their findings and reported that “42 million Americans ages 12 and over tuned in to online radio in a given week, up from 33 million in 2008,” thereby boosting current listener rates to 17% of the U.S. population. The trend over the last five years is shown in the table below.

![Weekly Online Radio Audience Up by Nearly One-Third in Last Year](chart.png)

<table>
<thead>
<tr>
<th>Year</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>8%</td>
<td>12%</td>
<td>11%</td>
<td>13%</td>
<td>17%</td>
<td></td>
</tr>
</tbody>
</table>

By 2009, online radio listenership represents 42 million people. Source: Arbitron, Edison Research.

The Arbitron and Edison Media Research study highlights other important trends in online radio usage. For example, 35- to 54-year-olds — a key radio demographic — are becoming more frequent online radio listeners; additionally, online radio listeners are typically well-

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educated, upper-income, full-time employed, and technologically savvy individuals.\(^7\)

There has also been a degree of fluidity in the statutory webcasting market over the past several years, with partnerships and consolidations changing the identity and characteristics of market participants. Due to the nature of statutory webcasting, it is possible for a new firm to rapidly capture listeners. The technology necessary to become a webcaster is widely available and the most valuable input (i.e., recorded music) is available at a very low sunk cost in the form of the statutory license. From the demand side, customers can sample new services easily and also appear willing to try out new services. By its very nature, the internet provides potential listeners with many means of learning about new services, thus breaking down what would ordinarily be a barrier to entry. A good example of a \textit{de novo} entrant that grew very quickly in this dynamic market is Last.fm, which entered in 2003 and received almost 1.9 million unique visitors in the U.S. per month by February 2008 — more than all but three terrestrial radio operators’ websites.\(^8\) In March 2009, Last.fm reported that its number of visitors worldwide had doubled to 30 million from the levels obtained a year before.\(^9\) Based on reporting to SoundExchange for 2009 through April, Last.fm is now the eighth largest statutory webcaster as measured by licensing fees paid to SoundExchange. Last.fm was purchased for $280 million in May 2007, demonstrating the ability of a new entrant to succeed in the market.\(^10\)

Another new entrant, Slacker Radio, began offering service on March 15, 2007. In the first four months of 2009, Slacker ranked as the 13\textsuperscript{th} largest statutory webcaster based on payments to SoundExchange. Slacker has rapidly adapted its service to work with new devices as well as its own dedicated web radio. For example, Slacker partnered with BlackBerry to create “the free

\(^7\) Id. pp. 58, 59.
\(^8\) JPMorgan, North American Equity Research, April 10, 2008, pp. 4-5.
\(^10\) Paidcontent.org, “CBS Pulls Last.fm, Radio into Interactive Music Group.” (05/05/2009).
Slacker Mobile application for the BlackBerry Storm smartphone from Research In Motion."  

One other significant factor in the growth of statutory webcasting is the ability of advertisers to obtain detailed demographics on listeners. Advertisers have access to detailed audience demographics from firms including Ando Media ("Webcast Metrics"). Katz Online Network, a leading full-service media sales and marketing firm serving the broadcasting industry, utilizes Ando Media’s Webcast Metrics to measure demographics and improve ad sales on web radio, using real-time metrics, seamless ad insertion, geo-targeting, and campaign optimization. The Katz Online Network delivers more than 52 million listener sessions per month and aggregates over 4 million listeners a week. The robust market for advertising on internet radio has led to a surge in spending on digital advertising to $101 million in the radio industry in the first quarter of 2009. One analysis projects that more than $350 million will be spent on advertising on internet radio as a medium by 2011.

In sum, the information that I have reviewed points to a robust and evolving market for webcasting that has grown significantly since the last proceeding. The market is aided by the low costs of entry, especially for entities such as broadcasters that simply simulcast their terrestrial programming over the internet. The growth of sophisticated analytical services and the increased ad revenue associated with internet radio also provide compelling evidence of an industry that has both short and long-term viability.

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12 Ando Media Press Release, April 1, 2009.
b. Evolution of Webcasters’ Business Models

In recent years statutory webcasting has grown and evolved based in part on new business models. A number of the fastest-growing services provide functions that increase the subscriber’s ability to customize the audio stream that he or she receives. One example is Pandora, which was founded in 2000, and is now the largest webcasting service.\(^\text{15}\) It has more than 25 million registered users and is growing fast, entering into partnerships with industry leaders such as AT&T, HP, Samsung, and Sprint. It has one of the most popular applications ("apps") on the Apple iPhone. Pandora provides highly customized radio-type stations for each subscriber, based on the listener’s stated preference for certain songs or artists. This is in marked contrast to the situation three or four years ago when all of the statutory webcasters that I analyzed — except for Live 365 — provided less than four hundred channels of preprogrammed streaming music. The popularity of Pandora and other services that offer very similar services, such as Last.fm and Slacker Radio, demonstrates that there is significant demand for what is termed “push” type services, which provide a continuous stream of music programmed to suit the subscriber’s tastes.

Another important trend in the industry is the development and deployment of mobile webcasting services. Many webcasting services feature mobile device applications, such as Slacker, Pandora, Live365, and Last.fm, all of which have apps for the iPhone and Blackberry. This reflects an important trend in the wireless handset industry, where the penetration of wireless data handsets has increased markedly in the last several years, to the point that 28% of new handsets sold in the United States in the second quarter of 2009 were wireless data handsets.

\(^{15}\) http://blog.pandora.com/jobs/ (visited September 13, 2009).
or so-called "smartphones." These wireless handsets enable customers to remain connected to the internet even when they are mobile. The most popular consumer wireless handset is the iPhone, of which 13.4 million have been sold during the first nine months of 2009. A large number of the webcasters are enabled to be played on the iPhone (as well as other mobile handsets). This includes services like Pandora, which recently announced its availability on the iPhone and other iPod devices. Pandora's iPhone app was recently named the top iPhone app of 2008 by Time Magazine. This trend towards increased mobility enables the webcasters to provide an important and valuable service to consumers, which in a free market would generate additional payments to the owners of the copyright in the sound recordings.

There has also been an increase in the development of Net radios, which receive both terrestrial and internet radio stations (for example, Livio Radio). Another new frontier for webcasting is the potential for vehicle-based web radios. In fact, both Chrysler and Ford now offer various models with in-car wireless capabilities. According to Sirius XM Radio, the improvements in internet radio continue to make it an "increasingly significant competitor" to its satellite radio service in the near future.

These trends in the market (increased customization of web-radio and increased mobility) may be particularly important for this proceeding in light of the recent decision by U.S. Court of Appeals for the Second Circuit, Arista Records, et al. v. Launch Media, Inc., Docket No. 07-2576-cv (August 21, 2009) (the "Launch decision"). Prior to the Launch decision, services that

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17 Apple Inc., Form 10-Q, for the quarterly period ended June 27, 2009, p. 31.
offered customized webcasting might not — depending on the degree of customization — qualify for the statutory license. The Launch decision may be interpreted by webcasters and record companies to loosen the constraints on the capabilities of the statutory services and bring more customized services under the statutory license. Although webcasters offering the kinds of functionality at issue in the Launch decision cannot provide truly on-demand programming or give the listener complete control over the stream of music he or she is listening to, nevertheless these services can provide significant functionality, and consumers appear to value that functionality. The greater ability to offer customization under the statutory license pursuant to the Launch decision renders the license more valuable.

In contrast to the situation at the time of the Web II Decision, when there was limited product differentiation and customization of “non-interactive” services, these services are now adding more functionality and becoming increasingly valuable to consumers. Technological advances and refined interpretations of the limits of the statutory license are likely to lead to significant further growth in the webcasting industry, although the exact contours of such growth are difficult to fully predict.

5. EVIDENCE FROM SETTLEMENTS BETWEEN SOUNDEXCHANGE AND WEBCASTERS

SoundExchange recently entered into multi-year agreements with the National Association of Broadcasters (the “NAB”), covering webcasting by over-the-air terrestrial radio stations, and with Sirius XM Satellite Radio, covering webcasting of the music channels broadcast on satellite radio. Each of these agreements was entered into in 2009 pursuant to the WSA and each establishes royalty rates through 2015. Together, these two agreements cover webcasters that paid more than 50 percent of the webcasting royalties received by SoundExchange in 2008. I
have reviewed these agreements, which provide useful information on rates that could be expected under a willing buyer/willing seller standard.

Both the NAB and Sirius XM agreements set royalty rates on a per-performance basis. The rates established by those agreements for the license term under consideration by this Court are set forth below:

<table>
<thead>
<tr>
<th>Year</th>
<th>NAB Agreement</th>
<th>Sirius XM Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>$.0017</td>
<td>$.0018</td>
</tr>
<tr>
<td>2012</td>
<td>$.0020</td>
<td>$.0020</td>
</tr>
<tr>
<td>2013</td>
<td>$.0022</td>
<td>$.0021</td>
</tr>
<tr>
<td>2014</td>
<td>$.0023</td>
<td>$.0022</td>
</tr>
<tr>
<td>2015</td>
<td>$.0025</td>
<td>$.0024</td>
</tr>
</tbody>
</table>

The WSA agreements are useful to understand the bargaining range over which buyers and sellers would negotiate in the hypothetical market for statutory webcasting. To state what is perhaps obvious, the rights being sold in these agreements are precisely the rights at issue in this proceeding. The buyers (with the broadcasters represented as a group by the NAB) are identical to the buyers in the hypothetical market at issue in this case. The sellers are the same copyright owners whose copyrights are at issue in this case, albeit represented by SoundExchange. The copyrights will be used for statutory webcasting services, and the agreements are very recent.

Each of these contracts, of course, was negotiated in the shadow of the regulatory scheme and against the background of statutory rates previously set by this Court. To that extent, they may or may not represent the same outcome that would result in a pure market negotiation with no regulatory overtones. In particular, any negotiation over rates to be in effect in 2011-2015 will be affected by the parties’ expectations as to the rates this Court would set if no settlement were reached (and also after netting out the cost of litigating the case before this Court). A buyer will not agree to rates above the upper end of the range of its expectations of the rates to be set by this Court; otherwise it would be better off litigating the rates. Similarly, Sound Exchange, as
the seller, will not agree to rates below the low range of its expectations as to what rates the Court would set.

Under the particular circumstances presented here, I conclude that the WSA agreements likely represent the low end of the range of market outcomes. I reach this conclusion for several reasons.

The buyer’s negotiating position will be affected by whether it feels it can construct a financially viable business model using the rates in the settlement. The buyer in the existing statutory scheme always has the option of not offering a statutory service. The rate that the NAB participants and Sirius XM agreed to in the settlements must reflect a judgment that they can operate a viable statutory webcasting service by purchasing sound recording rights at those rates. If they were not financially viable at the negotiated rates, they either would seek better rates from this Court, or simply not engage in statutory webcasting at all.

The analysis is somewhat different from the sellers’ side. Because of the statutory license, the sellers must sell. Absent the statutory license, a record company would have the very real alternative of not licensing the music to non-interactive webcasters, and would not grant a license if withholding the license would increase sales or licensing of music to other channels (such as CDs, digital downloads, or fully interactive music services).

Thus, the buyers operating under a statutory scheme are not likely to negotiate a rate above the free market rate even if they believe that the Court might set the rate too high, because they have the option of not buying at all. But the sellers might sell at a rate below the free market rate if they believe that the Court might set the rate too low, because they have no ability to decline a license. Therefore, the outcome of settlements — in the current regime where a statutory license
is the alternative to the settlement — is likely to be more favorable to the webcasting industry than what would prevail in a free-market setting.

The fact that the seller in the WSA agreements was SoundExchange, rather than the individual record companies, does not change this analysis. Because all of the copyright owners (on whose behalf SoundExchange negotiated) must sell under the statutory scheme, while the buyers have the option not to buy, the effect of the statutory scheme that I described above impacts SoundExchange as much as any other seller. Moreover, negotiation of the WSA agreements by SoundExchange does not significantly alter the market power equation. Each record company has a unique catalog of sound recordings that are highly valued (or even necessary inputs) to any webcasting service. The individual record companies, as a consequence, have a degree of market power. Conversely, there are many webcasters and few barriers to entry that would limit the effectiveness of potential competition among webcasters with respect to the negotiation of licenses, effectively making the webcasters price takers in the market. Thus, the fact that the sellers in the WSA agreements were the copyright owners acting through SoundExchange does not suggest that SoundExchange was able to extract a rate above the level that would prevail if each record company negotiated separately. Indeed, had SoundExchange attempted to do so, the buyers presumably would have rejected a settlement with SoundExchange and resorted to a rate-setting proceeding in this Court.

That the WSA agreements represent the low end of a market rate is confirmed by evidence drawn from the record companies’ marketplace agreements to license “custom radio” services. Custom radio services are webcasters that offer some degree of interactivity, short of providing music on demand. Such services may allow skipping of songs, or the ability to cache a particular song for replay at a later time, or the ability to customize a stream to the consumer’s particular
musical tastes. The record companies and the custom radio services have often disagreed about whether these services fall within the statutory webcasting license. In many cases the record companies have negotiated agreements licensing such services at a rate higher than the prevailing statutory rate. The licenses for custom radio service contain per-performance rates ranging from 115% of the prevailing statutory webcasting rate to 150% of the statutory rate, and frequently an alternative percentage of revenue fee as well.

I have testified in past proceedings that the custom radio service rates should not be adjusted to remove the effect of interactivity and then used as a benchmark to set statutory webcasting rates, because the custom radio rates likely were dragged down by the statutory rate. However, the recent Launch decision suggests that many such services may in fact qualify to operate under the statutory license. As an economist, I express no opinion on the merits of the Launch decision or the longer-term development of the law in this area. But if, under Launch, services that voluntarily agreed to pay 115% to 150% of the existing statutory rate actually qualify as statutory services, those voluntary agreements represent compelling evidence that on a forward-looking basis the current statutory rate may be too low. If greater and more valuable functionality is permitted for statutory webcasters than previously was thought to be the case, the statutory rate should reflect that fact. The custom radio rates may be artificially low due to the gravitational pull of the statutory rates, but they nevertheless stand as evidence that webcasters willingly agree to pay more than the current statutory rates for the right to use music in a customized digital music service.

Not only are the custom radio rates higher than the current statutory rates, but they are also higher than the rates negotiated by SoundExchange with the NAB and Sirius XM for the upcoming license term. The current per-play rate for statutory webcasting services for 2010 is
$.0019 per play. A rate that is 115% of the 2010 statutory rate would equal $.0022, and a rate that is 150% of the 2010 statutory rate would equal $.0028. Yet the NAB and Sirius XM agreements with SoundExchange start well below those rates and do not reach a per-play rate of $.0022 until 2013 and 2014 respectively. The agreements with the NAB and Sirius XM never reach the level of $.0028 per play. Thus the per-play rates in the agreements negotiated by SoundExchange under the WSA are, on the whole, lower than rates negotiated in a free market between record companies and the custom radio services that, under the Launch decision, may qualify for the statutory rate.

This evidence is probative of the issue of whether the collective bargaining under the WSA enabled the copyright owners to exercise cartel-like power and therefore set a higher price than in the absence of a statutory regime. Since the record companies negotiated the custom radio deals individually and independently, and the resulting rates were above the WSA agreement rates, this would indicate that cartel-like discipline was not essential to achieving the WSA agreement rates. If the opposite were true and SoundExchange had significantly more bargaining power than the individual record companies, one would not expect the rates negotiated by SoundExchange to be significantly lower than the individually negotiated rates for custom radio services that are close substitutes to the statutory services (and may now be statutory services under the Launch decision).

The custom radio rates, in fact, suggest that the WSA agreements negotiated by SoundExchange represent the low end of the range of market rates, because webcasters who can offer some degree of customization have shown themselves willing in marketplace negotiations to pay more than the WSA agreement rates. Sirius XM and the broadcasters who are part of the NAB agreement generally offer webcasting services that are not customized. Thus the rates they
negotiated may be lower than the rates that would be negotiated by webcasters offering customized services, which may now be deemed to be statutory. In addition, the WSA agreement rates may be low in part because, as I suggested earlier, a seller whose copyrights are subject to a statutory license loses bargaining power due to the fact that it cannot refuse to license its rights.

Having concluded that the WSA agreements provide useful evidence, I next consider whether those rates need to be adjusted in any way. In particular, I have considered whether the rates in the WSA agreements should be adjusted to reflect discounts from the current statutory rates that the NAB and Sirius XM negotiated for 2009 and 2010. As shown in the table below, SoundExchange agreed to accept rates for 2009 and 2010 below those set by this Court for the current license term, but received long-term contracts through 2015 at gradually increasing rates.

<table>
<thead>
<tr>
<th>Year</th>
<th>Current Statutory Rate</th>
<th>NAB Rate</th>
<th>Sirius XM Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>.0018</td>
<td>.0015</td>
<td>.0016</td>
</tr>
<tr>
<td>2010</td>
<td>.0019</td>
<td>.0016</td>
<td>.0017</td>
</tr>
<tr>
<td>2011</td>
<td></td>
<td>.0017</td>
<td>.0018</td>
</tr>
<tr>
<td>2012</td>
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<td>.0020</td>
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</tr>
<tr>
<td>2013</td>
<td></td>
<td>.0022</td>
<td>.0021</td>
</tr>
<tr>
<td>2014</td>
<td></td>
<td>.0023</td>
<td>.0022</td>
</tr>
<tr>
<td>2015</td>
<td></td>
<td>.0025</td>
<td>.0024</td>
</tr>
</tbody>
</table>

21 The NAB negotiated performance complement waivers with each of the major record companies at the same time it negotiated the WSA agreement with SoundExchange. These waivers allow the broadcasters to simulcast their broadcasts on the internet even though the number of plays by an artist or from an album might exceed the allowed levels under Section 114. I have reviewed these waivers and discussed this issue with the record company executives. My opinion is that a statutory license for non-broadcast webcasters that was set at the same level as the NAB settlement would not be measurably less valuable because it does not contain performance complement waivers. The performance complement waivers are uniquely valuable to broadcasters, whose over-the-air programming is not subject to a sound recording copyright and therefore not subject to the performance complement. The waiver allows these broadcasters to re-transmit their terrestrial signal without having to alter the programming that they created primarily for a use not subject to the performance complement. While the waivers may be important to the particular business model of terrestrial broadcasters, the waivers have little value for non-broadcasters, because the waivers are expressly limited to traditional broadcast-type programming aimed at a mass market, as opposed to the niche programming of multi-channel or customized webcasters. The market value of the waiver appears to be very small, since Sirius XM, with no such waiver, agreed to rates that are virtually identical over the life of the contract. Consequently, there is no reason to adjust the NAB rates to account for the performance complement waivers.
I do not believe that any adjustment is necessary if the Court chooses to base its rates for the upcoming license period on the WSA agreements. It is extremely unlikely that a willing seller who expected to have to negotiate future contracts with the same customer base would enter agreements that placed those who settled early at a competitive disadvantage compared to those who held out and settled later. To do so would send a strong signal to customers that it is a mistake to settle early. It would not be in a seller’s interest to create a reputation that settling with it before everyone else does is a big mistake. In this case, in the two WSA agreements that I have discussed, the copyright holders have settled with customers accounting for more than 50% of royalties paid to SoundExchange during 2008. The same copyright holders are unlikely to risk their reputation as a trustworthy partner in future negotiations with those who settled for the WSA rates by agreeing to lower rates for the minority of webcasters who have not yet settled.

Moreover, if new webcasters enter the market during the upcoming license term, it would not be economically rational for the copyright owners to license those new market entrants at rates below what the copyright owners are the receiving from Sirius XM and the NAB webcasters. The likely result of granting lower rates would be to enable the new market entrants that pay lower royalty rates to take market share away from the NAB webcasters and Sirius XM, which pay higher royalty rates, thus reducing the aggregate royalties paid by webcasting services. This would be contrary to the economic interests of the copyright owners. Therefore, I would not expect the copyright owners to agree to rates below those established by the WSA agreements during the license term that runs from 2011 to 2015. That is especially so for new market entrants that offer customized webcasting services, which, as I discussed previously, have been
shown by marketplace evidence to be more valuable than purely non-interactive webcasting services.\footnote{22 For the sake of completeness, I have calculated the effect on rates if one were to factor into the rate calculation the discounts that the NAB and Sirius XM received for the final two years of the current rate term. That calculation appears in Appendix II.}

Other factors that would not apply to non-settling parties may also account for the lower rates in 2009 and 2010. For example, SoundExchange may have viewed the ability to obtain agreements with webcasters that represent more than 50% of its webcasting royalty receipts in 2008 as warranting a discount akin to a signing bonus. Such considerations would not warrant discounting rates for non-settling parties in the later years of the license term.

In summary, the rates found in the agreements between SoundExchange on the one hand, and Sirius XM and the NAB on the other hand, provide a lower bound for potential market rates in this proceeding. The average of those rates appears in the table below.

<table>
<thead>
<tr>
<th>Year</th>
<th>WSA Agreement Average Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>$.00175</td>
</tr>
<tr>
<td>2012</td>
<td>$.0020</td>
</tr>
<tr>
<td>2013</td>
<td>$.00215</td>
</tr>
<tr>
<td>2014</td>
<td>$.00225</td>
</tr>
<tr>
<td>2015</td>
<td>$.00245</td>
</tr>
</tbody>
</table>

6. BENCHMARK ANALYSIS OF THE INTERACTIVE, ON-DEMAND MARKET

a. Overview

As the Court is aware, a benchmark rate can provide very useful evidence because it represents actual marketplace transactions between willing buyers and willing sellers, provided that the benchmark rate can be adjusted appropriately to account for differences between the benchmark and target markets.
In the Web II Decision, this Court found that the market for the digital performance of sound recordings by interactive, on-demand music services was the most appropriate benchmark to use for the analysis in that proceeding. Based on my recent research regarding developments in the digital music business, I am persuaded that the interactive, on-demand music services remain the best benchmark to use for the purpose of setting rates for statutory webcasting services in this proceeding.

The economic theory that supported my methodology for analyzing the interactive music service benchmark in Web II remains essentially the same in this proceeding. Because that analysis was accepted by the Court as a reasonable basis for setting rates, and the Court’s decision was affirmed by the D.C. Circuit Court of Appeals, I will not restate the theory here. I believe it is reasonable to predict that the ratio of per-subscriber royalty fees to consumer subscription prices will be essentially the same in both the benchmark and target markets. It follows then that consumer subscription prices in the benchmark market can be adjusted to remove the value of interactivity, and then the resulting per-subscriber royalty rate for the target market can be calculated by multiplying the adjusted subscription price by the ratio of the per-subscriber royalty fee to the subscription price that we find in the benchmark market.

In addition to adjusting for the effect of interactivity, in the Web II proceeding, I made a second adjustment in order to derive a per-play rate for the target market — I adjusted to account for the greater number of plays per subscriber in the target market compared to the benchmark market. Finally, in Web II, although I found no evidence that the benchmark interactive music service market was more likely to substitute for purchases of CDs and downloads compared to the target market, I offered a sensitivity analysis to show the effect that substitution might have on royalty rates. In this case, similarly, I will calculate the interactivity adjustment and per-play
adjustment using current data, and will again offer a sensitivity analysis that assumes some
greater substituitional impact on other music markets by interactive, on-demand music services as
compared to statutory services.

**b. The Interactivity Adjustment**

1. **Comparison of Subscription Rates for Interactive and Non-interactive Services**

   In my Web II testimony, I relied on two techniques to estimate the interactivity adjustment. The first was based on a comparison of the mean retail subscription rates in the benchmark and target markets, which in Web II yielded an interactivity adjustment factor of 0.53.

   The digital streaming markets have changed somewhat since my earlier testimony, with webcasting services offering more customization that blurs the lines between on-demand services and statutory services. In order to update my analysis, therefore, I have collected information on the characteristics of forty-one webcasting services now available in the market. Of these forty-one webcasting services, eighteen are subscription services. Because it is more straightforward to infer differences in consumer willingness-to-pay (and by extension how much the webcaster would be willing to pay for the license) from observed prices for subscription services, I will focus my discussion on the results derived from these eighteen services.

   However, I have also conducted an econometric analysis of all forty-one services and generated results that confirm the validity of the conclusions from the subscription services. I discuss these regression results in Appendix III.

   There are eleven subscription webcasting services that are fully interactive, *i.e.*, that allow complete on-demand listening. There are also seven subscription webcasting services that arguably qualify as statutory services (*i.e.*, services that offer no interactivity or limited
interactivity, which I will refer to as “statutory” services). The average subscription price for statutory services is $4.13. The average subscription price for fully interactive, on-demand services is computed on an unadjusted basis is $13.70. Since two of these services bundle a fixed number of permanent downloads in the monthly subscription, I have also computed an adjusted price by subtracting the retail value of the actual number of downloads used by the average subscriber to these services. As shown in the table below, the average subscription price adjusted for downloads is $13.30.

### Comparison of Subscription Services

<table>
<thead>
<tr>
<th>Service</th>
<th>Price per Month</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Statutory</strong></td>
<td></td>
</tr>
<tr>
<td>Pandora One</td>
<td>$3.00</td>
</tr>
<tr>
<td>Last.fm Premium</td>
<td>$3.00</td>
</tr>
<tr>
<td>Live365 VIP</td>
<td>$6.95</td>
</tr>
<tr>
<td>Sirius XM Radio</td>
<td>$2.99*</td>
</tr>
<tr>
<td>Slacker Radio Plus</td>
<td>$3.99</td>
</tr>
<tr>
<td>Musicover Premium</td>
<td>$4.00</td>
</tr>
<tr>
<td>Sky.fm/Digitally Imported Premium</td>
<td>$4.95</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>$4.13</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>On-Demand</strong></th>
<th>Not Adjusted for Downloads</th>
<th>Adjusted for Downloads</th>
</tr>
</thead>
<tbody>
<tr>
<td>Classical Archives</td>
<td>$9.95</td>
<td>$9.95</td>
</tr>
<tr>
<td>ZunePass</td>
<td>$14.99</td>
<td>$12.84</td>
</tr>
<tr>
<td>Rhapsody Unlimited</td>
<td>$12.99</td>
<td>$12.99</td>
</tr>
<tr>
<td>Rhapsody To Go</td>
<td>$14.99</td>
<td>$14.99</td>
</tr>
<tr>
<td>Napster</td>
<td>$5.00</td>
<td>$2.83</td>
</tr>
<tr>
<td>Napster To Go</td>
<td>$14.95</td>
<td>$14.95</td>
</tr>
<tr>
<td>iMesh Premium</td>
<td>$7.95</td>
<td>$7.95</td>
</tr>
<tr>
<td>iMesh ToGo</td>
<td>$14.95</td>
<td>$14.95</td>
</tr>
<tr>
<td>Pasito Tunes PC</td>
<td>$14.95</td>
<td>$14.95</td>
</tr>
<tr>
<td>Pasito Tunes Unlimited (Mobile)</td>
<td>$19.95</td>
<td>$19.95</td>
</tr>
<tr>
<td>Altnet (Kazaa)**</td>
<td>$19.98</td>
<td>$19.98</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>$13.70</strong></td>
<td><strong>$13.30</strong></td>
</tr>
</tbody>
</table>

* price for satellite radio subs
* includes free ringtones

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23 Whether these services actually qualify for the statutory license is a legal judgment about which I express no opinion. I have attempted to include a sufficient number of services that do not provide on-demand playing in order to increase the explanatory power of the statistics.

24 The data suggest that subscribers typically redeem 27% to 44% of their available free downloads. This is referred to as “breakage” in the industry.
Using the data shown in the table above, the interactivity adjustment factor based on the difference in means would be 0.301 based on the unadjusted subscription prices for interactive services and 0.311 based on the adjusted subscription prices for interactive services.

As I stated at the beginning of this section, the comparable calculation in my Web II testimony yielded an interactivity adjustment factor of 0.53. Because the adjustment factor is defined as the ratio of the non-interactive to the interactive willingness-to-pay, the lower interactivity adjustment factor calculated above compared to the factor that I derived for Web II would mean a greater reduction in the target market royalty fees, all else being equal.

2. Econometric Analysis

In my Web II testimony, in addition to calculating an interactivity adjustment based on the above-described comparison of the retail subscription rates, I presented the results of a hedonic demand model, which was used to isolate the value of interactivity to consumers of online music services. A hedonic model is used to measure the value of different characteristics of a heterogeneous product. In Web II, I found that the coefficient on interactivity was 0.60, which implied that interactivity raises the price of an online music service by 60% above the level of a non-interactive service that is identical in every other respect.

I have repeated this econometric analysis using the most recent data on the prices and characteristics of on-line music services. The regression result based on the eighteen subscription services and using the adjusted price (for downloads) are shown in the table below.
Table: Regression of Subscription Price on Service Characteristics (Subscription Only)

Dependent Variable: Adjusted Monthly Subscription Price

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>T-Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
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<td>3.36</td>
<td>0.62</td>
</tr>
<tr>
<td>Interactivity</td>
<td>8.52</td>
<td>2.00</td>
<td>4.26</td>
</tr>
<tr>
<td>Multiproduct</td>
<td>-5.85</td>
<td>3.77</td>
<td>-1.55</td>
</tr>
<tr>
<td>Mobile App</td>
<td>7.28</td>
<td>2.63</td>
<td>2.77</td>
</tr>
<tr>
<td>Desktop App</td>
<td>0.24</td>
<td>2.19</td>
<td>0.11</td>
</tr>
<tr>
<td>Tethered Downloads</td>
<td>2.01</td>
<td>1.77</td>
<td>1.14</td>
</tr>
<tr>
<td>Fixed Effects:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kazaa</td>
<td>9.39</td>
<td>4.31</td>
<td>2.18</td>
</tr>
<tr>
<td>Digitally Imported</td>
<td>8.73</td>
<td>4.01</td>
<td>2.18</td>
</tr>
<tr>
<td>Classical Archives</td>
<td>2.96</td>
<td>3.77</td>
<td>0.79</td>
</tr>
<tr>
<td>Pasito Tunes</td>
<td>7.83</td>
<td>2.24</td>
<td>3.50</td>
</tr>
<tr>
<td>iMesh</td>
<td>5.47</td>
<td>2.91</td>
<td>1.88</td>
</tr>
</tbody>
</table>

Number of Observations: 18
Adjusted R-Square: 0.8330

The regression includes a number of the same variables as in my previous work. The regression also includes some new regressors, which are helpful at explaining the variation in the subscription prices. For example, the availability of a mobile application (software that allows the user to listen on a cell phone or other mobile device) increases the value of a service by $7.28. The regression also suggests that consumers value a service that allows for tethered downloads, which do not require an active internet connection, at an additional $2.01, *ceteris paribus*. The presence of a desktop application, which allows the user to listen without an internet browser window open, appears to be associated with slightly higher-priced services, although not at a statistically significant level. Similarly, one might expect that a service produced by a multiproduct webcaster would be more expensive, but this effect is not statistically significant.
There are also a number of fixed-effect (i.e., dummy) variables, which are used to capture the unique aspects of several atypical services. Classical Archives, Digitally Imported and Pasito Tunes, for example, are services devoted to classical, electronic and Latin music, respectively, and are therefore horizontally differentiated from one another in ways that are difficult to otherwise include in the regression. Altnet (formerly Kazaa) is not a genre-specific service but markets itself primarily as a download service. The two services offered by iMesh.com are also somewhat different, being peer-to-peer services in which users search for a track ‘owned’ by another user, and download it (legally) from this source.

The most important result of the regression analysis is the value of the interactivity coefficient, which is equal to $8.52. This means that interactivity, which is defined in the coding of data as an on-demand capability, is worth $8.52 per month to the typical subscriber. This coefficient is highly significant with a t-value of 4.26.

This regression result can be used to calculate the interactivity adjustment factor. I calculate the adjustment factor as the ratio of the average price of the interactive services net of the interactivity coefficient to average price of interactive services without this adjustment. The formula is: \( \frac{13.30 - 8.52}{13.30} = 0.359 \).

The results from the comparison of the mean retail subscription rates in the benchmark and markets, calculated in the prior section of this testimony, and the regression described above, provide a range of interactivity adjustment factors that I will use to present a range of reasonable license fees for statutory services. The range, which is shown in the table below, is 0.301 to 0.359.

---

25 Although not exclusively a streaming service, this service appears to be otherwise very similar to streaming services like Rhapsody and Napster, and therefore merits inclusion in the regression sample. Notably, the record companies have negotiated agreements with Altnet that feature payments to the record companies for audio streaming by Altnet subscribers.
0.359. This compares to the interactivity adjustment factor of 0.55 that I calculated in the Web II proceeding.

<table>
<thead>
<tr>
<th>Source</th>
<th>Adjustment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comparison of Mean Subscription Rates —</td>
<td>0.301</td>
</tr>
<tr>
<td>Unadjusted Subscription Prices</td>
<td></td>
</tr>
<tr>
<td>Comparison of Mean Subscription Rates —</td>
<td>0.311</td>
</tr>
<tr>
<td>Adjusted Subscription Prices</td>
<td></td>
</tr>
<tr>
<td>Regression of Subscription Prices</td>
<td>0.359</td>
</tr>
</tbody>
</table>

**c. Per-Play Computation of License Fee**

The evidence on which I relied in the Web II case in order to derive a rate for the interactive music services market consisted primarily of the royalty rates set out in the contracts between the major interactive webcasting services and the four major record companies. In this case, I have again obtained the current agreements between the four major record companies and digital streaming music services in order to update my analysis. The contracts that I have reviewed contain rates and provisions that are very similar to the contracts that I reviewed in the Web II case. This data shows that the fully interactive subscription services continue to pay royalties on the basis of the greatest of three measures: a per-play rate; a percentage of gross revenue rate; and a per-subscriber fee.²⁶

---

²⁶ Appendix IV to my testimony provides a list of the contracts reviewed.
In my Web II testimony, I used the per-subscriber fee from these contracts as the starting point to calculate a three-part royalty rate for the target market. In this case, however, I have adopted the approach that this Court found most appropriate in Web II, and will present only a per-play rate. Because I am only calculating a per-play fee, it is logical to use the effective per-play rate paid under the current contracts as the starting point for my calculation, rather than the per-subscriber rate.

I have obtained data from the major record companies, Universal Music Group (UMG), Sony Music Entertainment (Sony), Warner Music Group (WMG), and EMI, which reveals that the effective per-play rates paid under these contracts to the companies is 2.194¢. The record companies provided me with either the raw monthly or quarterly statements that they receive for the interactive services with which they have agreements, or a spreadsheet showing the monthly revenue and unique plays reported by all such services. The revenue that the services report is collected under the “greatest of” formula that each record company has negotiated with each service. I divided the total revenue collected by the record companies from these services by the total number of unique plays of recorded music owned (or distributed) by the four major record companies reported by the interactive webcast service.

In making this calculation, I considered data from the following interactive webcasting services: Altnet (d/b/a Brilliant Digital Entertainment), Classical Archives, Imesh, Microsoft/ZunePass, Napster, and Rhapsody. For those services that feature a different rate structure for portable versus non-portable streams or for university student subscribers, I did not differentiate between the revenue and plays attributable to such distinctions, and I did not consider plays reported as part of trial memberships that exist solely as enticements for users to subscribe to a service. And for those services where a user receives credits for permanent
downloads along with an unlimited on-demand streaming service, such as Napster’s recently introduced 5-for-5 bundled offering, I have considered only the revenue that the record companies receive as a result of streaming in my calculations.

To calculate the per-play rate for the target market, I will apply the range of interactivity adjustments calculated previously to the effective per-play rate of 2.194¢ currently paid by interactive, on-demand services. However, since the interactivity adjustment described in the prior sections was calculated using the monthly subscription prices for interactive and non-interactive services, I must also adjust for any differences in the number of plays per subscriber between interactive, on-demand services and statutory services. In other words, since the number of plays per subscriber differs for interactive and non-interactive services, a per-play adjustment factor must account for these differences.

To calculate the number of plays per subscriber per month, I used the same data set that I used to calculate the effective per-play rate, with the exception of Classical Archives, which did not report consistent total usage data to all of the record companies. I divided the total number of plays reported by the services by the total number of subscribers reported by the same services. Again, I did not differentiate between the portable, non-portable or university subscribers where a service maintains such distinctions. The data shows that the average number of plays per subscriber per month for on-demand, interactive subscription service is 287.37.

It is more difficult, however, to estimate the average number of plays per subscriber for non-interactive services for two reasons. First, based on internet research and inquiries with SoundExchange, I determined that these services do not report the number of subscribers in public documents or in data provided to the record companies or SoundExchange. Second, I would expect that a greater percentage of the subscribers to “free” on-line music services do not
use the service regularly or are very light users, compared to the subscription services with a positive price, because there is no incentive to drop a free subscription. Hence, I have relied on data provided by the record companies for the "customized" on-line radio service Slacker Premium. Although this service involves a degree of interactivity (and therefore is not necessarily statutory), Slacker is similar to statutory services in that most of the music is pushed to the customer, rather than pulled by customers on an "on-demand" basis. Therefore, the data on plays-per-subscriber for this service is a good proxy for plays-per-subscriber for statutory subscription services — especially those with a positive price. This data yields an average number of 563.36 plays per subscriber per month.27

To adjust the effective per-play rate paid by interactive in order to derive a per-play rate for the statutory market, I have used the following calculation:

\[
F_N = F_I \cdot PL \cdot IAF,
\]

where:
- \(F_N\) is the recommended royalty fee for non-interactive services;
- \(F_I\) is the effective average per-play royalty fee paid for interactive services;
- \(PL\) is the adjustment factor for differences in plays, equal to the ratio of plays in the interactive market to the plays in the non-interactive market;
- \(IAF\) is the interactivity adjustment on a per-subscriber basis, derived from the comparison of means and regressions.

---

27 In discovery, SoundExchange obtained additional data from Live365, which offers a subscription non-interactive service. In the written direct statement of Johnie Floater, General Manager of Media at Live365, Mr. Floater testified that the average VIP subscriber to Live365 listens to 40 hours of music per month. Written Direct Testimony of Johnie Floater, at ¶23. These VIP subscribers listen to Live365's statutory webcasting service "without any audio and banner ad interruptions." Id. Using the conversion factor previously adopted by the Copyright Royalty Judges of 15.375 performances per aggregate tuning hour results in approximately 615 plays per Live365 VIP subscriber per month. Documents produced by Live365 in discovery suggest, however, that the actual plays per VIP subscriber are lower than reported by Mr. Floater. Relying on the documents reporting total ATH, VIP ATH and number of VIP subscribers for the time period January 2006 through August 2009, I calculated that the average VIP subscriber listens to 29.27 hours of music a month. I then used this data and the conversion factor for performances per aggregate tuning hour, which results in approximately 450.04 plays per Live365 VIP subscriber per month. Because I cannot determine accurately which of these calculations reflect the actual plays per subscriber for Live365's VIP service, I will complete the remaining calculations using only the Slacker data. I note, however, that using the average of Slacker's data and Mr. Floater's assertion of 40 hours per subscriber would lead to a slightly lower recommended noninteractive rate of $0.0035, and using the average of the Slacker data and the Live365 data as I have calculated it would lead to a rate slightly higher than the rate I have recommended.
This calculation involves taking the effective per-play rate from the interactive market and adjusting it twice: first to account for the difference in plays per subscriber; second to remove the additional value of interactivity. The data indicate that the number of plays is greater in the non-interactive than in the interactive market, and the “PL” adjustment factor reduces the interactive fee in order to restate the difference in subscription rates for the two services on a per-play basis. The second adjustment, “IAF”, is the interactivity adjustment factor that is described in the previous section. The table below provides the range of recommended statutory license fees based on this formula and the interactivity factors presented at the end of the prior section. The rates range from $.0034 to $.0040 per play, and the simple average is $.0036 per play.

<table>
<thead>
<tr>
<th>Interactive Fee Per-Play (PL)</th>
<th>Per-Play Interactivity Adjustment (IAF)</th>
<th>Source of Interactivity Adjustment</th>
<th>Resulting Rate for Statutory Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.02194</td>
<td>0.5101</td>
<td>0.0112</td>
<td>0.301</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Comparison of Mean Subscription Rates — Unadjusted Subscription Prices</td>
<td>0.311</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Regression of Subscription Prices</td>
<td>0.359</td>
</tr>
</tbody>
</table>
d. Effect of Substitution

In my Web II testimony, where I used a similar benchmark approach, I discussed whether on-line music services were substitutes or complements to sales of CDs and downloads. Specifically, I considered whether non-interactive and interactive on-line services affect CD and download sales differently. This is a relevant question for purposes of applying a benchmark, because even if the use of on-line music substitutes for purchases of music, there will be no effect on the benchmark so long as the substitution effect is the same for non-interactive and interactive services. I found no evidence at the time that there was a difference between these two types of on-line services with respect to their substitutional (or promotional) effects.

I continue to find no evidence that would contradict my conclusion from the last case. In fact, on an anecdotal or logical basis I would expect that there is even more reason to believe that non-interactive (i.e., statutory) services would be as much of a substitute for purchasing music as the interactive services. As subscribers have been increasingly able to customize their listening experience on non-interactive services, and as the legal framework appears to permit much of this to happen under the statutory license, I would expect that subscribers to these services will substitute this listening for the playing of CDs and downloads. Again, I have found no direct evidence that has quantified this effect or compared it to the music purchasing behavior of the subscribers to interactive on-line services.

In the prior case, I was asked to provide a sensitivity analysis to show the effect on my rate recommendation if interactive services did substitute for CD sales to a greater degree than statutory services. I have been asked to repeat this analysis to show how substitution would affect my benchmarking analysis in this case. To do this, I assumed, as before, that subscription
to an interactive service will cause the consumer to purchase two fewer CDs per year than if the consumer had subscribed to a non-interactive service instead. I also assumed, as before, that the profit margin on a CD was $5.60. Hence, the differential effect of a subscription to on-line services on the profit earned from the average subscriber would be equivalent to 93¢ per month.28

The loss in CD sales can be treated analytically as an increase in the marginal cost of the copyright holder of providing (or licensing) music to on-line services. This increase in marginal cost will be partially passed on to the music services in the form of higher license fees. As in my prior testimony, I will carry out this sensitivity analysis assuming a linear demand curve, which means that one-half of the margin lost from substitution — 47¢ — would be passed through to subscribers. This means I need to reduce the benchmark by this amount to remove the differential effect of CD substitution before making the other adjustments to apply the benchmark to the target market. The final step of this analysis is to convert the per-subscriber margin adjustment to a per-play margin adjustment. Using the average number of plays on interactive services given earlier of 287.37, this translates into a downward adjustment in the benchmark of 0.162¢. These calculations are summarized in the table below.

<table>
<thead>
<tr>
<th>Sensitivity Analysis for Substitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of CDs</td>
</tr>
<tr>
<td>Margin Per CD</td>
</tr>
<tr>
<td>Annual Loss</td>
</tr>
<tr>
<td>Monthly Loss</td>
</tr>
<tr>
<td>Passsthrough (one-half)</td>
</tr>
<tr>
<td>Monthly plays-per-sub</td>
</tr>
<tr>
<td>Per-play Passsthrough</td>
</tr>
<tr>
<td>Actual Fee per-play</td>
</tr>
<tr>
<td>Fee After Substitution Adjustment</td>
</tr>
</tbody>
</table>

28 This is derived as: \( \# CD \text{ sales lost} \times \text{profit margin} \div 12 \text{ months; or } 2 \times 5.60 \div 12 \)
In order to show the effect of differential substitution on the rate recommendation, I have substituted the “fee after substitution adjustment” from the sensitivity analysis in place of the actual fee per play. The results would be a range of recommended rates between $.0031 and $.0037, as shown below, with a simple average of $.0033.

### Effect of Substitution on Rate Recommendation for Statutory Services

<table>
<thead>
<tr>
<th>Interactive Fee Per-Play</th>
<th>Interactive Fee Per-Play Adjusted for Substitution</th>
<th>Source of Interactivity Adjustment</th>
<th>Interactivity Adjustment</th>
<th>Rate for Statutory Service No Substitution Effect</th>
<th>Rate for Statutory Service Net of Substitution Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.02194</td>
<td>0.02031</td>
<td>Comparison of Mean Subscription Rates — Unadjusted Subscription Prices</td>
<td>0.301</td>
<td>0.0034</td>
<td>0.0031</td>
</tr>
<tr>
<td>0.02194</td>
<td>0.02031</td>
<td>Comparison of Mean Subscription Rates — Adjusted Subscription Prices</td>
<td>0.311</td>
<td>0.0035</td>
<td>0.0032</td>
</tr>
<tr>
<td>0.02194</td>
<td>0.02031</td>
<td>Regression of Subscription Prices</td>
<td>0.359</td>
<td>0.0040</td>
<td>0.0037</td>
</tr>
</tbody>
</table>

### 7. SUMMARY AND CONCLUSION

At the low end of possible market prices, my analysis has yielded a rate derived from the WSA deals between SoundExchange on the one hand, and Sirius XM and the NAB on the other
hand. In addition, I have calculated rates using the interactive, on-demand market as a benchmark. I have presented those rates below both adjusted for a potential substitution affect, and not so adjusted, and in doing so I have averaged the different rates that resulted from the different outcomes of the hedonic regression and the econometric analysis. The potential range of marketplace rates for statutory webcasting services for the period from 2011 through 2015 appears in the table below. I have added to this table the rates that I understand have been proposed by SoundExchange. As SoundExchange’s proposed rates fall well within the range of possible marketplace rates that I have calculated, I believe that those rates meet the willing buyer/willing seller standard imposed in 17 U.S.C. § 114(f)(2)(B).

<table>
<thead>
<tr>
<th>Year</th>
<th>WSA Agreement Rates</th>
<th>SoundExchange Rate Proposal</th>
<th>Interactive On-Demand Rates (With Substitution Adjustment)</th>
<th>Interactive, On-Demand Rates (No Substitution Adjustment)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>$.00175</td>
<td>$.0021</td>
<td>$.0033</td>
<td>$.0036</td>
</tr>
<tr>
<td>2012</td>
<td>$.0020</td>
<td>$.0023</td>
<td>$.0033</td>
<td>$.0036</td>
</tr>
<tr>
<td>2013</td>
<td>$.00215</td>
<td>$.0025</td>
<td>$.0033</td>
<td>$.0036</td>
</tr>
<tr>
<td>2014</td>
<td>$.00225</td>
<td>$.0027</td>
<td>$.0033</td>
<td>$.0036</td>
</tr>
<tr>
<td>2015</td>
<td>$.00245</td>
<td>$.0029</td>
<td>$.0033</td>
<td>$.0036</td>
</tr>
</tbody>
</table>
I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 16, 2010  Michael D. Pelcovits
Appendix I

CURRICULUM VITÆ
(September 2009)

EDUCATION

Massachusetts Institute of Technology, Ph.D. (Economics), 1976
University of Rochester, B.A. (Economics), summa cum laude, 1972

EMPLOYMENT

MicRA
Principal: October 2002 – Present

MCI Communications (WorldCom, subsequent to its acquisition of MCI)
Vice President and Chief Economist: 1998 - 2002
Executive Director: 1996 – 1998
Director: 1992 – 1996

Cornell, Pelcovits & Brenner Economists Inc
Vice President and Treasurer: 1982 – 1988

Owen, Cornell, Greenhalgh & Myslinski Economists Inc.

Federal Communications Commission, Office of Plans and Policy

Civil Aeronautics Board, Bureau of International Aviation
Industry Economist: 1978 – 1979

University of Maryland, College Park, Department of Economics
Assistant Professor: 1976 – 1978
ACADEMIC AWARDS

National Science Foundation Graduate Fellowship, 1972 – 1975
Phi Beta Kappa, 1972
Isaac Sherman Graduate Fellowship, 1972 (University of Rochester)
John Dows Mairs Prize in Economics, 1971 (University of Rochester)

PUBLICATIONS


“Toward Competition in Phone Service: A Legacy of Regulatory Failure,” (with Nina W. Cornell and Steven R. Brenner), Regulation, July/August 1983.


OTHER PROFESSIONAL ACTIVITIES

Speaker and Panelist (selected examples):


Spring VON Exposition, “Competition Policy,” March 17, 2008


Guest lecturer in graduate and undergraduate courses at:

University of Chicago Law School
Columbia University, Graduate School of Business
New York University, Stern School of Business
Georgetown University, McDonnough School of Business
George Washington University
Johns Hopkins University
University of Maryland
American University
Northeastern University
RECENT TESTIMONIES (2003 to present)

U.S. DISTRICT COURT

In The United States District Court for The District of Colorado, Civil Action No. 03-F-2084 (CBS), QWEST CORPORATION, Plaintiff, v. AT&T CORP, Defendant. (Deposition taken; case settled)

LONDON COURT OF INTERNATIONAL ARBITRATION


COPYRIGHT ROYALTY BOARD

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Records, Docket No. 2005-1 CRB DTRA

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service, Docket No. 2005-5 CRB DTNSRA

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

STATE LEGISLATIVE COMMITTEE HEARINGS

State of Michigan, House Energy and Technology Committee, HB 4257, July 14, 2009-09-25

State of Delaware, House Telecommunication, Internet & Technology Committee, HB 417, June 3, 2008

State of Missouri, Joint Senate Commerce and Environment and House Special Committee on Utilities, 94th General Assembly, September 12, 2007

State of Missouri, Commerce and Environment Committee, 94th General Assembly, Senate Bill No. 552, March 15, 2007

State of Missouri, Special Committee on Utilities, 94th General Assembly, House Bill No. 1033, March 14, 2007
STATE UTILITY COMMISSIONS


Commonwealth of Massachusetts, Department of Telecommunications and Cable, D.T.C. 07-9, Petition of Verizon New England, Inc., et al, for Investigation under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers.

State of California, Public Utilities Commission, Order Instituting Rulemaking into the Review of the California High Cost Fund B Program, Rulemaking 06-06-028, (Declaration)


State of Vermont, Public Service Board, Joint Petition of Verizon New England, Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof and FairPoint Communications, Inc. for approval of asset transfer, acquisition of control by merger and associated transactions, Docket No. 7270

State of Connecticut, Department of Public Utility Control, DPUC Investigation of Intrastate Access Charges, Docket No. 02-05-17.

State of Connecticut, Department of Public Utility Control, Application of Southern New England Telephone Company for Approval to Reclassify Certain Private Line Services from Noncompetitive to Competitive Category, Docket No. 03-02-17.


FCC DECLARATIONS
In the Matters of Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24 and Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox’s Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 08-49

In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket 07-245

In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123

In the Matter of Amendments of Parts 1, 21, 73, and 101 of The Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66

In the Matter of Tyco Telecommunications, VSNL Telecommunications, et al, Application for Transfer of Control of Cable Landing Licenses, Petition to Deny of Crest Communications Corporation

In the Matter of Review of the Commission’s Rule Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers

In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services

In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities

Center for Communications Management Information, Econobill Corporation, and On Line Marketing, Inc., Complainants, v. AT&T Corporation, Defendant
SELECTED CONSULTING ASSIGNMENTS

Telecommunications Industry

Prepared FCC declaration for Sorenson Communications concerning the rate methodology for reimbursing Video Relay Service providers

Prepared FCC declaration for the Wireless Communications Association International analyzing the impact of limits on spectrum leases in the Educational Broadcasting Service bands on investment in wireless infrastructure

Prepared expert reports for the Infocomm Development Authority of Singapore on access to submarine cable landing stations and regulation of local leased line circuits

Prepared and presented an analysis of the market for termination of calling on mobile phones to Ofcom, the independent regulator and competition authority for the UK communications industries

Hired to provide expert analysis of liability and damage issues in Civil Action No. 5:03-CV-229: Z-Tel Communications Inc. v. SBC Communications Inc. et al; In the United States District Court for the Eastern District of Texas, Texarkana Division (case settled)

Other Industries

Analyzed the market for satellite radio services (XM and Sirius) and recommended rates for the compulsory license fee for digital audio transmission of sound recordings

Analyzed the market for Internet music services and recommended rates for the compulsory license fee for digital audio transmission of sound recordings.

Hired by a rural electric power company to develop a damage model for a case involving the failure of a lessee to properly maintain and utilize a coal-powered electric power plant (case settled)

Analysis of economic benefits and tax revenues from the construction and operations of a hotel and villa complex in the British Virgin Islands
Appendix II

I have solved for a rate structure that utilizes the current statutory rates for 2009 and 2010 and then increases those rates in a stepwise fashion through 2015, but generates the same average rate per play from 2009 through 2015 as the NAB and Sirius XM agreements generate for that period. The rates resulting from this calculation would give webcasters that are not part of the WSA settlements the same effective rate over the eight-year period as the NAB and Sirius XM, assuming they all experience the same level of growth in performances. This rate structure is shown in the table below. It uses a 12% present value factor and an assumed 6% annual growth rate in plays.

<table>
<thead>
<tr>
<th>Rate Schedule Comparable to Negotiated Rates</th>
<th>Present Value of 2009-2015 Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Web II</td>
<td>New Rate Schedule</td>
</tr>
<tr>
<td>2006</td>
<td>0.0008</td>
</tr>
<tr>
<td>2007</td>
<td>0.0011</td>
</tr>
<tr>
<td>2008</td>
<td>0.0014</td>
</tr>
<tr>
<td>2009</td>
<td>0.0018</td>
</tr>
<tr>
<td>2010</td>
<td>0.0019</td>
</tr>
<tr>
<td>2011</td>
<td>0.0019</td>
</tr>
<tr>
<td>2012</td>
<td>0.0020</td>
</tr>
<tr>
<td>2013</td>
<td>0.0020</td>
</tr>
<tr>
<td>2014</td>
<td>0.0020</td>
</tr>
<tr>
<td>2015</td>
<td>0.0021</td>
</tr>
<tr>
<td>Average</td>
<td></td>
</tr>
</tbody>
</table>

Discount rate | 1.12 |
Traffic Growth | 6.00% |
Appendix III

In conducting my econometric analysis, I considered the results from a second regression, which is reported in the table below. This regression includes both subscription and non-subscription services, which increases the sample size substantially to forty-one services.

Table: Regression of Subscription Price on Service Characteristics (All Services)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>T-Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
<td>3.47</td>
<td>1.25</td>
<td>2.78</td>
</tr>
<tr>
<td>Interactive</td>
<td>6.92</td>
<td>1.29</td>
<td>5.37</td>
</tr>
<tr>
<td>Multiproduct</td>
<td>-0.91</td>
<td>0.88</td>
<td>-1.04</td>
</tr>
<tr>
<td>Mobile App</td>
<td>1.42</td>
<td>0.90</td>
<td>1.57</td>
</tr>
<tr>
<td>Desktop App</td>
<td>-0.58</td>
<td>1.09</td>
<td>-0.53</td>
</tr>
<tr>
<td>Tethered Downloads</td>
<td>2.99</td>
<td>0.98</td>
<td>3.06</td>
</tr>
<tr>
<td>Adverts</td>
<td>-3.69</td>
<td>1.05</td>
<td>-3.50</td>
</tr>
</tbody>
</table>

Fixed Effects:

- imeem: -5.78 2.37 2.44
- MySpace: -6.69 2.34 -2.86
- Kazaa: 9.60 2.44 3.93
- Digitally Imported: 1.76 1.58 1.12
- Classical Archives: -1.96 1.70 -1.15
- Pasito Tunes: 6.35 1.58 4.01
- iMesh: 1.06 1.69 0.63

Number of Observations: 41
Adjusted R-Square: 0.9094

This regression adds three additional regressors; these are dummy variables for imeem and MySpace, which are interactive services that are highly differentiated from the other interactive on-line services, and a dummy variable equal to one if the service is advertising-supported. MySpace Music and imeem are primarily social networking sites, geared towards allowing users to share their taste in music and discover music that their friends enjoy. Neither MySpace nor imeem offer the comprehensive catalogs of music similar to what is available on Rhapsody or
Napster. Notably, imeem also permits users to upload their own music to the site and access it from the internet, but charges users based on how much of their own music they wish to upload. Because imeem charges subscribers based on how much music they want to load on the site, rather than on the basis of the subscriber's use of the service to listen to music, I have included only the free service in the full regression sample.

The interactivity coefficient for this regression is $6.92, slightly below the comparable estimate in the first regression. Using the same method as before, I calculate an interactivity adjustment factor of 0.385 — calculated as $(11.26 - 6.92)/11.26$, where $11.26$ is the mean adjusted price for all (subscription and free) interactive services.

I ultimately chose to not use the results of this regression to calculate a recommended rate for statutory services for two reasons. The first is that the dataset is difficult to adjust for the unique and highly distinguishable factors of the services and the negotiated agreements for the services, as well as the difficulty of measuring the intensity of advertising. The second is that it is difficult to estimate willingness-to-pay based on characteristics of non-subscription services. My analytical focus on determining the value that a subscriber assigns to interactivity requires that I give preeminence to the regression analysis of services with a positive subscription price.

29 In addition, the agreements that the record companies have entered into with these services arose out of vastly different circumstances than the agreements with the other services. Prior to entering into the current licensing arrangements, at least one of the record companies had filed a copyright infringement lawsuit against imeem (sued by WMG) and MySpace (sued by UMG). The licensing agreements between the record companies and imeem and MySpace Music are the direct result of settlements of these lawsuits. In exchange for releasing their legal claims against these two services, the record companies agreed to license their music to both services, but the litigation backdrop resulted in some unique features of these agreements. Most notably, the record companies received equity interests in these services along with substantial cash payments in settlement of the copyright infringement claims. MySpace Music, in fact, is a joint venture between MySpace and the four major record companies, with the record companies controlling a substantial percentage of the venture's equity. The record companies' ownership stakes and the ability of the record companies to benefit from the revenue that these services generate make them distinguishable from the other interactive services governed by negotiated agreements.
### Appendix IV

**Digital Audio Transmission Agreements**

<table>
<thead>
<tr>
<th>LICENSOR</th>
<th>LICENSEE</th>
<th>DATE(S)</th>
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<tr>
<td>EMI</td>
<td>Akoo International, Inc.</td>
<td>3/1/2009</td>
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<td>Classical International Limited</td>
<td>6/30/2008</td>
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<tr>
<td>EMI</td>
<td>Dada Entertainment, LLC</td>
<td>7/22/2008</td>
</tr>
<tr>
<td>EMI</td>
<td>la la media, inc.</td>
<td>5/16/2008; 11/10/2008</td>
</tr>
<tr>
<td>EMI</td>
<td>Last.fm, Ltd</td>
<td>1/22/2008; 11/10/2008</td>
</tr>
<tr>
<td>EMI</td>
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<td>6/3/2008; 1/13/2009</td>
</tr>
<tr>
<td>EMI</td>
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<td>9/24/2008</td>
</tr>
<tr>
<td>EMI</td>
<td>MySpace, Inc.</td>
<td>9/24/2008</td>
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<td>EMI</td>
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</tr>
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<td>PluggedIn Media Corp.</td>
<td>12/17/2007; 1/3/2008</td>
</tr>
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<td>Project Playlist, Inc.</td>
<td>3/9/2009</td>
</tr>
<tr>
<td>EMI</td>
<td>SpiralFrog, Inc.</td>
<td>5/2/2008</td>
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<td>11/27/2007</td>
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<td>Sony</td>
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<td>7/18/2008; 11/19/2008</td>
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<td>1/31/2008; 5/30/2008; 6/5/2008</td>
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<td>5/21/2008</td>
</tr>
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<td>MusicNow LLC</td>
<td>3/16/2005; 11/1/2005</td>
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<td>MySpace, Inc.</td>
<td>3/28/2008</td>
</tr>
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<td>Date/Information</td>
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</tr>
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<td>WMG</td>
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<td>2/7/2007; 12/21/2007; 2/7/2009</td>
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<td>Catch Media, Inc.</td>
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<td>WMG</td>
<td>la la media, inc.</td>
<td>9/1/2007</td>
</tr>
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<td>MySpace Music, LLC</td>
<td>4/2/2008</td>
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<td>WMG</td>
<td>MySpace, Inc.</td>
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<td>WMG</td>
<td>Slacker, Inc. f/k/a Broadband Instruments Corp.</td>
<td>4/17/2007; 12/2/2008</td>
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</tbody>
</table>
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

KIM ROBERTS HEDGPETH

National Executive Director
American Federation of Television and Radio Artists

Witness for SoundExchange, Inc.
In the Matter of:

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

KIM ROBERTS HEDGPETH

National Executive Director
American Federation of Television and Radio Artists

September 2009
WRITTEN DIRECT TESTIMONY OF KIM ROBERTS HEDGPETH

Background and Qualifications

I am the National Executive Director of the American Federation of Television and Radio Artists (AFTRA), the 70,000 member labor union representing the people who entertain and inform America: actors, journalists, singers, dancers, announcers, hosts, comedians, disc jockeys, and other performers across the spectrum of television, radio, cable, sound recordings, music videos, commercials, audio books, non-broadcast industrials, interactive games and emerging digital media. My responsibilities at AFTRA over the course of my 28-year association with the union have included negotiation of labor contracts in the areas of news, television and radio broadcasting, advertising, sound recordings and entertainment programming exhibited through traditional television, cable and emerging media.

I currently serve as a Trustee of the AFTRA Health and Retirement Funds, a multi-employer health and pension fund, with assets of over $1.5 billion; and I am a member of the Boards of the AFM-AFTRA Intellectual Property Trust Fund, the Alliance of Artists and Recordings Companies and of SoundExchange. I also serve as AFTRA’s representative to the AFL-CIO’s Department for Professional Employees and as its representative to FIA, the International Federation of Actors.

I received a B.A. from Harvard University and a J.D. from the Georgetown University Law Center.

Discussion

I am submitting this testimony to express AFTRA’s support for the designation of SoundExchange as the sole Collective to collect and distribute the statutory webcasting royalties...
at issue in this proceeding for the period 2011 through 2015. In this testimony, I also discuss the important role that record companies serve in making sound recordings available to the public.

I. AFTRA

AFTRA is a national labor organization representing over 70,000 actors, performers, journalists and other professionals and artists employed in the news, entertainment, advertising and sound recording industries. AFTRA’s membership includes approximately 12,000 vocalists on sound recordings, including approximately 4,000 artists who have royalty contracts with record labels (also known as “royalty artists”), as well as approximately 8,000 who perform as non-featured artists on sound recordings (also known as “session artists”). AFTRA actively pursues the rights of these recording artists through collective bargaining, public policy advocacy and legal action.

AFTRA and the American Federation of Musicians (AFM) worked to gain passage of the Digital Performance Right in Sound Recordings Act in 1995, which provided the first U.S. sound recording performance right of any kind and which ensured that the royalties collected pursuant thereto were shared with performers, including those represented by AFTRA and AFM, whose artistic creations bring the magic to sound recordings. AFTRA and AFM also worked to secure passage of the Digital Millennium Copyright Act of 1998 to clarify, among other things, that the digital performance right included webcasters.

One of AFTRA’s primary goals is to ensure its members’ livelihoods by securing adequate compensation for the use of copyrighted sound recordings. Vocal performance is the dedicated profession of AFTRA’s recording artist members, both “royalty artists” who are generally featured artists who earn royalties from record companies, and session artists, who are paid, but not entitled to royalties from record companies for their work on a recording. All of
these artists rely on their vocal performance to earn a living, support their families, and provide access to health insurance and retirement security. The compulsory license fees at issue in this case can make a meaningful difference in the lives of recording artists.

II. Designation of SoundExchange as the Sole Collective

In the previous webcasting proceeding, Docket No. 2005-1 CRB DTRA, I provided a letter to Tom Lee, the President of AFM, for submission in connection with his testimony in that proceeding. In that letter, I expressed AFTRA’s support of SoundExchange as the sole Collective for the collection and distribution of statutory royalties. I renew that support now, because I continue to believe there are several reasons why SoundExchange is the best choice for recording artists.

A. SoundExchange Represents Both Recording Artists and Copyright Owners.

SoundExchange is governed by a Board that includes representatives of artists and copyright owners – the very constituencies that are entitled by statute to receive the royalties that SoundExchange collects and distributes. This direct representation helps ensure the honest, efficient and fair distribution of royalties.

Half of the members of SoundExchange’s Board directly represent the interests of artists. This institutional structure reflects the fact that half of the statutory royalties required under Section 114 are paid to artists and ensures equal participation of artists in the governance of SoundExchange. It also gives artists an equal voice in the organization, so that SoundExchange is attentive to the particular needs and concerns of recording artists.

SoundExchange has demonstrated its commitment to serving the best interests of artists. To ensure that artists are aware of the royalties to which they are entitled, SoundExchange engages in extensive outreach efforts, such as contacting artists and their representatives directly
and attending industry conferences and panels to publicize SoundExchange’s mission and to encourage artists to register with SoundExchange. SoundExchange has also advocated vigorously for favorable royalty rates in rate-setting proceedings, and has worked tirelessly to create the legal and technical environment necessary to administer the statutory licenses. Through all of these efforts, SoundExchange has earned the trust of artists and copyright owners alike. Perhaps the best evidence of SoundExchange’s commitment to the fair representation of artists and copyright owners is that tens of thousands of artists and copyright owners have registered with SoundExchange.

B. SoundExchange Is a Non-profit Organization.

As a non-profit organization, SoundExchange collects royalty payments for distribution to artists and copyright owners, not for its own financial gain. These royalty payments represent real money for many of AFTRA’s members, and the payments should not be reduced by profits taken by a distribution collective which might occur if the license were administered by a for-profit entity. The purpose of the digital performance right is to compensate performers and copyright owners for the use of their recordings, not to create a business opportunity for organizations that collect and distribute royalties. The Collective should base the decisions it makes on the best interests of performers and copyright owners, not on the best way to generate a profit for itself. As a non-profit, SoundExchange’s incentives are properly aligned with the interests of royalty recipients. AFTRA would have grave concerns about designating a for-profit entity to collect and distribute the statutory royalty payments that are due our members.
C. SoundExchange Has Substantial and Unparalleled Experience Collecting and Distributing Statutory Royalties and Has Devoted Significant Resources to Developing a Distribution Infrastructure.

I am aware that in the previous webcasting proceeding, the Copyright Royalty Judges and the D.C. Circuit held that the best approach was to designate a single Collective. I very much agree with this conclusion.

The single Collective should be SoundExchange. SoundExchange has a demonstrated record of serving the interests of recording artists, seeking to maximize royalty payments to them, and searching far and wide for recording artists (regardless of whether they are SoundExchange members) to distribute their royalty payments to them. To choose a new Collective now would not serve the interests of artists or copyright owners. SoundExchange has made substantial investments and developed expertise in the complex tasks of administering the statutory license. If a new Collective were selected to replace SoundExchange, the benefits of that work would be lost, and a new Collective would need to re-learn much of what SoundExchange already knows. In that circumstance, artists and copyright owners would likely suffer as administrative costs would be needlessly incurred in transitioning to a new Collective and as distributions could be delayed and processed less efficiently. The best interests of the royalty recipients will be served by renewing SoundExchange as the Collective.

If additional entities were designated to collect and distribute royalties so that there were two or more Collectives, it would introduce counterproductive inefficiencies into the system, and would needlessly require the additional expenditure of time, money and resources. This would hurt artists and copyright owners, as they would have to pay for duplicative systems to administer the statutory licenses.
Furthermore, having multiple Collectives could lead to substantial confusion and delay in the collection and distribution of royalties – all of which would negatively impact artists and copyright owners. For example, disputes between the Collectives would inevitably arise related to how to interpret the applicable regulations, and there would be no obvious way to resolve them. Similarly, I understand it is not uncommon for disputes to arise related to how to allocate royalties among performers in a group. SoundExchange works to resolve these disputes, but if there were two Collectives, the Collectives might well disagree about the best resolution (especially if different artists in a group were represented by different Collectives), which would delay the distribution of royalties and might require a third party to resolve.

Adding another Collective into the mix would also make complying with the statutory license more complicated for webcasting services. The statutory and regulatory scheme for collecting and distributing royalties is already complex. It would undoubtedly be confusing and inefficient for webcasting services to have to submit payment and usage information to multiple Collectives.

In short, artists and copyright owners have been well served, and will be better served in the future, by designating SoundExchange as the sole Collective and, thereby avoiding inefficiencies.

D. RLI Is Not an Appropriate Collective.

I am aware that in the past proceeding, RLI sought to compete with SoundExchange to collect and distribute statutory royalties, and I understand RLI has indicated its intention to participate in this proceeding. AFTRA believes that RLI is not an appropriate entity to serve as the Collective to collect and distribute royalties for several reasons. To the best of my knowledge, RLI is a for-profit entity, and it has indicated that it is interested in royalty collection
and distribution to make money; RLI's structure does not ensure equal participation by artists in its governance; and RLI has close ties to music licensees and is closely affiliated with Music Reports, Inc., a company that represents the interests of music licensees. As there is no need for more than one Collective (indeed, multiple Collectives would be inefficient), the choice between SoundExchange and RLI could not be easier – SoundExchange is by far the better choice, for all the reasons discussed above.

III. The Important Role of Record Companies

It is no secret that in some contexts, artists and record companies do not always see eye to eye on a number of issues. Nonetheless, I recognize the important role that record companies play in today’s marketplace, and would like to comment briefly on it here. With the development of the Internet, it is tempting to think that recording artists have greater opportunities than ever before to deliver their recordings directly to their fans and that the role of record companies may have diminished. In reality, record companies continue to serve the interests of artists, and foster the availability of sound recordings to the public. Without record companies, many of the sound recordings that webcasting services play might never get created. Record companies provide upfront funding for artists to create recordings.

After the recordings have been created, record companies play a central role in marketing and promoting recordings. Although an artist could always try simply to post his or her songs on a website and hope that they will somehow become popular and generate income, those are not realistic expectations. The entertainment market, including the Internet, is so diffuse and so crowded with options that a recording artist cannot rely on releasing a recording into the digital space and then waiting for the revenue to start flowing. It is far too easy for a sound recording to get lost on the Internet. To generate consumer interest – and ultimately revenue – from a
recording, a coordinated marketing and promotional campaign is needed. More often than not, it is record companies that develop, execute and pay for such campaigns. Record companies have developed the infrastructure and expertise necessary to provide this important service for their artists. They marshal their resources and expertise to determine how best to position a recording so that it is targeted to the appropriate audience in an appealing way. These efforts help artists to the extent they result in revenue-generating opportunities (such as plays by webcasting services), and they help webcasting services by providing them with valuable and popular sound recordings to play.

Record companies also help recording artists create the sound recordings that webcasting services play by providing artists with some measure of financial security and stability. For example, not only do they fund the creation of recordings, but record companies often pay artists advances that provide an important source of income for artists before their recordings are able to generate revenue. In addition, record companies act as a stabilizing influence in the industry, as they generate employment for AFTRA members that provides wages and other benefits established pursuant to collective bargaining agreements negotiated between the record companies on the one hand and AFTRA on the other – these negotiated wages and benefits are important to assist our members in providing for themselves and their families in an industry in which careers can be otherwise insecure or reliant upon uncertain income streams.

In short, when a webcasting service plays a recording, it is benefiting not only from the hard work and creativity of recording artists, but also from the substantial investments and contributions of record companies.

Finally, based on my experience in the industry, I am generally aware that CD sales have been declining in recent years. This trend hurts artists, including AFTRA members, because
with fewer sales, there is less revenue for artists. In this environment, the royalty paid by webcasters is becoming more important. While the royalties that artists receive from SoundExchange do not by themselves replace lost income from declining CD sales, it is an important revenue stream, especially as there remain relatively few ways for recording artists to generate income through the Internet.
I declare under penalty of perjury that the foregoing testimony is true and correct.

Executed on September 28, 2009

[Signature]

Kim Roberts Hedgpeth
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

GEORGE S. FORD
President, Applied Economic Studies

Witness for SoundExchange, Inc.
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

GEORGE S. FORD

President, Applied Economic Studies

September 2009
I. My Experience and Qualifications

My name is George S. Ford. I am the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis, located in Birmingham, Alabama. I am also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies, a Washington, D.C. based 501(c)(3) research organization that specializes in the legal and economic analysis of public policy issues involving the communications and technology industries. In addition, I am an Adjunct Professor at Samford University, a private university located in Birmingham, Alabama, where I teach economics in the graduate program of the business school. I serve as a member of the Alabama Broadband Taskforce upon appointment by Alabama Governor Bob Riley.

I received a Ph.D. in Economics from Auburn University in 1994. Since then, I have worked as a professional economist in both government and industry. In 1994, I became an economist in the Competition Division of the Federal Communications Commission, an organization located in the General Counsel’s Office that provided competition analysis support to the many bureaus of that organization. My primary interests were multichannel video services and broadcasting policies, though my work ranged from international policy to radio interference standards to statistical analysis. After my government tenure, I became an economist at MCI Communications, where my work focused on telecommunications policy. In April 2000, I became the Chief Economist of Z-Tel Communications in Tampa, Florida, a small competitive telephone company where I performed both regulatory and business analysis. I have been in my present employment since the Summer of 2004.
My areas of specialty in economics include Industrial Economics, Regulation, and Public Policy, with an emphasis on the communications industries, including broadcast radio and television. I have written many papers on telecommunications and media policy, and much of this work has been published in economic and law journals including the *Journal of Law & Economics, Empirical Economics, the Journal of Business, the Journal of Regulatory Economics, the Antitrust Bulletin, Energy Economics, the Yale Journal on Regulation, the Federal Communications Law Journal,* and many others. I have testified before numerous public service commissions, state legislative bodies, and committees of the U.S. Congress on communications policy and rate setting. In June of this year, I filed testimony before the Copyright Royalty Judges in the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005. A copy of my curriculum vitae is attached as Appendix A.

II. Summary of My Testimony

The purpose of this proceeding is to establish the rates and terms for certain digital public performances of sound recordings under Section 114 of the Copyright Act and for the making of ephemeral copies in furtherance of such performances under Section 112(e) of the Copyright Act. I was engaged by SoundExchange, Inc. to provide an economic framework useful for establishing a rate for ephemeral copies under the statutory license provided in Section 112(e) of the Copyright Act and to canvas available sources for information relevant to that task.

In the course of my work, I have been given free reign by SoundExchange to examine any sources that I believed might be relevant in setting a rate for ephemeral copies. I have reviewed the relevant statutory provisions and the various decisions of the CRB and its predecessor, the CARP, as well as the Register of Copyrights, interpreting
those provisions. I have familiarized myself with the terms of marketplace agreements for non-statutory forms of music streaming licensing. I have familiarized myself with the technological issues arising from ephemeral copies. I have conferred with SoundExchange’s other expert, Dr. Michael D. Pelcovits, Ph.D. I have also carried out a free-ranging search of online materials in an effort to determine whether there is any information that would help establish the proper royalty rate for ephemeral copies in the webcasting context.

As I will explain below in further detail, I have concluded that sound principles of economic theory as well as observed marketplace benchmarks firmly establish that ephemeral copies have economic value. I have also concluded on the basis of marketplace benchmarks that the economic value of ephemeral copies is properly measured as a fixed percentage of the overall value of the rights acquired by webcasters under Sections 112 and 114. However, there exists very little in the way of traditional marketplace benchmarks to facilitate the proper computation of that percentage. This is because the hypothetical “marketplace” envisioned by Sections 112 and 114 is made up of actors with very different economic interests from the marketplace that exists outside of the statutory framework. In the unregulated marketplace, where copyright owners and services that publicly perform sound recordings freely negotiate to determine rates, the “willing buyers” and “willing sellers” are less concerned about the allocation of those royalty rates between payments for ephemeral copies and payments for public performances. However, when copyright owners and the service providers must abide by rates determined under Sections 112 and 114, the explicit allocation of payments between those two components becomes much more relevant, because the ephemeral copy payments under Section 112(e) are made
directly to copyright owners (or record companies in this case), while the performance payments under Section 114 are shared equally between copyright owners and artists. This particular division of payments is solely an artifact of the statute and does not bind or constrain market transactions.

While this division of royalties among upstream providers makes little difference to the “willing buyer” in this hypothetical marketplace — that is, the webcasters — it makes a significant difference to the “willing seller” or “sellers”, i.e., the record companies that own the rights to the sound recordings and the artists who get a share of the royalties. Record companies and artists care about what portion of royalty payments are allocated to ephemerals because the higher the portion allocated to ephemerals, the lower the portion paid directly to artists per the terms of the Section 114 license. Record companies and artists therefore have every incentive to negotiate over the proper percentage of royalty payments that are allocated to ephemeral copies. This negotiation is precisely what one would expect to happen in a hypothetical free market in which both artists and record companies are forced by statute to share 50-50 in performance royalty payments.

Such a negotiation is the basis of the rate proposal advanced by SoundExchange. SoundExchange, a collective made up of both record companies and artists, has proposed a rate that represents the result of negotiations between the artists and the record companies that make up its board. As long as the ephemeral rate is defined as a percentage subset of the total royalty payment, the willing buyer — the webcaster — is indifferent to the ephemeral copy rate. As such, marketplace negotiations between the “willing buyer” — the webcaster — and the “willing seller” — the copyright owner — while potentially informative, may or may not establish a specific ephemeral copy rate. From a ratemaking
standpoint, it does not matter. The SoundExchange proposal is what the willing seller in such a marketplace would propose. Because the willing buyer is indifferent, the rate proposed by SoundExchange is legitimately viewed as the proper marketplace rate for ephemeral copies. The proposal resolves the problem of a non-market allocation of royalties, and is the best evidence available of the market rate of, and rate mechanism for, ephemeral copies under Section 112.
IV. My Conclusions

Section 112(e), which governs the compulsory license for ephemeral copies, provides in relevant part that:

The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. . . . 16

Despite minor differences in the language between Section 112(e)(4) (governing ephemeral licenses) and Section 114(f)(2) (governing statutory licenses for nonsubscription services and new subscription services), the economic criteria for setting rates and terms under those licenses are, in the words of the CARP, “essentially identical.”17 In measuring the value of the Section 112(e) statutory license, just as in measuring the value of the Section 114(f)(2) license, a key consideration in setting a proper rate is the identification of proper marketplace benchmarks. As the CARP has observed: “[T]he quest to derive rates which would have been observed in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances.”18

As I will explain below, in reviewing the most closely analogous marketplace agreements, I come to three conclusions about the proper royalty rate for ephemeral copies under Section 112(e). First, marketplace benchmarks as well as basic economic theory demonstrate that ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot as a practical matter properly function without those copies. Second, marketplace benchmarks show that the royalty rate for

16 17 U.S.C. § 112(e)(4)
17 Webcaster I CARP Opinion at 25; see also Webcaster II at 24100-01.
18 Webcaster I CARP Opinion at 43; see also Webcaster II at 24092 (“we adopt a benchmark approach to determining . . . rates”).
ephemeral copies, if directly established, is almost always expressed as a percentage of the overall royalty rate for combined activities under Sections 112 and 114. Third, because the only actors in the hypothetical three-party market established by the statute — webcasters, record companies, and artists — that have any economic interest in the measure of that allocation are the artists and the copyright owners, the agreement reached between them as to that allocation is the best measure of how a willing buyer and a willing seller would allocate royalty payments between performance royalties and ephemeral copies, and would value the ephemeral license in the course of a marketplace negotiation for public performances.

A. The Ephemeral License Has Economic Value.

As an initial proposition, it is beyond serious question that ephemeral copies of sound recordings have economic value. This is because, as Congress recognized in enacting Section 112(e), webcasters simply could not exist without the ability to make ephemeral copies. In fact, because webcasters must have both the ephemeral copy right as well as the performance right in order to operate their services, as a matter of economic theory one could say that the Section 114 right has zero economic value without the Section 112 right, and the Section 112 right has zero economic value without the Section 114 right. One cannot remove the Section 112(e) right from the full complement of rights required by webcasters any more than one can remove oxygen molecules from water and still have water.

This theoretical proposition is confirmed by a number of marketplace benchmarks. First, in the marketplace deals between record companies and webcasters for non-statutory forms of licenses, it is typical for ephemeral copy rights to be expressly included among the grant of rights provided to the webcaster. Most of these agreements do not set a
distinct rate for those ephemeral copies, incorporating them instead into the overall rate that the webcaster pays for the combined ephemeral copy rights and performance rights. Nonetheless, economic theory teaches that rational companies do not give away something for nothing. Because these ephemeral copy rights are essential for webcasters to operate their services, it follows that the value of ephemeral copy rights has been included in the overall rate that webcasters pay under these agreements.

Second, I am aware of several agreements over the years between record companies and services that publicly perform sound recordings that do establish specific rate mechanisms for ephemeral copies. For example, I have reviewed a current agreement between a major record label and a webcaster that covers ad-supported internet radio service, subscription radio service, and on-demand streaming and recites the parties’ agreement that 10% of the royalty payments made under the agreement shall be designated as payment for ephemeral copies. Other agreements have contained similar language. For example, in Webcaster II and SDARS the CRJs were presented with evidence of agreements negotiated by Sony BMG and by Warner Music Group which provided that 10% of the overall fees for streaming are attributable to the making of ephemeral copies.¹⁹

¹⁹ See Webcaster II at 24101. The actual rates established in such marketplace agreements, while potentially informative, are not necessarily the best proxy for the ephemeral rate in the instant proceeding. These agreements are made without statutory constraints on how ephemeral and performance royalties are allocated between copyright owners and artists. Had these agreements been bound by such statutory conditions, then the outcomes may very well have been different. But these agreements are relevant in two important ways: First, they demonstrate that willing buyers and willing sellers do trade in ephemeral rights, which would be economically irrational if they had no value. Second, as discussed more fully in the next section below, they demonstrate that the payments for ephemeral rights, even absent regulatory constraint, employ a percent-of-total mechanism where ephemeral royalties are expressed as a percentage of payments metered on performances.
Third, I am also aware that, more recently, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. In these agreements, the willing participants in the market agreed to structure the ephemeral reproduction rate as an allocation of the correlative performance royalty.20

B. It Is Appropriate to Express the Value of Ephemeral Copies as a Fixed Percentage of the Performance Royalty.

Setting the ephemeral rate as a share of the total performance royalty fee does no injustice to economic theory. In fact, marketplace benchmarks consistently confirm that a percent rate is the appropriate measure. The marketplace has spoken with near unanimity in structuring the Section 112(e) ephemeral reproduction license as a percentage of the Section 114 performance royalty where such performance royalty is established. As discussed above, I have seen numerous voluntary agreements between willing buyers and willing sellers in which the rate for the ephemeral reproduction license was expressed as a percent of the performance royalty. Similarly, as mentioned above, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. There, again, the willing participants in the

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market agreed to structure the ephemeral reproduction rate as an allocation of the
correlative performance royalty.  

Thus, it appears that, where a rate for ephemeral copies is set in the marketplace, it
is set as a percentage of overall royalties. As a structural matter, the available evidence
suggests that setting the ephemeral rate as a percent of an overall payment is consistent
with marketplace negotiation.

C. The Best Market Benchmark is the Agreement Between Artists and
Record Companies.

Having established that the Section 112(e) ephemeral reproduction right clearly has
value and is best expressed as a percentage of the Section 114 performance royalty where
such royalty is set, the final step in the analysis is to determine how to set an actual
percentage as required by the Register. As noted above, most agreements that set a rate for
ephemeral copies specify that rate as a percentage of total royalty payments. Given the
nature of the rights at issue, that is not a surprising outcome. Where performance royalties
for streaming activities are negotiated in a free market setting, that is, outside of the
Section 114 context, the copyright owner (in this case the record companies) and the
service provider should have less at stake with respect to the allocation of payments
between ephemeral copies and performances.

By contrast, in the Section 114 context, Congress radically altered this market
dynamic when it comes to statutory licenses. There is a very significant difference
between payments under the Section 112(e) compulsory license and the Section 114
compulsory license: payments under Section 114 are by law split between copyright

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21 Although these agreements do not set the specific allocation, but leave that open to
future determination, the point here is that the willing buyers and willing sellers agreed to
structure the ephemeral rate as an allocation of the performance rate.
owners and artists, while payments under Section 112(e) go directly to copyright owners. The implication of this phenomenon is immediate. The sharing of income between record companies and artists for performances is set by law. Thus, if it is to have any relevance for the Judges, the willing buyer / willing seller market analysis suggested by Section 112(e) for ephemeral rates must reflect this statutory alteration to the market dynamics whereby the artists and the record companies jointly have a real interest in negotiating the Section 112(e) rate while the webcasters (as the willing buyers) do not.

By the very nature of the statute, the agreements reached under the constraints relevant in this proceeding will not be the same as in the unregulated market. Evidence suggests that the terms between the “willing buyer” in this hypothetical market — the webcaster — and the “willing seller” — the record companies — will either embody the ephemeral copy rate in the performance rate or express the ephemeral rate as a percent of the total overall performance royalty. If so, the buyer is indifferent to the allocation of payments between ephemeral copies and performance royalties. But the “willing seller” — the record companies — will not be so indifferent under the statutory division of royalties that cannot be assumed away. Under plausible conditions, only the record companies and artists are parties to the establishment of the ephemeral rate, and these parties have arrived at a royalty rate for ephemeral copies that reflects a more market based allocation of payments between ephemerals and performance royalties.

Because the willing buyer is disinterested with respect to that allocation, the agreement between the record companies and the artists thereby becomes the best indication of the proper allocation of royalties.
My understanding is that the recording artists and the record companies have reached an agreement that five percent (5%) of the payments for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities. In light of the principles I have articulated above, that appears to be a reasonable proposal, and credibly represents the result that would in fact obtain in a hypothetical marketplace negotiation between a willing buyer and the interested willing sellers under the relevant constraints.
I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 9/24/09

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

CORRECTED TESTIMONY OF

BARRIE KESSLER
Chief Operating Officer, SoundExchange, Inc.

Witness for SoundExchange, Inc.
CORRECTED TESTIMONY OF

BARRIE KESSLER

Chief Operating Officer, SoundExchange, Inc.

February 2010
Written Direct Testimony of Barrie Kessler

I. Background and Qualifications

I am the Chief Operating Officer of SoundExchange, Inc. ("SoundExchange"). I have held this position since July 2001. Before I became Chief Operating Officer, I served as SoundExchange’s Senior Director of Data Administration, beginning in November 1999. Prior to that, I worked as a database and technology consultant for the Recording Industry Association of America, Inc. ("RIAA") for seven years. There, I developed the software for the certification system for Gold, Platinum and Multi-platinum record sales, and created the royalty distribution system for the Alliance of Artists and Recording Companies ("AARC"). I also previously served as Director of Systems for RSA, Inc., where I directed project teams that provided analytical and application design systems to corporate clients, and was responsible for the company’s network administration. I also previously worked as a database consultant for Price Waterhouse and DOC Computer Center.

My responsibilities as SoundExchange’s Chief Operating Officer include overseeing the collection and distribution of royalty payments for the performance of sound recordings through the various types of services eligible for statutory licensing, including the services at issue in this proceeding. In this capacity, I supervise SoundExchange staff who receive royalty payments from licensees, determine the amounts owed copyright owners and performers, and distribute the royalties to those individuals and entities. Additionally, I oversee SoundExchange’s technical involvement with licensees, manage its budget, and coordinate its systems requirements, development, and testing.
II. Overview

I am submitting this testimony to provide background information about SoundExchange and its operations; to describe SoundExchange’s collection and distribution of royalties; to address several challenges that SoundExchange faces; to explain why SoundExchange should be the sole Collective for collecting and distributing royalties under the Section 112 and 114 licenses; to provide information related to the proposed minimum fee; and to support SoundExchange’s proposal that the Judges continue the same terms for the statutory licenses as they adopted in the Webcasting II proceeding, with certain modifications.

III. SoundExchange’s Collection and Distribution of Royalties

A. Overview of SoundExchange

SoundExchange is a 501(c)(6) nonprofit performance rights organization established to ensure the prompt, fair and efficient collection and distribution of royalties payable to performers and sound recording copyright owners for the use of sound recordings over, among other things, the Internet, wireless networks, cable and satellite television networks, and satellite radio services (hereinafter collectively “services” or “licensees”) via digital audio transmissions. SoundExchange is governed by an 18-member Board of Directors that is made up of equal numbers of artist representatives and sound recording copyright owner representatives. Copyright owners are represented by board members associated with the major record companies (four), independent record companies (two), the Recording Industry Association of America (two), and the American Association of Independent Music (one). Artists are represented by one representative each from the American Federation of Musicians (“AFM”) and the American Federation of Television and Radio Artists (“AFTRA”). There are also seven at-large artist seats, which are currently held by artists’ lawyers and managers (four), an individual artist...
(Martha Reeves), and individuals who are affiliated with the Future of Music Coalition and the Rhythm & Blues Foundation.

In Webcasting II, Docket No. 2005-1 CRB DTRA, the Judges designated SoundExchange “as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).” 37 C.F.R. § 380.4(b).

SoundExchange has represented artists and record labels on a vast array of issues, including notice and recordkeeping and rate-setting through the Copyright Royalty Judges’ proceedings, as well as the prior CARP processes. In addition, SoundExchange undertakes a number of measures to protect the interests of artists and copyright owners under the statutory licenses, including by conducting audits of licensees, seeking and obtaining compliance by noncompliant licensees, and engaging in other enforcement and compliance measures. Since its founding, SoundExchange has, on behalf of all artists and record labels, sought the establishment of fair royalties and regulations that enable the prompt, fair and efficient distribution of royalties to all those artists and copyright owners entitled to such royalties.

SoundExchange frequently refers to those record labels and artists who have specifically authorized us to collect royalties on their behalf as “members.” We have approximately 9,700 record label members and 29,000 artist members. We also pay statutory royalties to non-members – copyright owners and artists alike – as if they were also members. In total, we maintain accounts for approximately 11,500 record labels and 41,000 artists, including members and non-members.
SoundExchange has distributed royalties based on billions of webcasting performances. To date, SoundExchange has conducted a total of 33 royalty distributions and has made nearly 150,000 individual payments totaling more than $250 million. SoundExchange collected approximately $19 million in statutory webcasting royalties for 2006, $40 million for 2007 and $50 million for 2008.

SoundExchange strives to minimize the administrative costs associated with royalty collection and distribution. SoundExchange has 40 full-time staff members. In 2007, based on our audited expenses, our administrative rate was 4.3% of total revenue. In 2008, based on our (as of yet unaudited) expenses, our administrative rate was 5.1% of total revenue. This is a remarkable accomplishment, given the short time that SoundExchange has been in existence and the lower revenue base against which this number is calculated (compared with other U.S. collection societies, which often have overall royalties approaching or exceeding $1 billion). For comparison purposes, I believe reported administrative costs for the American Society of Composers, Authors and Publishers (“ASCAP”) and BMI are typically higher.

B. Webcasting Licensees

The number of webcasters paying royalties to SoundExchange remains robust – 610 webcasting services paid SoundExchange statutory royalties in 2008. In fact, this number undercounts the total number of webcasters that paid royalties in 2008. Some corporate enterprises (e.g., radio station groups) pay and report in a consolidated manner on behalf of all of their affiliates, while other affiliates of other enterprises pay and report separately for each station or for distinct subsets of stations (for example, on a regional basis). Taking these differences into account, SoundExchange actually receives separate reporting, and in some cases separate
payment, from over 1,400 different webcasting services, accounting for thousands of channels and stations.

The commercial webcasters participating in this proceeding – Live365 and RealNetworks – account for a relatively small portion of the total webcasting royalties paid to SoundExchange. In 2008, the royalties paid by these two parties’ webcasting services represented less than 2.5% of the total webcasting royalties paid to SoundExchange. In 2009, they represent less than 2% of the webcasting royalties paid to date.

By contrast, the royalties paid by the webcasters that have opted into one of the three Webcaster Settlement Act agreements that SoundExchange is submitting as exhibits in this proceeding – the Broadcasters agreement with the National Association of Broadcasters (“NAB”), the Noncommercial Educational Webcasters agreement with College Broadcasters, Inc. (“CBI”), and the Commercial Webcasters agreement with Sirius XM Radio – represent over 50% of the total webcasting royalties paid to SoundExchange in 2008.

C. Royalty Collection and Distribution

SoundExchange’s core mission is to collect and distribute statutory royalties as efficiently and accurately as possible. We have worked hard for nearly ten years to develop sophisticated systems, business processes and extensive databases uniquely suited to the challenging task of distributing statutory royalties. For managing royalty collection and distribution, SoundExchange employs the following operational procedures.

Receipt of Payment. SoundExchange’s Royalty Administration and Distribution Services Departments receive from statutory licensees royalty payments and, ideally, two reports: (1) statements of account that reflect the licensee’s calculation of the payments for the reporting period; and (2) reports of use that log performances of sound recordings. (We also receive
notices of election that indicate whether the licensee has utilized any optional rates and terms.) When SoundExchange receives payment from a licensee, that payment is logged into SoundExchange’s licensee database. If this is the first payment from a licensee, a new profile is created for the licensee. If the licensee has previously paid royalties, then the payment is entered under the existing profile. If the licensee operates services in multiple rate categories, the royalty payments are allocated among the applicable rate categories based on the statements of account. Similarly, block payments by a parent corporation covering corporate subsidiaries (e.g. by a radio station group covering individual radio stations) may be allocated among the subsidiaries if the parent provides separate statements of account for each of the covered subsidiaries.

**Loading of Reports of Use.** Reports of use are associated with a service’s payments and statements of account for a particular period and loaded into SoundExchange’s system. The reports are supposed to provide information about the sound recording title, album, artist, marketing label, International Standard Recording Code and other information, as well as information about the number of listeners. If a report does not conform to the required format and delivery specifications, it may not load without substantial manual intervention. Instead, SoundExchange staff must review the reports, identify the kinds of corrections that need to be made, work with the service to obtain a corrected report from the service, and then attempt again to load the report into the system. In some instances, services fail to accurately report identifying data for sound recordings by, for example, identifying an artist as “Various,” reporting a performer as “Beethoven” or “Mozart,” or simply not providing required information. In each of these instances my staff has to research the partially identified sound recording in order to identify accurately the sound recording copyright owners and performers entitled to royalties.
Matching. SoundExchange’s systems seek to match the recordings reported in licensee reports of use with information in SoundExchange’s database concerning known recordings and their copyright owners and performers. Our complex log loading algorithm attempts to match identical and similar data elements and combinations of data elements from the incoming log against performance information previously received from the services. If there is a match for a particular sound recording, then the program identifies the corresponding copyright owner and performer information. However, a reported recording might not match a known recording if, for example, the service has performed a recording by an unsigned band, or a very new, old, foreign or other obscure recording that has not previously been reported to SoundExchange, or if the service has provided incomplete or incorrect identifying information.

Research. SoundExchange has built its database of sound recordings from scratch, based on information reported to it by the services. To the extent a reported recording does not sufficiently match a known recording, SoundExchange personnel will research the recording in an effort to determine whether it should be added to SoundExchange’s database or whether it is in the database under different identifying information. This research requires a significant amount of staff time. Such research is often required for new releases, works reported for the first time, works from small labels, compilation albums and foreign repertoire. In the case of compilation albums, for example, finding copyright ownership information is particularly time-consuming because, although the album is issued by one label, each of the sound recordings on it could be owned by a different label.

SoundExchange conducts extensive data quality assurance work to ensure the correct association of copyright owners and performers, on the one hand, and particular performances, on the other. For example, the SoundExchange system detects what we call “performances in
conflict,” a situation in which performances of the same sound recording are reported as being on more than one label. In such cases, we conduct research to determine the correct label for the sound recording. We also review situations in which an artist has performances of different sound recordings with different labels or with “unassociated labels,” which may indicate that the label information provided to us was incorrect.

**Account Assignment.** SoundExchange then assigns reported sound recording performances to accounts belonging to copyright owners and performers. Performances for which a copyright owner or artist account is not identifiable (e.g., because the recording reported has not yet been matched to a recording known to SoundExchange) are assigned to a “suspense” account for later review and research. This is often the result of poor quality data provided by licensees. Performances assigned to suspense accounts are processed through the steps that follow as soon as identification is made, with the associated royalties being released in the next scheduled distribution.

**Royalty Allocation.** Once account assignment has occurred, a service’s royalty payments for a given distribution period are allocated to sound recordings used by that service during that period and to SoundExchange’s costs deductible under Section 114(g)(3) (sometimes referred to as SoundExchange’s “administrative fee”). Before distribution of allocated funds, SoundExchange takes several quality assurance steps to ensure accounts are payable, address and tax identification information is complete, performances in conflict are resolved and copyright owner conflicts are resolved (to the extent practicable).

**Adjustment.** Once allocations are completed, it is sometimes necessary to adjust particular accounts to rectify reporting and other errors that occurred in prior distributions. For example, if Copyright Owner A was incorrectly reported as the copyright owner of Song X and...
received royalties for Song X, but the actual owner of that song was Copyright Owner B, then SoundExchange would need to credit Copyright Owner B in a future distribution and debit Copyright Owner A’s account for the improper distribution. Adjustments typically take the form of an additional payment or a reduced payment to an existing account in the next scheduled distribution. For copyright owners and artists who are newly identified and for whom royalties have been accruing, a new account is created and royalties attributed to the suspense account are transferred to the new account. Adjustments are also made from suspense accounts to copyright owner and artist accounts based on registrations received during the period between distributions.

Distribution. This process begins with consolidating allocations across licensees’ performance logs within a license category according to earning entity,¹ which are then assigned to copyright owners, artists, or certain other payees (such as a producer who an artist directs SoundExchange to pay) based on the payment instructions for each. Next, the system generates a payment file, which we transmit to our banking partner. SoundExchange generally provides each royalty-earning entity with an electronic or hard copy statement reflecting the performances – and the licenses under which the sound recordings were performed – for which the royalty payment is made. When there is a payable balance in a payee’s account above the distribution threshold, a check is mailed or funds are electronically transferred.

SoundExchange’s database containing payee information is derived from account information received from record labels and artists, and includes such payees as the copyright owners and artists themselves, management companies, production companies, estates and heirs. We must, however, verify address and other information and secure appropriate tax forms

¹ An “earning entity” is the person or entity who has earned the royalties from a tax standpoint and does not have to be the person who receives royalties.
directly from each artist and label. If an earning entity fails to provide SoundExchange with tax information, then we can still distribute royalties but must withhold a portion of the royalties pursuant to applicable Internal Revenue Service ("IRS") guidelines.

SoundExchange presently conducts distributions at least four times a year for statutorily licensed uses (i.e., performances pursuant to 17 U.S.C. §§ 112(e) and 114) and, at times, for non-statutorily licensed performances for which SoundExchange has collected royalties, typically from non-U.S. performing rights organizations who have money for U.S. performers or copyright owners. The threshold for distributing royalties to a payee is $10. Distributing smaller amounts would incur significant additional transaction costs. Every payee with a balance greater than $10 receives at least an annual distribution. Payees with balances less than $100 receive more frequent distributions only if they have opted to be paid by electronic funds transfer rather than by check.

Payments for which SoundExchange lacks sufficient information to distribute to the appropriate copyright owner or performer are allocated to separate accounts in accordance with 37 C.F.R. § 380.8. When SoundExchange subsequently obtains the information necessary to distribute royalties to a particular copyright owner or performer, it will do so in a future distribution.
D. Challenges That SoundExchange Faces

1. The Complexities of Royalty Collection and Distribution

While SoundExchange has gained tremendous efficiencies through its custom software system, the massive scope of the undertaking and the frequency with which novel circumstances arise make the actual task of collecting and distributing royalty payments extremely complex.

Collecting royalties from hundreds of services and distributing the royalties to thousands of payees is an enormous undertaking. Working together with statutory licensees, artists, unions and record labels, we endeavor every year to streamline our processes and ensure that the maximum amount of royalties we collect are paid out to those entitled to receive them.

SoundExchange has automated many of its functions (and such automation is critical to ensuring efficient distribution of royalties). About a year ago, we deployed a new royalty distribution platform that has improved SoundExchange’s ability to manage royalty recipient accounts, match performances to repertoire, and manage our research work flow. This new platform automates more functions, enables us to process large volume logs more easily, and permits greater flexibility in how artist and copyright owner accounts are paid, among other things. I am very pleased with these improvements and greater automation, though SoundExchange staff still must undertake the laborious process of tracking down individuals entitled to royalties and correcting or completing misreported performance data.

The process of matching performances of specific sound recordings to individual copyright owners and performers is often difficult because many business arrangements in the recording industry are intricate and continually evolving. For a given sound recording, there may be multiple artists as well as multiple payees entitled to receive a portion of the royalties, as well as the IRS. Further, members of a band often change over the course of the band’s
existence. When a band that has undergone changes in membership releases multiple versions of the same song, each release may involve payments to different people. Matching the performing band members to a particular sound recording of such a song can be complicated. For example, Fleetwood Mac has undergone multiple changes in membership since it originally formed in 1968, making the task of determining which royalties belong to which members difficult. Indeed, fourteen different individuals may claim to have been a part of the “featured artist” Fleetwood Mac at one time or another, and SoundExchange must determine which individuals are entitled to payment for which sound recording. And Sade is the name of both the individual artist Sade Adu and the band with which she has sung. When SoundExchange receives reports from licensees that list only “Sade” as the performing artist, it can be difficult to determine whether Sade Adu or Sade the band (which includes other members in addition to Sade Adu) is the proper recipient of royalties for a sound recording performance.

Band members may also share royalties on an unequal basis. In the easy case, bands or artists have a corporation that receives the royalties and the corporation assumes responsibility for dividing and distributing royalties among the band members. In some cases, however, SoundExchange itself has to locate the information regarding shares, divide the royalties, and make the payments to each band member. The general rule we have created is to distribute royalties on a pro rata basis among the members of a band when there is no indication to the contrary from band members.

Furthermore distributions can be especially complicated if an artist is deceased and there are multiple heirs (each of whom may have a different share) entitled to the royalties from the performance of a single sound recording; this is particularly true where the artist is a group and more than one group member is deceased.
2. **Problems Caused by Poor Licensee Compliance**

SoundExchange works diligently to pay through as high a percentage of its receipts as possible, as fast as possible. SoundExchange’s royalty distributions are impeded by many licensees’ submitting reports of use that are inaccurate, incomplete, improperly formatted or delinquent, or by their failure to provide reports of use altogether. SoundExchange understands that the CRJs are considering issues related to reports of use, including census reporting, in a separate proceeding, Docket No. RM 2008-7, and that proposals for regulations related to reports of use properly belong in that proceeding. To that end, SoundExchange has submitted three sets of comments in Docket No. RM 2008-7. However, I mention the problems SoundExchange faces in connection with licensees’ widespread noncompliance with the reporting regulations and poor quality reports of use because it has a direct impact on SoundExchange’s distribution of royalties.

SoundExchange’s ability to allocate and distribute royalties depends to a large degree upon the cooperation of licensees in complying with their payment and reporting obligations on a timely basis, and among services there is widespread noncompliance with the Judges’ regulations. Unfortunately, many services have not historically and still do not regularly provide reports of use or have submitted defective reports of use.

For example, in past years, RealNetworks failed to provide reports of use. This failure to comply with basic reporting requirements has caused SoundExchange to expend time and money to get RealNetworks to fulfill its obligations and prevents the prompt distribution of royalties.

In addition to missing or defective reports of use, many services fail to provide the required statement of account or other necessary documentation with their payments, or are paying at an improper rate. All of this has the effect of delaying distribution.
the Judges set the webcasting royalty rates for 2006 - 2010 in Webcasting II, Live365 has not paid SoundExchange at those new rates. Live365’s recent litigation efforts suggest that it is unsatisfied by the rates set in Webcasting II. It certainly has every right to seek whatever legal remedies may be available to it, and to participate in this rate-setting proceeding to advocate in favor of different rates. But a service’s unhappiness with the rates set by the Judges should not excuse the service from paying those rates.

Poor compliance by licensees impedes SoundExchange’s efforts to administer the license efficiently. SoundExchange has taken a number of steps to address these problems. We have applied increased pressure on services to supply missing reports of use and to provide more compliant reports of use. We work with licensees to improve their reporting compliance. We have also assigned more SoundExchange staff to focus their attention on resolving problems with logs, and we have reallocated members of our software development team to data and distribution activities. However, all such efforts require SoundExchange’s attention, time and money – all of which could have been devoted to its core mission of collecting and distributing royalties.

3. **Identifying and Locating Royalty Recipients**

In an effort to maintain accurate information on artists’ arrangements for division of royalties as well as basic contact and tax information, SoundExchange actively engages in artist outreach. SoundExchange attends about 50 music industry conferences, meetings, festivals and events a year, and speaks to artist management firms, record labels, performing rights organizations and law firms that represent artists. SoundExchange also works with music associations to spread awareness of its services, and it advertises in a variety of media outlets.
SoundExchange personnel are available to artists (as well as to copyright owners and licensees) to provide information and answer questions, and we do so on a regular basis.

For undistributed royalties, six SoundExchange staff members’ and three consultants’ responsibilities include conducting research to locate artists and obtain their payee information. Even where SoundExchange is able to determine the identity of the artist and record label, that does not mean that SoundExchange knows where to locate them. Locating accurate payee information for a sound recording can be very difficult, especially if the recording is listed in a non-active, deep “catalog” or involves an artist who does not have a U.S. corporate entity designated to receive royalties on his or her behalf. Moreover, even when we locate artists or their managers, we still need them to return payee information so that we can send their royalties to them. All of these steps mean that tracking down and paying the enormous number of artists and record companies entitled to statutory royalties is a daunting task.

Through niche programming, services perform many sound recordings of smaller, less well-known labels and performers who are hard to find (and the problem is magnified if the labels are no longer in existence). SoundExchange spends a significant amount of time addressing this problem in two ways. First, SoundExchange personnel publicize the organization, its mission and its functions in order to ensure that artists and copyright owners are aware that they may have royalties owed to them. We hope that individuals who learn about us will contact us to provide us with the information we need to pay them. Second, SoundExchange performs extensive research to locate and contact individuals who may be entitled to royalties. For example, we rely on databases such as Celebrity Access and All Music Guide as well as information provided by other organizations within the music industry, both domestic and
foreign, to locate artists. SoundExchange also utilizes temporary employees, interns, and independent contractors to assist in locating individuals and entities entitled to royalty payments.

SoundExchange’s ability to distribute royalties depends upon the cooperation of copyright owners and performers in providing necessary payment and tax information. SoundExchange cannot distribute allocated royalties when the artist or the rights owner or both have failed to register with SoundExchange. Inexplicably, even when SoundExchange contacts artists about unpayable royalties, some of them fail to submit the proper registration information to enable payment. In addition, many artists change address frequently, and it is not uncommon that an artist SoundExchange has previously paid will move but fail to inform SoundExchange of his or her new address. SoundExchange is then unable to distribute royalties to that artist until he or she can be located again. If artist group members cannot agree to the splits among them for their repertoire or if there are multiple claims against the same repertoire (as with two foreign collecting societies claiming the same sound recording), those payments will be placed on hold, pending resolution of the dispute.

SoundExchange is working to address these challenges in several ways in addition to the outreach measures discussed above. For example, instead of issuing checks, we offer royalty recipients the option of receiving their royalties through automated check clearinghouses that essentially offer direct deposit into bank accounts. Even when artists tour frequently and change their addresses, their bank accounts generally remain the same. Under this system, when an artist moves or is touring, he or she will continue to receive payments directly into his or her bank account. In addition, we continue to pursue initiatives with foreign collectives to locate artists. SoundExchange has developed relationships and negotiated agreements with sister royalty societies around the world, including SOMEXFON in Mexico, PPL in the United
Kingdom, ABRAMUS and UBC in Brazil, AIE in Spain, RAAP in Ireland, and SENA in the Netherlands. Under these agreements, SoundExchange remits royalty payments due to copyright owners or performers represented by those societies. In some agreements, SoundExchange receives royalty payments for performances of U.S. sound recordings that these analogous societies have collected.

We also work with other organizations with connections to the artist community to compare our unmatched lists to data they maintain about artists. When those organizations have contact information for artists for whom we lack information, they contact the artists and encourage them to register with SoundExchange and collect their royalties. Furthermore, we have launched on-line registration, so that artists and copyright owners can register with SoundExchange without having to use conventional mail. Finally, we continue to appreciate the efforts of our record label members who encourage their artists to collect their SoundExchange royalties.

IV. SoundExchange Should Be Designated the Sole Collective to Collect and Distribute Webcasting Royalties.

In Webcasting II, the Judges found “that selection of a single Collective represents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses.” Faced with testimony and evidence submitted by SoundExchange and RLI, the Judges concluded that “SoundExchange is the superior organization to serve as the Collective for the 2006-2010 royalty period.” 72 Fed. Reg. at 24105 (May 1, 2007).

I agree with the CRJs’ conclusions, and request that the Judges again designate SoundExchange as the sole Collective to collect and distribute royalties for the 2011-2015 statutory period. SoundExchange now has considerable experience and expertise in
administering the statutory licenses. Whereas at the time I submitted my written direct testimony in Webcasting II, SoundExchange had processed over 650 million sound recording performances, 72 Fed. Reg. at 24104, SoundExchange has now processed billions of sound recording performances. SoundExchange has continued to increase the size of its membership and the number of record label and artist accounts it maintains. Whereas at the time the Webcasting II direct testimony was submitted, SoundExchange had approximately 3,000 record label members and 12,000 artist members, 72 Fed. Reg. at 24104, today SoundExchange has approximately 9,700 record label members and 29,000 artist members. And while SoundExchange had over 700,000 sound recordings in its database when I submitted my written direct testimony in Webcasting II, today that number has grown to nearly 2 million.

I am aware that RLI has filed a petition to participate in Webcasting III. I oppose any effort by RLI to be designated as the sole Collective or as an alternative collective to collect and distribute statutory webcasting royalties. In selecting SoundExchange over RLI as the sole Collective in the Webcasting II proceeding, the Judges expressed “serious reservations about the bona fides of Royalty Logic to act as the Collective under the statutory licenses.” Webcasting II, 72 Fed. Reg. at 24105. The Judges noted that RLI is a for-profit organization that wants to enter the royalty collection and distribution business to make money; that the testimony of Mr. Gertz raised concerns “as to whether Royalty Logic will act in the best interest of all copyright owners and performers covered by the statutory licenses”; that RLI’s relationship with copyright users and services “elevated” these concerns; and that RLI’s arguments about the potential effects of competition between collectives were not relevant. Webcasting II, Fed. Reg. at 24105.

In my testimony in Docket No. 2005-1 CRB DTRA, I discussed the problems associated with a system that includes more than one collection and distribution agent. Those problems
remain true today. SoundExchange’s system presently contains entries for tens of thousands of copyright owners and performers and nearly 2 million sound recordings. For the system to recognize multiple agents, SoundExchange would have to expend significant resources, both human and monetary, to create the accounting platform necessary to track numerous distributing agent relationships, keep accounts current when entitled parties change affiliation with multiple agents, and still ensure timely distributions. Adding multiple agents would not only create administrative costs and burdens, but would also result in substantial delay in distributing royalties owed. The resulting complexity and administrative burden would serve no one and would lead only to a large number of disputes between collectives – disputes that might end up back before the Judges.

In my view, a multi-agent system is anathema to the concept of an efficient statutory licensing system. Although proponents of a multi-collective system often point to ASCAP, BMI, and SESAC – the musical works performing rights organizations – it is important to understand that administering a statutory license is fundamentally different from what those organizations do. Those organizations all engage in direct, voluntary licensing. They represent their members (and only their members) and are able to compete for members by negotiating different rates and terms for collection and distribution of royalties. They only collect and distribute monies for their own members, and have no responsibility to anyone other than their members.

Under the Copyright Act, SoundExchange is in the position of administering a statutory license whose rates and terms are set by the Judges. There cannot be “competition” between collectives on rates and terms; the only “competition” would be created by one collective trying to free-ride off the efforts of another, as RLI has done in the past and may want to do in the future. Moreover, because many copyright owners and performers will be members of no
organization, there must be an entity that has the responsibility of researching and identifying their recordings, locating them and ensuring that they too receive the royalties to which they are entitled. SoundExchange (or its predecessor) has undertaken that responsibility since royalties began being paid under Section 112(e) and Section 114 of the Copyright Act.

Where a statutory license has specified rates and terms, it only makes sense for a single entity to provide administration. As I discussed in my prior testimony, if multiple collectives were to administer the same license, the collection and distribution process would grind to a halt.

Moreover, designating a second Collective would create greater overall costs because copyright owners and performers would have to pay for duplicative systems for license administration. Similarly, designating a new Collective to replace SoundExchange would be inefficient. SoundExchange has invested substantial time, effort and money into developing its collection and distribution systems, and has developed great expertise in administering the statutory license. The benefits to copyright owners and artists of that experience and expertise would be lost if a different entity were designated as the Collective. Copyright owners and artists would also be harmed because they would subsidize the costs of transitioning to a new Collective.

V. The Minimum Fee

SoundExchange proposes setting the statutorily-required minimum fee at $500 per channel or station, subject to a $50,000 annual cap for commercial webcasters. This proposal is supported by agreements that SoundExchange is submitting as evidence, and would ensure that every licensee makes some contribution to the costs of administering the statutory license.
A. Agreements

SoundExchange’s agreements under the Webcaster Settlement Act establish that services are willing to pay the minimum fee that SoundExchange is seeking in this proceeding. SoundExchange has submitted two settlements to the CRJs for publication and adoption – a Broadcasters agreement with the National Association of Broadcasters (“NAB”) and a Noncommercial Educational Webcasters agreement with College Broadcasters, Inc. (“CBI”). The parties entered into the Broadcasters agreement pursuant to the Webcaster Settlement Act of 2008, and the Noncommercial Educational Webcasters agreement pursuant to the Webcaster Settlement Act of 2009. In addition, SoundExchange has entered into a Commercial Webcaster settlement with Sirius XM pursuant to the Webcaster Settlement Act of 2009. The agreements provided eligible services an opportunity to opt into the agreements and accept the rates and terms established by them.

The NAB agreement covers the time period 2006 through 2015, and includes an annual minimum fee of $500 per station or channel, subject to a $50,000 cap. According to SoundExchange’s records, 404 entities have opted into the NAB agreement on behalf of several thousand individual stations.

The Commercial Webcaster Agreement covers the time period 2009 through 2015, and likewise includes an annual minimum fee of $500 per station or channel, subject to a $50,000 cap. Sirius XM has opted into the agreement for its webcasting service.

The CBI agreement covers the time period 2011 through 2015 (with special reporting provisions for 2009-2010), and includes an annual minimum fee of $500 per station or channel. The opt-ins for the CBI agreement are not due until January 2010. The minimum fee in the CBI agreement has no cap but, in our experience, the huge majority of noncommercial services never
pay more than $500, and no individual noncommercial licensee that pays SoundExchange reports more than ten stations on its statements of account, let alone the 100 that would reach the cap in the commercial webcaster context. In addition, for noncommercial services, $500 covers the first 159,140 ATH per channel or station as well, meaning that a cap would be inappropriate. For example, if a noncommercial webcaster offered 150 channels, but was subject to a cap of $50,000 at a minimum fee rate of $500 per channel, that noncommercial webcaster should not get 159,140 aggregate tuning hours of usage on 50 channels for free.

These agreements show that both commercial and noncommercial stations are willing and able to pay a $500 minimum fee.

B. Contribution Toward Administrative Costs

One rationale for the minimum fee that has been raised in past proceedings is that it should cover SoundExchange’s administrative expenses even in the absence of royalties. 72 Fed. Reg. at 24096 (May 1, 2007). I agree that the minimum fee should ensure that every licensee makes an appropriate contribution to the costs of administering the statutory license, as well as a reasonable payment for usage of sound recordings. After all, if the minimum fee covered only administrative expenses, then copyright owners and performers collectively would receive no payment for the use of their sound recordings by services paying only the minimum fee. Those payments would in effect be completely consumed by costs of administration.

That said, SoundExchange has never sought to collect all of its costs from minimum fee payments. Payments from services that pay larger amounts of royalties in effect subsidize the costs associated with processing payments and information from smaller services that typically pay only the minimum fee.
SoundExchange’s per service or per station or channel administrative costs are difficult to quantify. The expenses that SoundExchange incurs in relation to particular services vary widely depending on the quality of data that a service provides to SoundExchange and on the additional work that SoundExchange may need to do when it receives poor quality data. In addition, some large station groups submit separate statements of account and reports of use for each of their individual stations. This means that we need to process each such station individually, rather than as a group, which necessarily adds time to our efforts. Our costs also vary depending on the breadth and obscurity of a service’s repertoire, with services that play a great deal of repertoire that is relatively unique imposing greater research costs. In addition, many of our costs are effectively shared across services – including things like research of repertoire used by multiple services, costs of artist outreach and distributing royalties once individual services’ allocations are loaded, information technology and corporate overhead. SoundExchange does not track its administrative costs on a licensee-by-licensee, station-by-station or channel-by-channel basis and, as a result, there is no precise way to determine exactly what we must spend on such a basis.

As a check on whether the minimum fees agreed upon in SoundExchange’s Webcaster Settlement Act agreements and proposed in this proceeding are reasonable in light of our administrative costs, SoundExchange nonetheless estimated our administrative costs per service. Based on current (and as of this point unaudited) records, SoundExchange’s expenses for 2008 were approximately $8.4 million. This amount includes SoundExchange staff, facilities, amortized and depreciated equipment, operating expenses, and other costs. This amount excludes the amortization of costs of rate-setting proceedings. In 2008, based on information available in September 2009, SoundExchange had 1,454 licensees (at the statement of account
level) of all license types. When SoundExchange’s operating costs are divided by the number of licensees, the result is a per licensee cost of approximately $5,777.

While the overwhelming majority of these licensees (about 1,371) operated only one station or channel, some operated multiple stations or channels. The number of individual channels or stations on a licensee’s service is often an indicator of greater complexity required to handle such payments and reporting. However, it is unclear how many “stations” there actually are in the case of a handful of internet-only services that allow users to create channels, and handling payments and reporting by those services is probably not hundreds or thousands of times more expensive or complex than handling payments and reporting by a service with only one channel. That is why we have been willing to agree to a cap on the minimum fee corresponding to 100 channels or stations per licensee, and propose such a cap for commercial webcasters in this proceeding.

As a further check on our proposed per channel or per station minimum fee, we tried to determine the average number of channels or stations per webcaster licensee. Calculating the average number of channels or stations per webcaster is necessarily an inexact exercise. Services do not always report the total number of channels or stations, and as noted above, for services that allow users to create channels, it is unclear how many “stations” there actually are. In estimating the average number of stations or channels per webcaster, we used actual numbers where that information is reported to us. Where that information is not reported to us, but where a service provides information about the number of its stations or channels on a publicly

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2 In this Corrected Written Direct Testimony, I am correcting the number of licensees and the calculations of per licensee cost and average per channel or station cost that use that number on pages 24 and 25, so that the testimony is correct as of the time I originally submitted my Written Direct Testimony on September 29, 2009. I have not otherwise updated these numbers or any other information in this testimony.
available website, we used that information. For the small number of services for which we lack information about their total number of stations or channels, but for which we are generally aware that they have a large number of stations or channels, we assumed 100 stations or channels. The assumption of 100 stations or channels is consistent with SoundExchange’s proposal of a $50,000 cap on minimum fees for commercial services with 100 or more stations or channels where the minimum fee is $500.

Based on the foregoing information, we determined that there are an average of about seven channels or stations per webcaster licensee at the statement of account level. As a matter of arithmetic, SoundExchange’s average per channel or station cost for webcasters in 2008 was approximately $825 ($5,777 divided by 7). One could do this analysis differently. For example, if one capped at 100 the number of channels on services known to have a much larger number of channels, one would get a lower average number of channels or stations per webcaster licensee at the statement of account level and a correspondingly higher average per channel or station cost.

The exact cost imposed by any particular licensee varies widely. Every single statement of account and every single report of use must go through the entire process described above – the payments and statements of account must be reviewed, verified, and recorded; and the reports of use must likewise be reviewed, tested, logged, and loaded into the distribution engine. Any problems with paperwork or logs can introduce problems and cause delay.

Nonetheless, the estimates described above demonstrate that SoundExchange’s proposed minimum fee of $500 per station or channel is below our estimated per station or channel costs. As indicated above, SoundExchange has never sought to collect all of its costs from minimum fee payments. Payments from services that pay larger amounts of royalties in effect subsidize the costs associated with processing payments and information from smaller services that
typically pay only the minimum fee. However, because $500 per station or channel does not
recover all of our administrative costs, particularly if the minimum fee is understood to include
some payment for usage of sound recordings, that level of payment represents a reasonable and
justified contribution to the costs of administering the statutory license.

VI. License Terms

SoundExchange generally proposes continuing the same terms in this proceeding as the
Judges adopted in the Webcasting II proceeding, Docket No. 2005-1, subject to the revisions
described below with regard to (i) server log retention, (ii) late fees for reports of use, (iii)
identification of licensees, and (iv) certain technical and conforming changes.

Although the Judges did not rule in SoundExchange’s favor on all of the terms issues
raised in the Webcasting II proceeding, the Judges clearly recognized many of SoundExchange’s
concerns, and the terms adopted in that proceeding represented an important step forward. In the
SDARS proceeding, Docket No. 2006-1, the Judges adopted terms that were largely similar to
the terms adopted in the Webcasting II proceeding, except to the extent dictated by differences in
the rate structure and for certain technical changes. I believe there is value in having consistency
of terms across licenses, and in allowing time to fully assess the effectiveness of those terms
based on experience working under those terms. Consistency among the terms regulations for
the various types of services and over time aids SoundExchange’s administration of the licenses
and makes licensees’ compliance with the terms more efficient.

For all of these reasons, SoundExchange proposes that the Judges adopt the same terms
regulations as it adopted in Docket No. 2005-1, as codified at 37 C.F.R. Part 380, except as
discussed below.
A. Server Log Retention

SoundExchange proposes that the statutory license terms expressly confirm that the records a licensee is required to retain pursuant to 37 C.F.R. § 380.4(h) and that are subject to audit under 37 C.F.R. § 380.6 include server logs sufficient to substantiate rate calculation and reporting. Licensees often do not retain the actual server logs showing which transmissions were made when. This data is critical for verifying that licensees have made the proper payments.

The current royalty rate structure is based on the actual performances transmitted, and SoundExchange proposes continuing that rate structure in the next rate period. Every webcaster’s transmissions are made by computer servers that typically generate original records of what recordings they transmitted to how many users and when. Those logs should become the basis for a licensee’s statements of account and reports of use. However, if SoundExchange cannot compare those logs to the statements of account, reports of use and other records maintained by the licensee that purportedly were derived from the server logs, we are missing the first – and perhaps most important – link in the chain of records that establish actual usage.

While I believe the current regulations already require licensees to maintain their server logs for at least a three year period, because they are “records of a Licensee . . . relating to payments of . . . royalties.” 37 C.F.R. § 380.4(h), some licensees apparently take a different view and do not retain their server logs. Accordingly, SoundExchange proposes that the Judges make this requirement more explicit.

B. Late Fees for Reports of Use

SoundExchange proposes that reports of use be added to the list in 37 C.F.R. § 380.4(e) of items that, if provided late, would trigger liability for late fees. SoundExchange made a similar proposal in the pending notice and recordkeeping proceeding, Docket No. RM 2008-7.
The implementation of that concept could be included in either the notice and recordkeeping regulations or the license terms. Implementing the concept in the license terms would be appropriate because late fees are otherwise provided for in the license terms, and timely provision of reports of use is essential to the distribution of statutory royalties as contemplated by the license terms. Indeed, reports of use are at least as important to timely distribution as statements of account, which are subject to late fees. SoundExchange is raising the issue here in case the Judges would prefer to consider the issue in the context of this proceeding, rather than in the recordkeeping proceeding.

As SoundExchange explained in Docket No. RM 2008-7, widespread noncompliance with reporting requirements demonstrates that it is important to provide greater incentives to compliance than in the past. We receive no reports of use from many webcasters, and the reports we received were often late or grossly inadequate. This is a significant impediment to our timely payment of copyright owners and performers. Other than the threat of litigation, there is no commercial incentive for a service to comply with the regulations governing reports of use. The possibility of late fees would provide an additional, immediate incentive to comply with the applicable reporting requirements and would greatly facilitate operation of the statutory licenses.

C. Identification of Licensees

SoundExchange proposes that statements of account correspond to reports of use by identifying the licensee in exactly the way it is identified on the corresponding notice of use and report of use, and by covering the same scope of activity (e.g., the same channels or stations). In addition, the regulations should be clarified to explain that the “Licensee” is the entity identified on the notice of use, statement of account, and report of use, and that each Licensee must submit its own notice of use, statement of account, and report of use. Under this proposal, a station
group could choose to submit separate statements of account for each of its stations, but if it did, it would also have to have filed a corresponding notice of use for each station and would have to submit separate reports of use for each station. Likewise, a station group could choose instead to file a single statement of account covering all of its stations, but in that instance, it would need to supply a single notice of use and a single report of use covering all of its stations. We would prefer that station groups consolidate their reporting to the extent possible.

Because SoundExchange receives reports from hundreds of webcasting payors covering thousands of channels and stations, we devote considerable effort to reconciling changes and variations in licensee names and matching statements of account to reports of use covering different combinations of channels and stations. Those aspects of our work would be greatly simplified at little or no evident cost to licensees if licensees were required to provide notices of use, statements of account and reports of use on a consistent basis, and to use consistent names to refer to themselves in such documents.

In addition, we would like a regulation requiring licensees to use an account number, that is assigned to them by SoundExchange, on their statements of account and reports of use. This unique identifier would make it easier for SoundExchange to identify each licensee in our system, and to distinguish between services with similar names. This proposal would not burden licensees, and indeed might simplify their reporting and accounting efforts, as well.

D. Technical and Conforming Changes

Finally, SoundExchange is proposing a few technical and conforming changes to the regulations, including changes that would be helpful to make for the sake of clarity or consistency across licenses. These proposed changes are reflected in the redlined proposed regulations that SoundExchange is submitting as an attachment to its rate proposal.
I declare under penalty of perjury that the foregoing testimony is true and correct.

Executed on February 15, 2010

Barrie Kessler
## WHUS Radio

### Actual vs. Budget

**June 30, 2009**

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<tr>
<td>50500 - Events/Programs Co-Sponsorship</td>
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<tr>
<td>50600 - Contractual Fees:50601 - Tower Lease Fees</td>
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<tr>
<td>50600 - Contractual Fees:50603 - CPB Digital Conversion Grant</td>
<td>45,000.00</td>
<td>45,000.00</td>
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<tr>
<td>50600 - Contractual Fees:50604 - CPB Programming Grant</td>
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<td>-</td>
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<tr>
<td>50600 - Contractual Fees:50605 - Miscellaneous Fees</td>
<td>-</td>
<td>-</td>
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<tr>
<td>50700 - Food Sales</td>
<td>-</td>
<td>-</td>
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<tr>
<td>50800 - Merchandise Sales:50801 - Poster Sale</td>
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<td>85.00</td>
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<td>50800 - Merchandise Sales:50803 - Silent Auction</td>
<td>1,122.00</td>
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<tr>
<td>50900 - Fees - Fines, Late Charges</td>
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<td>28.01</td>
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<tr>
<td>51000 - Student Fees</td>
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<tr>
<td>51400 - Interest</td>
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<tr>
<td>51500 - Miscellaneous</td>
<td>1,861.99</td>
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<td>1,861.99</td>
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</table>

**Total Revenues**

527,364.21  488,776.00  37,466.21

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Actual</th>
<th>Budget</th>
<th>Variance</th>
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<tbody>
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<td>60100 - Advertising:60101 - Advertisements and Sponsorships</td>
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<td>60200 - Donations and Gifts:60202 - Radiothon Premiums</td>
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<td>60300 - Dues Expense</td>
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<tr>
<td>60400 - Registration Fees</td>
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<tr>
<td>60500 - Programs Co - Sponsorship</td>
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<td>(1,500.00)</td>
</tr>
<tr>
<td>60600 - Fees (contractual services):60601 - Commissions</td>
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<td>-</td>
<td>-</td>
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<tr>
<td>60600 - Fees (contractual services):60602 - Tower Loan</td>
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<td>-</td>
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<tr>
<td>60600 - Fees (contractual services):60603 - Credit Card Fees</td>
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<td>700.00</td>
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<td>60600 - Fees (contractual services):60604 - HD Radio Project</td>
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<tr>
<td>60600 - Fees (contractual services):60605 - Studio Build Project</td>
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<tr>
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<td>60600 - Fees (contractual services):60607 - DJ Services Fee</td>
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<td>60600 - Fees (contractual services):60608 - News Services</td>
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<td>60600 - Fees (contractual services):60609 - Concerts and Events</td>
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</tr>
<tr>
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<td>60600 - Fees (contractual services):60614 - Tower Manager Salary</td>
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**Total Expenses**

527,364.21  488,776.00  37,466.21
<table>
<thead>
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<th>Account Description</th>
<th>Actual</th>
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<th>Variance</th>
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<td>60700 · Cost of Goods Sold - Food Sales</td>
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<td>60900 · Interest and Penalties</td>
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<td>11.85</td>
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<tr>
<td>61000 · Raffle</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>61100 · Travel/6101 · Staff Development Travel</td>
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<td>10,730.00</td>
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<tr>
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<tr>
<td>61300 · Postage/61302 · Radiothon Postage</td>
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<td>61400 · Photocopying</td>
<td>105.26</td>
<td>250.00</td>
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<td>4,700.00</td>
<td>98.29</td>
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<tr>
<td>61700 · Printing/61701 · Publications</td>
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<tr>
<td>61700 · Printing/61702 · Radiothon</td>
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<tr>
<td>61700 · Printing/61703 · Miscellaneous</td>
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<td>3,306.11</td>
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<td>62000 · Supplies/62007 · Promotional Supplies</td>
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<td>62100 · Repairs and Maintenance</td>
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<td>62200 · Utilities</td>
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<tr>
<td>62300 · Subscriptions</td>
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<td>65,668.00</td>
<td>(15,509.07)</td>
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<td>62702 · Student Wages Admin</td>
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<td>13,860.00</td>
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<tr>
<td>62703 · Student Wages Engineering</td>
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<td>62801 · Wages Non-Student Operations Board</td>
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<td>30,600.00</td>
<td>(7,588.28)</td>
</tr>
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<td>62802 · Wages Non-Student Admin</td>
<td>96,700.11</td>
<td>103,690.00</td>
<td>(6,989.89)</td>
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<td>62803 · Wages Non-Student Engineering</td>
<td>26,184.29</td>
<td>26,407.00</td>
<td>(222.71)</td>
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<td>62900 · Wage Taxes Student</td>
<td>2,204.43</td>
<td>2,500.00</td>
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<td>63001 · Non Student Wage Taxes FICA</td>
<td>11,506.78</td>
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<td>63100 · Miscellaneous Expenses</td>
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<td><strong>Total Expenses</strong></td>
<td><strong>$ 440,322.66</strong></td>
<td><strong>$ 610,532.00</strong></td>
<td><strong>(170,209.34)</strong></td>
</tr>
</tbody>
</table>
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

W. TUCKER McCRADY

Associate Counsel, Digital Legal Affairs
Warner Music Group

Witness for SoundExchange, Inc.

SX Trial Ex. 7
Public Version
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

TESTIMONY OF

W. TUCKER McCRAY

Associate Counsel, Digital Legal Affairs
Warner Music Group

September 2009
STATEMENT OF W. TUCKER McCRADY
WARNER MUSIC GROUP

Background and Qualifications

I am Associate Counsel, Digital Legal Affairs at Warner Music Group (WMG). In that role, I am responsible for handling a range of digital legal issues, a majority of which involve negotiating digital deals on behalf of WMG. I have negotiated deals for downloads, streaming (both audio and video, and both ad-supported and subscription-based), ringtones, custom radio and many others, with providers such as Apple, Amazon, Google, Rhapsody, MTV, Yahoo, Last.fm and Slacker. I have worked at WMG in this capacity since early 2006.

I am also a member of the Board of Directors and the Licensing Committee of SoundExchange. This committee, among other things, is directly responsible for negotiating and approving any settlements related to statutory licenses on behalf of SoundExchange.

I hold a bachelors degree from Harvard, a diploma in drama from The Juilliard School, and a JD from Columbia Law.

About Warner Music Group

Warner Music Group Corp. is the only stand-alone music company to be publicly traded in the United States. WMG is home to some of the best-known labels in the recorded music industry including: Asylum, Atlantic, Cordless, East West, Elektra, Nonesuch, Reprise, Rhino, Roadrunner, Rykodisc, Sire, Warner Bros. and Word. Collectively, these labels encompass a global roster of vibrant artists and a diverse catalog of some of the world’s most celebrated and popular recordings. Warner Music International, a leading company in national and international recorded music repertoire,
operates through numerous affiliates and licensees in more than 50 countries. WMG also includes Warner/Chappell Music, one of the world’s leading music publishers, with a catalog of more than one million songs from more than 65,000 songwriters.

**Overview**

My testimony seeks to explain WMG’s strategy with respect to negotiations with digital service providers outside the limitations of the statutory licensing framework. These agreements are the best evidence of how we, as a willing seller of copyrighted sound recordings, approach such negotiations. Understanding that approach is essential to the proper determination of the statutory rate for non-interactive webcasting, and the Copyright Royalty Judges relied on similar testimony to set statutory webcasting rates in the prior proceeding known as Webcasting II.

**The Digital Distribution of Music**

The overarching strategy of WMG with respect to digital agreements is to seek out and exploit all potential avenues for monetizing the musical experience. As a general matter, WMG is not interested in allowing its sound recordings to be used for free in the name of “promotion,” because the ubiquity and high quality of digital distribution have fundamentally transformed the concept of “substitution.” In the past, our primary concern was to protect sales of our CDs or other physical products. Today, we examine each new business model or proposal, not just for its likely substitutional impact on sales of physical products, but for its likely substitutional impact on other revenue sources. As a result, we must now be increasingly vigilant to ensure that any particular digital exploitation of our sound recordings does not damage potentially more lucrative digital exploitations of our sound recordings.
As for promotion, as a general matter we cannot afford to enter into free or low-revenue digital agreements, with the hope of promoting sales of CDs, or any other type of digital or physical music product. As we continue to explore new avenues for monetization, each digital business model needs to provide a distinct revenue stream that either contributes meaningfully to our bottom line, or helps to develop a business model that may, over time.

Audio Streaming Agreements

A. Webcaster Settlement Act Settlements

In 2008, Congress passed legislation designed to encourage settlements of royalty disputes for statutory webcasting royalty rates. The Webcaster Settlement Act of 2008 ("WSA"), which was extended by Congress and President Obama in 2009, specifically permitted SoundExchange and webcasters to negotiate settlements of ongoing disputes arising out of the royalty rates that were set by the Copyright Royalty Judges ("CRJs") in 2007 covering the time period from 2006-2010 and which were the subject of an ongoing appeal at the time. The WSA also permitted SoundExchange to negotiate royalty rates to be applied from 2011-2015, the time period at issue in this proceeding. The WSA permits the following WSA settlements to be considered in this proceeding.

1. Broadcasters

In February of 2009, SoundExchange and the National Association of Broadcasters ("NAB") reached the first such settlement under the WSA. Exhibit 1, Agreed Rates and Terms for Broadcasters, available at 74 Fed Reg. 9293, 9299 (Mar. 3, 2009) (the "Broadcasters settlement"). This settlement governs the webcasting activities of traditional terrestrial commercial broadcasters. These activities overwhelmingly

3
consist of internet simulcasts of over-the-air radio broadcast transmissions, although they also may include internet-only programming. Any broadcaster, as the term is defined by the agreement, can opt in. The Broadcasters settlement features the following royalty rate structure:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>$0.0008</td>
</tr>
<tr>
<td>2007</td>
<td>$0.0011</td>
</tr>
<tr>
<td>2008</td>
<td>$0.0014</td>
</tr>
<tr>
<td>2009</td>
<td>$0.0015</td>
</tr>
<tr>
<td>2010</td>
<td>$0.0016</td>
</tr>
<tr>
<td>2011</td>
<td>$0.0017</td>
</tr>
<tr>
<td>2012</td>
<td>$0.0020</td>
</tr>
<tr>
<td>2013</td>
<td>$0.0022</td>
</tr>
<tr>
<td>2014</td>
<td>$0.0023</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0025</td>
</tr>
</tbody>
</table>

WMG believes that these rates are below what the webcasting rate would be in the open market, but nevertheless see this agreement with the broadcasters as a positive development.

Another feature of the Broadcasters settlement is a minimum fee of $500 for each individual channel/station, with a $50,000 annual cap on minimum fees for any single broadcaster. A minimum payment, which is also included in the other WSA settlements, is an important element of these deals from WMG’s perspective because it ensures a minimum amount of compensation for the use of WMG’s copyrighted sound recordings. The minimum included within this and the other WSA settlements, however, is substantially smaller and less valuable than the type of minimum payments and revenue guarantees that are generally included within WMG’s digital deals, as discussed more fully below. It was obviously based on the statutory minimum, and is an example of how
negotiating in the context of a statutory licensing regime leads to below-market outcomes.

In addition to the per-play royalty rates and the minimum payment structure, the Broadcasters settlement also generally requires more comprehensive reporting than called for by the current regulations. Specifically, broadcasters that opt in to the Broadcasters settlement are usually required to provide reports of use to SoundExchange “on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).” Ex. 1, at § 5.2. However, small broadcasters have an option to avoid reporting.

a. Performance Complement Waivers

Separate and apart from the negotiated agreement between SoundExchange and the broadcasters, WMG negotiated with broadcasters on the issue of the sound recording performance complement (defined in 17 U.S.C. § 114(j)(13)), which limits the number and frequency of recordings by a given artist or from a given album that may be played within a specified time period. Terrestrial broadcasters have long maintained that the performance complement is, as a practical matter, incompatible with their traditional broadcasting practices, and operates as a strong motivating factor against a broadcaster entering into the webcasting business.

Although WMG was under no obligation to grant the waiver, we did so for the reasons set out below, which are unique to the business of terrestrial broadcasters, the only ones eligible to opt in to the Broadcasters settlement. Most importantly,
For simulcasts, however, WMG was happy to offer the waiver. Terrestrial radio has never been subjected to a statutory requirement similar to the performance complement, and it has been asserted that some medium and small broadcasters lack the resources to program in strict compliance with it. But the standard programming practices of broadcasters already reflect principles that are similar in some respects to the performance complement. Blocks of radio programming devoted to a single artist or album are the exception rather than the rule for terrestrial radio stations, and for good reason; rather than appealing to a geographically unlimited but extremely taste-specific audience, broadcasters’ programming must appeal to as broad a range of listeners as possible, within a narrow geographic range. Thus, broadcasters tend to play a variety of music organized around a genre or format, such as Top 40, Hip-Hop, Oldies, Classic Rock, etc., that will appeal to a broad market segment.

To ensure that the waiver did not extend to unforeseen business practices, WMG included provisions in its complement waiver...
2. **Commercial Webcasters**

In July of 2009, SoundExchange also reached a settlement with Sirius XM Satellite Radio that is applicable to commercial webcasters. Exhibit 2, Agreed Rates and Terms for Webcasts by Commercial Webcasters, available at 74 Fed Reg. 40614 (Aug. 12, 2009) (the “Commercial Webcasters settlement”). The Commercial Webcasters settlement features the following royalty rate structure:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>$0.0016</td>
</tr>
<tr>
<td>2010</td>
<td>$0.0017</td>
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<tr>
<td>2011</td>
<td>$0.0018</td>
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<tr>
<td>2012</td>
<td>$0.0020</td>
</tr>
<tr>
<td>2013</td>
<td>$0.0021</td>
</tr>
<tr>
<td>2014</td>
<td>$0.0022</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0024</td>
</tr>
</tbody>
</table>

The Webcasters settlement includes a $500 per channel minimum payment, with a $50,000 minimum payment cap for a commercial webcaster with more than 100 channels. Unlike the Broadcasters settlement, the Commercial Webcasters settlement does not change the reporting obligations of the webcasters.

3. **Noncommercial Educational Webcasters**

Also in July of 2009, SoundExchange reached a settlement with College Broadcasters, Inc. ("CBI") that is applicable to noncommercial educational webcasters. Exhibit 3, Agreed Rates and Terms for Noncommercial Educational Webcasters, available at 74 Fed Reg. 40614, 40616 (2009) (the “Noncommercial Educational settlement”). The Noncommercial Educational settlement features the following royalty rate structure:
<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
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<tr>
<td>2012</td>
<td>$0.0020</td>
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<tr>
<td>2013</td>
<td>$0.0022</td>
</tr>
<tr>
<td>2014</td>
<td>$0.0023</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0025</td>
</tr>
</tbody>
</table>

This per-performance rate is only applicable when a noncommercial educational webcaster transmits more than 159,140 Aggregate Tuning Hours ("ATH") in a month on any individual channel or station. This is another instance of a WSA agreement being based on the statutory rate structure. Any webcaster that must pay these additional usage fees, but is unable to calculate the total number of performances (and not required to do so, as discussed below), can opt to pay the fees on the basis of ATH, by converting total ATH to performances at the rate of 12 performances per hour. The Noncommercial Educational settlement also includes a $500 annual minimum fee for each individual channel. There is no cap on the aggregate minimum payments, because of the usage restriction built into the minimum fee.

The reporting requirements contained within the Noncommercial Educational settlement are different than those in the Broadcasters settlement. Specifically, noncommercial educational webcasters who opt in to the settlement can choose one of three reporting mechanisms. First, like small broadcasters, a qualifying webcaster that does not exceed 55,000 total ATH per channel for more than one month in the previous year and does not anticipate exceeding that amount in a single month in the applicable calendar year can pay a $100 fee and be exempt from any usage reporting. The intention of the $100 fee is to help pay for proxy data on usage which SoundExchange will need to either develop internally or acquire from a third party.
Second, a noncommercial educational webcaster that does not exceed 159,140 total ATH per channel for more than one month in the previous year and does not anticipate exceeding that amount in a single month in the applicable calendar year can submit reports of use on a sample basis, which is defined as a two-week period per calendar quarter, as governed by 37 C.F.R. § 370.3. Webcasters that elect to report on this basis are not required to report ATH or actual total performances, but are encouraged to do so. Finally, a qualifying webcaster that exceeds 159,140 total ATH in more than one month in the previous calendar year, or anticipates exceeding that amount in more than one month in the applicable calendar year, or did not otherwise elect to report usage under one of the other two options must provide quarterly Reports of Use on a census basis.

B. WMG Agreements

Outside of the statutory webcasting framework, WMG has negotiated an increasing number of deals for the digital exploitation of WMG’s extensive catalog of copyrighted sound recordings. The U.S. deals that we have executed for online streaming services seem particularly relevant to the CRJs’ task of determining the proper rate for statutory webcasting. These services fall into one of three broad categories: (1) subscription on-demand streaming, (2) ad-supported streaming, and (3) custom radio. Each of these categories engenders unique concerns, and I will discuss each one below.

In these deals, there are a few important elements are of value to WMG, and important components of our negotiating strategy. The single most important aspect of negotiated marketplace agreements is that they feature a payment structure based on the greatest of three different amounts (or in some cases, the greater of two different
amounts). Specifically, WMG almost always requires audio streaming services to pay the greatest of [ ] Our proportionate share is calculated as a percentage of the total streams that are WMG-owned or controlled sound recordings.

In the U.S., WMG does not have a single agreement with an audio streaming service where the payment amount is based solely on a per-play rate, as is the case with the statutory license. In all of our negotiated agreements we view the per-play minimum payment as the absolute floor for our revenue, a minimum protection for the value of the recordings we provide. The [ ] represent the potential upside for our revenue. Although we negotiate the amounts of the per-play minimums, the [ ] with each streaming service, our ultimate goal in these negotiations is to ensure that WMG and its recording artists are fairly compensated for providing the one essential element without which an audio streaming service simply could not function – the music.

Another important component of negotiated deals is the non-refundable advance payments that WMG typically receives. Even when these advance payments are recoupable against future royalty payments, they essentially serve as minimum revenue guarantees, which can be significantly higher than the minimum payment requirements under the statutory rate and the WSA settlements.

WMG is also able to obtain important protections with respect to other aspects of audio streaming in its negotiated deals. For example, WMG requires adherence to strict security measures, limits the types of devices that can be used with a given service, and
specifies the audio quality of streams offered by a service. WMG also negotiates extensive and uniform reporting requirements for these services, along with technical and financial auditing rights, thus allowing WMG broad oversight over the exploitation of its copyrighted works.

All of these deal components are designed to ensure that each digital audio streaming service functions as a distinct product, offering a distinct method of monetization, and limit the substitution risk for other revenue sources (such as permanent digital downloads).

In its negotiated deals, WMG also has much more control over the recordings that are made available. This control is partially mandated by restrictions that WMG has with its artists regarding the use of their music. But WMG also negotiates holdback rights so that it can create exclusive deals for certain content, enabling WMG to derive greater value, including by way of lucrative sponsorship opportunities.

Finally, our negotiated agreements are typically of short duration, especially for new services. Thus, with any given service, WMG is able to commit to a particular deal structure in the short term, knowing that it will be able to re-assess the structure’s long-term financial viability when technology and consumer preferences inevitably change.

Importantly, none of these valuable negotiated deal components is found in the statutory license. In fact, in the last rate-setting proceeding for webcasting in 2007, the CRJs specifically rejected arguments that the statutory rate should feature a “greater of” structure. The long term of the statutory license – five years – also means that there is no opportunity to correct for any undervaluation until the next rate-setting proceeding.
1. Subscription On-demand Services

Among the more established and profitable negotiated streaming deals that WMG has executed are those entered into with subscription on-demand streaming services. These services offer the height of the interactive experience for a subscriber – the ability to hear exactly the song the subscriber wants to hear when he or she wants to hear it (hence, “on-demand”). Not only can subscribers hear requested songs via audio stream online, these services also typically permit subscribers to conditionally download the songs to their PC hard drive or in some cases, to a portable device (depending on the service and the subscription purchased). The songs that have been downloaded by a subscriber from one of these services can be played on-demand, and remain accessible on the subscriber’s hard drive or portable device for as long as the subscriber maintains his or her paid subscription.

An example of the type of on-demand subscription agreement that WMG has entered into is the Subscription Services Agreement that we executed with Napster, LLC (“Napster”) for its subscription service in November of 2005 (the “Napster Subscription Agreement”) (Attached as Exhibit 4). This agreement is still in effect and its material terms remain unchanged, with the exception of the recently introduced bundled offer discussed in detail below. The specific royalty terms of the Napster agreement are as follows: [ ]
Although WMG’s agreements with other subscription services vary in details such as [ ], the Napster agreement also features a number of the deal components I outlined above as valuable considerations in WMG’s strategy for agreements with services. For example, [ ]

As I explained above, the “greatest of” rate structure and the additional valuable deal components in our subscription on-demand agreements allow WMG to maximize the revenue potential of providing our recordings to on-demand subscription services. I have attached the May 2009 Subscription Earnings Statement provided by Napster to WMG that emphasizes just how valuable the “greatest of” structure really is to WMG (Exhibit 5). As shown on the report, [ ].

The most important aspect of those figures is that neither of them is calculated based on the “per-play” fee of [ ], as the “per-play” fee was not the “greatest of”. Rather, [ ].
In other words, the agreement is functioning exactly the way WMG hoped it would when we negotiated the contract – we are receiving revenue in an amount that far exceeds the contractual floor of the per-play fee.

Recently we have negotiated agreements with two subscription on-demand services related to a new bundled offer they are making available to consumers. Specifically, this type of bundled offer, which both Napster and Microsoft (through its ZunePass service) have in some form, provides a subscriber a set number of monthly credits for permanent downloads along with the standard on-demand streaming and conditional download functionality of the service. These download credits are being offered essentially as a sales incentive, in an attempt to win over consumers who may continue to be uncomfortable with the idea of “renting” music that is associated with Napster and other such services, where access to music is dependent on continued membership, and users never possess the music on a permanent basis.

I have attached as Exhibit 6, the Bundled Offer Agreement that WMG signed with Napster in May of 2009 for its bundled offer. I also have attached as Exhibit 7 the May 2009 Bundled Offer Royalty Statement provided to WMG by Napster. The statement shows that WMG [redacted]

Because of the relative newness of these bundled offers it is difficult to gauge just how successful they will be in attracting subscribers and driving revenue to WMG. But we are enthusiastic about the possibility that these types of
services represent for revenue growth. These are examples of the opportunities presented by free-market negotiations.

2. Ad-supported Services

In recent years WMG has explored an experimental business model involving free-to-the-user, on-demand, limited streaming of WMG content. Unlike the subscription services discussed above, these experimental services derive their revenue entirely from advertising, including audio and video ads. In the United States, WMG primarily has agreements with these types of services for video (rather than audio) streaming, but we do have uniquely structured agreements with a few ad-supported audio streaming services. However, we tend to view the ad-supported audio business model with caution, because it has yet to generate stable revenue streams.

The primary examples of ad-supported services with which WMG has agreements are imeem and MySpace Music, two social networking sites with significant scale, but (so far) limited ability to generate significant per-user revenue. Both deals represent WMG’s licensing approach at its most experimental, as we seek to develop an alternate business model that is very much in demand (as evidenced by the services’ popularity), but which is not yet mature. WMG also works closely with both imeem and MySpace to drive purchases of digital downloads, another business model that we do not yet believe has reached its full potential (despite its success to date), and [____] We do not yet know whether these services will succeed in the long run, but as is always the case with

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experimental negotiated agreements, we will be able to revisit terms should the services not succeed as hoped.

3. **Custom Radio**

Finally, WMG has agreements with services that are not on-demand, but are, to a degree, customized to the listener's preferences. We generally refer to these services as "custom radio," although there are differences in functionality across the category. Many of these agreements arose as part of larger relationships such as those with Rhapsody, MySpace and others; but of our currently active agreements, our deal with Slacker (a stand-alone custom radio service) is perhaps the purest example of the category.

The most noticeable feature about custom radio deals is that they have traditionally included a per-play rate expressed as a percentage of the statutory webcasting rate. WMG has always believed that custom radio services, with their varying degrees and types of customization, ought to pay more than the terms in the agreements tend to indicate because the user experience of some of these services is so good that they probably substitute for on-demand services that tend to pay us more. On the other hand, some custom radio services have adamantly maintained that they are, in fact, statutory webcasters. As a result, the existence of the statutory licensing option has depressed the market rates for the use of copyrighted music in customized audio streaming deals.

This issue has been further complicated recently by the decision of the United States Court of Appeals for the Second Circuit in *Arista Records, et al. v. Launch Media, Inc., Docket No. 07-2576-cv* (August 21, 2009) (the "Launch decision"), wherein the court held that Launch, which essentially operated as a custom radio service, fell within
the statutory definition of a non-interactive webcasting service. In the wake of this decision, I believe that we are likely to see a proliferation of customized webcasting services in the coming years that will be able to offer listeners a highly personalized entertainment experience, while paying only the statutory royalties the CRJs have established for more traditional, non-interactive, non-customized webcasting.

Examination of WMG's deal with one of these service providers, Slacker, demonstrates just how much variation there can be within even this seemingly small band of services. WMG has authorized Slacker to use WMG recordings in a number of different services. In this agreement, [REDACTED]

The agreement sets forth the following rate structure for each of the services:[REDACTED]
Slacker’s different service tiers all offer different user experiences. First, there is Slacker’s Basic Radio Service which is free to consumers and allows users to create personalized stations based on a number of settings including a preference for newer versus older music, or popular versus relatively unknown music. Basic Radio features advertising and does not allow the user to play a specifically requested song. Moreover, Basic Radio stations must comply with the performance complement and users are limited to 6 forward skips per hour.

Second, Slacker offers a Premium Radio Service which is similar in most respects to the Basic Radio, but requires a subscription to use and allows for ad-free streaming. Premium Radio users are also allowed an unlimited number of forward skips. The other relevant feature of the Premium Radio is that users can save streams that they like to their cache and later access those streams on-demand.

Finally, the agreement includes rates for a non-portable on-demand service and a portable on-demand service. To my knowledge, Slacker does not actually offer either of these services.

As I mentioned above, the Second Circuit’s *Launch* decision is likely to have far-reaching implications for deals like our agreement with Slacker, substantially weakening WMG’s ability to negotiate fair rates for the use of our copyrighted sound recordings in these types of custom radio services. Under such circumstances, the importance of setting a reasonable statutory rate, designed to reflect the likely migration to customized webcasting services, is of paramount importance to WMG.
Role of the Collection Organization for Statutory Licensing

I offer one final note about the preferred mechanism for statutory royalty collection and distribution. WMG believes that in the interest of efficiency for both webcasters and those who receive revenue from the statutory license, there should be one unified licensing collective. SoundExchange, a nonprofit organization governed by an equally-weighted coalition of artists (and representatives of artist organizations) and representatives of recorded music organizations, has done an admirable job. It collects and distributes royalties from and to countless parties, persistently seeks out artists who may not be aware of monies being held for them, and has reached settlements covering the substantial majority of the industry, enabling multiple statutory business models to develop and thrive while protecting the economic value of the music on which these services are built. Based upon its track record, SoundExchange deserves to maintain its position as the only licensing collective. I see no benefit – and myriad potential drawbacks – to permitting multiple entries into the field of webcasting royalty collection, particularly when SoundExchange is embracing its challenging mission so fully.
I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: Sept. 23, 2009

W. Tucker McCrady
Exhibits Sponsored by W. Tucker McCrady

<table>
<thead>
<tr>
<th>Exhibit No.</th>
<th>Description</th>
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<tr>
<td>SX Ex. 101-DP</td>
<td>Webcaster Settlement Act Agreement for Broadcasters made between SoundExchange, Inc. and the National Association of Broadcasters, on behalf of its members</td>
</tr>
<tr>
<td>SX Ex. 102-DP</td>
<td>Webcaster Settlement Act Agreement for Commercial Webcasters made between SoundExchange, Inc. and Sirius XM Radio Inc.</td>
</tr>
<tr>
<td>SX Ex. 103-DP</td>
<td>Webcaster Settlement Act Agreement for Noncommercial Educational Webcasters made between SoundExchange, Inc. and College Broadcasters, Inc.</td>
</tr>
<tr>
<td>SX Ex. 104-DR</td>
<td>Subscription Services Agreement between Warner Music Inc. and Napster, LLC, Nov. 13, 2005 (RESTRICTED - not included in public version of direct case)</td>
</tr>
<tr>
<td>SX Ex. 105-DR</td>
<td>Napster Subscription Earnings Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)</td>
</tr>
<tr>
<td>SX Ex. 106-DR</td>
<td>Bundled Offer Agreement between Warner Music Inc. and Napster, LLC, May 18, 2009 (RESTRICTED - not included in public version of direct case)</td>
</tr>
<tr>
<td>SX Ex. 107-DR</td>
<td>Napster Bundled Offer Royalty Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)</td>
</tr>
</tbody>
</table>
EXHIBIT A – AGREED RATES AND TERMS FOR BROADCASTERS

ARTICLE 1 – DEFINITIONS

1.1 General. In general, words used in the rates and terms set forth herein (the “Rates and Terms”) and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

(a) “Broadcaster” shall mean a webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(iii) that (i) has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission; (ii) has obtained a compulsory license under 17 U.S.C. §§ 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (iii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and (iv) is not a noncommercial webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(i).

(b) “Broadcaster Webcasts” shall mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are not Broadcast Retransmissions.

(c) “Broadcast Retransmissions” shall mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming transmitted on an internet-only side channel.

(d) “Eligible Transmission” shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

(e) “Small Broadcaster” shall mean a Broadcaster that, for any of its channels and stations (determined as provided in Section 4.1) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria: (i) during the prior year it made Eligible Transmissions totaling less than 27,777 aggregate tuning hours; and (ii) during the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 aggregate tuning hours; provided that, one time during the period 2006-2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding clause (i) above if it implements measures reasonably calculated to ensure that that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following
year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

(f) "SoundExchange" shall mean SoundExchange, Inc. and shall include its successors and assigns.

ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2008

2.1 Availability of Rates and Terms. Pursuant to the Webcaster Settlement Act of 2008, and subject to the provisions set forth below, Broadcasters may elect to be subject to the rates and terms set forth herein (the “Rates and Terms”) in their entirety, with respect to such Broadcasters’ Eligible Transmissions and related ephemeral recordings, for all of the period beginning on January 1, 2006, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. §§ 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Broadcaster must comply with otherwise applicable rates and terms.

2.2 Election Process in General. To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for all of the period beginning on January 1, 2006, and ending on December 31, 2015, a Broadcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at http://www.soundexchange.com) by the later of (i) March 31, 2009; (ii) 30 days after publication of these Rates and Terms in the Federal Register; or (iii) in the case of a Broadcaster that is not making Eligible Transmissions as of the publication of these Rates and Terms in the Federal Register but begins doing so at a later time, 30 days after the Broadcaster begins making such Eligible Transmissions. On any such election form, the Broadcaster must, among other things, identify all its stations making Eligible Transmissions. If, subsequent to making an election, there are changes in the Broadcaster’s corporate name or stations making Eligible Transmissions, or other changes in its corporate structure that affect the application of these Rates and Terms, the Broadcaster shall promptly notify SoundExchange thereof. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Broadcaster that has participated in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the Federal Register at 72 Fed. Reg. 24084 (May 1, 2007) (the “Final Determination”) or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015 (including Docket No. 2009–1 CRB Webcasting III and Docket No. 2009–2 CRB New Subscription II, as noticed in the Federal Register at 74 Fed. Reg. 318–20 (Jan. 5, 2009)) shall not have the right to elect to be treated as a Broadcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceeding prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

2.3 Election of Small Broadcaster Status. A Broadcaster that elects to be subject to these Rates and Terms and qualifies as a Small Broadcaster may elect to be treated as a Small
Broadcaster for any one or more calendar years that it qualifies as a Small Broadcaster. To do so, the Small Broadcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at http://www.soundexchange.com) by no later than January 31 of the applicable year, except that election forms for 2006-2009 shall be due by no later than the date for the election provided in Section 2.2. On any such election form, the Broadcaster must, among other things, certify that it qualifies as a Small Broadcaster; provide information about its prior year aggregate tuning hours and the formats of its stations (e.g., the genres of music they use); and provide other information requested by SoundExchange for use in creating a royalty distribution proxy. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

2.4 Representation of Compliance and Non-waiver. By electing to operate pursuant to the Rates and Terms, an entity represents and warrants that it qualifies as a Broadcaster and/or Small Broadcaster, as the case may be. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Broadcaster or Small Broadcaster or that it has complied with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a Broadcaster agrees that SoundExchange’s acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements that are not inconsistent with these Rates and Terms.

ARTICLE 3 – SCOPE

3.1 In General. In consideration for the payment of royalties pursuant to Article 4 and such other consideration specified herein, Broadcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations (except as otherwise specifically provided herein or waived by particular copyright owners with respect to their respective sound recordings), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for all of the period beginning on January 1, 2006, and ending on December 31, 2015.

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3.2 Applicability to All Eligible Services Operated by or for a Broadcaster. If a Broadcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Broadcaster that qualify as a Performance under 37 C.F.R. § 380.2(i), and related ephemeral recordings. For the avoidance of doubt, a Broadcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 112(e) and 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations.

3.3 No Implied Rights. These Rates and Terms extend only to electing Broadcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. §§ 112(e) and 114.

ARTICLE 4 - ROYALTIES

4.1 Minimum Fees. Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2006-2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. §§ 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For purposes of these Rates and Terms, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the “Proxy Fee”) to SoundExchange for the reporting waiver discussed in Section 5.1.

4.2 Royalty Rates. Royalties for Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), shall, except as provided in Section 5.3, be payable on a per-performance basis, as follows:
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<td>2014</td>
<td>$0.0023</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0025</td>
</tr>
</tbody>
</table>

4.3 **MFN.** If at any time between publication of this Agreement in the Federal Register and December 31, 2015, SoundExchange enters into an agreement with a Broadcaster specifying terms and conditions for the public performance of sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and the making of related ephemeral recordings within the scope of Section 112(e), upon principal financial or other material terms that are more favorable to such Broadcaster than the principal financial or other material terms set forth in these Rates and Terms, then SoundExchange shall afford electing Broadcasters hereunder the opportunity, in each Broadcaster's sole discretion, to take advantage of the terms and conditions of such agreement, in their entirety, in lieu of these Rates and Terms, with respect to the Broadcaster's Eligible Transmissions, from the date such more favorable terms became effective under such other agreement and continuing until the earlier of (i) the expiration of such other agreement, or (ii) December 31, 2015.

4.4 **Ephemeral Royalty.** The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Broadcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange has discretion to allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011-2015, provided that such allocation shall not, by virtue of a Broadcaster's agreement to this Section 4.4, be considered precedent in any judicial, administrative, or other proceeding.

4.5 **Payment.** Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees and, where applicable, the Proxy Fee shall be paid by January 31 of each year. Once a Broadcaster's royalty obligation under Section 4.2 with respect to a channel or station for a year exceeds the minimum fee it has paid for that channel or station and year, thereby recouping the credit provided by Section 4.1, the Broadcaster shall make monthly payments at the per-performance rates provided in Section 4.2 beginning with the month in which the minimum fee first was recouped.

4.6 **Monthly Obligations.** Broadcasters must make monthly payments where required by Section 4.5, and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.
4.7 **Past Periods.** Notwithstanding anything else in this Agreement, to the extent that a Broadcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on February 28, 2009, any amounts payable under these Rates and Terms for Eligible Transmissions during such period for which payment has not previously been made shall be paid by no later than April 30, 2009, including late fees as provided in Section 4.8 from the original due date.

4.8 **Late Fees.** A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange, provided that, in the case of a timely provided but noncompliant statement of account or report of use, SoundExchange has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

**ARTICLE 5 – REPORTING, AUDITING AND CONFIDENTIALITY**

5.1 **Small Broadcasters.** While SoundExchange’s ultimate goal is for all webcasters to provide census reporting, requiring census reporting by the smallest Broadcasters at this time may present undue challenges for them, reduce compliance, and significantly increase SoundExchange’s distribution costs. Accordingly, on a transitional basis for a limited time and for purposes of these Rates and Terms only, and in light of the unique business and operational circumstances currently existing with respect to these entities, electing Small Broadcasters shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related ephemeral recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 aggregate tuning hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. Instead, SoundExchange shall distribute the aggregate royalties paid by electing Small Broadcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange’s Board of Directors. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to SoundExchange a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data. SoundExchange hopes that offering this option to electing Small Broadcasters will promote compliance with statutory license obligations and thereby increase the pool of royalties available to be distributed to copyright owners and performers. SoundExchange further hopes that selection of a proxy believed by SoundExchange to represent fairly the playlists of Small Broadcasters will allow payment to more copyright owners and performers than would be possible with any other reasonably available option. Small Broadcasters should assume that, effective January 1, 2016, they will be required to report their actual usage in full compliance with then-applicable regulations. Small Broadcasters are encouraged to begin to prepare to report their actual usage by that date, and if it is practicable for them to do so earlier, they may wish not to elect Small Broadcaster status.
5.2 Reporting by Other Broadcasters in General. Broadcasters other than electing Small Broadcasters covered by Section 5.1 shall submit reports of use on a per-performance basis in compliance with the regulations set forth in 37 C.F.R. Part 370, except that the following provisions shall apply notwithstanding the provisions of applicable regulations from time to time in effect:

(a) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hour basis as provided in Section 5.3.

(b) Broadcasters shall submit reports of use to SoundExchange on a monthly basis.

(c) As provided in Section 4.6, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(d) Except as provided in Section 5.3, Broadcasters shall submit reports of use to SoundExchange on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(e) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

(f) Broadcasters shall transmit each report of use in a file the name of which includes (i) the name of the Broadcaster, exactly as it appears on its notice of use, and (ii) if the report covers a single station only, the call letters of the station.

(g) Broadcasters shall submit reports of use with headers, as presently described in 37 C.F.R. § 370.3(d)(7).

(h) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes (i) the name of the Broadcaster, exactly as it appears on its notice of use, and (ii) if the statement covers a single station only, the call letters of the station.

5.3 Limited ATH-Based Reporting. Recognizing the operational challenge of census reporting, Broadcasters generally reporting pursuant to Section 5.2 may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hours basis, if (a) census reporting is not reasonably practical for the programming during those hours, and (b) if the total number of hours on a single report of use, provided pursuant to Section 5.2, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

<table>
<thead>
<tr>
<th>Year</th>
<th>Maximum Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>20%</td>
</tr>
<tr>
<td>2010</td>
<td>18%</td>
</tr>
<tr>
<td>2011</td>
<td>16%</td>
</tr>
<tr>
<td>2012</td>
<td>14%</td>
</tr>
</tbody>
</table>
To the extent that a Broadcaster chooses to report and pay for usage on an aggregate tuning hours basis pursuant to this Section 5.3, the Broadcaster shall (i) report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour; (ii) pay royalties (or recoup minimum fees) at the per-performance rates provided in Section 4.2 on the basis of clause (i) above; (iii) include aggregate tuning hours in reports of use provided pursuant to Section 5.2; and (iv) include in reports of use provided pursuant to Section 5.2 complete playlist information for usage reported on the basis of aggregate tuning hours. SoundExchange may distribute royalties paid on the basis of aggregate tuning hours hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis.

5.4 Verification of Information. The provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 C.F.R. §§ 380.4(h) and 380.6) shall apply hereunder. The exercise by SoundExchange of any right under this Section 5.4 shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

5.5 Confidentiality. The provisions of applicable regulations concerning confidentiality (presently 37 C.F.R. § 380.5 (and the applicable definitions provided in 37 C.F.R. § 380.2)) shall apply hereunder.

ARTICLE 6 – ADDITIONAL PROVISIONS

6.1 Applicable Regulations. To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 C.F.R. Parts 370 and 380, shall apply to activities subject to these Rates and Terms.

6.2 Participation in Specified Proceedings. A Broadcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during any part of the 2006-2015 period and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006-2015 period. Thus, once a Broadcaster has elected to be subject to these Rates and Terms, it shall not at any time participate as a party, intervenor, amicus curiae or otherwise, or give evidence or otherwise support or assist, in Intercollegiate Broadcasting Sys. v. Copyright Royalty Board (D.C. Circuit Docket Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179), Digital Performance Right in Sound Recordings and Ephemeral Recordings (Copyright Royalty Judges’ Docket No. 2009-1 CRB Webcasting III), Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service (Copyright Royalty Judges’ Docket No. 2009-2 CRB New Subscription II) or any successor proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006-2015, including any appeal of the foregoing or any proceedings on remand from such an appeal, unless subpoenaed on petition of a third party (without any action by a Broadcaster to
encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

6.3 **Use of Agreement in Future Proceedings.**

(a) Consistent with 17 U.S.C. § 114(f)(5)(C), and except as specifically provided in Section 6.3(b), neither the Webcaster Settlement Act nor any provisions of these rates and Terms shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of musical works or sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges.

(b) Pursuant to 17 U.S.C. § 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. § 114(f) is expressly authorized. For the avoidance of doubt, this Section 6.3(b) does not authorize participation in a proceeding by an entity that has agreed not to participate in the proceeding (pursuant to Section 6.2 or otherwise).

6.4 **Effect of Direct Licenses.** Any copyright owner may enter into a voluntary agreement with any Broadcaster setting alternative rates and terms governing the Broadcasters’ transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.5 **Default.** A Broadcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Broadcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Broadcaster’s authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given repeated notices of noncompliance. Any transmission made by a Broadcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners’ rights under 17 U.S.C. § 106 and the remedies in 17 U.S.C. § 501-506, and all limitations, exceptions and defenses available with respect thereto.

**ARTICLE 7 – MISCELLANEOUS**

7.1 **Acknowledgement.**

(a) The parties acknowledge this agreement was entered into knowingly and willingly.

(b) This agreement is limited solely to webcasting royalties, and the parties acknowledge that it shall not be cited in connection with any efforts to obtain, and sets no precedent related to, over-the-air performance royalties.
The parties further agree that the preceding acknowledgement in Section 7.1(a) does not in any way imply Broadcasters’ agreement that the royalty rate standard set forth in 17 U.S.C. § 114(f)(2)(B) is an appropriate rate standard to apply to Broadcasters. Broadcasters shall never be precluded by virtue of such acknowledgement from arguing in the context of future legislation or otherwise that a different royalty rate standard should apply to them, and SoundExchange shall never rely upon by such acknowledgement as a basis for arguing that the royalty rate standard set forth in 17 U.S.C. § 114(f)(2)(B) should apply to Broadcasters.

7.2 Applicable Law and Venue. These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and Broadcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.3 Rights Cumulative. The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.4 Entire Agreement. These Rates and Terms represent the entire and complete agreement between SoundExchange and a Broadcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Broadcaster with respect to the subject matter hereof.
EXHIBIT A – AGREED RATES AND TERMS FOR WEBCASTS BY COMMERCIAL WEBCASTERS

ARTICLE 1 – DEFINITIONS

1.1 General. In general, words used in the rates and terms set forth herein (the “Rates and Terms”) and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

(a) “Commercial Webcaster” shall mean a webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(iii) that (i) has obtained a compulsory license under 17 U.S.C. §§ 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a Broadcaster (as defined in Section 1.2(a) of the agreement published in the Federal Register on March 3, 2009 at 74 Fed. Reg. 9299); (iv) is not a noncommercial webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(i); and (v) has not elected to be subject to any other rates and terms adopted pursuant to the Webcaster Settlement Act of 2008 or the Webcaster Settlement Act of 2009.

(b) “Eligible Transmission” shall mean an eligible nonsubscription transmission, or a transmission through a new subscription service, made by a Commercial Webcaster over the internet, that is in full compliance with the eligibility and other requirements of Sections 112(e) and 114 of the Copyright Act and their implementing regulations, except as expressly modified in these Rates and Terms, and of a type otherwise subject to the payment of royalties under 37 C.F.R. Part 380.

(c) “SoundExchange” shall mean SoundExchange, Inc. and shall include its successors and assigns.

ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2009

2.1 Availability of Rates and Terms. Pursuant to the Webcaster Settlement Act of 2009, and subject to the provisions set forth below, Commercial Webcasters may elect to be subject to these Rates and Terms in their entirety, with respect to such Commercial Webcasters’ Eligible Transmissions and related ephemeral recordings, for all of the period beginning on January 1, 2009, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Commercial Webcaster must comply with otherwise applicable rates and terms.

2.2 Election Process in General. To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for all of the period beginning on January 1, 2009, and ending on December 31, 2015, a Commercial
Webcaster shall submit to SoundExchange a completed and signed election form (available on
the SoundExchange Web site at http://www.soundexchange.com) by the later of (i) 15 days after
publication of these Rates and Terms in the Federal Register; or (ii) in the case of a Commercial
Webcaster that is not making Eligible Transmissions as of the publication of these Rates and
Terms in the Federal Register but begins doing so at a later time, 30 days after the Commercial
Webcaster begins making such Eligible Transmissions. Notwithstanding anything else in these
Rates and Terms, a person or entity otherwise qualifying as a Commercial Webcaster that is
participating in any way in any appeal of the Final Determination of the Copyright Royalty
Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act
for the period January 1, 2006, through December 31, 2010 published in the Federal Register at
72 Fed. Reg. 24084 (May 1, 2007) (the “Final Determination”), any proceedings on remand from
such appeal, Docket No. 2009-1 CRB Webcasting III, as noticed in the Federal Register at 74
Fed. Reg. 318-19 (Jan. 5, 2009), or any other proceedings to determine royalty rates and terms
for Eligible Transmissions (as defined in Section 1.2(b)) or related ephemeral phonorecords
under Section 112(e) or 114 of the Copyright Act for all or any part of the period January 1,
2006, through December 31, 2015 shall not have the right to elect to be treated as a Commercial
Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such
proceedings prior to submitting to SoundExchange a completed and signed election form as
contemplated by this Section 2.2.

2.3 Representation of Compliance and Non-waiver. By electing to operate pursuant to these
Rates and Terms, an entity represents and warrants that it qualifies as a Commercial Webcaster.
By accepting an election by a transmitting entity or payments or reporting made pursuant to
these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity
qualifies as a Commercial Webcaster or that it has complied with the eligibility or other
requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act
(including these Rates and Terms). It is the responsibility of each transmitting entity to ensure
that it is in full compliance with applicable requirements of the statutory licenses under Sections
112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make
determinations as to whether each of the many services that rely on the statutory licenses is
eligible for statutory licensing or any particular royalty payment classification, nor does it
continuously verify that such services are in full compliance with all applicable requirements.
Accordingly, a Commercial Webcaster agrees that SoundExchange’s acceptance of its election,
payment or reporting does not give or imply any acknowledgment that it is in compliance with
the requirements of the statutory licenses (including these Rates and Terms) and shall not be
used as evidence that it is in compliance with the requirements of the statutory licenses
(including these Rates and Terms). SoundExchange and copyright owners reserve all their rights
to take enforcement action against a transmitting entity that is not in compliance with all
applicable requirements.

ARTICLE 3 – SCOPE

3.1 In General. Commercial Webcasters that have made a timely election to be subject to
these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound
recordings within the scope of the statutory license provided by Section 114 by means of Eligible
Transmissions, and to make related ephemeral recordings for use solely for purposes of such
Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the
limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations, in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for all of the period beginning on January 1, 2009, and ending on December 31, 2015.

3.2 Applicability to All Eligible Services Operated by or for a Commercial Webcaster. If a Commercial Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Commercial Webcaster.

3.3 No Implied Rights. These Rates and Terms extend only to electing Commercial Webcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. §§ 112(e) and 114.

ARTICLE 4 - ROYALTIES

4.1 Minimum Fees. Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2009-2015 during which the Commercial Webcaster is a licensee pursuant to licenses under 17 U.S.C. §§ 112(e) and 114, provided that a Commercial Webcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations) in any one year. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year for the same channel or station.

4.2 Royalty Rates. Royalties for Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), shall be payable on a per-performance basis, as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate per Performance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>$0.0016</td>
</tr>
<tr>
<td>2010</td>
<td>$0.0017</td>
</tr>
<tr>
<td>2011</td>
<td>$0.0018</td>
</tr>
<tr>
<td>2012</td>
<td>$0.0020</td>
</tr>
<tr>
<td>2013</td>
<td>$0.0021</td>
</tr>
<tr>
<td>2014</td>
<td>$0.0022</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0024</td>
</tr>
</tbody>
</table>

4.3 Ephemeral Royalty. The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Commercial Webcaster and covered hereby is deemed to be included
within the royalty payments set forth above. SoundExchange may allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011-2015.

4.4 **Payment.** Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees shall be paid by January 31 of each year. Once a Commercial Webcaster's royalty obligation under Section 4.2 with respect to a channel or station for a year exceeds the minimum fee it has paid for that channel or station and year, thereby recouping the credit provided by Section 4.1, the Commercial Webcaster shall make monthly payments at the per-performance rates provided in Section 4.2 beginning with the month in which the minimum fee first was recouped.

4.5 **Monthly Obligations.** Commercial Webcasters must make monthly payments where required by Section 4.4 and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.

4.6 **Past Periods.** Notwithstanding Sections 4.4 and 4.5, a Commercial Webcaster’s first monthly payment after electing to be subject to these Rates and Terms shall be adjusted to reflect any differences between (i) the amounts payable under these Rates and Terms for all of 2009 to the end of the month for which the payment is made and (ii) the Commercial Webcaster’s previous payments for all of 2009 to the end of the month for which the payment is made. Late fees under 37 C.F.R. § 380.4(e) shall apply to any payment previously due and not made on time, or to any late payment hereunder.

**ARTICLE 5 – ADDITIONAL PROVISIONS**

5.1 **Applicable Regulations.** To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 C.F.R. Parts 370 and 380, shall apply to activities subject to these Rates and Terms.

5.2 **Participation in Specified Proceedings.** A Commercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during any part of the 2009-2015 period and in lieu of participating at any time in a proceeding to set rates and terms for Eligible Transmissions and related ephemeral recordings for any part of the 2006-2015 period. Thus, once a Commercial Webcaster has elected to be subject to these Rates and Terms, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in *Intercollegiate Broadcasting Sys. v. Copyright Royalty Board* (D.C. Circuit Docket Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179), any proceedings on remand from such appeal, *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges’ Docket No. 2009-1 CRB Webcasting III), or any other proceedings to determine royalty rates and terms for Eligible Transmissions and reproduction of related ephemeral phonorecords under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006-2015, including any appeal of the foregoing or any proceedings on remand from such an appeal, unless subpoenaed on petition of a third party (without any action by a Commercial Webcaster to encourage or suggest such a
subpoena or petition) and ordered to testify or provide documents in such proceeding.

5.3 Use of Agreement in Future Proceedings. Pursuant to 17 U.S.C. § 114(t)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. § 114(f) is expressly authorized.

5.4 Effect of Direct Licenses. Any copyright owner may enter into a voluntary agreement with any Commercial Webcaster setting alternative rates and terms governing the Commercial Webcasters’ transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

ARTICLE 6 – MISCELLANEOUS

6.1 Acknowledgement. The parties acknowledge this agreement was entered into knowingly and willingly. The parties further acknowledge that any transmission made by a Commercial Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms or Section 112(e) or 114, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners’ rights under 17 U.S.C. § 106 and the remedies in 17 U.S.C. § 501-506, and all limitations, exceptions and defenses available with respect thereto.

6.2 Applicable Law and Venue. These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and Commercial Webcasters consent to the jurisdiction and venue of the foregoing court, waive any objection thereto on forum non conveniens or similar grounds, and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

6.3 Rights Cumulative. The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations. No failure to exercise and no delay exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.
6.4 **Entire Agreement.** These Rates and Terms represent the entire and complete agreement between SoundExchange and a Commercial Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Commercial Webcaster with respect to the subject matter hereof.
EXHIBIT A
AGREED RATES AND TERMS FOR
NONCOMMERCIAL EDUCATIONAL WEBCASTERS

ARTICLE 1 – DEFINITIONS

1.1 General. In general, words used in the rates and terms set forth herein (the “Rates and Terms”) and defined in 17 U.S.C. § 112(e) or 114 or 37 C.F.R. Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

1.2.1 “Noncommercial Educational Webcaster” shall mean a Noncommercial Webcaster (as defined in 17 U.S.C. § 114(f)(5)(E)(i)) that (i) has obtained a compulsory license under 17 U.S.C. §§ 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically-accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, and (iv) is not a “public broadcasting entity” (as defined in 17 U.S.C. § 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396.

1.2.2 “Eligible Transmission” shall mean an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the internet.

1.2.3 “SoundExchange” shall mean SoundExchange, Inc. and shall include its successors and assigns.

1.2.4 “ATH” or “Aggregate Tuning Hours” shall mean the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. § 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.
ARTICLE 2 – AGREEMENT PURSUANT TO WEBCASTER SETTLEMENT ACT OF 2009

2.1 Availability of Rates and Terms. Pursuant to the Webcaster Settlement Act of 2009, and subject to the provisions set forth below, Noncommercial Educational Webcasters may elect to be subject to the rates and terms set forth herein in their entirety, with respect to Eligible Transmissions and related ephemeral recordings, for all of any one or more calendar years during the period beginning on January 1, 2011, and ending on December 31, 2015 (the “Term”), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, by complying with the procedure set forth in Section 2.2.1 hereof. In addition, Noncommercial Educational Webcasters may elect to be subject to the provisions of Article 5 only, for all of the period beginning on January 1, 2009, and ending on December 31, 2010 (the “Special Reporting Term”), in lieu of reporting under 37 C.F.R. Part 370.3, by complying with the procedure set forth in Section 2.2.3 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Noncommercial Educational Webcaster must comply with otherwise applicable rates and terms.

2.2 Election Process.

2.2.1 In General. To elect to be subject to these Rates and Terms, in their entirety, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. §§ 112(e) and 114, for any calendar year during the Term, a Noncommercial Educational Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at http://www.soundexchange.com) by January 31st of each such calendar year or, in the case of a Noncommercial Educational Webcaster that has not made Eligible Transmissions as of January 31st of a calendar year within the Term but begins doing so at a later time that year and seeks to be subject to these Rates and Terms for that year, 45 days after the end of the month in which the Noncommercial Educational Webcaster begins making such Eligible Transmissions. Even if an entity has once elected to be treated as a Noncommercial Educational Webcaster, it must make a separate, timely election in each subsequent calendar year in which it wishes (and is eligible) to be treated as such. A Noncommercial Educational Webcaster may instead elect other available rates for which it is eligible. However, a Noncommercial Educational Webcaster may not elect different rates for a given calendar year after it has elected to be subject to these Rates and Terms or for any year in which it has already paid royalties.

2.2.2 Contents of Election Form. On its election form(s) pursuant to Section 2.2.1, the Noncommercial Educational Webcaster must, among other things, provide a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by SoundExchange, that the Noncommercial Educational Webcaster (i) qualifies as a Noncommercial Educational Webcaster for the relevant year, and (ii) did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a Statement of Account and pay required Usage Fees. At the same time the Noncommercial Educational Webcaster must
identify all its stations making Eligible Transmissions. If, subsequent to making an
election, there are changes in the Noncommercial Educational Webcaster's corporate
name or stations making Eligible Transmissions, or other changes in its corporate
structure that affect the application of these Rates and Terms, the Noncommercial
Educational Webcaster shall promptly notify SoundExchange thereof. On its election
form(s), the Noncommercial Educational Webcaster must, among other things, identify
which of the reporting options set forth in Section 5.1 it elects for the relevant year
(provided that it must be eligible for the option it elects).

2.2.3 Election for Special Reporting Term. A Noncommercial Educational Webcaster
may elect to be subject to the provisions of Article 5 only, for all of the Special Reporting
Term, in lieu of reporting under 37 C.F.R. Part 370.3 as it may from time to time exist.
To do so, the Noncommercial Educational Webcaster shall submit to SoundExchange a
completed and signed election form (available on the SoundExchange Web site at
http://www.soundexchange.com), which SoundExchange may combine with its form of
Statement of Account. Such form must be submitted with timely payment of the
Noncommercial Educational Webcaster's minimum fee for 2010 under 37 C.F.R.
§ 380.4(d) and the Proxy Fee described in Section 5.1.1 for both 2009 and 2010 if
applicable. On any such election form, the Noncommercial Educational Webcaster must,
among other things, provide (i) a certification, signed by an officer or another duly
authorized faculty member or administrator of the institution with which the
Noncommercial Educational Webcaster is affiliated, that the Noncommercial Educational
Webcaster qualifies as a Noncommercial Educational Webcaster for the Special
Reporting Term, and (ii) identification of all its stations making Eligible Transmissions
and which of the reporting options set forth in Section 5.1 it elects for the Special
Reporting Term (provided that it must be eligible for the option it elects for the entire
Special Reporting Term).

2.2.4 Participation in Specified Proceedings. Notwithstanding anything else in these
Rates and Terms, a person or entity otherwise qualifying as a Noncommercial
Educational Webcaster that has participated or is participating in any way in any appeal
of the Final Determination of the Copyright Royalty Judges concerning royalty rates and
terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006,
through December 31, 2010 published in the Federal Register at 72 Fed. Reg. 24084
(May 1, 2007) (the “Final Determination”), any proceedings on remand from such
appeal, Digital Performance Right in Sound Recordings and Ephemeral Recordings
(Copyright Royalty Judges' Docket No. 2009-1 CRB Webcasting III), Digital
Performance Right in Sound Recordings and Ephemeral Recordings for a New
Subscription Service (Copyright Royalty Judges' Docket No. 2009-2 CRB New
Subscription II), or any other proceeding to determine royalty rates or terms under
Sections 112(e) or 114 of the Copyright Act for all or any part of the period January 1,
2006, through December 31, 2015 (all of the foregoing, including appeals of the
proceedings identified above, collectively “Specified Proceedings”) shall not have the
right to elect to be treated as a Noncommercial Educational Webcaster or claim the
benefit of these Rates and Terms, unless it withdraws from such proceeding(s) prior to
submitting to SoundExchange a completed and signed election form as contemplated by
Section 2.2.1 or 2.2.3, as applicable. In addition, once a Noncommercial Educational Webcaster has elected to be subject to these Rates and Terms, either for the Special Reporting Term or any part of the Term, it shall not at any time participate as a party, intervenor, amicus curiae or otherwise, or give evidence or otherwise support or assist, in any Specified Proceeding, unless subpoenaed on petition of a third party (without any action by a Noncommercial Educational Webcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

2.3 Representation of Compliance and Non-Waiver. By electing to operate pursuant to the Rates and Terms, either for the Special Reporting Term or any part of the Term, an entity represents and warrants that it qualifies as a Noncommercial Educational Webcaster and is eligible for the reporting option set forth in Section 5.1 that it elects. By accepting an election by a transmitting entity pursuant to these Rates and Terms or any payments or reporting made by a transmitting entity, SoundExchange does not acknowledge that the transmitting entity qualifies as a Noncommercial Educational Webcaster or for a particular reporting option or that it has complied with the eligibility or other requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is eligible for the statutory licenses under Sections 112(e) and 114 of the Copyright Act and in full compliance with applicable requirements thereof. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a transmitting entity agrees that SoundExchange’s acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements that are not inconsistent with these Rates and Terms.

ARTICLE 3 – SCOPE

3.1 In General. Noncommercial Educational Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. §§ 112(e) and 114 and their implementing regulations (except as otherwise specifically provided herein), in lieu of other rates and terms from time to time applicable under 17 U.S.C. § 112(e) and 114, for each calendar year within the Term that they have made a timely election to be subject to these Rates and Terms.

3.2 Applicable to All Services Operated by or for a Noncommercial Educational Webcaster. If a Noncommercial Educational Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1, these Rates and Terms shall apply to all Eligible
Transmissions made by or for the Noncommercial Educational Webcaster and related ephemeral recordings. For clarity, a Noncommercial Educational Webcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 112(e) and 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations. However, a single educational institution may have more than one webcasting station making Eligible Transmissions. If so, each such station may determine individually whether it elects to be subject to these Rates and Terms as a Noncommercial Educational Webcaster. It is expressly contemplated that within a single educational institution, one or more Noncommercial Educational Webcasters and one or more public broadcasting entities (as defined in 17 U.S.C. § 118(g)) may exist simultaneously, each paying under a different set of rates and terms.

3.3 No Implied Rights. These Rates and Terms extend only to electing Noncommercial Educational Webcasters and grant no rights, including by implication or estoppel, to any other person or entity, or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. § 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. §§ 112(e) and 114.

ARTICLE 4 – ROYALTIES

4.1 Minimum Fee. Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of $500 (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it elects to be subject to these Rates and Terms. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in Section 5.1.1 shall pay a $100 annual fee (the “Proxy Fee”) to SoundExchange.

4.2 Additional Usage Fees. If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours (“ATH”) on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (“Usage Fees”) for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

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<th>Year</th>
<th>Rate per Performance</th>
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<tbody>
<tr>
<td>2011</td>
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<tr>
<td>2012</td>
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<td>2013</td>
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<td>2014</td>
<td>$0.0023</td>
</tr>
<tr>
<td>2015</td>
<td>$0.0025</td>
</tr>
</tbody>
</table>
For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under Section 5.1.3, the Noncommercial Educational Webcaster may pay Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay Usage Fees at the per-performance rates provided above in this Section 4.2 based on the assumption that the number of sound recordings performed is 12 per hour. SoundExchange may distribute royalties paid on the basis of ATH hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis.

A Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per channel or station basis.

4.3 **Ephemeral Royalty.** The royalty payable under 17 U.S.C. § 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange may allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011-2015.

4.4 **Statements of Account and Payment.**

4.4.1 **Minimum Fee.** Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account in a form available on the SoundExchange Web site at http://www.soundexchange.com ("Statement of Account") by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster’s election to be subject to these Rates and Terms for the applicable calendar year.

4.4.2 **Usage Fees.** Noncommercial Educational Webcasters required to pay Usage Fees shall submit a Minimum Fee and Statement of Account in accordance with Section 4.4.1, and in addition, a Statement of Account accompanying any Usage Fees owed pursuant to Section 4.2. Such a Statement of Account and accompanying Usage Fees shall be due 45 days after the end of the month in which the excess usage occurred.

4.4.3 **Identification of Statements of Account.** Noncommercial Educational Webcasters shall include on each of their Statements of Account (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Statement of Account covers a single station only, the call letters or name of the station.

4.4.4 **Payment.** Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange.

4.5 **Late Fees.** A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any Statement of Account or any Report of Use (as defined in Section 5.1 below) is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late Statement of Account or Report of Use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee
shall accrue from the due date of the payment, Statement of Account or Report of Use until a fully compliant Payment, Statement of Account or Report of Use (as applicable) is received by SoundExchange, provided that, in the case of a timely provided but noncompliant Statement of Account or Report of Use, SoundExchange has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

ARTICLE 5 – REPORTING

5.1 Provision of Reports of Use. Noncommercial Educational Webcasters shall have the following three options, as applicable, with respect to provision of reports of use of sound recordings (“Reports of Use”):

5.1.1 Reporting Waiver. In light of the unique business and operational circumstances currently existing with respect to these services, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay a nonrefundable, annual Proxy Fee of $100 in lieu of providing Reports of Use for the calendar year. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this Section 5.1.1 during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH per month during that calendar year. SoundExchange shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange’s Board of Directors. The Proxy Fee is intended to defray SoundExchange’s costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster’s election to be subject to these Rates and Terms for the applicable calendar year (or in the case of the Special Reporting Term, by the date specified in Section 2.2.3) and shall be accompanied by a certification on a form provided by SoundExchange, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage, and if applicable, measures to ensure that it will not make excess Eligible Transmissions in the future.

5.1.2 Sample-Basis Reports. A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect (as described in Section 2.2.2) to provide Reports of Use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at 37 C.F.R. § 370.3 as they existed at January 1, 2009, except that
notwithstanding 37 C.F.R. § 370.3(c)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency (i.e., number of spins). Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These Reports of Use shall be submitted to SoundExchange no later than January 31st of the year immediately following the year to which they pertain.

5.1.3 Census-Basis Reports. If any of the following three conditions is satisfied, a Noncommercial Webcaster must report pursuant to this Section 5.1.3: (i) the Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year, (ii) the Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year, or (iii) the Noncommercial Educational Webcaster otherwise does not elect (as described in Section 2.2.2) to be subject to Section 5.1.1 or 5.1.2. A Noncommercial Educational Webcaster required to report pursuant to this Section 5.1.3 shall provide Reports of Use to SoundExchange quarterly on a census reporting basis (i.e., Reports of Use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by 37 C.F.R. § 370.3 as of January 1, 2009), except that notwithstanding 37 C.F.R. § 370.3(c)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency (i.e., number of spins), during the first calendar year it is required to report in accordance with this Section 5.1.3. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this Section 5.1.3 for a full calendar year, it must thereafter include ATH or actual total performances in its Reports of Use. All Reports of Use under this Section 5.1.3 shall be submitted to SoundExchange no later than the 45th day after the end of each calendar quarter.

5.2 Delivery of Reports. Reports of Use submitted by Noncommercial Educational Webcasters shall conform to the following additional requirements:

5.2.1 Noncommercial Educational Webcasters shall either submit a separate Report of Use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

5.2.2 Noncommercial Educational Webcasters shall transmit each Report of Use in a file the name of which includes (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Report of Use covers a single station only, the call letters or name of the station.

5.2.3 Noncommercial Educational Webcasters shall submit reports of use with headers, as such headers are described in 37 C.F.R. § 370.3(d)(7).
5.3 **Server Logs.** To the extent not already required by the current regulations set forth in 37 C.F.R. Part 380, as they existed on January 1, 2009, Noncommercial Educational Webcasters shall retain for a period of at least three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting hereunder. To the extent that a third-party web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

ARTICLE 6 – ADDITIONAL PROVISIONS

6.1 **Applicable Regulations.** To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 C.F.R. Parts 370 and 380, shall apply to activities subject to these Rates and Terms. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 C.F.R. §§ 380.4(h) and 380.6) shall apply hereunder. Noncommercial Educational Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

6.2 **Use of Agreement in Future Proceedings.** Pursuant to 17 U.S.C. § 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. § 114(f) by any participant in such proceeding is expressly authorized.

6.3 **Effect of Direct Licenses.** Any copyright owner may enter into a voluntary agreement with any Noncommercial Educational Webcaster setting alternative rates and terms governing the Noncommercial Educational Webcaster’s transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.4 **Default.** A Noncommercial Educational Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Noncommercial Educational Webcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Noncommercial Educational Webcaster’s authorization to make public performances and ephemeral reproductions under these Rates and Terms may be terminated by further written notice; provided, however, that such period shall be 60 (rather than 30), in the case of any such notice sent by SoundExchange between May 15 and August 15 or between December 1 and January 30. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given at least two notices of noncompliance. Any transmission made by a Noncommercial Educational Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms or Section 112(e) or 114, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things,

ARTICLE 7 – MISCELLANEOUS

7.1 Acknowledgement. The parties acknowledge these Rates and Terms were entered into knowingly and willingly.

7.2 Applicable Law and Venue. These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, D.C. SoundExchange and each Noncommercial Educational Webcaster consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.3 Rights Cumulative. The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.4 Entire Agreement. These Rates and Terms represent the entire and complete agreement between SoundExchange and a Noncommercial Educational Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Noncommercial Educational Webcaster with respect to the subject matter hereof.
Join IBS Radio Station - Webcasting Membership

Through December 31, 2010, Payable by check, or credit card - VISA - MasterCard - Discover

<table>
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<tr>
<th>Intercollegiate Broadcasting System Membership Dues for One Year</th>
<th>$125.00</th>
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<tr>
<td>IBS 24/365 Radio Information (<a href="http://www.collegeradio.tv">http://www.collegeradio.tv</a>) (<a href="mailto:ibs@ibsradio.org">ibs@ibsradio.org</a>)</td>
<td></td>
</tr>
<tr>
<td>Save $80 registration IBS on international convention: March 5-7, 2010 - NYC</td>
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<td>IBS facilitated Webcasting License for 2010</td>
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<td>IBS Student Radio Network, by Backbone - reduced rates! IBS SRN</td>
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<td>Coast to coast IBS Fall Conferences- registration $25/person including lunch</td>
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<td>IBS Publications, Music service assistance, engineering/technical assistance</td>
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<td>Annual Subscription to IBS Newsletter printed in color and mailed</td>
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Includes First (1st) delegate FREE registration. Save $80 - IBS International Radio Conference. IBS International Convention - Friday - Sunday, March 5 - 7, 2010 - NY City at Hotel Pennsylvania 70th annual with over 115 seminars by top academic, broadcasting and government professionals!

Reduced ($25/person registration) IBS Conference- Oct. 9, 2010, Boston/Brookline, MA
Reduced ($25/person registration) IBS Conference- Oct. 23, 2010, Chicago, IL
Reduced ($25/person registration) IBS Conference- Dec. 4, 2010, Los Angeles/Claremont, CA

IBS is a not for profit education corporation, association, and foundation with 70 years of continuous service to the over 1,000 IBS Members Worldwide!

Intercollegiate Broadcasting System, Inc. Federal ID is: # 23 705 9805

Please enclose with your check either the top portion of this invoice or IBS invoice number and mail to:

IBS
367 Windsor Highway
New Windsor, NY 12553-7900
Kutztown University of Pennsylvania
KUR 88.3 FM/1670 AM

This is to certify that

Treasure and Chief Operating Officer
Phil Kass

Intercollegiate Broadcasting System, Inc.
and is an IBS Member in good standing of the
Webcasting license
has an IBS Endorsement
Pennsylvania
Kutztown
Kutztown
University of Pennsylvania

IBS Intercollegiate Broadcasting System

2006-2007
IBS - college radio, TV, webcasting, podcasting, streaming, and high school radio! Trusted resource for radio, TV, webcasting, podcasting, and streaming information! 68 Years of continuous Service for over 1,000 USA IBS Members!

IBS legally represents ONLY IBS Members! Join IBS Today, to have YOUR webcasting protected by the IBS Washington, DC, LEGAL TEAM!

It pays to be an IBS Member!
IBS Membership has MANY Privileges!


US Court of Appeals Case:
Intercollegiate Broadcasting System vs. Copyright Royalty Board
Consolidated Case 07-1123, Court has granted a delay in the briefing schedule (submissions) for IBS and all other Appellants until March 10, 2008.

IBS vs. CRB (Case 07-1123) US Court of Appeals Schedule:

March 10, 2008 Appellants' Brief(s)
May 9, 2008 Appellee's Brief
May 29, 2008 Intervenor's Brief
June 26, 2008 Appellants' Reply Brief(s)
July 10, 2008 Deferred Appendix
July 24, 2008 Printed briefs

IBS & Appellants file briefs on March 10, 2008
(Copies - pdf of public briefs are below)

- IBS, et. al., vs. CRB, US Court of Appeals Case 07-1123
Public Copy (pdf) of Joint Noncommercial Webcaster Brief
IBS - NPR - NPR1C - CR

SX Trial Ex. 10

For non-IBS Members the CRB settlement is Monday, July 16, 2007.

IBS - RIAA/SoundExchange announce that IBS and performance copyright holders are in negotiation for rates and terms for IBS Members for 2006 - 2010.

Some IBS Members May Decide to Defer Impracticable Royalty and Reporting Terms Pending Conclusion of IBS - RIAA/SoundExchange Negotiations

IBS Members should keep webcasting, enjoy the education benefits of webcasting, and relax.

IBS - SoundExchange/RIAA are discussing fair, nondiscriminatory, reasonable, rates for artists/labels for the use of their valuable performances by our 1,000 IBS Members. We will also work out a reasonable, defensible, and economically practical system to disburse IBS copyright fees to the labels/artists (recordkeeping/reporting).

It pays to be an IBS Member!
IBS Membership has MANY Privileges!
- PDF copy of Federal Register for May 1, 2007, Copyright Royalty Board, Library of Congress click here

May 21, 2007, Washington, DC, CRB/CRJ Orders!
- Broadcasters Motion for clarification (and change) of CRB May 1, 2007 published rates is GRANTED!
- click here for pdf copy of CRB Order
- Although this is a small clerical error in commercial rates, now corrected by the CRB, it is significant to noncommercial webcasters.
- because the CRB acted on the motion within the month of May, the CRB preserved Monday, July 16, 2007, as settlement date, pending IBS Appeal.

May 9, 2007, U.S. SENATE introduces their version of Internet Radio Equality Act (S-1353) to set aside CRB decision.  
- [PDF copy of Senate Bill S - 1353 click here](#)
- The major difference between the House and Senate Bills is in the noncommercial webcaster area.
- The House uses a 1.5 times factor over the 2004 rate, the Senate uses 1.65 times factor over the 2004 noncommercial rate.

April 26, 2007, Internet Radio Equality Act H.R. 2060 is introduced in U.S. House of Representatives to set aside the Copyright Royalty Board (CRB) decision.  
- [PDF copy of H.R. 2060 - Internet Radio Equality Act click here](#)

- [PDF copy of May 31, 2007, SX letter to noncoms making offer click here](#)
- SX responds to House Judiciary Committee Chairman Berman to make a settlement offer and avoid the Internet Radio Equality Act (IREA)HR 2060.
- [PDF copy of June 19, 2007, IBS reply to SX letter/offer click here](#)
- IBS responds to SoundExchange General Counsel Michael Huppe, Esq., for a Webcast Rates/Terms settlement, avoiding the Internet Radio Equality Act (IREA).

March 2, 2007, the Copyright Royalty Board (CRB) has announced its decision on Internet radio royalty rates, rejecting all of the arguments made by Webcasters and instead adopting the "per play" rate proposal put forth by SoundExchange, a digital music fee collection body created and controlled by the RIAA, Recording Industry Association of America.  
- [PDF copy of the CRB March 2, 2007, 115 page decision, click here](#)

April 16, 2007, the Copyright Royalty Board (CRB) has announced its decision to deny all motions for rehearing the the CRJ determination of rates and terms. (see above)

The CRB did say the IBS Motion for relief from recordkeeping and reporting requirements established in the initial determination will be addressed in a future proceeding.

- [PDF copy of the CRB April 16, 2007, decision to deny motions for rehearing, click here](#)

Commercial Rates ordered on March 2, 2007, by the CRJ are as follows:

2006 - $.0008 per play  
2007 - $.0011 per play  
2008 - $.0014 per play  
2009 - $.0018 per play  
2010 - $.0019 per play

The minimum fee is $500 per channel per year.

For noncommercial webcasters, the fee will be $500 per channel, for up to 159,140 ATH (aggregate tuning hours) per month.  
Above 159,140 ATH all webcasters, noncommercial and commercial, pay the commercial rate.
IBS Notes on the above decision:

IBS Members remain protected by IBS.
IBS Members should do nothing until they receive written advice from IBS.
IBS is a party to the CRB proceedings and has many options open.
IBS will, when necessary, appeal the CRB decision to the U.S. Court of Appeals, DC Circuit.
Our 1,000 IBS school/college IBS Members WILL BE PROTECTED!
Nonmembers not part of IBS are on their own. Join IBS TODAY!
Membership has privileges!

- JOIN IBS in YOUR Fight for FREEDOM. JOIN IBS TODAY! click here

What is IBS's position on Webcasting?

1. IBS believes there is tremendous educational and operational value for educational stations to stream their audio (and video) signal over the Internet.

2. IBS believes every educational station should continue to stream their audio signal!

3. IBS believes the benefits of streaming/webcasting are so great that your radio station should continue to stream on the Internet even with DMCA copyright discussions taking place.

4. IBS believes that every station that is not now streaming should start streaming! Learning the techniques and technology of digital communications is vital for today's graduates. Competitive knowledge of Internet Webcasting communications is an important skill set in the world of today.

The value of streaming for an IBS Member Radio Station is:

Education-
To learn and practice the techniques and technology of digital communications, America's Sons and Daughters must compete in a global digital world. Vital communication skills are being learned by webcasting at USA schools and colleges.

Operations-
To be able to reach out to alumni, parents, friends and other audiences with information and programming that cannot be provided by other broadcasting technology.

Constitutional FREEDOM.
The right to free speech and expression of views by American Education Entities and their faculty and students is vital to a FREE United States of America. Our GREAT NATION cannot long endure if we allow a foreign controlled music oligopoly to shut down school and college webcasts with impossible to meet recordkeeping and unrealistic rates that apply to music and NON-MUSIC programming. Why should RIAA/SoundExchange be paid based on FREE SPEECH, non-music listenership?

Keep webcasting, learning and reaching out to a wider audience!
IBS will keep member stations informed.

Go to IBS First Website Page - click here!

Links and content being added - stop back and visit again.
Please send us your comments, suggestions and critiques.

Contents of this site copyright 1996 - 2007, all rights reserved by the
April 8, 2008

Fritz Kass
Chief Operating Officer
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367 Windsor Highway
New Windsor, NY 12553-7900

William Malone
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1155 Connecticut Avenue, NW
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Re: Improper Statutory Licensing Information on IBS Website

Dear Fritz and Bill:

I am writing to you on behalf of SoundExchange to follow-up on the various conversations you have had with SoundExchange regarding some of the statutory licensing information posted on the IBS website (http://www.frontiernet.net/~ibs/DCMA.html).

While SoundExchange recognizes and appreciates that you have changed some of the misleading information posted on the website about IBS members’ legal obligations under the statutory license for paying royalties to SoundExchange, the current content remains equally problematic and deceptive. It continues to mislead your constituents, essentially counseling them to break the law. Moreover, it wrongfully implies that SoundExchange condones this behavior, and that SoundExchange is granting some sort of waiver as part of the pending negotiations. These improper statements must be corrected immediately.

First, the website in no uncertain terms authorizes IBS members to withhold payment of their royalties to SoundExchange, stating that “Some IBS Members May Decide to Defer Impracticable Royalty and Reporting Terms Pending Conclusion of IBS-RIAA/SoundExchange Negotiations.” And it provides this counsel while telling constituents that “IBS Members should keep webcasting, enjoy the education benefits of webcasting, and relax.” This reckless advice, if followed, places IBS members in violation of their statutory obligations. That means that they can be held liable for copyright infringement because, absent compliance with the statutory license or some other license, they have no right to webcast sound recordings.

Second, the website advises IBS members to “do nothing until they receive written advice from IBS,” and juxtaposes this instruction with a statement that “IBS is a party to the
CRB proceedings and has many options open." Collectively, this advice signals to IBS members that they need not pay the royalty rates that they are statutorily required to pay.

Indeed, based on these inaccurate postings, multiple IBS members have informed SoundExchange that they do not have to pay the webcasting royalties because IBS told them they did not have to as a result of their IBS membership. They cite language on IBS’s website to support their noncompliance with the copyright regulations. These communications signal to SoundExchange that IBS members are heeding the faulty advice IBS is providing and, as a result, are placing themselves in serious risk of legal repercussions.

SoundExchange also finds problematic IBS’s posting of this inaccurate information on a website that includes reference to the ongoing negotiations between SoundExchange and IBS, and that contains -- without permission -- SoundExchange’s trademarked logo. This juxtaposition wrongfully gives the impression that the advice you impart -- authorizing your members to violate their statutory obligations -- is sanctioned by SoundExchange. Nothing could be further from the truth, as your numerous discussions with SoundExchange have made clear.

While it is true that SoundExchange desires to continue to engage in good faith negotiations with IBS to resolve outstanding issues, these ongoing negotiations in no way alter the fact that IBS members are required to comply with the statutory mandate of §§ 114 and 112 as established by the CRB’s May 1, 2007 ruling. That ruling is and remains the governing law and requires all webcasters to comply with the royalty fees and terms set forth in the CRB’s order. IBS members are thus obligated to pay SoundExchange for the royalties owed under the regulations, as well as to file the appropriate reports. Any advice to the contrary is simply authorizing illicit activity.

SoundExchange once again demands that you immediately remove from the IBS website the misleading and inaccurate language identified above, and that you take any corrective measures necessary to inform your constituents of their legal obligations under the governing regulations.

Should you have any questions about any of this information or wish to speak further, please do not hesitate to contact me.

Sincerely,

[Signature]

Thomas J. Perrelli
October 7, 2008

Fritz Kass  
Chief Operating Officer  
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New Windsor, NY 12553-7900

William Malone  
Miller & Van Eaton, PLLC  
1155 Connecticut Avenue, Suite 1000  
Washington, DC 20036

Re: False Information on IBS Website

Dear Fritz and Bill:

I am writing to respond to your June 16, 2008 letter in response to SoundExchange’s multiple letters. Your continued refusal to remove misleading and inaccurate information from the IBS website is unacceptable. It completely fails to address SoundExchange’s concerns or the fact that IBS is placing its members at risk of legal action for failing to comply with governing regulations. To date, you have done nothing to correct this inaccurate information -- brought to your attention over six months ago. And what’s worse, you continue to post the message in conjunction with SoundExchange’s logo even though SoundExchange demanded that you remove the logo. Despite your contrary characterization, you have not made any substantive changes, in “good faith” or otherwise, to this information.

In total disregard of the gravity of this matter, you attempt to transform IBS’s improper encouragement of its members to act unlawfully into a mere difference of opinion between SoundExchange and IBS that can be cleared up through a SoundExchange posting on your website. This is not a simple “disagree[ment] with the views expressed” on IBS’s website. Rather, as SoundExchange has explained in clear and unambiguous terms, this is about IBS’s blatant disregard of its members’ legal obligation to pay royalties under the governing law and its encouragement of those members to defy the law.

Yet rather than correct the mis-information on your website when brought to your attention and given the opportunity (not once, but twice) to do so, you continue to encourage your members to ignore the Copyright Royalty Judges’ Order and to withhold any royalty payments until you instruct them otherwise. This is unethical and unacceptable and has led at least some of your members to violate the law, claiming that you told them to do so.
SoundExchange has given you several opportunities to make corrections and to inform your members that they must pay royalties according to the governing law. You have failed to do so, and instead continue to post this erroneous content. Accordingly, SoundExchange is going to contact directly IBS members -- those that have already been in touch with SoundExchange as well as all others -- to inform them in no uncertain terms of the legal obligation each station has to pay royalties under the current law. In addition, SoundExchange will make exceeding clear that they risk legal action should they fail to comply with these obligations. And finally, SoundExchange will highlight the fallacy (posted on your website) that membership in IBS provides any sort of protection from legal action or exemption from these royalty obligations, and will make them each aware of the risk that IBS has exposed them to by advising them to withhold their statutorily mandated royalty payments.

We tried on multiple occasions to reach an amicable outcome to this matter, but your persistent refusal to engage in any reasonable discussion -- as evidenced by your June 16 letter and prior non-responsive correspondence -- has left us with no other choice.

Sincerely,

Thomas J. Perrelli

cc: Michael J. Huppe
Colin Rushing
BEFORE THE COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
WASHINGTON, D.C.

---ooO---

In the Matter of: ) DOCKET NO.
DIGITAL PERFORMANCE RIGHT ) 2009-1, CRB
IN SOUND RECORDINGS and ) WEBCASTING III
EPHEMERAL RECORDINGS )

DEPOSITION OF N. MARK LAM
San Francisco, California
Tuesday, January 28, 2010

Reported by:
LUCY CARRILLO-GRUBBS, RMR, CRR, RPR, CRP, CSR
Job No. 18609

SX Trial Ex. 13
Public Version
BE IT REMEMBERED THAT, pursuant to the laws pertaining to the taking and use of depositions, and on January 28, 2010, commencing at the hour of 9:36 a.m. thereof, at the offices of Davis, Wright, Tremaine, 505 Montgomery Street, 8th Floor, San Francisco, California, before me, Lucy Carrillo-Grubbs, CRP, RMR, CRR, RPR, CSR No. 6766, a California Certified Shorthand Reporter in and for the State of California, personally appeared

N. Mark Lam

being called as a witness by the SoundExchange, who, having been by me first duly sworn, was thereupon examined and interrogated as hereinafter set forth.

APPEARANCES

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EXHIBITS

Exhibit 1: Written Direct Testimony by N. Mark Lam
Exhibit 2: Three-page letter dated May 28, 2008
Exhibit 3: Two-page letter dated August 20, 2009
Exhibit 4: Document entitled Rate Proposal for Live365, Inc.
Exhibit 5: Table entitled Table 1 - Allocated Costs of Live365 for Webcasting to US Listeners (FY 2008).

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Exhibit 4 Document entitled Rate Proposal for Live365, Inc. 114
Exhibit 5 Table entitled Table 1 - Allocated Costs of Live365 for Webcasting to US Listeners (FY 2008). 155
San Francisco, California, January 28, 2010
9:36 a.m. - 4:54 p.m.

EXAMINATION

BY MR. DeSANCTIS:

Q. Good morning. Could you please state and spell your full legal name for the record?
A. Last name is Lam, L-a-m, first name Nam-Yeng, but I generally use N, N. Mark Lam.
Q. Okay.
A. Could you spell that first name for the record?
Q. Mr. Lam, have you ever been deposed before?
A. Yes.
Q. When was that?
A. That was a while ago.
Q. How many times?
A. It be a couple times, yeah.
Q. Do you recall what proceedings those were in?
A. That was in -- I think it involved some sort of a real estate lease.
Q. Okay.
A. Some years ago.

Q. Was that while you were at Live365?
A. No, that's before I was at Live365.
Q. Okay.
A. Have you ever been deposed while at Live365 for anything?
Q. I don't remember that being the case.
Q. Okay.
A. With whom were you employed when you were deposed?
Q. If -- why don't I ask you this -- well, were you employed at the time of your prior depositions?
A. Yes.
Q. With whom?
A. My own firm.
Q. Which firm was that?
A. That's Pristine Law Offices.
Q. And what was the subject matter of the dispute?
A. Having something to do with the lease.
Q. The lease of what?
A. I remember it was a real estate lease.
Q. Of the -- of the building in which the law firm was in?
   A. Yes.
Q. And do you recall whether the law firm was the plaintiff or the defendant in that action?
   A. I don't even remember, it was just a very small matter.
Q. Okay.
   You said there were two depositions that -- that you recall having given, were they both in -- in relation to that real estate dispute?
   A. I say a couple loosely, I remember roughly that years ago I may have been deposed another time, but I'm not sure. And I don't even remember what it was, the subject matter.
Q. Okay.
   The one that you do recall, the real estate action.
   A. Yeah.
Q. Roughly when was that?
   A. Probably about ten years ago.
Q. Okay.
   Do you recall whether that case went to trial or whether it settled?
   A. It didn't go to trial, I believe.
Q. Okay.
   What did you -- what did you do -- what, if anything, did you do to prepare for today's deposition? And I'm not asking for the substance of any communications with counsel, I'm just asking what you did to prepare.
   MR. MacDonald: I'm also going to object on the record to the extent that it calls for any privileged or any mental impressions of counsel with respect to your preparation for your deposition.
   So please don't reveal any communications or anything that reflects mental impressions of your counsel in preparation for your deposition.
   But go ahead.
   THE WITNESS: I read my direct statements.
   MR. DeSanctis: Uh-hmm.
   THE WITNESS: I also reviewed Mr. Floater's direct statement, and I review Dr. Fratrik's statement, and then -- and then with counsel, you know, we did the prep for this deposition.
   BY MR. DeSANCTIS:
Q. Did you meet with Mr. Floater?
   MR. MacDONALD: Objection, vague, lacks foundation.
   MR. DeSANCTIS: Okay.
Q. Did you meet with Mr. Floater to prepare for this deposition?
   A. No.
Q. Did you read the transcript of Mr. Floater's deposition before this deposition?
   A. No.
Q. Did you review any documents other than the testimony that you mentioned during your prep meeting for this deposition?
   A. Excuse me, could you reask the question?
Q. Sure.
   During your prep meeting for this deposition that you mentioned, did you review any documents, other than the three pieces of testimony that you mentioned?
   MR. MacDONALD: I'm just going to object on the record to the extent that it calls for any mental impressions of counsel, which may invade the attorney work product doctrine.
   THE WITNESS: I have -- I have -- I review also my prior testimony in CRB proceeding.
   MR. DeSANCTIS: Okay.
Q. Written testimony or the transcript of your oral testimony?
   A. Transcript, transcript.
A. Because --
Q. Is he a lawyer?
A. No, he's not a lawyer.
Q. Is he an economist?
A. No, he's not an economist.
Q. What is his area of specialty, if he has one?
MR. MacDONALD: Objection, vague.
THE WITNESS: He has an MBA, and he was business -- previously employed by Adobe.
BY MR. DeSANCTIS:
Q. Did he consult for Live365 prior to the time at which you began preparations for this proceeding?
MR. MacDONALD: Objection, lacks foundation.
THE WITNESS: I brought him in with a view toward preparing for the CRB.
MR. DeSANCTIS: Okay.
Q. Was any employee or representative of RealNetworks present at your meeting at which you prepared for today's deposition?
A. No.
Q. Have you ever met with anyone from RealNetworks to discuss this litigation?
A. Let me think.
Q. Sure, take all the time you need.
A. I think early on there may have been a phone conversation about whether to proceed with the CRB or not, I think --
Q. Do you recall who that conversation was with?
A. That was quite some time ago. I'm not sure but I think it could have been with their counsel, their in-house counsel.
Q. With RealNetworks' in-house counsel?
A. Yeah.
Q. Who was on the phone, if anyone, other than you from Live365?
A. I think Mr. Floater could have been on the phone, Mr. Floater. I think that was it.
Q. Okay.
Q. Do you recall whether there was anyone -- an employee of RealNetworks on the phone as opposed to just their counsel who you mentioned?
A. I don't remember.
Q. And do you recall when this conversation occurred? I'll remind you the written direct statements in this case were filed at the end of September of 2009.
A. I think that was sometime last year, in 2009.
Q. Prior to September 2009?
A. Yes.
Q. Okay.
Let me just back up a little bit. You're -- you're a lawyer, right?
A. Correct, was a lawyer.
Q. You were a lawyer. Once a lawyer, always a lawyer, no?
MR. MacDONALD: Not if you're not paying your dues.
MR. DeSANCTIS: I suppose that's right.
Q. Were you a litigator?
A. I did some litigation.
Q. Okay.
What other kinds of law did you practice?
A. I represented mostly manufacturers.
Q. You said that you used to be a litigator, or you used to be a lawyer?
A. Yeah.
Q. In your -- does that mean that you would not describe your duties at Live365 now as legal work?
MR. MacDONALD: Objection, vague, confusing, compound.
THE WITNESS: Could you reask the question, please?
BY MR. DeSANCTIS:
Q. I'm sorry?
A. Could you reask the question?
Q. Sure. I was just following up on when you said you used to be a lawyer.
A. Yeah.
Q. I was wondering, if by that you meant that what you do now at Live365 is not work in the capacity as a lawyer but as some other capacity?
A. Correct.
Q. So you're the CEO of Live365, do you have any other titles there?
A. No.
Q. Do you provide legal advice to the company?
A. No.
Q. So you've mentioned that you've been in a couple depositions before but they were a long time ago. I'll just briefly give a few ground rules.
If -- as you can see, I ask questions, you give answers. You've already asked me to clarify a question and that's great, I want you to do that any time you don't understand the question. It's -- doesn't serve any purpose if you and I are on different pages.

If you want to take a break, you can whenever you like, let me know and maybe I'll have one or two more questions to ask and I'll certainly try to accommodate any request for a break.

If -- if there's anything about my questions that you don't understand, please definitely speak up and let me know.

We need audible responses, and that's a tough thing to remember, but -- so the court reporter can record your answers, she can't get nods of the head or this kind of thing, so we need oral responses to all of my questions.

Okay?

A. Understood.

Q. Is there any reason, Mr. Lam, that would prevent you from offering full and accurate and honest testimony today? Are you -- are you ill, are you on any medications, anything like that?

MR. MacDONALD: Objection, compound.

THE WITNESS: Would you please reask the question, when you say consulted, in what sense?

MR. DeSANCTIS: Sure.

THE WITNESS: Consult is a really broad word.

MR. DeSANCTIS: Sure.

Q. Let me put it this way: Are you aware of the fact that in response to SoundExchange's request for the production of documents Live365 produced documents to SoundExchange?

A. Yes, I'm aware.

Q. And also produced written responses?

A. Yes.

Q. Were you involved in any way with the collection of those documents and the preparation of the written responses?

BY MR. DeSANCTIS:

Q. Were you involved in any way in the collection of documents for purposes of producing documents to SoundExchange?

A. I gave instruction to staff to cooperate fully with our attorneys and to turn over whatever document that we have in our possession.

Q. Did you personally look for documents that were responsive to the requests?

MR. MacDONALD: I'm just going to object to the extent it calls for a legal analysis as to which documents were responsive to which requests.

THE WITNESS: I think I ask -- when they asked me for certain documents, I generally direct them to -- you know, to go to whoever's involved that have possession of the documents.

MR. DeSANCTIS: Okay.

Q. Do you know what requests for interrogatories are?

A. Yes.

Q. Are you aware of the fact that SoundExchange has served requests for -- has served...
interrogatories on Live365 in this case?
A. I think so. I mean, I've been told, yeah.
Q. And are you aware of the fact that Live365 has provided responses to those interrogatories?
A. That I am not sure.
Q. Okay.
They did.
A. Okay. I'm not sure because -- you know.
Q. And my next question was whether you were involved in any way in the preparation of Live365's responses to SoundExchange's interrogatories?
MR. MacDONALD: Objection, vague.
MR. DeSANCTIS: It's broad, I'm asking if you were involved in any way, and if you were, we can talk about it some more.
MR. MacDONALD: Same objection.
THE WITNESS: You know, I think counsel and I had some brief discussions on the interrogatories.
BY MR. DeSANCTIS:
Q. Did you actually draft any of the responses?
A. Physically, no.
Q. Okay.
Did you personally review any of the responses before they were submitted to SoundExchange?
A. I think I -- I don't remember whether I did or not, because in a typical day, you know, I have a lot of things that come from my desk, so many documents sometimes. It's funny, I was talking to a friend, just the other day, and he said, didn't you just call me this afternoon or something? I said, did I? I'm sorry, you know.
Q. It's quite all right.
A. Yeah, it's --
Q. I understand. It's a -- that's the way it goes.
A. Yeah.
Q. You submitted written testimony in this proceeding, correct?
A. Correct.
(Lam Exhibit No. 1 was marked for identification.)
BY MR. DeSANCTIS:
Q. Let me show you, Mr. Lam, what has been marked as Lam Exhibit 1. Is that the written direct testimony that you submitted in this case? You can take a moment to flip through it if you like.
(Witness reviews document.)
I'll -- go ahead, I'll let you finish reading through it before I ask you any questions about anything specific, though, I'll point you to exactly what I'm talking about.
Okay?
A. Okay.
Q. Is that your signature on the last page of what's been marked as Exhibit 1?
A. Looks to be.
Q. So have -- is this your written direct testimony that you submitted in this case?
A. Yes.
Q. Okay.
In it, right in the first paragraph there, you say that Live365 consists of two businesses, you call one broadcast services and you call the other Internet radio. Can you describe just very briefly and -- and generally what those two lines of businesses -- what those two lines of business are?
A. Okay.
The broadcast services actually is a platform, technology platform that consists of proprietary software as well as off-the-shelf software such as Oracle. It provides broadcasting tools, listening tools, many different type of tools, meaning tools are not hardware tools, but software tools. And it also provides bandwidth, and, you know, all the service that make the thing work, and the various components.
In fact, those consist of -- I won't bore you with some details. Various types -- various types of servers, you know, because we heard about service all the time, but, you know, for example, to make our system work, it will require application servers, streaming servers, database servers, dataware servers, and many other servers which has both components of hardware and software to enable -- and then as well -- as well the tracking software for this to work.
So, in essence, it's a platform composing of many parts, roughly when we calculated it, probably in terms of component, you know, really, really many components.
Q. Okay.
A. So that we could service the broadcasters when they want to broadcast or we should say webcast. So it's a -- you know, so through the years, you know, we -- many people have broadcast, use us as a platform and we're generally pretty well known in this area.
There are companies such as Stream Guys, StreamTheWorld, Epicast, and quite a few others.
Q. Those are other companies that provide similar --
A. Yeah.
Q. -- broadcast services?
A. Yeah.
Q. And when you provide those broadcast services to a customer, for lack of a better word, what is -- what is the -- how do you identify -- how do you refer to the customer to whom you're -- you are providing the broadcast service? Just so we have common vocabulary for the rest of the day --
A. Sure.
Q. -- do you call them broadcasters, webcasters, customers?
MR. MacDONALD: I'm just going to object, it's vague, it's compound.
THE WITNESS: It's compound.
MR. DeSANCTIS: It is.
Q. But I'm just asking how you refer to them so you and I can talk about it and know what we're talking about.
A. Generally we refer to them as broadcasters.
Q. Broadcasters.
MR. MacDONALD: Objection, compound, vague and ambiguous.
THE WITNESS: Could you reask the question?
MR. DeSANCTIS: Well, sure, I'll get back to it in another way.
Q. Can you also describe for me now, what the Internet radio business is that you referred to in paragraph I of your testimony?
A. Okay, Internet service is where we actually provide customers the ability to listen to thousands of broadcasters. And they were -- you know, we have a directory, we have a website and a directory --
Q. Uh-hmm.
A. -- that allows people to come to www.Live365 and, you know, listen to -- to all the music.
Q. And how do you refer to those customers who are -- who stream as part of your Internet service? Do you also refer to them as broadcasters or do you refer to them some other way? Again, just so we have a common vocabulary.
MR. MacDONALD: Objection, vague.
THE WITNESS: Please reask the question.

BY MR. DeSANCTIS:

Q. What about it don't you understand?

A. Because you use, I think, broadcasters and webcasters and -- if you could just reask another way.

Q. This is exactly what I'm trying to avoid, I'm trying to get some common dialogue here.

A. Yeah.

Q. Common definitions so we can have a discussion, okay?

A. Sure.

Q. I asked you who you consider your customers to be for your broadcast services and you said broadcasters, okay?

A. Yeah.

Q. Now I'm asking you, based on the way you used aggregated webcasters here in paragraph 1.

A. Uh-hmm.

Q. Are those the webcasters that webcast over the Live365 service?

A. Yes.

Q. Okay.

Do all of the aggregated webcasters also use the broadcast services that we discussed a moment ago?

A. Yes, I believe so.

Q. Okay.

Do any not? Or is it a -- is it a requirement that they do?

MR. MacDONALD: Objection, compound.

BY MR. DeSANCTIS:

Q. Let me ask it this way: If a broadcaster wants Live365 broadcast services but they do not want to become an aggregated webcaster, they just want to webcast on their own.

A. Uh-hmm.

Q. Would Live365 provide those broadcast services?

MR. MacDONALD: Objection to the extent it calls for speculation.

BY MR. DeSANCTIS: I don't want you to speculate.

Q. I'm asking, does that occur in your business?

A. I think it's possible, I'm not sure whether that actually occurs or not.

Q. Okay.

A. Yeah.

Q. Let me turn your attention to page 3, paragraph 7. Would you read that paragraph and then I'll ask you some questions about it.

A. I'm done, go ahead, yeah.

Q. The last sentence reads: "Live -- since 2002, Live365's service has aggregate and made available to the public over 38,000 paying webcasters," and then it continues.

Do you see that?

A. Yup.

Q. What do you mean by made available? In other words, what does it mean that Live365's service has aggregated and made available to the public 38,000 paying webcasters?

A. I think 38,000 paying webcasters have -- use our -- I mean, operate during this period of time, since 2002.

Q. What do you mean paying webcasters? Do the -- you mean webcasters pay Live365?

A. Yes, yeah, the webcasters do.

Q. Okay, what do they pay Live365?

A. Various amount, depending on the -- you know, which packages they choose.

Q. Various technology packages?

A. Yes, and also -- yes.

Q. Can you describe those various packages?

A. If you -- you know, we're pricing for different levels of use, features, memory, bandwidth, you know, that type of stuff. So -- so it's priced according to really -- you know, what kind of services they -- they choose to use.

Q. Do any of the packages not include the royalty servicing services?

MR. MacDONALD: Objection, lacks foundation.

THE WITNESS: Some broadcasters or webcasters choose to take care of their own royalty.

MR. DeSANCTIS: Okay.

Q. For those webcasters, the ones that choose to take care of their own royalties, are they still considered aggregated webcasters of Live365?

A. I believe so.

Q. Okay.

Do you know how many or roughly what percentage of the aggregated webcasters take care of their royalties by themselves, pay their own royalties to whoever it is they pay them to?

A. I don't have that information.

Q. Do you know roughly?

MR. MacDONALD: I'm going to object to the extent it calls for speculation.

THE WITNESS: Yeah, I really don't have that...
number.

BY MR. DeSANCTIS:
Q. And I don't -- I don't want you to guess --
A. Yeah.
Q. -- at a number, but are we talking about roughly half or is it more or less than half, do you know that much?
A. I think I don't feel comfortable guessing, so, you know.

Q. It's a guess?
Let me put it this way, do you know whether it's more or less than half? I'm not asking for a specific number, but -- or do you not know whether or not it's more or less than half?
A. We have a lot of packages, so I -- I really don't know, okay?

Q. Okay.
The aggregated webcasters on Live365 are responsible for programming their own channels, correct?
A. Correct.
MR. MacDONALD: Objection, vague.
THE WITNESS: Okay, could you reask the question?
BY MR. DeSANCTIS:
Q. And if it's unclear, what I was getting at is whether Live365 is involved in programming your webcasters channels.
A. No.
Q. So in what sense, then, does Live365 make available to the public the webcasters channels, the way you use that phrase in paragraph 7 of your testimony?
A. You mean the stations?
Q. Their stations, yes.
A. No.
Q. But your testimony says that Live365's service has made available to the public over 38,000 paying webcasters. And my question is: In what sense did Live365 make available the 38,000 paying webcasters?
A. Okay.

MR. MacDONALD: I'm going to object, again, to the extent it mischaracterizes the written testimony.
MR. DeSANCTIS: Okay, let me put it this way:
Q. Well, did you understand the question?
A. Yeah, roughly, but, you know, let's ask specifically.

Q. Okay, your words here, okay?
A. Yeah.
Q. "Live365's service has made available to the public over 38,000 paying webcasters."
A. Uh-hmm.
Q. My question, what did you mean by "made available"?

MR. MacDONALD: I'm going to object, I think this question was asked and answered about ten minutes ago.
MR. DeSANCTIS: It probably was asked, I doubt it was answered.
Q. Go ahead.
A. You know, as we say -- as I said earlier, we -- we have a website and we have a directory of all webcasters, so I think that's what -- what that means.

Q. Okay.
So it's making it available on the Live365 site?
A. Yup. On the directory, just like SHOUTcast, makes available something like 30,000 stations available on their directory.
Q. Okay.
A. Or there may be others out there that does the same thing.
Q. Other what?
1 A. Like SHOUTcast.
2 Q. Other services?
3 A. Yeah, they basically act as a directory.
4 Q. Okay.
5 Would you call those other services aggregators?
6 A. Yes, in a sense, yes.
7 Q. Do you have any reason to think that if a
8 particular Live365 aggregated webcaster was not
9 signed up with Live365, that they wouldn't use one
10 of the other services? In other words, is the
11 aggregating services that you provide
12 interchangeable with the other services you
13 mentioned or does Live365 do something unique and
14 special that they don't?
15 MR. MacDONALD: I'm going to object, it's
16 compound, calls for speculation.
17 THE WITNESS: Could you reask the question?
18 BY MR. DeSANCTIS:
19 Q. Yeah. You just mentioned a number of
20 aggregating services with whom you compete.
21 A. Uh-hmm.
22 Q. Do they provide the same services to
23 webcasters that Live365 provides or is there
24 something different that Live365 provides that your
25 competitors don't?
26 MR. MacDONALD: Objection, this calls for
27 speculation.
28 THE WITNESS: I try my best to -- to see if
29 I could get to your question and answer it
30 straightforwardly.
31 I think every service -- I think, I don't
32 know this for a fact and I haven't played with every
33 service out there, but most services are slightly
34 different one way or the other. So I really don't
35 know, you know, really what people would or would
36 not do. I mean, really -- so I think my answer to
37 that question is really, you know, I -- I really
38 don't know.
39 BY MR. DeSANCTIS:
40 Q. You don't know whether Live365 does anything
41 unique that any of your competitors don't?
42 MR. MacDONALD: Objection, vague.
43 BY MR. DeSANCTIS:
44 Q. And I'm talking about with whatever services
45 you provide to your webcasters.
46 A. Yeah, I think we have some uniqueness.
47 Q. What is that?
48 A. I think we -- like I said, we provide a
49 fairly comprehensive set of services that probably
50 some others don't. But on the other hand, I really
51 don't know if there are other out there that also --
52 that provide more or less than we do because I
53 haven't checked every service out there.
54 Q. Okay.
55 A. If you don't mind in a few minutes, could we
56 take a little break?
57 Q. Yeah, now is a fine time to take a break.
58 A. Now is --
59 MR. DeSANCTIS: We'll go off the record.
60 (Recess.)
61 BY MR. DeSANCTIS:
62 Q. Let's go back on the record.
63 Staying with Exhibit 1, which is in front of
64 you, Mr. Lam, let me direct you to page 4, paragraph
65 11. Why don't you read that and I'll ask you some
66 questions about it.
67 (Witess reviews document.)
68 Okay. In this paragraph you use the term
69 "aggregate tuning hours," which you abbreviate as
70 ATH. Can you just describe for me very briefly what
71 aggregate tuning hours are?
72 A. I think aggregate tuning hours is a term of
73 art that have been used by the industry to capture
74 the hours that webcasting services -- to -- to
75 capture, you know, how many hours of listening that
76 occurs.
77 Q. So do you know what -- how one ATH is
78 defined, one tuning hour?
79 A. Yes, it's when a person listens to a webcast
80 for one hour, that's one aggregated tuning hour.
81 Q. Okay.
82 In the second sentence in that paragraph you
83 write, "Current statutory rates force Live365 to cap
84 its aggregate tuning hours."
85 What are you referring to by "the current
86 statutory rates"?
87 A. The current statutory rates is the CRB rate,
88 I think that was announced in March 2007.
89 Q. Okay.
90 And that covered the period 2006 through
91 2010?
92 A. Correct.
93 Q. So how is it that the current statutory
94 rates force Live365 to cap its aggregate tuning
95 hours?
96 A. Because the current statutory rates is much
97 more than the old rate, from 2006, for example, the
98 old rate up to 2005, was .000762. The CRB rate
99 went -- take it all the way up .00019, in 2010. No,
Q. Do you remember what it was for 2006?
A. Yes, I think it was .0008.
Q. So, then, how did the current statutory rates -- sorry, let me start over.
What do you mean in this sentence that the current statutory rates force Live365 to cap its aggregate tuning hours? And actually let me break that down.

What did Live365 do to cap its aggregate tuning hours?
A. I think we took a number of actions.
Q. What were they?
A. One of them was to put the parking meter on ability of people to listening.
Q. What is the parking -- how does that work?
A. That we would stop their listening at a certain point in time in the stream.
Q. Even if the listener wants to continue listening?
A. Yes, they would have -- yeah.
Q. So why would you stop the stream if the listener wants to keep listening?
A. Because otherwise for every hour stream we have to pay more royalty.
Q. So -- so you changed the system so that the listener might be listening and then the stream just stops. Does it ever start up again?
A. They have to do something to start it up.
Q. Like what?
A. They have to go to the website and take proactive action to find the -- you know, some button to push in order to -- to listen to it.
Q. Okay.
And you did this -- well, let me ask you: Why did you -- why did you institute the system that you just described in terms of stopping ATH?
MR. MacDONALD: I'm going to object, lacks foundation, and it's vague as to who "you" is referring to.

BY MR. DeSANCTIS:
Q. You, I just mean Live365, not you personally.
A. Okay. Because as I said, the cost just went up quite a bit for us, because of the new statutory rate.
Q. The cost of .0002 versus .0008?
A. It's not just that that's the first year but subsequent years it kept going up, in increments of 30 percent, you know, or more.
Q. Okay.
So does it -- what do you call this, this system that you implemented?
A. We generally just call it the parking meter.
Q. Parking meter?
A. Yeah.
Q. Okay.
So the parking meter was intended to save Live365 money?
MR. MacDONALD: Objection, vague.

BY MR. DeSANCTIS:
Q. Parking meter?
MR. MacDONALD: I'm going to object, lacking foundation, and it's vague as to who "you" is referring to.

BY MR. DeSANCTIS:
Q. You, I just mean Live365, not you personally.
A. Okay. Because as I said, the cost just went up quite a bit for us, because of the new statutory rate.
Q. The cost of .0002 versus .0008?
A. It's not just that that's the first year but subsequent years it kept going up, in increments of 30 percent, you know, or more.
Q. Okay.
So does it -- what do you call this, this system that you implemented?
A. We generally just call it the parking meter.
Q. Parking meter?
A. Yeah.
Q. Okay.
So the parking meter was intended to save Live365 money?
Q. Okay.

So is it true that the parking meter was intended to reduce Live365's royalty costs?

MR. MacDONALD: Objection, vague.

BY MR. DeSANCTIS:

Q. Isn't that the bottom line purpose of the parking meter?

A. Yes, I think by and large.

Q. And the parking meter also would have reduced Live365's royalty costs under the old rate of .000762, correct?

MR. MacDONALD: Objection, calls for speculation.

Q. Okay.

Q. Isn't that the bottom line purpose of I asked you what Live365 has done to cap its aggregate tuning hours and you said numerous things, one of which was instituting the parking meter.

A. Yeah.

Q. What other things were there?

A. I think we were at one point in time more aggressive in being listed on different platforms.

Q. I'm sorry, of being listed on different platforms?

A. For example, instead of website, you know, we will also -- some of our stations will also be -- having our content made available, our content to different platforms.

Q. You could just -- you mean a listener could stream some of your stations from the iTunes website?

A. From the -- actually, iTunes Radio, yeah.

Q. By what extent, do you know?

A. Could you clarify your question as what do you mean by to what extent?

Q. How much has it reduced Live365's royalty costs, if you know?

A. I don't have the exact number, but I -- I don't have the percentage either, but it did -- you know, let me rephrase my answer before.

It really depends on the rate. When you say did it reduce your royalty costs, it may not have, because we may -- because the rate was much higher, even though we have less -- we were delivering less ATH, actually could have cost us more.

Q. Oh, sure, because the rate changed.

A. Correct, the rates is basically as of 2010 is two and a half times the rate.

Q. Right. Okay.

So, then, has the parking meter been successful in reducing the royalty rates under the current rates as compared to what they would have been without the parking meter?

MR. MacDONALD: Objection, compound, vague.

THE WITNESS: I think I would use the word "contained," I don't think I would say -- I'm not sure about the reduced, yeah.

Q. Okay.

And Live365 stopped doing that?

A. No, we didn't stop doing that, but we basically, you know, took measure that removed I think most of our stations that -- we took measures to -- to -- to make sure that it would not cost us in terms of royalty.

Q. Well, my -- so how does this -- first of all, what did you remove? What did Live365 remove from the iTunes website?

A. I think we used to have more stations on iTunes.

Q. How did you decide -- meaning Live365 affirmatively removed some from iTunes or they went away for some other reason?

A. Yeah.

Q. And Live365 affirmatively removed some stations from iTunes Radio?

A. Yeah.

Q. Okay.

But not all of them?

A. Not all.

Q. How was it determined which would be removed and which would stay?

A. Specifically, I'm not the one to do that.
Somebody in charge of broadcasting in the company made the decision.

Q. Who would that have been?
A. I think Jason Stoddard.

Q. Do you know if it was based on an analysis of which stations were more profitable, more -- or more popular versus other stations?
A. I don't know --

MR. MacDONALD: Objection, vague.

THE WITNESS: Okay.

Could you reask the question?

BY MR. DeSANCTIS:

Q. Can you answer the question?
A. I think I don't know exactly what the criteria that he used or, you know, whoever was involved used.

Q. Okay.
A. But I'm sure they must have considered a number of factors.

Q. Like what, if you know?
A. You're asking me to speculate, I don't know for certain.

Q. Don't speculate.
A. Yeah.

Q. So you don't know?
A. Yeah.

Q. Do you know whether wecasters -- whether Live365's wecasters pay to have their stations listed on iTunes Radio?
MR. MacDONALD: I'm going to object to the extent it calls for speculation.

BY MR. DeSANCTIS:

Q. I'm asking if you know.
A. The question is whether they pay to -- to --

Q. Well, specifically let me ask -- let me withdraw it and ask it this way: Do you know whether wecasters pay Live365 to have their stations listed on iTunes Radio?
MR. MacDONALD: I'm just going to object, again, to the extent it calls for speculation.

THE WITNESS: I -- I don't know. But I think your question was specifically do they pay specifically to get listed on iTunes Radio, correct?

BY MR. DeSANCTIS:

Q. Right.
A. I really don't know, but I don't think so.
Q. Okay.

So how does taking certain channels off iTunes Radio decrease Live365's ATH?
A. Because the stations listed on iTunes Radio have a tendency to get listened to a lot.

Q. And so there's less listening --
A. Yeah.

Q. -- if you take it off?
A. Yeah.

Q. So with -- by delisting channels from iTunes Radio, Live365 actually wanted to discourage listening hours?
MR. MacDONALD: Objection, vague, lacks foundation.

BY MR. DeSANCTIS:

Q. I'm just trying to get at what the motivation was.
A. Contain costs as a result of the high royalty.

Q. Not to affirmatively discourage listening hours?
MR. MacDONALD: Objection, vague.

THE WITNESS: If! get your question correctly, I mean, it's the same thing, so as I told you more than once, cost containment was critical, given this -- the high rates of royalty.

BY MR. DeSANCTIS:

Q. So you've mentioned now the parking meter?
A. Uh-hmm.

Q. And the delisting of iTunes Radio?
A. Uh-hmm.

Q. Do you know whether wecasters -- whether Live365's wecasters pay to have their stations listed on iTunes Radio?
A. Uh-hmm.

Q. You describe them both as measures to contain costs?
A. Uh-hmm.

Q. Okay.
A. It depends.

Q. On what?
A. It depends on whether -- on the costs were contained, there were revenues that are associated with the cost, and then whether the revenue was greater than the cost or less than the cost.

Q. Okay, I asked you whether these measures reduced Live365's revenues and you said it depends on whether -- whether the revenue was greater than the cost or less than the cost?
A. Maybe -- maybe I didn't answer correctly. I think it depends on whether they were revenue associated with this cost or not, okay?
Q. Uh-hmm.

A. So if -- if it is, if there are revenue associated with the cost, then of course the revenue would be -- would be down. But if there's no
revenue associated with cost, then it wouldn't have impacted.

Q. Right.

And wasn't it the idea in -- in implementing these measures, to reduce cost in ways where the cost was not contributing to revenue?

A. Or not contributing sufficiently to cover the additional cost brought on by the higher royalty rate.

Q. Okay.

So these were measures, is it fair to say, that were intended to make Live365 more efficient?

MR. MacDONALD: Objection, vague.

BY MR. DeSANCTIS:

Q. Can you answer the question?

A. When you say efficient, maybe could you ask -- could you be more specific about what do you mean by efficient.

Q. I'm using it in the general sense that a business is -- businesses try to be efficient by cutting costs and maximizing revenue.

A. Okay.

Q. Were these measures, the parking meter and the delisting of channels on iTunes Radio, intended to make Live365 more efficient?

A. Yes.

Q. Okay.

In terms of measures that Live365 took to cap its aggregate tuning hours, you mentioned the parking meter and delisting of certain channels off of iTunes Radio, were there any other measures that Live365 took in order to cap its aggregate tuning hours?

A. No. I think there must be other measures, because we constantly try to optimize and improve and all that. But, you know, there are a lot of things we -- we did also but, you know, I don't remember exactly when, what was done, and how they did it. Because that's operation matters that -- you know, we have people doing that.

Q. Okay.

Do you know whether the parking meter and the delisting of channels on iTunes Radio have succeeded in containing Live365's royalty costs?

A. When you say succeeded, it's a very loaded word.

Q. Okay.

What makes it difficult for you to answer?

A. Because success, definition of success can be measured many ways.
happening, and to this day we are still trying to negotiate settlement.

Q. Okay.

A. Yup.

Q. But it wasn't paying that money to SoundExchange, what was it doing with that money?

A. Roughly, but I don't have the exact figures. I mean, accounting, they do the bookkeeping, so I -- 

Q. When does Live365 intend to pay SoundExchange that money?

A. We -- 

MR. MacDONALD: Hold on. I'm going to object here, to the extent it calls for privileged communications. So I'm going to caution you not to get into -- not to reveal the substance of any privileged communications. So if you feel like you can answer that without getting into privileged communications, go ahead.

But if not, then I'm going to instruct you not to -- not to reveal these communications.

THE WITNESS: We have had discussion with SoundExchange about settlement all along. And so it would come to some sort of a settlement, we would like to square everything up.

MR. MacDONALD: Objection, vague, lacks relevance. 

A. We -- 

MR. MacDONALD: Objection, vague, lacks relevance.

MR. MacDONALD: Objection, vague.

A. I don't know.

Q. Discussions with Live365's counsel?

MR. MacDONALD: Objection, vague.

A. Yeah.
Q. Or with SoundExchange's counsel?
A. Live365 counsel, and our counsel have been
in contact with them too.
Q. Your counsel has been --
A. With SoundExchange, about settlement.
Q. When was the last time your counsel
contacted SoundExchange about settlement?
A. I don't remember exactly when, but not too
long ago.
Q. Can you -- roughly?
A. I think -- I think within the last month or
two.
Q. The last month or two?
A. Yeah.
Q. Do you know who at SoundExchange they
contacted?
A. I don't -- I really don't know, per se, but
I think -- I have to ask my counsel for that.
Q. Was an offer of settlement made? I mean,
was -- was there some offer made by Live365 to
SoundExchange?
A. Yes, I believe offer of settlement was made.
Q. And do you know how SoundExchange reacted?
MR. MacDONALD: Objection, calls for
speculation.

BY MR. DeSANCTIS:
Q. Do you know if SoundExchange accepted your
offer?
A. To my knowledge, no. But it's in
discussion.
Q. It's in continuing discussions?
A. That's -- I believe so.
Q. How do you define continuing discussions?
If Live365 representatives continue to call
SoundExchange, is that alone how you define
continuing discussions?
MR. MacDONALD: Objection, vague and lacks
foundation and assumes facts that aren't necessarily
established.

BY MR. DeSANCTIS:
Q. Well, I'm trying to understand what you mean
by continuing discussions. Has there been another
discussion planned or a meeting set up?
A. My understanding is that our counsel had
contacted SoundExchange's counsel and that -- last I
heard, that somebody at SoundExchange had actually
discussed with other counsel about settling. I
think that's as late as a few weeks ago.
Q. So is it your position that Live365 will not
pay SoundExchange what it owes under the CRB
webcasting rates if settlement discussions are
continuing?
MR. MacDONALD: I'm going to object to the
extent it mischaracterizes Mr. Lam's testimony.

BY MR. DeSANCTIS:
Q. I'm asking if that's Live365's position?
MR. MacDONALD: Same objection.
Q. I asked you before -- let me withdraw that
question.
I asked you earlier today, when you planned
on paying, and you said we are still in settlement
discussions with them.
A. Uh-hmm.
Q. Do you remember that?
A. Uh-hmm.
Q. Okay.

MY question is: Is it Live365's position
that they will not pay SoundExchange what it owes
under the CRB rates as long as there are settlement
discussions continuing?
MR. MacDONALD: And I'm going to make the
same objection as before.

BY MR. DeSANCTIS:
Q. IS that Live365's

MR. MacDONALD: I'm also going to object to
the extent it lacks foundation, as to whether or not
Live365 has actually formulated a position.

THE WITNESS: This is in discussion with our
counsel, okay, so --
BY MR. DeSANCTIS:
Q. And I don't want you to discuss any advice
that counsel gave you.
A. Uh-hmm.
Q. But you've been talking about discussions
with SoundExchange, those are not privileged. I'm
asking you when Live365 plans to pay the money it
owes SoundExchange.

MR. MacDONALD: Hold on.
I'm going to object, again, lacks
foundation, and again, caution the witness to not
reveal the substance of any privileged
communications.

MR. DeSANCTIS: Okay, I actually appreciated
that objection, and you're right, perhaps it did
lack foundation.
Q. Does Live365 intend ever to pay
SoundExchange what it owes it under the CRB
webcasting rates?
MR. MacDONALD: Objection, vague.
THE WITNESS: This is something that with our counsel we've been discussing.

MR. DeSANCTIS: Okay.

Q. And I don't want -- I don't want to hear --

A. Yeah, so, I mean, you know, we -- you know, we -- you know, we have been discussing with our counsel on how to proceed with this.

Q. Okay.

A. Okay. So we haven't taken a particular position, it's on advice of counsel whether we do or don't do certain things.

Q. So Live365 -- is it your testimony that Live365, as you sit here today, has not decided whether it will ever pay SoundExchange the money it owes it under the CRB webcasting rates?

MR. MacDONALD: Objection, mischaracterizes testimony and it's vague.

THE WITNESS: Could you reask the question?

MR. DeSANCTIS: Yes.

Q. I'll reask it this way: If no settlement is reached between Live365 and SoundExchange, will Live365 pay what it owes SoundExchange under the webcasting rates set by the CRB?

MR. MacDONALD: Objection, calls for speculation, and again, to the extent this gets into communications that you've had with counsel about settlement, I'm instructing you not to reveal the --

THE WITNESS: As I said before, we have been discussing with the counsel, whatever counsel concerned at this point.

BY MR. DeSANCTIS:

Q. That doesn't answer the question.

A. This information.

Q. I don't want to know about the discussions with counsel.

A. Uh-hmm.

Q. That's correct.

THE WITNESS: Our plan is necessarily dependent on our discussion and consultation with counsel.

Q. Yes.

A. We rely on -- we rely on their advice and counsel, so at this point in time, we really have to look to our counsel for the answers. We have not formulated one way or the other.

And we are continued to believe that we would -- you know, we are trying to get a settlement, as many other parties have.

Since the beginning, since the CRB, even before the CRB rate came down, we have been out there, you know, we have actually gone to SoundExchange and said, you know, we -- applicator, you know, our broadcasters, many of them are very small, you know, broadcasters, they are much smaller than the definition of small broadcasters, that you know, we, you know -- we would like to -- you to consider -- I mean, SoundExchange make available the rates to our broadcasters, okay?

And that discussion have been going on, in
1 fact, you know, we have been keeping saying that, well,
2 we're business with this party, that party, when we
3 settle with that party, we will turn to you. Okay?
4 And so final -- I mean, you know, so
5 that's -- and then in the interim there was an
6 appeal and in the interim there are other things
7 that happened, and we really are eagerly awaiting to
8 see if we can get a settlement.
9 Q. And is it -- this indicates that Live365
10 will not pay what it owes SoundExchange unless or
11 until there's a settlement, is that your position?
12 And I am not asking for any discussions with
13 counsel, I'm asking is that your position now?
14 MR. MacDONALD: Objection, calls for
15 speculation and it -- same cautionary instruction.
16 THE WITNESS: I don't know what I would do.
17 We really are discussing this with our counsel, this
18 has been discussed.
19 BY MR. DeSANCTIS:
20 Q. Has anyone at SoundExchange ever told you
21 that it was okay not to pay while there was
22 discussions going on?
23 MR. MacDONALD: Objection, vague.
24 THE WITNESS: John Simpson had basically in
25 the public said that, you know, as long as there's
26 discussion of settlement.
27 BY MR. DeSANCTIS:
28 Q. What?
29 A. As long as there's settlement discussions,
30 that -- that -- let me rephrase this.
31 Q. Okay.
32 A. John Simpson I think had in the public
33 stated it, as long as there are discussions going
34 on, that he would not take actions against parties.
35 Q. That he would not take action against
36 parties?
37 A. Yup.
38 Q. When did he say that?
39 A. I was advised by counsel that was the
40 position of SoundExchange.
41 Q. When -- when did John Simpson make the
42 statement you're referring to?
43 A. I don't know. I don't know when.
44 Q. Were you advised by counsel that he had
45 made that statement?
46 A. Some time ago.
47 Q. Can you estimate when?
48 A. I don't remember, but it's a while ago.
49 Q. Was it in 2009?
50 A. I don't really remember, but it's over a
We just believe that in our case, we actually, as I told you earlier, made up of broadcasters, small webcasters, and, you know, they actually should be paying a certain rate. [redacted] and we have been in good faith trying to negotiate and say, look, let's see if we can come to some sort of, you know, agreement, so that, you know, it's reasonable for everybody.

It's the same music, just because we happen to aggregate a lot of broadcasters, that our broadcasters that are very small broadcasters are being penalized. 

MR. DeSANCTIS: Could I have my question read back, please?

(The Reporter read back as follows):

"Question: Did you interpret that to mean that you had no obligation to pay under the rates set by the CRB?"

MR. DeSANCTIS: Could I get the prior question read as well, I think the question came out in two parts.

(continued)

MR. DeSANCTIS: What was the statement from John Simpson?

A. I think he -- he -- I mean, he basically is that if parties are under negotiations, they don't have to pay the royalty yet at that point in time. And we know of the fact that in this -- in a situation, you know, people in the industry, when the rates wasn't exactly set yet, you know, they continued to pay under the old rate.

Q. And is it your understanding that regardless of how long any discussions took, SoundExchange did not expect Live365 to pay under the web II rates set by the CRB?

MR. MacDONALD: Objection, calls for speculation, it's vague as well.

BY MR. DeSANCTIS:

Q. Well, I'm asking for your understanding of the statement. Did you interpret it as open-ended, no matter how long discussions went on, SoundExchange did not expect Live365 to pay under the web II rates?

A. We have been getting in the queue forever to try to discuss with them to rev up the settlement if we could, every time we approached them, we've been told, we got this more -- this thing is more important, we're going to do it now, and get back to the queue.

I mean, it's very frustrating for us as well.

Q. Are you aware of SoundExchange ever demanding payment from Live365 under the web II rates set by the CRB?

A. Yes, I've heard it from counsel.

Q. You've heard it from counsel?

A. Okay.

Q. Uh-hmm.

A. Okay.

Q. Who told you? Who told you that SoundExchange has demanded payment under the web II rates?

A. I think it's Abraham Yacobian or is it David Rosenberg who told me that, I don't recall, you know, but one of these.

Q. It was one of those two?

A. Yeah.

Q. Do you recall whether anyone at
SoundExchange -- actually, let me back up.

Who is Mr. Chang, C-h-a-n-g, at Live365?

A. C-h-a-n-g?

Q. Maybe I have that wrong.

Steve Chang, do you know Steve Chang?

A. Yup.

Q. Are you aware of -- has he ever told you that SoundExchange demanded payment from him, from Live365 -- sorry, let me rephrase that.

Has Mr. Chang ever told you that SoundExchange made a demand to him that Live365 pay SoundExchange under the web II rates?

A. I think what he did was when he received the letter, you know, he talked to counsel, and the counsel was the one who told me.

Q. Okay.

What letter are you referring to?

A. I think there's some demand, you know, I don't remember exactly when or -- you know, when or where.

Q. Have you ever seen that letter?

A. Yeah, I think I glance at it.

Q. Okay.

Did you discuss it with Mr. Chang?

A. I discuss it with counsel.

Q. Did you discuss it with Mr. Chang?

A. No. I mean, I discuss it with counsel, the counsel is the one who gave me the -- you know, I -- as I said, our counsel had been trying to conduct, you know, settlement with -- with SoundExchange for some time now, trying to.

Q. I understand.

SoundExchange sent a letter to Mr. Chang, correct?

A. I don't know -- I don't remember who they sent it to, okay?

Q. Uh-hmm.

A. I really don't remember.

Q. The letter you were referring to, I didn't mention a letter, you mentioned a letter.

A. You're the one who brought up the letter, didn't you?

Q. No, you did.

MR. MacDONALD: Is there a question pending?

MR. DeSANCTIS: I'm not even sure anymore.

Q. Do you know whether Mr. Chang received a letter from SoundExchange demanding payment under the web II rates?

A. I don't know whether it's Mr. Chang or counsel who received the letter.

Q. Okay.

But you know there was a letter?

A. Yes, I was told that it was a letter.

Q. Did you ever discuss that letter with Mr. Chang?

A. No, I discussed it with counsel.

Q. Okay.

And after receiving that letter -- do you recall when it was?

A. I don't remember.

Q. And after receiving that letter, Live365 still has not paid SoundExchange under the web II rates, correct?

A. I believe so, but that's based on discussion with counsel.

Q. How is that based on discussion with counsel? I asked since receiving the letter --

A. Yeah.

Q. -- Live365 has not paid SoundExchange at the rate set by the CRB.

A. Correct.

Q. Is that correct?

A. Correct.

Q. Okay.

Why, after receiving a letter demanding payment has Live365 not paid under the rates set by the CRB?

MR. MacDONALD: I'm going to object to the extent it calls for privilege, so I'm instructing you, Mr. Lam, not to reveal any communications that you've had with counsel about this subject matter.

THE WITNESS: Because there was actually discussion with counsel.

BY MR. DeSANCTIS:

Q. Discussions with your counsel?

A. Yeah.

Q. And that's why you decided not to pay?

A. We were -- we have discussion about -- with the counsel about what to do. Okay, the discussion is ongoing, I mean...

Q. I'm sorry, I'm very confused as to the timeline of events here.

A. Yeah.

Q. You said you were informed that Mr. Simpson made a statement about not taking action against webcasters if good faith settlement negotiations were ongoing.

A. Uh-hmm.

Q. Correct?

A. Yes.
Q. Were you told of that before or after you received -- before or after you were told of the letter sent from SoundExchange to Live365 demanding payment?
A. I don't remember.
Q. So, then, my question is: Once you received the letter -- once Live365 received the letter demanding payment, why did Live365 continue not to pay at the rate set by the CRB?
A. I actually have not.
Q. Were you informed about this letter by anyone else?
A. I actually I --
Q. The question is, were you informed about this letter by Mr. Chang?
A. I'm not sure.
Q. Were you informed about the letter by anybody else?
A. I don't know about that, but I'm sure they must -- I mean, Live -- the counsel must have one way or the other.
Q. You don't -- were you involved in formulating that response?
A. I --
Q. Do you know if Live365 responded to SoundExchange in any way to this letter?
A. I don't know about that, but I'm sure they must -- I mean, Live -- the counsel must have one way or the other.
Q. You don't -- were you involved in formulating that response?
A. I --
MR. MacDONALD: Objection. Hold on, lacks foundation as to whether a response was actually made.
THE WITNESS: Like I said, I don't really remember.
BY MR. DeSANCTIS:
Q. You don't remember whether there was a response or whether you were involved?
A. I don't remember whether actually -- I said, you know, something like this happen, unless Steve dropped the ball, I'm sure he must have given it to counsel and counsel must have somehow grab a hold of me to talk to me about, but I don't have recollection of conversations or anything regarding this letter, per se, because I don't remember seeing this three-page letter.
Q. Okay.
But it's true, is it not, that Live365's response was not to begin paying SoundExchange at the rates set by the CRB, correct?

MR. MacDONALD: Objection, lacks foundation.

THE WITNESS: Live365 consulted with counsel about what to do with this.

Q. And after receiving this letter, Live365 did not begin paying at the rates set by the CRB for webcasting, correct?

A. Counsel, I believe, responded, must have responded to SoundExchange, okay?

MR. DeSANCTIS: Right.

Q. Uh-hmm.

A. I'm not -- I'm not asking about who responded, I'm saying -- let me put it this way:

After receipt of this letter, Live365 did not begin paying SoundExchange at the rate set by the CRB, did it?

Q. Okay.

A. Okay.

Q. And this letter is dated May 28, 2008?

A. Uh-hmm.

Q. Numbered paragraph 1, it starts with the bold sentence, "Failure to pay appropriate royalties." Numbered paragraph 2 starts with the bold sentence, "Failure to pay mandatory true-up for 2006 and 2007."

At the time this letter was written, May 2008, had Live365 paid the true-up for 2006 and 2007?

A. Excuse me, could you read the question back to me, I try to read this:

(The Reporter read back as follows: "Question: Numbered paragraph 1, it starts with bold sentence, 'Failure to pay appropriate royalties.' Numbered paragraph 2 starts with the bold sentence 'Failure to pay mandatory true-up for 2006 and 2007.'")

At the time this letter was written, May 2008, had Live365 paid the true-up for 2006 and 2007?

MR. MacDONALD: Object as lacking foundation as to whether this witness is familiar with the -- with true-up.

BY MR. DeSANCTIS:

Q. Do you understand the true-up that's being referenced in this paragraph?

Q. Mr. Lam, back on the record.

Mr. Lam, I'd like to direct your attention back to the letter of May 28th, it's been marked as Exhibit 2. Do you have that in front of you still?

A. Uh-hmm.

Q. We talked about the first numbered paragraph entitled, Failure to Pay Appropriate Royalties. And this paragraph is alleging that Live365 had not been laying royalties to SoundExchange under the rates set by the CRB as of May 28, 2008 and I believe that that is true, correct, Live -- Live365 was not so paying?

A. What's --

Q. At that time?

A. Was not --

Q. Was not paying at the rate set by the CRB as of May 28, 2008, correct?

A. Yeah, there was serious negotiations, everybody's in negotiations.

Q. Paragraph 2, failure to pay the mandatory true-up for 2006 and 2007, just before our break I believe you said that is also true?

A. Yeah.

Q. Paragraph 3 is entitled, Failure to Provide Required Reports of Use, and the second sentence
According to our records, Live365 is only
submitted reports of use for 2007. Live365 should
immediately provide reports of use from at least the
second quarter of 2004 through 2006. Going forward,
reports of these should be submitted promptly."
Is this -- is this paragraph also true, to
the extent that Live365 had submitted reports of use
only for 2007?
A. I'm not sure.
Q. Okay.
A. Because this doesn't rise to my level, they
usually take care of this type of stuff.
Q. Who normally takes care of this?
A. I think Steve would submit -- you know,
Steve Chang will submit the -- the report of use on
a regular basis.
Q. Okay.
A. And I think during that time there was also
a change under the CRB of how the reporting would be
done.
Q. Uh-hmm.
A. Okay. I think there was this ongoing
negotiation.
Q. Well, I understand there was an ongoing
negotiation, but --
A. Yeah.
Q. -- the question was whether the allegation
in this paragraph No. 3 of Exhibit 2 is true, and I
think your answer was that you do not know, correct?
A. I really don't know, yeah.
Q. Okay.
A. Because there were a lot of things
happening, there were discussions about different
reporting formats and that kind of stuff, so there
was generally confusion amongst the payers as well
as the payee and all that.
Q. There was confusion at Live365 as to how to
comply?
A. No, no, no. I think there was generally
during that period of time, I think amongst the
different -- different players, I think there was
generally in the marketplace, because there were
changes that was going on, if I could recall this.
Q. But I'm asking if Live365 -- if there was
confusion at Live365 as to how to comply with the
reporting requirements?
A. I don't know if we were confused but I think
we usually are pretty good with this type of stuff.
Q. Okay.
A. By that answer, then, do you mean that if
the allegations in paragraph 3 were true it was
intentional and not an accident?
MR. MacDONALD: Objection, vague,
mischaracterizes the testimony.
THE WITNESS: I did not say that, I did not
say what you just told me. I said generally at that
point in time, I think under the CRB I remember
there were discussions in associations and different
associations and different members about using the
reporting, what was required, what wasn't required
and all that. But I'm -- should I say that I really
don't know, so I should just say, I don't know,
ookay?
BY MR. DeSANCTIS:
Q. Okay.
Paragraph 4 --
A. Uh-hmm.
Q. -- is entitled, Failure to Pay the Minimum
Annual Fee.
A. Uh-hmm.
Q. Why don't you give that paragraph a read and
I'll ask you some questions about it.
(Witness reviews document.)
A. Okay.
Q. Is it true that as of May 28, 2008 Live365
was not paying the required annual minimum fee under
the regulations determined by the copyright royalty
judges?
MR. MacDONALD: Objection, lacks foundation.
BY MR. DeSANCTIS:
Q. I'm asking if that's true. If it's not, you
can tell me it's not.
MR. MacDONALD: Again, it lacks foundation
to the extent he's aware of the minimum annual fee.
BY MR. DeSANCTIS:
Q. You know what an annual minimum fee is,
correct?
A. Yes.
Q. You've had many discussions with
SoundExchange about what that should be?
A. Yes. After -- after the CRB there was a
requirement of -- of $500 per channel or per
station. And that there was an appeal on that that
was subsequently, I think -- I think the appellate
court reversed that part of it.
Q. Okay.
A. It was being appealed at that point in time
and there was a huge outcry in the industry, because
that would put basically almost everybody out of
business.
Q. Do you recall whether in May 28 -- whether
as of May 28, 2008 Live365 was paying the annual
minimum fee set by the CRB?
A. I don't recall. We subsequently also
took into agreement.
Q. Okay.
A. You entered an agreement with SoundExchange?
A. Yes.
Q. Do you recall the terms of that agreement?
A. I think it says we come under the $50,000
per service minimum, okay.
Q. You recall when you entered into that?
A. I don't remember.
Q. Do you recall the -- the duration of that
agreement, for how long did it last?
A. We subsequently also entered into agreement.
Q. Let me put it this way: Is the agreement
still in effect today?
A. I don't remember but I believe so.
Q. Do you have an understanding of when, if
ever, it expires?
A. I don't remember when it expires.
Q. You mentioned that the issue of the minimum
fee was on appeal in the D.C. circuit --
A. Yup.
Q. -- at the time this letter was written.
A. Uh-hmm.
Q. Other aspects of the CRB's decision was also
on appeal, correct?
A. I think the whole decision was appealed.
Q. Is that one of the reasons why Live365 was
not paying SoundExchange under the rate set by the
CRB because the decision was on appeal?
A. Yes, it was one of the reasons.
Q. You know, the -- with respect to everything
other than the minimum fee, the appeal has been --
well, the appeal is over, correct?
A. Correct.
Q. The D.C. circuit has decided?
A. Correct.
Q. And the CRB has affirmed with respect to
everything other than the minimum fee, correct?
MR. MacDONALD: I'm going to object to the
extent it calls for a legal analysis.
THE WITNESS: I believe so.
BY MR. DeSANCTIS:
Q. Did you think -- and I'm -- let's talk about
this period of, say, 2008, you've said that there
were ongoing discussions with SoundExchange.
A. Uh-hmm.
Q. And that that is one of the reasons why
Live365 was not paying at the rates set by the CRB,
correct?
A. Yes.
Q. Were you under the impression at that time
that SoundExchange agreed that if you were under
ongoing -- if you were continuing negotiations, then
you did not need to pay at the rate set by the CRB
or was that only Live365's view?
MR. MacDONALD: Objection, compound, calls
for speculation.
THE WITNESS: As I told you before, we
discuss this with counsel, okay?
MR. DeSANCTIS: Right.
Q. I'm asking if you -- if -- if you ever
discussed it with SoundExchange.
A. Directly?
Q. Right.
A. Not personally I didn't.
Q. So no one -- did anyone at SoundExchange
ever tell you that it was okay not to pay at the
rates set by the CRB --
A. I don't know.
Q. -- as long as there were ongoing
discussions? I'm asking if anyone at SoundExchange
told you personally.
A. Personally I seldomly talk to SoundExchange.
Q. What's that?
A. Personally, I mean, I actually have not
talked to -- I very seldomly talk to SoundExchange,
and these kinds of things are all done through
counsel and other people.
Q. And --
A. So the question is, you know, I don't know.
Q. Well, I'm not asking you to get inside of
SoundExchange's head, so to speak.
A. Uh-hmm.
Q. If you weren't ever -- wait.
I take it from your last answer, if I recall
it correctly, that you were never informed by anyone
at SoundExchange that they thought it was okay for
Live365 not to pay at the rates set by the CRB,
correct?
A. I believe so.
Q. Okay.
A. I believe counsel, during this period of
time, have been in continuous negotiation,
settlement negotiation with SoundExchange, you know.
Q. But did anyone tell you that because of that, SoundExchange was okay with Live365 not paying at the rate set by the CRB?
A. Nobody told me whether it's okay or not okay.
Q. Okay.
A. Or SoundExchange okay.
Q. Let me point you to the second to last paragraph on page 2 of Exhibit 2.
A. Okay.
Q. The whole paragraph is in bold, do you see it?
A. Okay.
Q. It says, "To avoid further liability for noncompliance with the rates and terms set by the CRB, Live365 must immediately submit any and all past due amounts, revised statement of account forms and all past due reports of use as well as all applicable late fees. Please confirm by June 5th that Live365 will promptly comply with these obligations."
Did you ever see -- did Steve Chang, who received this letter, ever show you that language?
A. No, I told you earlier --
Q. Yeah.
A. -- when you show me this letter, that I -- I don't recall ever seeing it.
Q. Did Mr. Chang ever convey to you the substance of that paragraph?
A. I think Mr. Chang talked to counsel, okay, and then I think counsel did talk to me.
Q. Well, were you informed of SoundExchange's demand, that's my question?
MR. MacDONALD: Let me object to the extent it calls for revealing any privileged communications.
THE WITNESS: I mean, there's discussion between me and counsel.
BY MR. DeSANCTIS:
Q. Simply passing on to you SoundExchange's demand for payment. I'm not asking whether counsel advised to pay or not, or how to respond, I'm asking whether anyone conveyed this message of -- of SoundExchange's demand for payment to you and you said this would all be with regard -- this would all be from discussions with counsel, correct?
A. Uh-hmm.
Q. Did counsel convey to you that SoundExchange had demanded payment?
A. I don't remember.
Q. Okay.
A. Yeah.
Q. Has SoundExchange ever conveyed to you that it is no longer interested in negotiating?
A. To me?
Q. Yeah.
A. I don't think so.
Q. Do you know if they have to anyone else at SoundExchange -- at Live365?
A. I don't know.
Q. Do you recall whether SoundExchange has ever conveyed to you, Mr. Lam, that whether or not settlement discussions continued, they want payment now --
A. They --
Q. -- under the CRB rates?
A. I don't remember they have convey to me.
(Lam Exhibit No. 3 was marked for identification.)
MR. DeSANCTIS: Let me show you what's been marked as Exhibit 3.
THE WITNESS: Okay.
MR. DeSANCTIS: While the witness reviews the document, I'll state for the record that this is a two-page letter dated August 20, 2009 on SoundExchange letterhead from Colin Rushing to N. Mark Lam, CEO Live365, Inc., and the re line is third notice of -- of noncompliance: Live365's webcasting service.
Q. Please take whatever time you need, Mr. Lam, to familiarize yourself with the document.
A. Okay.
Q. Do you recall receiving the letter that has been marked as Exhibit 3?
A. Yes, I do.
Q. Did you read it when you received it?
A. I think, yeah, I glance at it and gave it to counsel.
Q. Okay.
You only glanced at it. Did you --
A. I look at it.
Q. Did you read it closely or you did -- you read it or you didn't read it?
MR. MacDONALD: Objection, vague and compound.
THE WITNESS: I read it.
BY MR. DeSANCTIS:
Q. After reading this letter, did Live365 begin paying SoundExchange -- or let me put it this way
because I've think we've already asked and answered
the question.

After receiving this letter, Live365 still
did not begin paying SoundExchange at the webcasting
rates set by the CRB, correct?

A. I don't believe so.

Q. Okay.

Nor did it pay the true-up for '06, '07 and '08 to SoundExchange, correct?

A. No. I don't believe so.

Q. Okay.

A. We still are trying to negotiate a
settlement.

Q. Okay, and because of that, you think Live365
does not have to pay? Or let me put it this way:
Is that why Live365 is not paying, because you
continued to try to negotiate?

A. As I told you before, there are different
players in the industry --

Q. Right.

A. -- through this period that have, you know,
one way or the other negotiate to settle and all
that, right? And then -- so, you know, some of them
have, some of them not, and that kind of stuff.

And we have very earnestly tried to talk to

SoundExchange, discuss with them, and say this is
our rate. I think as late as June or even after
that, we continue to say, look, can we in earnest
sit down and discuss this, okay, and see if we could
come to some sort of a resolution, okay?

Q. And that's for the '06 to '10?

A. Yup.

Q. 2010 period as well as the 2011 to 2015
period or are you just talking about one or the
other?

A. I think we have preferred to -- to be able
to negotiate the whole thing.

Q. Do you recall what the last -- do you recall
what the last settlement offer was that Live365 made
to SoundExchange? Let me rephrase it as, do you
recall when it was?

A. I think counsel may have told me, but I
don't recall exactly when.

Q. Okay.

A. Not too long ago.

Q. Like?

A. Because we had discussions.

Q. Was it in 2010, was it this month in January
2010, was it --

A. Yeah, I think I had this -- I have a couple
discussion with counsel about -- about settlement
this month.

Q. Discussions with counsel at SoundExchange?

A. No, no, no. I never discuss with counsel
directly at SoundExchange.

Q. Okay.

A. Our counsel, yeah.

Q. My question is: Do you know when the last
time was that Live365 or its counsel made a
settlement offer to SoundExchange?

A. I don't, but it's -- I don't.

Q. Do you know whether any such offer was made
since this case was filed in September of '09?

A. I don't know.

Q. Do you know what the terms of the last
settlement that -- that Live365 offered to
SoundExchange were? And there may have been many
terms, let me ask about the -- the rates that
Live365 proposed paying.

Do you recall what the proposed rates were
in Live365's last offer to SoundExchange?

A. Since I'm not sure what the last offer is,
so I'm not sure about what the rate. But over time,
you know, we have made different offers to

SoundExchange.

So I'm not sure I can remember all of them,
but, you know, I don't -- as I told you, I don't --
if I don't really know whether there have been, you
know, an offer made recently, I don't remember,
actually.

Q. Do you remember the rates that -- do you
remember any rates that Live365 has offered
SoundExchange as part of a settlement?

A. Yeah, I think we started with an aggregator
rate.

Q. What rate?

A. I don't remember the particular, but I
think, you know, that -- that counsel actually put
together. I don't know, I don't remember the
particulars.

Q. Do you --

A. Because there are different iterations and
all that, over long period of time.

Q. Do you remember there being a time when
Live365 made a proposal to SoundExchange, I'm
talking about the 2009 period, and SoundExchange
responded to you via e-mail saying, what is the
total that Live365 would pay SoundExchange per year
under your proposal and you gave them an answer, do
you remember that exchange?

A. Yes, that one I do remember.

Q. Do you remember what your answer was?

A. Not exactly.

Q. Does a year sound right to you?

A. I really don't remember, if you could refresh my recollection.

Q. Okay.

A. Yeah.

Q. Do you -- if you don't recall the specifics of that exchange, do you recall ever making it -- a proposal to SoundExchange that would require Live365 to pay more than a year in royalties?

A. You know, I don't really remember the particulars, there are a number -- a lot of numbers I look at every day.

Q. Right.

A. I'm sorry if that's -- yeah.

Q. Do you have any idea whether that the is in the ballpark?

MR. MacDONALD: Objection, vague.

MR. DeSANCTIS: Well, it is.

Q. I'm asking if it sounds right to you or --

A. Like I said, over the period of, you know, some years, there are different offers made back and forth and stuff like that, so I don't really remember, you know. I don't want to run the risk of giving you the wrong number or anybody the wrong impression.

Q. Okay.

A. Let me ask you, and this is hypothetical, if SoundExchange and Live365 never agree on a settlement, will Live365 ever pay SoundExchange what it owes under the web II rates?

MR. MacDONALD: Objection, this inherently calls for speculation.

BY MR. DeSANCTIS:

Q. You can -- you can -- you can answer the question.

A. But you are asking me to speculate. I mean, as I saw -- as I told you earlier, right, counsel and I have been in discussion for some time and then try in good faith try to settle this case.

Q. Okay.

A. But I find it -- I find it surprising that you can't answer the question. Because that suggests to me that your position is that even if no settlement is ever reached, Live365 might not ever pay SoundExchange what it owes under the CRB web II rates, is that true?

Discussion that we -- we do or will not do.

BY MR. DeSANCTIS:

Q. Well, if there's no settlement --

A. Yeah.

Q. -- what possible ground would Live365 have to not pay the rates set by the CRB in web II?

A. As I related to you earlier, okay, we had actually been really trying to get a settlement.

Q. Right.

A. And we have tried very hard to get a settlement.

Q. Right.

A. Okay? And so --

Q. And -- but my question is: If there is no settlement, what ground would Live365 have not to pay SoundExchange at the rate set by the CRB and web II?

MR. MacDONALD: Objection, calls for speculation.

BY MR. DeSANCTIS:

Q. You can answer.

A. I really don't know.

MR. MacDONALD: While there's a pause, I'm just going to make a request that this transcript be designated as restricted under the protective order.
based on a lot of the discussions about settlement, the business decisions surrounding settlement and any settlement negotiations and any proposals made back and forth with SoundExchange. I don't know if you want to get the stipulation on the record now or at some other point.

MR. DeSANCTIS: Sure. What I was actually picturing, although you're right, we didn't actually articulate it at the beginning, was doing the same thing that we've done in prior depositions, which is we'll consider the whole transcript restricted and the parties will aim to exchange designations 14 days after receiving the final transcript. And I don't mean that as a deadline like if you miss that by one day, you've missed your chance. But that's when the parties will aim to exchange designations.

Is that our stipulation?

MR. MacDONALD: That's my understanding of the stipulation, yes.

MR. DeSANCTIS: Okay, great. MR. MacDONALD: Thank you.

MR. DeSANCTIS: Since we're the only two here, I think it's so stipulated.

Actually, you know what? We're not the only two counsel here, do you agree to that stipulation, Mr. Wright?

MR. WRIGHT: I -- I agree, thank you.

MR. DeSANCTIS: Okay. And I hope no offence was taken.

Q. Are you familiar with your rate proposal, with Live365's rate proposal in this case?

A. What rate proposal are you referring to?

Q. I'm sorry, that's a fair question.

A. Somewhat.

Q. Can you define what somewhat means? Can you define what your -- what your involvement was?

A. I mean, the expert -- our expert witness prepared the -- the proposal.

Q. Uh-hmm.

A. So he asked for information, so I instructed my staff to give instruction. And, you know, he has some questions and so I answered some questions, give him an idea of what the business look like. He work mostly with counsel.

Q. Okay.

A. Okay. Was it -- did you personally decide what the requested rate would be?

Q. Who did?

A. Expert witness.

Q. Okay.

Are you aware of the fact that the basic structure of the Live365 rate proposal, and I'm not giving you the detail, but it proposes a particular rate per play --

A. Yeah.

Q. -- and then a percentage discount for aggregators.

A. Yes.

Q. Is that -- is that correct?

A. What's correct?

Q. Is that the basic structure of the Live365 rate proposal, it provides a certain rate, penny rate per stream, and then a percentage discount for aggregators?

A. Correct.
Would that help?
A. Okay. Could you reask the question, then, maybe I'm not hearing it.
Q. It's fine, I don't want you to guess.
A. Yeah.
Q. It just dawned on me maybe it would help if we actually looked at the rate proposal.
A. Okay.
MR. DeSANCTIS: So let me -- let me see if I have that here.
(Lam Exhibit No. 4 was marked for identification.)
MR. DeSANCTIS: While the witness reviews what I've just handed him, I'll state for the record that what's been marked as Lam Exhibit 4 is a three-page document, double-sided, entitled Rate Proposal for Live365, Inc. (Witness reviews document.) And why don't you take a moment to read it closely, actually, so we can talk about it.
Q. Okay -- oh, sorry, don't mean to rush you, take your time.
A. Okay.
Q. What's been marked as Exhibit 4 is Live365's rate submitted to the CRJs in this proceeding, correct?
A. I believe so.
Q. Okay.
And this is the proposal, is it not, that seeks a 20 percent discount for what's referred to as qualified webcast aggregation services, correct?
A. Correct.
Q. Under this definition, the term qualified webcast aggregation services is defined in the proposal, correct, at Paragraph B (1) C?
A. Yes.
Q. Okay.
Under that definition, would Live365 qualify as a qualified webcast aggregation service?
A. Yes.
Q. Are you aware of any other services that would qualify under that definition of -- as a qualified webcast aggregation service?
A. Yes.
Q. Who?
A. I think LoudCity would qualify.
Q. I'm sorry, spell that.
A. LoudCity, H-o-l -- I mean, L-o-u-d-C-i-t-y, SWCast.
Q. Anyone else?
said you don't believe that SHOUTcast is paying royalties to SoundExchange, do you know whether under SHOUTcast's agreement with its webcasters, SHOUTcast is supposed to be paying royalties to SoundExchange on behalf of its webcasters? And I'm only asking if you know, I'm not asking you to speculate.

A. I don't know.

MR. MacDONALD: I'm just going to object to the extent it calls for speculation.

MR. DeSANCTIS: Right.

Q. I'm just asking if you know and your answer is you don't know?

A. My understanding, my understanding is that the Shout-- the webcasters are supposed to be paying their own royalty.

Q. You can put that aside for a minute. And let me direct your attention to -- back to Exhibit 1, which is your written direct testimony, do you still have that?

A. Yup.

Q. Page 8, paragraph 24.

Why don't you read that paragraph and then I'll ask you some questions about it, it continues over to the next page as well.

A. Okay.

Q. Here you explain that BMI -- BMI is a performing rights organization, correct?

A. Yes.

Q. They license music publishing rights; is that correct?

A. Yes, for composition rights, yeah.

Q. And you state in this paragraph that BMI provides Live365 a 20 percent discount, correct?

A. Yeah, approximately 20 percent.

Q. Okay.

And that's by -- by contract or statute?

A. As far as I know it's not by statute.

Q. It's by contract?

A. Yes.

Q. So agreed upon between Live365 and BMI?

A. I believe so.

Q. And you actually attach that contract as an exhibit to your testimony, correct?

A. I believe so, yeah.

Q. Okay.

The next paragraph, 25, it says, "The other PROs (i.e., ASCAP and SESAC) provide even greater discounts to Live365 webcasters for the same reasons."

A. But if I said greater, I mean, chance is they're a high percentage, yeah.

Q. Okay.

If you wanted to find out, if you wanted to go to the contracts themselves, where -- where -- do you know where those are?

A. Yeah, I should be able to locate them.

Q. In Live365's files?

A. I should be able to locate them.

Q. Okay.

A. I mean, unless of course if -- if somehow it's just, as I told you earlier, that we've done it that way, and then there's no specific contract. But, you know, that would be off, you know, what the standard rate.

MR. DeSANCTIS: Okay.

Now, the relationship between Live365 -- well, let me take that back.

Let's go off the record for just a minute.

(Recess.)

(Whereupon, a lunch recess was taken from 12:33 p.m. to 1:30 p.m.)
Q. Okay, anybody else?
A. I think that's it.
Q. I'd like to return your attention to Exhibit 1, which is your written direct testimony.
A. Okay.
Q. Prior to the lunch recess I believe we were looking at paragraph 24, which begins on page 8. How is the royalty that Live365 pays to SESAC set for the use of the SESAC compositions?
MR. MacDONALD: Objection, lack's foundation.
BY MR. DeSANCTIS:
Q. Well, let me put it this way: Live365 pays a royalty to SESAC, correct?
A. Correct.
Q. For musical compositions?
A. Correct.
Q. How is that royalty set? Is it statutory, is it set by the CRB, is it by contract?
MR. MacDONALD: I'm going to object, lacks foundation.
THE WITNESS: I think there's a rate code involved for ASCAP, BMI, and so SESAC, I'm not quite sure.
MR. DeSANCTIS: Okay.
THE WITNESS: But even -- so let me stop it there.

By Mr. DeSANCTIS:
Q. Okay, so as far as you're aware, the rate court sets the rate code to ASCAP and BMI but you're not sure how the rate owed to SESAC is set; is that right?
A. Yeah, as far as there may be some negotiation involved as well.
Q. Has BMI ever complained to Live365 that Live365 is not paying BMI the royalty rate that it should be paying?
A. To my knowledge, no.
Q. Has ASCAP?
A. To my knowledge, no.
Q. Has SESAC?
A. To my knowledge, no.
Q. Let me direct your attention to paragraph 27 of your statement, which is Exhibit 1. Why don't you read that and then I'll ask you some questions about it.
(Witness reviews document.)
A. Go ahead.
Q. The last sentence of that paragraph reads: "Significant risks and uncertainties abound for our nascent industry."
What are the statutory royalty fees that you're referring to there?
A. In this particular instance, we particularly referred to the status change, the royalty rates.
Q. The fees for sound recordings?
A. Sound recordings, correct.
Q. Not the composition fees?
A. Yeah.
Q. And how is it that they're fluctuating?
A. Well, between the first -- between -- between cop- -- copyright arbitration, royalty panel, and CRB rate went up dramatically, as I mentioned earlier, it went up two and a half times. To my knowledge, I've not seen that in -- in other industries.
Q. Okay.
Then how does -- how does a fluctuating statutory rate affect your business, as your -- as you define those -- those terms in paragraph 27?
A. In this list, like in anything else, you want to have certain amount of predictability as to your cost. When you don't know what your cost will be, it makes it virtually -- virtually impossible to plan for the future. It's extremely difficult to run a business that way.
Q. Another risk and uncertainty that you refer to in that sentence is "increasing diversity of media outlets."
What does that mean?
A. I think there are, as told you earlier, you know, first of all, for example, the latest -- the last five years or so, you see new players coming in that basically wouldn't have existed five years before.
Q. New --
A. And different -- different players offering different features, and some of them are crossovers and some of them are things that nobody have ever thought about five years ago and so on and so forth.
Q. When you said new players, do you mean in the webcasting industry?
A. In -- in that industry, so something having to do with providing, you know, music listening, or content listening.
Q. What new players are -- what specific new players in the webcasting industry in the last five years are you referring to?
A. I say players that are related to this industry.
Q. Okay.
competition.

BY MR. DeSANCTIS:

Q. Very formidable competition?
A. Yeah.
Q. Let me turn your attention to paragraph 34, which is on page 11.
A. 34?
Q. Yes, paragraph 34 on page 11.
A. Uh-hmm.
Q. Why don't you read that and I'll ask you some questions about it.
A. Okay.
Q. Okay.

The first sentence is since webcaster II, and by that do you mean the webcasting II rates issued by the --

A. Yup.
Q. -- CRJs in May 2007?
A. Yes.
Q. As I sit here today, I can't actually remember if -- it was May but it was 2007?
A. I think it's March.
Q. Okay, March.
It says, "Since webcaster II, Live365 has witnessed decreased new VIP member acquisition."

What does -- what does that mean, decreased new member VIP acquisitions?
A. Fewer members of paid subscriber listeners.
Q. Does -- do you mean in this sentence to attribute that decrease to the webcaster II rates?
A. Yes.
Q. Why would the -- why would the decrease in new VIP members be attributable to the webcaster II rates?
A. Because overall listening decreased.
Q. Overall listening has decreased since the webcaster II rates?
A. Roughly, yeah, around that time.
Q. Are you referring to listening on Live365 --
A. Correct.
Q. -- or in the industry generally?
A. On Live365.
Q. Do you know if it has decreased in the industry generally?
A. I'm not sure. I mean, over the period of time.
Q. Okay.
So I'm still having difficulty figuring out or understanding why it is that you're attributing the decrease in new VIP member acquisitions to the increased web II rates.

A. Okay, in order for us -- you know, basically have -- offer listening, free listening, you know, anybody could come to our site and listen to -- to the content.
Q. To the free ad-supported content?
A. Yes.
And, you know, just like many other sites, you know, you need enough people to come to the site in order to drive the subscribers.

So as -- you know, we took actions to limit the hours because of the cost of -- because of the -- you know, SoundExchange rate, you know, we also get less VIPs.
Q. Do you know why you get less VIPs?
A. Yes. I mean, it's like a funnel concept, right? On the top you need -- on top of these new listeners or listeners that come to your site and then, you know, you only net a certain small percentage of that. In fact, a very low percentage.
Q. I'm sorry, net a low percentage, you mean --
A. Convert the free listeners to paid listeners.
Q. Okay.
And has that conversion rate decreased since the web II rates were issued?
A. No, I think the rate as -- to my knowledge, I'm not sure because I haven't looked at the stats, the conversion rate has basically stayed about the same or may be due to our effort to optimize, it's gotten slightly better. But I'm not sure about that.
Q. The conversion rate from free to paid subscriber --
A. Yup.
Q. -- has increased?
A. No, I'm saying it -- it probably stay about the same. I don't have the stats in front of me but -- you know, because we take action to try to improve that all the time.
Q. Okay.
A. So it might have done better.
But I don't know. But I think it's very difficult to -- to -- it's very difficult to get people to pay what they're offering free alternatives out there.
Q. Sure.
If there were fewer free alternatives, would more people pay?
MR. MacDONALD: Objection, calls for
speculation.

THE WITNESS: I can't say for sure, but I imagine.

BY MR. DeSANCTIS:
Q. You imagine yes?
A. Yeah.
Q. So if the rate of conversion from free listener to VIP subscriber has stayed the same or roughly the same, does that mean that the rate of new free users has decreased, thus a decrease in VIP subscribers? How can you have a decrease in VIP subscribers if the conversion rate has stayed the same?
MR. MacDONALD: I'm going to object to the extent it calls for speculation, and the question as posed was compound.

BY MR. DeSANCTIS:
Q. Do you understand the question?
A. Could you reask the question again, just so I--
Q. What I'm trying to get at, is you suggested that the conversion rate from free to paid subscriber --
A. Yeah.
Q. -- may have stayed the same.

A. Uh-hmm.
Q. Since the web II rates came out.
A. Uh-hmm.
Q. I'm asking, if the conversion rate has stayed the same, how can it be that there has been a decrease in new VIP member acquisitions?
MR. MacDONALD: Same objections.

BY MR. DeSANCTIS:
Q. Could you reask the question?
A. Uh-hmm.
Q. So people -- so your testimony is that there's been less listening to Live365. Is it correct?
MR. MacDONALD: I'm going to object to the extent it mischaracterizes the prior testimony.

MR. DeSANCTIS: I'm actually -- I'd love the witness to clarify, I'm not trying to characterize it.

THE WITNESS: I think we took actions as we told you earlier, because of the expensive nature of the result, listening, you know -- you know, we have restricted our listening to a certain extent, and that caused the VIP to decrease.

BY MR. DeSANCTIS:
Q. Okay. If you have -- if you have limited or contained ATH, which means you limited or contained hours listened, does that necessarily mean that you have limited or contained the number of unique listeners to the Live365 service?
MR. MacDONALD: Objection, calls for speculation.

MR. DeSANCTIS: Well, I don't want you to speculate.
Q. I'm asking if that is part of your assumption here, that there have been fewer unique listeners to the Live365 service since the web II rates came out?
A. Okay, could you reask the question?
Q. Sure.

Do you know whether there have been fewer unique listeners to the Live365 service since the web II rates came out?
A. I'm not sure. I'm not sure whether we have actually fewer unique listeners.
Q. Then if you're not sure whether there have been fewer unique listeners, and if the conversion rate from listeners to subscribers has remained constant, how is it that the new VIP acquisitions could have decreased?

MR. MacDONALD: Objection, compound, calls for speculation.

THE WITNESS: As people listen less, because we try every way possible to convert them. So when people listen to us, there will be messages that are produced by us, audio and visual to say, you know, become a VIP. So, you know, as they listen, for example, if a person listened for an hour, he may get it a few times, a person listen to it two hours, he will get twice as many messages.

So the more fees, the more the person listen, the more likely they will be converted.

BY MR. DeSANCTIS:
Q. Do you know that somehow or are you assuming that?
A. I'm -- it makes sense, because we -- like I said, that there's a correlation -- correlation between how -- how much they listen and how much we're able to get them to convert.
Q. And -- well, but my question is: Do you have any data supporting that correlation or is that just your assumption?
A. My assumption is that, because we actually,
you know, try to do any way that we could, to monetize our listeners.

Q. But the decrease in ATH, the decrease in listening was the result of intentional measures taken by Live365, right, to --
A. Yes, to a certain extent.
Q. The parking meter and this kind of thing?
A. Yeah.
Q. And those -- those decisions to -- the decision to implement things like the parking meter and other things that decreased ATH were done in order to contain costs while decreasing revenue as little as possible, correct?
A. Correct.
Q. And the same measures could have been taken under the old rates, the .762 rates, before the CRB's web II rates came out, correct?
MR. MACDONALD: Objection, calls for speculation.

BY MR. DESCANZIS:
Q. Well, it's not speculation, I'm saying Live365 could have implemented the same measures, parking and delisting from the iTunes Radio in order to contain royalty costs while having a minimal impact on revenue, it could -- Live365 could have implemented those same measures before the web II rates came out, right?
MR. MACDONALD: Objection, compound, calls for speculation.

THE WITNESS: Yeah, I think you're asking me questions on a hypothetical basis, that's really hard to answer. I mean, we could do any number of things, but unless something triggered, we just don't do things randomly.

MR. DESCANZIS: Right.
Q. But that's not -- that doesn't mean I'm asking you a hypothetical.
Live365 did not implement those measures under the old rates, correct? That's just -- that's not hypothetical, I'm just asking, did they or didn't they?
A. We had -- various times have experiment with different things. But, you know, I think for us, because royalty went up so much, we implemented that to avoid running up costs that would drive us to bankruptcy.
Because those are staggering number, it's not small numbers.
Q. Right.
A. And my question is that -- isn't it true that Live365 did not implement the measures we've been discussing to limit listening prior to the web II rates coming out, that's something Live365 did after the web II rates came out, right?
A. We may have done different things, like I told you, that over time to experiment with different things, but in terms of consciously try to limit listeningship due to the cost of royalty, yes, that was after -- after, you know, the web II came out.
Q. Okay.

MR. DESCANZIS: Okay.

The witness: There was no reason for us to do that, we calculated that in our revenue we'll be able to cover the cost.

But after web II came out, it became so patently obvious to us that, you know, to continue to grow our listeningship at such rate we would really be in the poorhouse.

BY MR. DESCANZIS:
Q. Why wouldn't it have made you more efficient before the web II rates came out, if you could have contained royalty costs by decreasing listeningship without having -- let me rephrase that.
If before the web II rates came out, you could have implemented, say, a parking meter to contain royalty costs and decrease listeningship, wouldn't that have made your business more efficient then?
MR. MACDONALD: Objection, calls for speculation and compound.

THE WITNESS: Let's ask the question one more time.
MR. DESCANZIS: Okay.
Q. I'll try to ask it as crisply as possible.
Let me ask this first: Was there anything?
<table>
<thead>
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<th>1</th>
<th>meter before the web II rates came out? I realize you thought you didn't need to, but I'm asking whether there was anything preventing you from doing it.</th>
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<tr>
<td>2</td>
<td>A. You're asking me to really speculate on hypothetical situations.</td>
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<td>3</td>
<td>Q. No, no, no, no, I'm not.</td>
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<td>4</td>
<td>MR. MacDONALD: I'm going to ask that -- let the witness finish his response, I'm not sure he was done before --</td>
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<td>5</td>
<td>THE WITNESS: Okay.</td>
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<td>6</td>
<td>MR. MacDONALD: -- there was an interjection.</td>
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<td>7</td>
<td>THE WITNESS: We just don't do things randomly, we calculate. You know, I mean, if we could grow our business at a profitable rate, we would be all for it, okay? But the fact that the rate came out and then we did some serious analysis and realized that, you know, we cannot -- I mean, the -- if we try to grow and increase our listenership and all that, we would go to poorhouse, okay? So to answer your question, under the old rate, at some point, I mean, there are -- this is --</td>
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<td>8</td>
<td>that specific question, analyzed by Live365?</td>
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<td>9</td>
<td>A. I don't remember whether we analyzed it or not, okay?</td>
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<td>10</td>
<td>Q. Yup.</td>
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<tr>
<td>11</td>
<td>Before the break we were talking about some of the settlement discussions between Live365 and SoundExchange.</td>
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<td>12</td>
<td>A. Uh-hmm.</td>
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<td>13</td>
<td>Q. And at one point you said that the settlement offers that SoundExchange was making penalized small broadcasters, do you remember that?</td>
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<td>14</td>
<td>A. The what?</td>
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<td>15</td>
<td>Q. You said that the proposals that SoundExchange was making penalized small broadcasters, do you remember stating that?</td>
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<td>16</td>
<td>A. I don't remember I stated specifically that way. But what I -- I believe what I said was that we are being penalized, because before we have thousands of small broadcasters who block us on a platform who are paying basically the highest rate when they rightfully should be -- you know, be, you know, enjoying the small webcaster rate.</td>
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<tr>
<td>17</td>
<td>Q. But the webcasters aren't paying the rate at all, right? I thought Live365 pays the rate?</td>
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<tr>
<td>18</td>
<td>A. Some of them do. Some of them decided to...</td>
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use us just as technology platform and all that, use our tools, use our streaming facilities, use, you know -- so on and so forth.

Q. But then in that event, those webcasters that you just described aren't subject to Live365's rate, are they? They'd be subject to whatever other rate they would be subject to?

MR. MacDONALD: Objection, vague.
BY MR. DeSANCTIS:
Q. I mean, isn't that right?
MR. MacDONALD:Same objection.

THE WITNESS: If I'm understanding correctly, they should be.

BY MR. DeSANCTIS:
Q. They should be what?
A. They should be paying whatever rate that which category they -- they fit under.
Q. Okay.

Not necessarily what Live365 pays?
A. Correct.

Q. So those webcasters aren't penalized or even affected by the rates that Live365 pays to SoundExchange, correct?

MR. MacDONALD: Objection, vague, also calls for speculation.

Q. I mean, those webcasters pay royalties to SoundExchange independently of whatever Live365 pays to SoundExchange, correct?

A. Yes.
Q. Okay.

For other webcasters, Live365 actually pays the royalties to SoundExchange, right?
A. On their behalf, yes.
Q. On their behalf?
A. Yeah.
Q. They do not pay themselves directly, correct?
A. Yes.

Q. Do those webcasters make more or less money, depending on the rate that Live365 pays to SoundExchange?

MR. MacDONALD: Objection, calls for speculation.

THE WITNESS: Yeah, I really don't know if they make -- I never look at their financial statements, so...

BY MR. DeSANCTIS:
Q. I'm asking is there even a relationship there? Is there a relationship between what the rate that Live365 pays to SoundExchange and the amount of money that your webcasters make?

MR. MacDONALD: Objection, this calls for speculation.

MR. DeSANCTIS: No, I'm not asking for speculation.
Q. I'm asking whether there's a relationship?
A. I really don't know. But many of our webcasters, they are tastemakers.
Q. What does that mean?
A. Tastemakers, they really love music, or love certain content.

Q. Tastemakers?
A. Yeah. And they really want to share whatever they have with the world, and some of them are former DJs of clear channels, even very -- you know, they are not necessarily into make money, per se, okay?
Q. Right.

A. So I really don't know whether they make more or less money. Some of them don't care about making money, that's their hobby.
Q. Right.
A. Okay. So really, that question -- you know, the answer to that question is really difficult.

Q. Well, no.
A. And we don't really have access -- I mean, many of them are individuals or individual entities, they're not necessarily, you know, big companies, so we don't have access to their financials and we don't know, we don't talk to them about those.
Q. Okay.
A. Yeah. Thousands of them, you know.
Q. Sure.

So how, if at all, are those webcasters negatively affected if the rate for Live365 goes up?
A. Well, in a very big --

MR. MacDONALD: Objection, calls for speculation.

THE WITNESS: Okay.

BY MR. DeSANCTIS:
Q. Seems like you wanted to answer.
A. Well, let me suggest this, when a cost goes up, somehow to stay in business we necessarily have to ask whoever is use us as a broadcasting platform or whatever, to pay more, okay? It's just -- or charge our VIP more.
Q. Well, the VIPs are users, right, not webcasters?
A. Yeah, yeah.
1 Q. So has Live365 raised the fees that it charges its webcasters?
2 A. Yes.
3 Q. Because of the web II rates?
4 A. Yes.
5 Q. When did it do that?
6 A. I don’t remember exactly when, but after the -- the web II rate.
7 Q. Has Live365 ever communicated to its webcasters that it is not paying SoundExchange at the web II rates?
8 A. I don’t know.
9 Q. Has Live365 ever communicated to its webcasters that one of the reasons that it increased fees to the webcasters is because of the CRB’s web II rates?
10 A. I don’t really know whether we have communicated that either.
11 Q. As far as you know, was there any reason given to the webcasters when Live365 raised its fees?
12 A. I don’t really know whether we did or we didn’t.
13 Q. You don’t know whether any explanation was given?
14 A. Yeah, yeah.
A. Yes, it should be, if I'm not mistaken.

Q. Okay.

And in this table, as the title suggests, Dr. Fratrik allocates a certain percentage of the various costs to the Live365 Internet radio service, correct?

MR. MacDONALD: Objection, lacks foundation, and I'm going to object to the extent it calls for him to speculate.

THE WITNESS: You talk about --

BY MR. DeSANCTIS:

Q. Well, is it correct that -- that in this table Dr. Fratrik has allocated a certain percentage of various costs and revenue to the Live365 Internet radio service as opposed to the broadcast service?

MR. MacDONALD: Objection, calls for speculation, also lacks foundation.

THE WITNESS: It's our expert, right?

BY MR. DeSANCTIS:

Q. Isn't that --

A. -- cost and revenue, I don't see any revenue here.

Q. You see the top several lines?

A. Oh, okay.

Q. Okay.

So -- so is that -- is that what's going on here, in this chart, Dr. Fratrik has allocated a certain percentage of the revenues and the costs to Live365's Internet radio service as opposed to the broadcast service?

MR. MacDONALD: Objection, lacks foundation and it calls for speculation as to what Dr. Fratrik did or did not do.

THE WITNESS: I don't really know the methodology he used to -- to do this.

MR. DeSANCTIS: Okay, but --

THE WITNESS: He's our expert, right?

BY MR. DeSANCTIS:

Q. Yes, but separate and apart from the methodology, you said you reviewed the testimony this morning.

A. Yup.

Q. And I'm just asking, did I accurately describe what's going on in this chart? If you don't know, you don't know, I'm just asking.

MR. MacDONALD: Same objections.
THE WITNESS: Okay, ask the question one more time, let's make sure, I want to answer the question.

BY MR. DESANCTIS:

Q. Is it right that what's going on in this chart is that Dr. Fratrik is allocating various percentages of the revenues and costs to the Live365 Internet radio service as opposed to the broadcast service?

MR. MACDONALD: Objection, calls for speculation as to what Dr. Fratrik did, and there's a lack of foundation.

THE WITNESS: Yeah, I think that's his -- you know, his attempt to do that.

MR. DESANCTIS: Okay.

Q. Were you involved at all in the preparation of this table?

A. Yeah. A little bit.

Q. How so? What was your involvement?

A. My involvement was there were certain questions that were asked of me, you know, so whatever question that he -- we gave him an overview of what the business is, just a really brief overview, and then -- and then, you know, he asked for -- so -- and then he asked certain questions and I answered certain things and then he went ahead and did this, yeah.

Q. Okay.

A. Yeah. A little bit.

Q. Do you see how each item of revenue or cost has its own percentage allocation, correct?

A. Correct.

Q. Some are -- some are in the 90 percent, some are in the 80 percent, some are 100 percent, some are 49 percent.

A. Uh-hmm.

Q. Do you know whether those percentages were provided to Dr. Fratrik from someone at Live365 or whether he derived those himself?

A. I really don't know.

Q. Did you help derive any of them?

A. I don't think I help him derive it in the percentages, in this document.

Q. You see about two-thirds of the way down under cost of sales?

A. Uh-hmm.

Q. Is others?

A. Uh-hmm.

Q. There's 773,858?

A. Uh-hmm.

Q. Do you know what's included in others?

A. I think the --

MR. MACDONALD: Hold on, objection to the extent it calls for speculation.

THE WITNESS: I'm not sure -- surely of all the details, what it includes, but I would imagine it would include -- let me remember what the detail. I don't remember exactly what they are, actually.

MR. DESANCTIS: Okay.

Q. Do you know why they are attributed 100 percent to the Internet radio service as opposed to the broadcast service? I'm just asking if you know.

MR. MACDONALD: Objection to the extent that this calls for speculation, and also, this lacks foundation.

BY MR. DESANCTIS:

Q. You can answer, if you know.

A. No, I don't know exactly why he take that percentage.

Q. Okay.

Q. Is that true for all of the percentages in the table, you don't know why the particular percentages were picked? Or as you review it now, are there any that you do know why the particular percentage was picked?

A. I think he -- I think he tried to the best of his ability to given the information that he gleaned and understood about this business, and work on the percentages. I mean, that's my guess, I didn't work on this, so I don't know.

Q. Okay.

A. To the best of his ability, I'm sure.

Q. Okay.

Q. Would you describe Live365's webcasting service as noninteractive?

MR. MACDONALD: Objection, vague, vague and ambiguous.

THE WITNESS: What do you mean by noninteractive?

MR. DESANCTIS: I know it can mean different things in different context, I didn't mean it to be...
a trick question at all.
Q. Some webcasting services are on demand, and the user can request a particular track to be played to that user’s computers. Other services, the listener can pick a particular station but has no input and no effect of what’s played on that station, it’s just whatever is programmed by the programmer.
A. Uh-hmm.
Q. Okay, that’s what I call noninteractive. Is Live365’s Internet radio service not interactive?
A. According to your definition, it’s not interactive.
Q. Okay.
Is there any definition under which it would be interactive? I’m just -- just based on how you answered the question, I wondered if you were suggesting that if defined differently it might be interactive?
MR. MacDONALD: Objection, vague and ambiguous as to interactive.
THE WITNESS: I don’t think our services could be defined as interactive.
MR. DeSANCTIS: Okay.
Q. So your -- the listener --
A. Yup.
Q. -- cannot request that a particular stream be played to him or her, correct?
A. A particular song, yes.
Q. Yeah.
A. It cannot.
Q. Are you familiar with what many refer to as custom radio?
A. A little bit.
Q. Pandora, you’re familiar with a service called Pandora?
A. Yes.
Q. Is Pandora a service that you would consider to be custom radio?
MR. MacDONALD: Objection, to the term "custom radio," it’s vague.
THE WITNESS: That term, I think over time it’s taken -- I don't know. I understand there’s a case about -- I haven’t read the case, so how that term is -- you know, is used to define, what is and what isn’t, I’m not quite sure, yeah.
BY MR. DeSANCTIS:
Q. Well, separate and apart from the case.
A. Yeah.
Q. I think you’re referring to the LAUNCHcast decision by the Second Circuit?
A. Yup.
Q. Second and apart from that --
A. Yup.
Q. -- I’m just asking under Pandora’s service.
A. Yup.
Q. And I’m not asking what’s interactive or noninteractive under -- as terms of art or anything like that. I’m just saying, isn’t it right that the -- the user of Pandora can influence what songs are streamed to him or her more so than they can using Live365?
MR. MacDONALD: Objection, lacks foundation and calls for speculation.
BY MR. DeSANCTIS:
Q. Well, do you -- are you familiar with the Pandora service?
A. Yes, I haven’t used it for a while.
Q. But you know how it works?
A. Yeah, in general, yeah. I haven’t used it for -- for a long time, I mean, I’ve gone and used it.
Q. Right.
But do you understand that to be a custom radio service?
A. Very much like radio, okay? So the user --
THE WITNESS: That term, I think over time it’s taken -- I don’t know. I understand there’s a case about -- I haven’t read the case, so how that term is -- you know, is used to define, what is and what isn’t, I’m not quite sure, yeah.
BY MR. DeSANCTIS:
Q. How is it more interactive than yours? I’m not using any terms of art here, I’m just asking you to describe the service.
A. I think ours is just passive listening.
Q. Okay.
A. Very much like radio, okay? So the user -- while the user can try to figure out which station have certain songs, but they have no way of predicting when the song will come on, okay? So they may have to wait three hours until the last song on the list, or somewhere in the middle or three-quarters towards the end.
Q. Okay.
A. Okay.
Q. That’s the Live365 service?
A. Yeah, it’s very much like radio.
Q. Okay.

How does the Pandora -- you said Pandora is more interactive, how is it more interactive?

A. I think what happened is the user says I like this -- unless they have changed the services recently.

Q. Sure.

A. And then supposedly they have a computer algorithm that says, if you like this song, you know, there are these other songs that you may also like, okay?

Q. So is it fair to say that what Pandora is offering is a stream that is -- is more tailored to the specific user's preferences?

MR. MacDONALD: I'm going to object to the extent it's vague.

THE WITNESS: Yeah.

I think you sort of asked me to speculate but I say to a certain extent, yes.

MR. DeSANCTIS: Okay.

THE WITNESS: Because, you know, I heard people complain also that it isn't exactly what they want, you know.

BY MR. DeSANCTIS:

Q. Right. I'm not saying it's on demand.

A. Yeah.

Q. But you said it's more interactive than Live365.

A. Yeah.

Q. And I'm just trying to figure out how.

A. Yeah.

Q. And so can you explain how it's more interactive? What -- and I -- I -- I don't mean to be argumentative here at all, just --

A. Yeah.

Q. -- you said the user can indicate preferences and that what it streams to the user is tailored to those preferences, right?

A. Supposedly, according -- I mean, they have an algorithm that's supposed to do that, right?

That's my understanding.

Q. Does Live365 offer a service like that, where streams are somehow tailored to the particular user's preferences?

A. No. Live365 relies on the broadcasters, basically, you know, to -- behind every Live365 broadcasting station is a live human being who put together the play list, okay, to -- to -- so -- so it's different.
MR. DeSANCTIS: Okay.
Q. Are you -- is -- is Live365 still considering the possibility of offering a more customized service, where streams are tailored to individual users' preferences, or is it something -- is that something that Live365 has ruled out?
MR. MacDONALD: Objection, compound.
THE WITNESS: You know -- you know, we look at it competitive landscape. And so we try to pay attention to what's around us, okay?
To answer your question, as long as, you know, we have not, you know -- I think we are not actively saying we are not going to do this or that, you know. There's certain things that -- that, you know, we by necessity of being in this industry, you know, we have to really, you know, entertain different possibilities and all that, okay?

BY MR. DeSANCTIS:
Q. Is it something you would like to offer as a business matter, if possible?
MR. MacDONALD: Objection, calls for speculation.
MR. DeSANCTIS: No, it's not speculation.
Q. It's --
A. It's fairly speculative in a sense, because as I explained to you, it's not just something that we -- we like to do something, it happens. Because it takes a lot of engineering to change certain things.
Q. Right.
A. Okay.
Q. Right.
A. And so it's also depending on what project is competing with, the likelihood of success, and you know, other benefits that we may be able to get from doing certain things.
Q. And all of those remain under consideration?
A. Yeah, I think we consider a lot of things, okay? And then there's only so much resources we have.
Q. Is there a person in charge of analyzing whether Live365 should or should not implement a customized service like we've been discussing?
A. No, there's not just one person. I think we talk amongst management, different people about -- you know, about which project we should undertake or not. And -- and so that's how decisions usually made.
Q. Are you aware of any documents describing the analysis of whether Live365 should or could offer a customized service like we've been discussing?
A. I'm not aware of any documents.
Q. Okay.
You're not aware of any presentations about this subject, written presentations, PowerPoint slides, anything like that?
A. Not to my recollection.
Q. You said there are many -- there would be many people involved in analyzing this, who else would it be?
A. I mean, people in the engineering, because, you know, they would be different directors in engineering, the two of them have to say what does it take, and probably, you know, people in the broadcasting platform side, say what does this mean for the broadcasting business, and people who are in the listening side, the Internet radio side, say what does this mean. I mean, would it do anything for us.
Q. And all of those remain under consideration?
A. Yeah.
Q. So currently do I understand correctly that you know, planning committee, product planning meetings and all that either, okay?
A. Yeah.
Q. -- at Live365, wouldn't you know about it?
MR. MacDONALD: Objection, to the extent it calls for speculation.
THE WITNESS: Generally guys will work something up and then, you know, they will bring it up, you know, when it goes through certain
Q. So Live is actually -- more than seeking clarification, Live is alleging that the CRJs were constituted unconstitutionally, correct?
A. That's our position.
Q. Okay.
A. Is the pendency of that -- and that case has not been resolved yet, right?
A. To the best of my knowledge.
Q. It remains pending?
A. Yup.
Q. Is the pendency of that litigation one of the reasons why Live365 has not been paying SoundExchange at the webcasting rates set by the CRJs in web II?
MR. MacDONALD: Objection, vague, lacks foundation.
THE WITNESS: As I conveyed to you earlier, there are reasons why. I mean, you know, why we have not paid a CRB rates, okay?
I think the principal reason is that, you know, we had really trying to -- really trying to see if we come to a settlement, so we can -- yeah.
MR. DeSANCTIS: Right.
Q. The foundation was set all this morning by your testimony that Live365 has not been paying under the web II rates?
A. We are asking for clarification from the court.
Q. Or maybe it's not one of the reasons, I'm just asking.
A. I think the main reason, right, is the one I told you this morning, okay?
Q. That you want to reach a settlement with SoundExchange?
A. Yeah.
Q. You also mentioned this morning that you felt that -- I don't want to put words in your
1 mouth, I'm not trying to characterize your testimony.
2 A. Sure.
3 Q. You said, I think, that SoundExchange -- you felt you weren't a priority for SoundExchange, that they were negotiating with others and -- and weren't negotiating enough with you; is that right? And again, I don't want to put words in your mouth. If you could just explain.
4 A. We have tried since March '07, first I think we had -- you know, outside counsel who supposedly know SoundExchange people might have know people quite well and say, let's talk about this.
5 And then nothing came to fruition. And then we ourselves, through one of the consultants that we hire, who work at Capital Hill quite a bit, to try advance our position.
6 And basically, you know, in fact, we've gone to the East Coast, not me personally, but I think Johnie or this person had gone and try to talk to SoundExchange and all of that.
7 Yeah, I think I would say that, you know, each time we say could we come to some -- you know, could we really talk about this. It's been, oh, you know, we're busy doing this, let us finish this first before we turn to you.

1 Q. Has any been accepted? There's -- there is no settlement, right?
2 A. Yeah, but -- okay. I mean --
3 Q. So --
4 A. But the thing is that my impression, at least my impression is that, you know, always we'll get to you, we'll get to you.
5 Q. What's that impression based on?
6 A. Because actually, you know, I have the e-mail that you were referring to earlier with me, we had -- you know, outside counsel who supposedly basically, look, my impression is always, we'll get back to you, we're busy with this other bigger fish to fry now, and so...
7 Q. Isn't it also possible that SoundExchange wasn't impressed with any of your proposals?
8 MR. MacDONALD: Objection, calls for speculation.
9 THE WITNESS: I don't know what they're thinking about, but...

1 Q. Have you or anyone at Live365 that you're aware of ever told SoundExchange that Live365 will not pay at the web II rates as long as discussions are ongoing?
2 BY MR. MacDONALD:
3 Q. I'm asking if you have ever told that to SoundExchange.
4 A. I don't believe so.
5 Q. Are you aware of anyone else at Live365 ever telling that to SoundExchange?
6 A. I'm not aware of that.
7 Q. But it is true, correct?
8 MR. MacDONALD: Objection, vague.
9 THE WITNESS: I don't believe that's true, okay?

1 Q. You don't -- how is it not true? Isn't it true that Live365 has not been paying SoundExchange at the web II rates because in its view settlement discussions have been ongoing? I thought that's what you said the reason was.
2 A. Yeah. I mean -- and various, during this last few years, it's not just them, but this -- you know, various settlement proceeding in which we're part of DiMs, right, and then other things that continue to happen.
3 Q. So that -- so it is -- it is true that that is why Live365 has not been paying, but you've
1. never -- you've never conveyed that to
2. SoundExchange; is that right?
3. MR. MacDONALD: Objection, vague.
4. THE WITNESS: What have I not conveyed to
5. SoundExchange?
6. BY MR. DeSANCTIS:
7. Q. I'm sorry?
8. A. That --
9. Q. Well, okay.
10. We saw a couple of letters this morning --
11. A. Yup.
12. Q. -- where SoundExchange demanded payment from
13. Live365 at the web II rates, right?
14. A. Uh-hmm.
15. MR. MacDONALD: I think that
16. mischaracterizes --
17. MR. DeSANCTIS: I'm sorry, at the web II
18. rates, did I just say web III, I apologize.
19. Q. So the question is whether you ever
20. responded to SoundExchange by telling them that you
21. will not pay at the web II rates as long as
22. settlement discussions are ongoing?
23. MR. MacDONALD: Objection, vague as to who
24. "you" is referring to.
25. BY MR. DeSANCTIS:

Q. I'll start --
A. I believe counsel, our counsel had responded
3. to SoundExchange. I don't remember exactly what the
4. content is, but, you know, something to that effect.
5. Q. Something to what effect?
6. A. To maybe, we are -- we are looking forward
to -- you know, to try to see if we could settle and
negotiate a settlement, yeah.
7. Q. And that's why Live365 has not been
8. paying at the web II rates?
10. BY MR. DeSANCTIS:
11. Q. Well, no, that's -- it's actually an
12. important point.
13. There's a difference between your counsel
14. saying to SoundExchange that we want to continue
15. discussions versus we will not pay the web II rates
16. as long as discussions are continuing. I'm
17. wondering if you're aware of the latter ever having
18. been conveyed to SoundExchange?
19. A. I'm not aware of the fact that it was ever
20. conveyed.
21. It was conveyed, okay.
22. MR. DeSANCTIS: Okay.
23. Let me show you another document.

Q. That was analysis done by someone within
2. Live365?
3. A. Yes.
4. Q. Were you involved in that analysis?
5. A. Doing this?
6. Q. Doing any --
7. A. The spreadsheet?
8. Q. Analysis, yeah.
9. A. No, I wasn't involved in doing the
10. spreadsheet.
11. Q. Did you -- were you responsible for
12. commissioning someone to prepare this spreadsheet?
13. A. Not exactly. What happened was after this
14. came down, I think management team had a meeting and
then I think -- and then I believe it might have
15. been Johnie, Johnie Floater, because that's who --
who undertook this task to do that.
16. Q. Okay.
17. In the -- the vertical columns have years at
18. the top --
19. A. Uh-hmm.
20. Q. -- going from 2004 to 2010 projected, do you
21. know how the projections were calculated, what the
assumptions were going into that?
22. MR. MacDONALD: Objection, compound.

Lam Exhibit No. 6 was marked for
identification.
MR. DeSANCTIS: It's marked as Lam
Exhibit 6. Why don't you take a moment to review
it.
For the record, I will state that this is a
one, two, three, four, five-page document, dated
March 15, 2007, it's on 11-by-17 paper, it's on
Live365 stationery, and it is -- the title is
Live365 DSRP Royalty Statements Scenarios.
Q. Have you had a chance to look it over, Mr. Lam?
A. I'm not finished.
This one has a lot of detail.
Q. It does, and I won't ask you specific
questions without pointing you to something
specific, but let me just ask you this first, have
you ever seen this before? Perhaps not this size,
it's blown up so that it's more easily read, but
have you ever seen this before?
A. Yeah, I believe I've seen this before.
Q. What is it?
A. I think at one point in time there was some
analysis that was done to try to see what the new
rate, how it would impact our business.
THE WITNESS: No, I don't really know what the assumptions were.

MR. DeSANCTIS: Okay.

MR. MacDONALD: I just want to state something on the record, I can't quite tell if this is a document that's been produced or not, to SoundExchange. It doesn't have -- it doesn't bear a Bates number, as far as I can tell. It may have been produced as a native format, and I was under the assumption that documents produced in a native format would bear the restricted designation. And I don't see any restricted designations here, so I would like this document to be treated as restricted under the protective order.

MR. DeSANCTIS: I have no objection to that whatsoever.

MR. MacDONALD: Okay.

MR. DeSANCTIS: I affirmatively concur in that unless and until such time as you dedesignate, that's fine.

MR. MacDONALD: Thank you.

BY MR. DeSANCTIS:
Q. Mr. Lam, on page 1 is -- well, strike that. I don't have this document. Why don't we all write restricted on the bottom right now, if we haven't already.
I'm going to take a Post-it and put the Post-it on the original.

(Lam Exhibit No. 7 was marked for identification.)

Q. I'm showing you now, Mr. Lam, what has been marked as Exhibit 7. If you could take a look at this and I'll state for the record that this is a one-page document, bearing the Bates label LIVE 971, and the title -- this does bear the restricted designation, by the way, and the title is Live365: Five-Year Financial Historical Trend and Comparison.

Do you recognize this as an accurate representation of Live365's financials?

MR. MacDONALD: Objection, vague as to which financials.

MR. DeSANCTIS: Well, let me ask this way:
Q. Do you know what Exhibit 7 is, Mr. Lam?
A. Yes.
Q. What is it?
A. I believe this is a financial -- a financial statement that shows from October '04 to June '09.
Q. Do you review financial -- financials such as this in the regular course of your business?
A. Yes.
Q. At the very top -- well, first of all, the first column of numbers is fiscal year 2005, do you see that?
A. First column?
Q. First column of numbers.
A. Yes.
Q. That's October '04 through September '05?
A. Yup.
Q. That's Live's fiscal year?
A. Uh-hmm.
Q. The last column is October '08 through only June '09. So that means this is not the full fiscal year of '09 on this document, correct?
A. Correct.
Q. Okay.

But those -- and this as you can see, this document was prepared September 15, 2009. I understand that the numbers for the full fiscal year '09 are now available; is that correct?
A. Correct.
Q. Have you looked at the numbers for the full fiscal year 2009?
A. Yes, I have looked at some numbers for fiscal year '09.
Q. At the -- the top line is ATH total, do you see that?
A. Uh-hmm.
Q. Then it has a line for growth percentage.
A. Uh-hmm.
Q. And the next line says ATH royalty bearing, and the next says performances royalty bearing.
A. Uh-hmm.
Q. What does ATH royalty bearing mean?
A. ATH is advocate tuning hours, as we discussed this morning. Royalty bearing is, you know, the ATH, that should bear the SoundExchange warranty.
Q. So some -- some ATH doesn't bear royalty?
A. No.
Q. And some does?
A. Uh-hmm.
Q. How do you account for situations where part of an hour might bear royalties and part of an hour might bear royalties?

MR. MacDONALD: Objection, vague, ambiguous, lacks foundation.

BY MR. DeSANCTIS:
Q. In other words -- well, really my question...
is: Do you know how this figure is calculated, the royalty bearing ATH as opposed to nonroyalty bearing ATH?

Q. How?

A. Yeah, I have a rough idea.

Q. Do you know whether this is the numbers we're looking at here, are US only or global or something else?

A. I think we're talking about US only.

Q. This is US only?

A. Yeah. I could be wrong, but I think it's US only.

Q. Okay.

A. I don't have any more questions on this document right now, I may get back to it later.

Q. Okay.

A. Yes.

Q. Performances (royalty bearing) line calculated?

A. Correct.

Q. Okay, I understand. Thank you.

Q. So the ATH royalty bearing is only the ATH of those webcasters for whom Live365 pays the royalties?

A. Correct.

Q. Okay, I understand. Thank you.

A. Yes.

Q. What is performances (royalty bearing)?

A. Within each advocate tuning hour there are 14, 15 songs, so the amount multiplied by factor, I don't know exactly what the factor use here, but I think it's between 14 and 15.

Q. I see.

A. Song.

Q. Performances and individual tracks streamed to an individual listener, one stream?

A. Supposedly, there's -- okay.

Q. Okay.

Q. So is this -- this physical count of the streams contained in the ATH royalty bearing line or is it sort of rough calculation, to take the ATH and multiply it by a certain number?

A. Could you repeat the question?

Q. Do you --

A. No, I don't -- one more time, I mean --

Q. Let me ask it this way: How is the performances (royalty bearing) line calculated?

A. I think we actually had the database, a data warehouse that tracks all the songs.

Q. So it's an actual count of actual performances?

A. I believe so.

Q. Okay.

A. Okay.

Q. And again, is that only -- does this only include performances of webcasters for whom Live365 pays the royalties?

A. Yes.
that's attached to this e-mail?

A. Actually, I don't. In fact, on this e-mail, I may recognize it, but I don't really remember the content. First of all, because of time, second of all, Jason -- I'm sure I probably have seen this before, but Jason would shoot us an e-mail from time to time about his views of, you know, what we need to do and all that. And because he's not inside the company, sometimes, you know, he's pretty far removed about what we can and cannot do or the constraints we have. You heard about consultants?

Q. Yes.

Is this something, do you recall, and I'm talking about the e-mail and the PowerPoint presentation, is this something that Mr. Dedrick compiled on his own initiative or was he asked to do so by someone at Live365, if you know?

MR. MacDONALD: Objection to the extent it calls for speculation.

THE WITNESS: I -- I don't remember exactly what it was. But this could have been after strategic meeting that we had.

BY MR. DeSANCTIS:

Q. Do you recall the strategic meeting where... was discussed?

A. You know, I think in various strategic meeting various things were discussed. And advisors such as Jason sometimes would raise things that, oh, we need to do this, we ought to do this, we ought to do that, and present their view. You know, they come to the meeting with their view of what the world should be, not exactly what our reality is.

Q. Right.

A. Okay.

Q. Right.

A. I mean, if I could do all these, I'd be happily do it, okay?

Q. Are you aware of Live365 having any meetings...

MR. DeSANCTIS: I don't have anything more on that document.

(Lam Exhibit No. 9 was marked for identification.)

MR. DeSANCTIS: I'll show you what's been marked as Exhibit 9. You'll probably want to write restricted on that, Mr. MacDonald.

Q. Are you given it every month, you may or may not look at it, is that how it works?

A. Yeah, I think every month we generate the updated balance sheet.

Q. Do you know the most recent one generated?

A. Probably December -- December '09.

Q. About how long after the close of the month is the balance sheet generated?

A. Probably by somewhere in the middle of the month.

Q. Okay.

A. Usually within 15 days.

Q. And do you receive these in hard copy like this or do you receive them electronically?

A. The accountant usually does this.

Q. The accountant prepares them?

A. Yeah, prepares them.

Q. Uh-hmm.

I was asking if you received them in hard copy or if you receive it electronically?

A. I'm trying to think.

Q. Okay, sorry.

A. Sometimes she doesn't send it to me, you know, sometimes when I ask for it -- I really don't look at this every month.
Q. Okay.  
A. Because there's very little change from month-to-month.  
Q. Okay.  
A. Yeah. You know, from an operations standpoint, yeah.  
Q. I'm sorry, from an operations standpoint?  
A. There's relatively little change.  
Q. I see.  
A. Yeah.  
Q. But when you do receive it, do you recall whether you receive them in hard copy or electronically?  
A. I think she would send me -- if she remembers to do this, send me them in soft copy.  
Q. Like attached to an e-mail?  
A. Yeah, something like that.  
MR. DeSANCTIS: Put that aside.  
(Lam Exhibit No. 10 was marked for identification.)  
BY MR. DeSANCTIS:  
Q. I'm showing you now, Mr. Lam, what has been marked as Lam No. 10. Take a moment to review it again, just sort of briefly, and if I'll point you to specific language if I'm going to ask specific questions.  
A. Sure.  
Q. In the meantime, I'll state for the record that this is a multi-page document, bearing the Bates label LIVE 8358 through 8364. This one is single-sided, it bears the heading Management Discussion and Analysis September 2009.  
A. Uh-hmm.  
Q. Do you recognize this, Mr. Lam?  
A. Yes, I do.  
Q. What is it?  
A. It's a monthly management discussion and analysis that I try to compile.  
Q. That was going to be my next question. Did you -- did you compile this?  
A. No. Usually different people give different inputs to accounting, and accounting, you know, put together the numbers, and then -- and then I would have final review and -- and -- of this.  
Q. I see.  
A. Sometimes when we're really, really busy, for example, last year at the end of the year, you know, we didn't get to compile this until three months afterwards.  
Q. Okay.
Q. BVI stands for what?
A. British Virgin Islands.
Q. That's where those businesses are incorporated?
A. Correct.
MR. DeSANCTIS: Let me show you, Mr. Lam, what's been marked as Exhibit 11.
(Lam Exhibit No. 11 was marked for identification.)
BY MR. DeSANCTIS:
Q. I apologize that on a number of these I don't have enough copies, but...
Same here, Mr. Lam, there's a lot of numbers on this exhibit, I'm not asking you to know them all, but if you'd just take a look to familiarize yourself with the document.
I'll state for the record that this is a multi-page document, bearing the Bates range LIVE 1068 through LIVE 1091.
Mr. Lam, do you know what this is?
A. I think this is a set of document that accounting -- let me -- dispatch -- I haven't had a chance to take a look at the whole thing.
Q. Okay, why don't you take a chance to look through it.
A. This actually contains various financial statements -- financial internal, I think financial and operations statements or metrics. I mean, it's --
Q. Are these statements that are --
A. Some of them that I don't actually even come across.
Q. Okay.
A. Yeah. I think this is for accounting, some of them are marketing, metrics.
Q. Do you recognize them as Live365's numbers as compared to some other company? Is this a Live365 document?
A. This should be, but some of them I have never seen.
Q. Okay.
Let me turn your attention to the fourth page, which is Bates numbered LIVE 1071.
A. Uh-hmm.
Q. Are these -- is this a set of data that you are familiar with? It's entitled Revenue Trend.
A. Yes, somewhat, yeah.
Q. On the left, the third line down is unique listeners by month in whole numbers, not in millions?
A. Uh-hmm. (Nods head up and down.)
MR. DeSANCTIS: Okay. I don't have any more questions on that for now.
(Lam Exhibit No. 12 was marked for identification.)
BY MR. DeSANCTIS:
Q. I'll show you, Mr. Lam, what's been marked as Lam Exhibit 12. Ask you to look it over to familiarize yourself with it generally.
And I'll state for the record that this is a multi-page document, bearing the Bates range LIVE 4200 through 4208, and it -- the cover page bears the title VIP Membership Review and Forecast. It's dated October 10, 2008.
Do you recognize this document, Mr. Lam?
A. It's strange, I don't remember this document. I don't remember having seen this document.
Q. Okay.
Do you remember seeing other VIP membership review and forecasts?
A. Yeah. I think previously, you know, the people who were in charge, just in charge of...
certain -- certain departments, they put together some stuff. And -- okay.

Q. Okay.

On the front page, under the title there's a box, do you see that box?

A. Uh-hmm.

Q. At the top it says "Monty Ma"?

A. Uh-hmm.

Q. Is that the author of this document?

A. Yes.

MR. MacDONALD: Objection, calls for speculation.

THE WITNESS: Yes, I believe so.

MR. DeSANCTIS: Is it, okay.

Q. Who is Monty Ma?

A. He was previously the VIP person in charge of the VIP.

Q. You said previously, he is not -- is he not now?

A. Yes, he left the company the end of last year, I mean, the end of 2008.

Q. Do you know if he's currently employed?

A. Yes.

Q. With whom?

A. I don't know.

Q. Who is in that position now?

A. Amy.

Q. Last name?

A. Jou, J-o-u.

Q. J-o-u?

A. Yeah.

Q. Under the name Monty Ma it says FY '09 Q1, presumably that's fiscal year '09, first quarter, strategy meeting, Live365, Inc.

Is -- is there a quarterly strategy meeting at Live365?

A. Yes. We used to have one, but, you know, once in a while we'll miss one or so. But during the past year, I think this may have been our last strategic meeting.

Q. The one that was on October 10, 2008?

A. Yeah.

Q. So you've gone more than a year without having one?

A. If I don't remember incorrectly.

Q. I'm sorry, what?

A. If I don't remember incorrectly, I believe so.

Q. Did you attend the meetings when they did occur?

A. Yeah. I usually attend the meeting, but sometimes I'm in and out of the meeting, that's why maybe I don't have impression.

Q. Were there typically handouts given out at the quarterly strategic meetings when they were held?

A. Yeah, typically by some managers, but not in every instance.

Q. Right.

A. Yeah.

Q. So is it the case that various managers -- managers of various departments would present forecasts at these strategy meetings?

A. Typically by some managers, but not in every instance.

Q. The one that was on October 10, 2008? Let me put it this way: Do you know why there hasn't been a meeting since October 2008?

A. I think we are really, really shorthanded and, you know, we have been having strategic meeting for four or five years, okay? We found that oftentimes we could talk about a lot of this stuff, but we were not able to execute it, whatever we were trying to do.

So -- and that's one reason, and it's also because we were really overwhelmed with different things, and I think -- I don't know exactly the reason why, you know, but that's, you know -- I think those are all contributing factors.

MR. DeSANCTIS: Okay.

(Lam Exhibit No. 13 was marked for identification.)

MR. DeSANCTIS: I'm going to mark this next exhibit, Lam No. 13. And I'm really going to apologize on this one, this is the only copy. I've got one for myself and this original. Obviously we
can make some more copies at the break, it's a

document we looked at yesterday with Mr. Floater, so

it shouldn't be new to you.

Q. Mr. Lam, why don't you look over this
document.

And I'll state for the record that this is a
multi-page document with the Bates range 4210
through LIVE 4219. The first page bears the heading
Financial Review, Company Meeting, October 10, 2008,
Melody Hu, H-u.

Do you recognize this document, Mr. Lam?

A. Yeah, it's financial put together probably
by Ms. Hu. I don't have specific recollection, but
looking at the format, I believe it's prepared by
Melody.

Q. Do you recall this company meeting,
October 10, 2008?

A. We typically have a monthly meeting around
the first full week of

the month.

Q. And is a financial review presented at all
of those?

A. Yes.

Q. Usually it's just the -- what we did the
previous month and then what we -- you know, the
month before and the previous month.

Q. This one seems to have more in it than that.

A. Yeah.

Q. Some slides show --

A. Yeah.

Q. -- quarters or two quarters. Was that
common?

MR. MacDONALD: Objection, vague.

THE WITNESS: Can you repeat that question?

BY MR. DeSANCTIS:

Q. Was it common that -- that -- that at some
corporate meetings you would not only discuss the
prior month but the prior quarter or two quarters?

MR. MacDONALD: Same objection.

THE WITNESS: This is a typical.

MR. DeSANCTIS: Okay.

Q. Let me turn your attention to the page
numbered LIVE 4214. This is entitled Financial '08
Second Half Year Review --

A. Uh-hmm.

Q. -- actual versus forecast.

A. Uh-hmm.

Q. So the first line, for example, is total
cost.

A. Uh-hmm.

Q. On the right is a column entitled Forecast.

Q. Do you know when the forecast was made? I'm
assuming, am I right, that what's in that column are
forecasts for the second half of financial '08 that
presumably were made at some point prior to time,
correct?

A. Yeah, I think so previously, but I can't
tell you exactly when.

Q. You don't know how -- how far back
projections --

A. It should have been the previous year but
sometimes they're late.

Q. I see.

And then the next column over to the left is
actual?

A. Correct.

Q. So that is -- those are the numbers -- not
the forecast, but the actual results of the second
half of fiscal year '08?

A. Correct.

Q. What is EBITA, E-B-I-T-A?

A. Earnings before interest, tax and
amortization.

Q. And here the forecast was and the
actual was . Do you know why the actual

EBITA was so much higher than the forecast?

MR. MacDONALD: I'm going to object to the
extent it calls for speculation.

THE WITNESS: I think if you notice --
actually, we -- this is -- when did this occur?
October '08.

MR. DeSANCTIS: Right.

Q. If we were reading this correctly, these are
numbers for the first half of fiscal '08 on this
page, 4214.

A. No, it's the second half.

Q. I'm sorry, second half of fiscal '08, you're
right, so the projection for the second half of
physical year '08 EBITA was but the actual
was . And I'm asking, if you know, why the
actual was so much higher than the forecast?

A. I think we consciously tried to suppress
cost and expense as much as possible. I think even
back then I had the sense that the economy's going
to turn really bad, so we -- first of all, we -- for
some reason we have wanted to recruit more people,
but, you know, we haven't been able to bring them
in. And then we did whatever we could try to try to
contain our costs as much as possible. And I think
that's the reason why.
Q. Okay.
If you -- if you turn the page, this slide, which is page LIVE 4215 is entitled FY 2008 Financial Overview, original versus revised versus actual. And it has three columns of numbers: One is original forecast, one is revised forecast, one is actual. Do you -- these actual numbers are for fiscal year 2008; is that correct?
A. Uh-hmm.
Q. So that would have closed in September of '08?
A. September 30th, yeah.
Q. Okay.
Do you know when the original forecast for the fiscal year '08 numbers was made?
A. The previous year, probably.
Q. October of the previous year?
A. Yeah, October, that time frame.
Q. How about the revised forecast, do you know when the revised forecast was made?
A. I don't remember.
Q. Is it typical that there are revised forecasts in the middle of the year?
A. I don't remember.
Q. When there are revisions, is it at a particular time of the year, say, the midpoint or the six months?
A. Not necessarily.
Q. Okay.
A. Not necessarily.
Q. And do you remember when these particular revisions were made to the fiscal year 2008 forecast?
A. No, I don't remember.
MR. DeSANCTIS: I don't have any further questions on that document. Could we take a short break?
MR. MacDONALD: Absolutely.
(RECESS.)
BY MR. DeSANCTIS:
Q. Mr. Lam, I've seen in some of the Live365 documents that have been produced references to PRO stations and CB stations?
A. Uh-hmm.
Q. What does that mean? What does PRO station stand for?
A. Pro stations.
Q. Pro as in professional?
A. Yeah.
Q. What does that mean in this context of Live365?
A. We use the term kind of loosely, meaning the more professional type of stations. We -- the broadcasting stations we have, we basically in our mind group them into two, you know, like colleges, churches, businesses, those are generally considered professional stations, and the CBs are generally the hobbyists or the smaller stations.
Q. I see.
I assume it's not always a clear line which is which?
A. Yeah. I mean, there's different pricing and, you know, some of them are not very big, they sign up as pros and they're willing to pay more, so...
Q. Is there a pro package and a CB package that you offer to webcasters?
A. Yeah.
Q. That's sort of how you know which is which, it's up to the webcaster to pick one or the other?
A. Correct.
Q. I see.
So you're saying typically a certain profiled webcaster tends to pick the pro package and a certain profiled webcaster tends to pick the CB package?
A. Correct.
Q. Are these -- the type of packages that are available, what's offered in each, how much each is, is that stuff -- is that information available on the Live website?
A. Yes.
MR. DeSANCTIS: Let me show you what's been marked as Exhibit 14.
(Lam Exhibit No. 14 was marked for identification.)
BY MR. DeSANCTIS:
Q. I'll ask you to take a general look at it to familiarize yourself with it.
In the meantime, I'll state for the record that this is a multipage, double-sided document, bearing the Bates LIVE 9297 through 9371. This is...
as it was produced by Live and it does not contain a
restricted label.

The title is Net Music Radio 2007 through
2010: Listening hour analysis by site and brand.
And in the middle of the first page it says
AccuStream I media research.
Mr. Lam, do you know generally what this is?
A. Yeah, I knew about AccuStream.
Q. What's AccuStream?
A. I think it's -- it's a media research
company, it measures various -- measures, you know,
various players in the industry.
Q. How often does Live365 receive data from
AccuStream?
A. I really don't know, I'm embarrassed to tell
you that.
Q. That's okay, don't be embarrassed.
Have you ever seen this document before?
A. I actually have not read this document.
Q. Okay.
A. Are these AccuStream reports things that
Live365 relies on or in any other way uses in their
business?
MR. MacDONALD: Objection, vague.
MR. DeSANCTIS: Admittedly, I'm asking a
broad question and we can -- we can get more
specific.
Q. But is -- are they used in any way in -- in
the business?
A. I don't know whether we rely on this report,
per se, or not.
Q. Do you know whether you rely on other
AccuStream data?
A. I think we one way or the other probably
came across the data. Like I told you, I'm little
bit embarrassed to say that I don't know whether we
actually bought the reports or not, I think these
are not free, and so...
Q. Oh, these are purchased by Live365 from
AccuStream?
A. I don't think these are free, I'm saying --
ookay.
Q. Okay.
A. I mean, these type of reports, typically you
have to pay.
Q. I see.
You pay per report or is it like a
subscription?
A. I don't really know, yeah.
Q. Okay.
Q. Was there other reasons?
A. Not right off the top of my head, because royalty was a really serious issue for us.
Q. But Live365 was always in the business of maximizing its revenue, correct?
A. Trying to, anyhow.
Q. Yeah.
A. Yeah, we always try to maximize our revenue.
Q. Right.
A. Without equivocation.
Q. So is it true that you would not have done any of the measures presented here on Exhibit 15 if you thought that they would have had a net effect of decreasing revenue?
MR. MacDONALD: Objection, calls for speculation, it's vague.
THE WITNESS: Could you reask the question?
MR. DeSANCTIS: Sure.
Q. And revenue might not be quite the right word here, let's put it this way, if you think of profit as revenue minus cost.
A. Yup.
Q. Very basic definition.
A. Uh-hmm.
Q. Was it -- did Live365 in each of these measures think that the measures would reduce profit or were they intended to increase profit while containing cost?
MR. MacDONALD: I'm going to object, it's still -- it's still --
BY MR. DeSANCTIS:
Q. Well, do you see the difference?
MR. MacDONALD: Hold on. Still vague as to profit, and the question's still compound.
MR. DeSANCTIS: Okay.
THE WITNESS: How do you define profit?
BY MR. DeSANCTIS:
Q. Let's just define profit in the very basic sense as --
A. EBITA?
Q. Okay, I was going to say revenue minus cost, just in a very, very basic sense.
A. Okay.
Q. Revenue minus cost.
A. That's before depreciation, interest, tax and all that?
Q. Yes.
A. So basically gross profit?
Q. Yes, okay.
A. Okay.

Q. I don't think the answers will change if we make it EBITA, but you can tell me if they do.

You said, if I remember correctly, that each of the measures on this exhibit, deposition Exhibit 15, was taken for the purpose of reducing or at least containing royalty costs, right?

A. Yes, I believe I said that, yeah.

Q. Okay.

Did you also think that any of these measures would decrease profits or was the hope with each of them that they would contain costs while maximizing profit?

MR. MacDONALD: Objection, calls for speculation and it's a bit on the compound side.

THE WITNESS: Let's try to make it very simple.

MR. DeSANCTIS: Okay.

THE WITNESS: Really simple, straightforward, okay?

MR. DeSANCTIS: Okay, I will try.

THE WITNESS: I want to answer your question but by the time I get to the answer it's okay, what do you want.

BY MR. DeSANCTIS:

Q. Let's look at one in particular, okay?

A. Uh-hmm.

Q. The -- in April '07, maybe it's March, April, there's a dot on the exhibit.

A. Maybe February.

Q. Maybe February, there's a dot that says set listening limits, parking meter (2), do you see that?

A. Yup.

Q. So when Live365 set the listening limits that this is referring to, it was for the express purpose of reducing ATH, correct?

MR. MacDONALD: Objection, vague.

MR. DeSANCTIS: I thought that's what we were talking about all day.

Q. Is that not right?

A. Yeah. I think when we did that, our intent was to make sure that -- because revenue was -- was so much higher than before -- I mean, not revenue, the royalty costs were so much higher than before, you know, we really need to be cognizant of that, because that is one of our biggest costs, okay?

Q. Right.

A. So the way it jumped, I mean, we necessarily have to look at that very carefully, yeah.

Q. Right.

And so the -- the reason that Live365 set the limits referred to here in the exhibit was to reduce ATH, correct? Wasn't that the purpose of the limit?

A. Yes.

Q. And by reducing ATH, the goal was to reduce or at least contain royalty costs, correct?

A. Yes, contain the costs.

Q. Okay.

Did you also intend for the setting of the listening limits to reduce revenue?

A. No. I mean, the intent is maximize the revenue as long and as much as we could.

Q. So the intent of this measure that we've been discussing --

A. Yeah.

Q. -- setting limits in the spring of '07 --

A. Yup.

Q. -- was to reduce or contain royalty costs --

A. Yup.

Q. -- while not reducing revenue; is that correct?

A. I think.

Q. Or preserving revenue?

A. We also did other things to try to increase revenue.

Q. Oh, sure, I didn't mean to say this was exclusive.

A. Yeah.

Q. But that was the concept behind this measure?

A. In this particular case, I think we did some calculation, the costs, the costs was far greater than any incremental revenue that we could generate.

Q. Okay.

And does that same analysis go for each of the measures described on this deposition Exhibit 15, in the sense that these measures were intended to decrease or contain royalty costs while maintaining revenues as high as possible?

MR. MacDONALD: Objection vague.

THE WITNESS: In everything we do, right, in business what you try to do, any reasonable, rational business person is to try to make -- I mean, to increase revenue and decrease costs, and I believe everything we did, we tried to do is with a view toward that.

MR. DeSANCTIS: Okay. Thank you. I get it.

THE WITNESS: Yeah.
(Lam Exhibit No. 16 was marked for identification.)

MR. DeSANCTIS: Let me show you what's being marked as Exhibit 16.

I'll state for the record that this is a one-page document entitled Live365: Historical US Internet Radio Network Revenue.

Q. Do you recognize this, Mr. Lam?

A. I don't really -- I don't believe -- I'm not sure that I've seen this before. But that looks like it's something that's produced by our accounting department.

Q. Okay.

A. Yeah.

Q. But you're not sure whether you've ever seen this document before?

A. I probably did.

Q. Probably, do you recall when?

A. No.

Q. No?

A. Like I say, I see a lot of financials, I see a lot of documents.

Q. Right.

A. So I don't -- I can't tell you when I saw it.

Q. Okay.

A.Yeah.

Q. But it's in the format that we prepare a report, so this -- unless I'm mistaken, this was generated by -- by our accounting department, yeah.

Q. But you don't recall ever seeing this particular document before?

A. Yeah. I mean, the numbers look -- look right, you know, so I don't have any reason to believe that --

Q. Right. But the question is: Do you recall seeing this particular document before?

Q. Okay.

A. Yeah.

I'm so overloaded, that sometimes I really don't have time to look over the financial, per se. I did not say this wasn't produced by them. I mean, I told you earlier that this looked like the format which, you know, it's probably -- it's produced by them.

Q. Okay.

A. But I just don't recall this particular document, per se, that, you know, I have looked at it before. I may well have looked at it, you know.

Q. Okay.

A. If you want to ask questions, you could try to the extent I can answer, I will try to answer.

MR. DeSANCTIS: Yeah. I was just sort of trying to decide whether that was worth it or not, if you don't actually remember reviewing this particular document.

Okay, let me show you a different document, then.

(Lam Exhibit No. 17 was marked for identification.)

BY MR. DeSANCTIS:

Q. This is a one-page document bearing the title Live365: Historical Operating Income Statement.
does not pay the royalties, correct?

A. Uh-hmm.

Q. Do you know what the rough breakdown is there, what percentage Live365 pays for versus what percentage they don't, very roughly?

A. No. I told you earlier, I don't really have that number in my head.

Q. Okay.

A. I mean, you know, if I have, I would give it to you happily, okay?

Q. okay.

A. I just don't want to give you a number and that's off base.

Q. Do you know whether Live365 advertises on channels both for which Live365 pays royalties and for ones that Live365 does not pay the royalties?

MR. MacDONALD: Objection, compound.

THE WITNESS: What do you mean by advertise, what do you mean by --

MR. DeSANCTIS: Let's put it this way:

Q. Live365 sells advertising space on the channels it broadcasts, correct? Isn't that what Mr. Floater does for a living?

A. Yeah.

Q. Okay.

A. Yes.

Q. Do you recall you were asked questions about Exhibits 16 and 17 to your deposition?

A. Yes.

Q. And the court reporter has just handed you --

MR. DeSANCTIS: Wait, let me get those exhibits in front of me. 15 and 16 you said?

MR. MacDONALD: 16 and 17.

MR. DeSANCTIS: Okay.

THE WITNESS: Okay.

BY MR. MacDONALD:

Q. Does Exhibit 4 resemble Exhibit 16 to your deposition?

A. It's identical.
MR. DeSANCTIS: Objection, the two documents speak for themselves, but okay.

THE WITNESS: It's identical.

BY MR. MacDONALD:

Q. Turning to Exhibit 5 of the Lam written direct testimony, does Lam Exhibit 5 to the written direct testimony resemble Lam Exhibit 17 to your deposition?

A. They are identical.

Q. Does this refresh your recollection as to whether you have seen Exhibits 16 and 17 to your deposition before?

A. Yes, I've seen them.

I -- when I said I wasn't sure, because there's a lot of numbers, you know, I wasn't sure, you know, I mean, looking at the documents, because I see a lot of documents. So -- but anyhow, they are identical to my exhibits.

Q. To the best of your knowledge, do the numbers reflected in Lam deposition Exhibit 16 and 17:

A. Yup.

Q. -- represent true and correct numbers with respect to Live365's business?

A. Yes.

Q. Do you have any reason to dispute the authenticity of the information presented in Lam deposition Exhibit 16 and 17 of your deposition?

A. No.

MR. MacDONALD: I have no further questions.

MR. DeSANCTIS: Do I get to retake him, then?

MR. MacDONALD: Go ahead.

THE WITNESS: If you want to.

MR. DeSANCTIS: No further questions.

(Whereupon, the deposition adjourned at 4:54 p.m.)

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


N. MARK LAM

REPORTER'S CERTIFICATE

I hereby certify that the witness in the foregoing deposition, N. MARK LAM, was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth, in the within-entitled cause; that said deposition was taken at the time and place herein named; that the deposition is a true record of the witness' testimony as reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer.

I further certify that I am not interested in the outcome of the said action, nor connected with, nor related to any of the parties in said action, nor to their respective counsel.

IN WITNESS WHEREOF, I have hereunto set my hand February 8, 2010.

LUCY CARRILLO-GRUBBS, RPR
CSR No. 6766
STATE OF CALIFORNIA
ERRATA

I wish to make the following changes, for the following reasons:

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WITNESS'S SIGNATURE DATE
ERRATA

I wish to make the following changes, for the following reasons:

PAGE LINE | CHANGE | REASON
-----------|--------|-------
137 13     | Change "fees" to "free listeners" | Typographic error
149 20     | Change "use" to "using" | Typographic error
152 2      | Change "block" to "broadcasting" | Typographic error
190 21     | Change "advocate" to "aggregate" | Typographic error
222 13     | Change "hillage" to "usage" | Typographic error

WITNESS' SIGNATURE: N. Mark Lam
DATE: 3/9/10
March 9, 2010

VIA USPS & EMAIL

William Alvarez
David Feldman Worldwide, Inc. Production
450 7th Avenue, Suite 2803
New York, NY 10123

Re: N. Mark Lam’s Errata

Mr. Alvarez:

Please find attached N. Mark Lam’s Errata with respect to his January 28, 2010 deposition. Absent any objections, we ask that Mr. Lam’s official deposition be changed to reflect the proposed changes. Thank you for your assistance in this matter.

Sincerely,

Abraham J. Yacobian

cc: Jared Freedman, Jenner & Block LLP (via email only)
    Chad Breckinridge, Wiltshire & Grannis LLP (via email only)

Attachment
Live365's Professional Broadcasting Services

And You Are...?

- Company or business
- (FM/AM) radio station
- Sports team
- Internet only broadcaster
- Faith based
- Musical artist or label
- Educational institution

Live365's Professional Broadcasting Services (PRO) enables you or your company to broadcast audio easily and affordably via the Internet. Live365's PRO services are scalable, which makes them perfect for the large and small broadcaster alike. Use our award winning services to broadcast your audio content live, archived, on-demand, or just relay your existing Internet broadcast via our network.

Live365 clients use our PRO services to broadcast all kinds of audio, including music, lectures, sermons, news, training, educational information, sports, speeches, meetings, events or good old fashioned self promotion.

Live365 offers full royalty/licensing coverage for SoundExchange, ASCAP, BMI and SESAC. In addition, Live365's PRO broadcasting services will allow you to broadcast without any Live365 advertising in or on your broadcast.

You won't need to buy extra bandwidth, pay expensive server-licensing fees, or outsource your audio broadcast to expensive vendors.

Visit the PRO Frequently Asked Questions for more info.

Live365's PRO services are perfect if you are a

- Company or business
- (FM/AM) radio station
- Sports team
- Internet only broadcaster
- Faith based broadcaster
- Musical artist or label
- Educational institution

Reach Your Listeners

"We tried out more than a half dozen companies to handle our live streaming audio before we found Live365 - and, they haven't given us a reason to switch in the four years we've been a customer. Their impressive reliability and customer support not to mention great pricing -- has allowed us to think creatively about adding more audio side channels to super serve our listeners. I highly recommend them to other broadcasters without any reservations."

Patricia Monteith, General Manager (WUMB Folk Radio Network)


SX Trial Ex. 4/24/2010
1. Why should I broadcast with Live365? Live365 has many advantages. Our site attracts 4 million plus listeners every month, and being listed in our directory provides exposure in and of itself. Also, our expanding distribution network includes TiVo, Philips Streamium, D-Link, Windows Media Player, Windows Media Center, iTunes, and others. On the technical side, our service is flexible in its delivery. It is an end to end solution with broadcasting software, bandwidth, tracking, reporting, licensing, customization, and support. Basically, Live365 is a one stop shop.

2. How much computer knowledge do I need to be a professional broadcaster? Broadcasters should have working knowledge of Windows or OSX. Additionally, it is helpful to have a basic understanding of MP3 files.

3. What kind of hardware do I need to broadcast?

Minimum requirements

PC: 300MHz or faster processor and a sound-card that supports your desired broadcast source (i.e. Microphone, Line-In, etc).

MAC: G3 or faster processor and a sound-card that supports your desired broadcast source (i.e. Microphone, Line-In, etc).

4. What is "up to 64k," "up to 96k," "up to 128k" and how does it affect my broadcast? These are all bitrates available to broadcast in. The higher the bitrate, the better the quality of the audio. We call 64k "FM Quality," with 128k being "CD Quality" and 96k falling between the two. To reach dial-up listeners, you would select an "up to 64k" package and stream at 32k or lower.

5. What is TLH and SL? TLH is Total Listening Hours. This is the number of collective hours that people listen to your station. If one person tunes into your station for one hour, that's 1 TLH. If two people tune into your station for one hour each, that's 2 TLH, and so on. Keep in mind, these are listening hours, not broadcast hours. TLH is calculated to the nearest minute. SL is simply the number of simultaneous listeners tuned into your station.

6. Can I broadcast live? Yes, provided that you have a high speed internet connection (DSL, Cable, etc). We recommend that the upload speed be double your broadcast bitrate.

7. Why do I need storage space? Storage space is used for uploading MP3s for basic mode (playlist based) broadcasting.

8. Does Live365 run ads on my station? As a professional broadcaster Live365 will not run any advertising in your broadcast. If a listener launches your broadcast from the Live365 directory they will still receive any pre-roll or graphic ads. No audio ads are inserted into a professional broadcast.

9. How is this different than satellite radio? Live365 is available anywhere there is an internet connection. Satellite radio is available only with subscription, proprietary hardware, and where a signal to the satellite can be established.

10. How can I generate revenue from my broadcast? Most broadcasters use the advertising/sponsorship model to drive revenue. We provide the back end for your business, how you generate revenue is entirely up to you. Live365 does not require any percentage of your ad revenue.

Here are some ideas:

- Re-sell your broadcast hours to other content providers. Provide an e-commerce link to your website/store from the player interface. Create a subscription model associated with your broadcast.
- Live365 does have a couple built in revenue generating opportunities.
available, including:

- VIP Listenership: for every VIP that tunes into your station, you receive a small portion of the profit of their membership based on how much they listen to your station. It’s not much, but it adds up if you attract a large VIP audience.
- Bounties: Live365 has banner ads available for your website. For every person that clicks the ad, and then signs up for a VIP account, you get a $1.50 one time award.

11. What ad rates or sponsorship rates should I charge? You are free to charge whatever your market will bear.

12. How do I insert ads into my broadcast and on to my player window? You can insert audio ads just as any MP3. As for the player window, if you have the HTML or Flash knowledge you can build your own that features any advertising you want.

13. How do I acquire listeners? First, Live365 lists your station in our directory, which gives our over 4 million unique listeners access to your station. You can also be included in our distribution network which can place you on devices such as TiVo, D-Link, Windows Media Player 10, Windows Media Center, iTunes, Squeezebox, Palm, Terra.com, Planetatv.com, Philips Streamium, etc. For additional tips, you can visit your broadcast home page here: http://www.live365.com/broadcast/promote.live (must be logged in to access)

14. Does Live365 censor its stations? Live365 does not generally censor its stations. There is no FCC governance over internet radio. You can broadcast explicit content, but it is recommended you label your station as such. For complete details on broadcasting rules, you can read our Terms of Use (http://www.live365.com/info/terms.html).

15. What is the DMCA and what legal guidelines does it lay down for internet broadcasts? The Digital Millennium Copyright Act ("DMCA") was passed by Congress and details the rules regarding Internet broadcasts that are eligible for compulsory licenses.

There is an excellent section on the wiki devoted to this: http://wiki.live365.com/pmwiki.php?n=Broadcasting.DMCA

16. Can exceptions to the DMCA be made? Yes. If you own the rights to all material contained in your broadcast, or have permission from the copyright holder(s), it may be possible to exempt you from the Live365 DMCA filter.

17. Do I have to use the Live365 Player Window? No. Our service is available for launching in iTunes, WinAmp, Real Player, Windows Media Player, and just about any MP3 player. Also, you can integrate our service directly into your website via your own custom player.

18. Can I launch the station directly from my website? YES! As a Pro Broadcaster, you do have this ability. See below for examples.

19. Can I customize my player window? Yes, certainly. There are a number of options. The first is our standard player window, which is available in a number of colors and can display your logo and custom text information. We do provide templates for custom HTML, Flash, and desktop players. But their implementation is entirely up to your web designer.

Pop-Up Player launch:

[Image]

Embedded Website Player:


4/24/2010
20. Can I use Flash as part of my player interface? Yes. You may use our flash template or design your own to link to your broadcast. [See above]

21. Can I launch my station from other websites as a pop up window? Yes. As a pro broadcaster you have this option. Keep in mind that if the content is copyrighted, any website launching the audio will need to have their own proper licensing in place.

22. What other digital devices pick up my station? There are a wide variety of consumer level devices that connect to Live365 stations. These devices include stand alone internet radio boxes, home based media centers, and mobile devices. PocketTunes allows for the Palm Treo to connect, D-Link Products, Philips Streamium, Roku Soundbridge, TiVo, and other wireless enabled devices can connect at home. More are being added all the time!

23. Do I have to be listed in the Live365 directory? No, your station can be de-listed upon request.

24. Do I need to store my audio on your servers? No. If you wish to host your own audio content you can use our Live mode broadcasting to deliver the audio to your Live365 server. Only in Basic Mode do you need to store audio on our servers.

25. Can I do a live call in show with Live365 software? Yes, although Live365 does not provide all the software needed for calling in. However, programs such as SKYPE [http://www.skype.com] can allow you to use your computer as a phone that people will be able to call into. This software combined with Live365 allows you to run a talk show with the ability to call in. There are also professional hardware solutions that allow you to digitize your phone line and run the audio into your broadcast computer or mixer. Check out [http://www.isojuice.com] for more information.

26. How do I create a Podcast on Demand audio station? For broadcasters who own the rights to all the content they plan on broadcasting, Live365 offers on demand services, where in listeners can go to your station page or website and select audio segments managed by you to listen to. This is a great option for podcasters who want immediate streaming of their content in addition to a more traditional podcast.

27. Can I move to a different Pro package after I sign up? Yes, upgrades are available at any time. Should you desire more TLH for an expanding fan base or more storage space for a bigger playlist, we can accommodate either or both. Contact your sales rep or customer support for details.

28. Do you have discounts for purchasing more than 1 broadcast package at a time? Yes, please contact us! [http://www.live365.com/pro/contact.html]

29. Can licensing cover more than 1 broadcast? Yes. Our ASCAP/BMI/SESAC, which accounts for $48/month of the Royalty Included rates, licenses a URL. All stations launched off of the same URL can be covered under one license.

30. What's the difference between Basic and Live mode? In Basic mode you upload MP3s to our server, create playlists, and schedule them to be aired. This does not require a constant connection to our servers. Live mode is where, through a
constant connection to our servers, you stream audio in real time, and as such have real time control over the how
In respect of current legislation and laws enacted to protect copyrighted/licensed audio on the Internet, Live365 is proud to offer two pricing plans based on the type of audio you are considering broadcasting on your Internet radio station. Please be aware that this legislation and these laws are for any Internet audio broadcast whether you use Live365 or some other method. Live365 is committed to being at the forefront of these issues. We are proud to be the only company offering the options below.

If you are planning on playing any amount of copyrighted/licensed material that you do not own the rights to, or do not have expressed written consent from the copyright and/or license holder, we would like to offer these Royalty Included Professional Broadcasting options that will ensure your Internet broadcast is covered for any United States royalty and licensing fees from SoundExchange, ASCAP, BMI and SESAC. If you are either planning on broadcasting non-copyrighted material (such as a talk show) or you will be licensing yourself directly with the royalty agencies mentioned above, Live365 is pleased to offer these Standard Professional Broadcasting Packages.

If you have any questions as to which package you should select, please feel free to Contact Us.

"Royalty Included" Listening Hours-Based Rates - (Explanation)

<table>
<thead>
<tr>
<th>Package</th>
<th>Intro</th>
<th>Small</th>
<th>Medium</th>
<th>Large</th>
<th>Deluxe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Setup Fee</td>
<td>$199</td>
<td>$199</td>
<td>$199</td>
<td>$199</td>
<td>$199</td>
</tr>
<tr>
<td>Monthly Listening Hours</td>
<td>500</td>
<td>1,000</td>
<td>2,500</td>
<td>5,000</td>
<td>15,000</td>
</tr>
<tr>
<td>Monthly Fee (Up to 64k)</td>
<td>$107</td>
<td>$147</td>
<td>$217</td>
<td>$297</td>
<td>$507</td>
</tr>
<tr>
<td>Monthly Fee (Up to 96k)</td>
<td>$136.50</td>
<td>$196.50</td>
<td>$301.50</td>
<td>$421.50</td>
<td>$736.50</td>
</tr>
<tr>
<td>Monthly Fee (Up to 128k)</td>
<td>$166</td>
<td>$246</td>
<td>$386</td>
<td>$546</td>
<td>$966</td>
</tr>
<tr>
<td>Storage Space*</td>
<td>100 MB</td>
<td>200 MB</td>
<td>300 MB</td>
<td>400 MB</td>
<td>600 MB</td>
</tr>
</tbody>
</table>

"Additional Services"

| Cost Per Additional Hour*** | (Up to 64k) | $0.052 | $0.042 | $0.032 | $0.022 | $0.020 |
| Cost Per Additional Hour*** | (Up to 96k) | $0.078 | $0.063 | $0.048 | $0.033 | $0.030 |
| Cost Per Additional Hour*** | (Up to 128k)| $0.104 | $0.084 | $0.064 | $0.044 | $0.040 |

| Additional Storage Space  | $5 per 100 MB | $5 per 100 MB | $5 per 100 MB | $5 per 100 MB | $5 per 100 MB |

BSW PRO Hardware

mp3PRO Broadcasting

Advanced Station Statistics

Station Listing on Live365.com

Custom Player Window

Subscription Service

Customer Support

http://www.live365.com/pro/pricing.html

4/24/2010
**Setup Fee:** $199 for all packages.

* Disk space is only necessary for archived or on-demand broadcasting.

** SoundExchange, ASCAP, BMI and SESAC fees covered. Certain broadcaster limits apply to ASCAP, BMI and SESAC fees. Please ask Live365 representative for details.

*** Once your 'Monthly Listening Hours' have been reached you will automatically be charged for any additional hours based on the 'Cost Per Additional Hour' rates above.

- **Printable "Royalty Included" Rate Card (pdf)**
- **Printable PRQ Broadcast Agreement (pdf)**

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### "Standard" Listener-Based Rates - (Explanation)

<table>
<thead>
<tr>
<th>Package</th>
<th>Intro SL</th>
<th>Small SL</th>
<th>Medium SL</th>
<th>Large SL</th>
<th>Deluxe SL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Simultaneous Listeners (SL)</td>
<td>25</td>
<td>50</td>
<td>100</td>
<td>300</td>
<td>500</td>
</tr>
<tr>
<td>Setup Fee</td>
<td>$199</td>
<td>$199</td>
<td>$199</td>
<td>$999</td>
<td>$999</td>
</tr>
<tr>
<td>Monthly Fee (Up to 64k)</td>
<td>$75</td>
<td>$125</td>
<td>$200</td>
<td>$600</td>
<td>$750</td>
</tr>
<tr>
<td>Monthly Fee (Up to 96k)</td>
<td>$100</td>
<td>$175</td>
<td>$300</td>
<td>$900</td>
<td>$1,500</td>
</tr>
<tr>
<td>Monthly Fee (Up to 128k)</td>
<td>$125.50</td>
<td>$212.50</td>
<td>$400</td>
<td>$1,200</td>
<td>$2,000</td>
</tr>
<tr>
<td>Storage Space*</td>
<td>100 MB</td>
<td>200 MB</td>
<td>300 MB</td>
<td>400 MB</td>
<td>600 MB</td>
</tr>
<tr>
<td><strong>Additional Services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Additional 25 SL's (Up to 64k)</td>
<td>$50</td>
<td>$50</td>
<td>$50</td>
<td>$50</td>
<td></td>
</tr>
<tr>
<td>Additional 25 SL's (Up to 96k)</td>
<td>$75</td>
<td>$75</td>
<td>$75</td>
<td>$75</td>
<td></td>
</tr>
<tr>
<td>Additional 25 SL's (Up to 128k)</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
<td>$100</td>
<td></td>
</tr>
<tr>
<td>Additional Storage Space</td>
<td>$5 per 100 MB</td>
<td>$5 per 100 MB</td>
<td>$5 per 100 MB</td>
<td>$5 per 100 MB</td>
<td>$5 per 100 MB</td>
</tr>
<tr>
<td>mp3PRO Broadcasting</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Advanced Station Statistics</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Station Listing on Live365.com</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Subscription Service</td>
<td>Available Upon Request</td>
<td>Available Upon Request</td>
<td>Available Upon Request</td>
<td>Available Upon Request</td>
<td>Available Upon Request</td>
</tr>
<tr>
<td>Customer Support</td>
<td>Email Only</td>
<td>Email Only</td>
<td>Email &amp; Phone</td>
<td>Email &amp; Phone</td>
<td>Email &amp; Phone</td>
</tr>
</tbody>
</table>

**Setup Fee:** $199 for all packages.

* Disk space is only necessary for archived or on-demand broadcasting.

** This Rate Card is only applicable for broadcasts either playing non-copyrighted/licensed material or for those broadcasters who either wholly own the copyright/license to the broadcasted audio or have expressed written consent that can be furnished to Live365.

Pre-payment Discounts: Pay for 12 months, get the 13th for free

- **Printable "Standard" Rate Card (pdf)**
- **Printable PRQ Broadcast Agreement (pdf)**

### Optional Features (additional cost, contact us for details):

- Custom Colors
- Additional Listeners
- Additional Disk Space
- Single or Short-Term Events

Interested in a custom package or discounts for multiple broadcasts? Write to us!

### Ready to Get Started? 

---

[Links to Home, Solutions, Technology, Royalties, Syndication, Pricing, Company, Contact Us, Support]

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http://www.live365.com/pro/pricing.html

4/24/2010
Select a Personal Broadcasting Package

Upload your favorite music, broadcast your content - *It's Your Radio Station!*

- Reach millions of Live365 listeners: website, iPhone, iPod, Sony, Blackberry, Windows Mobile, and more!
- Hosting included or broadcast LiveRelay from your own system!
- **Free music library tracks**
- **FREE 7-Day Trial on select packages (P1, P2, P3, P4)**
- Unlimited VIP listening slots on all packages. Up to 128k audio quality on all packages
- Live365 pays all royalties (SoundExchange, BMI, ASCAP, and SESAC)
- **Revenue Share!** Earn bonuses for each new VIP and share of VIP listening revenue

**Who package is right for me?**

<table>
<thead>
<tr>
<th>Package</th>
<th>Price</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1</td>
<td>$5.95</td>
<td>BUY</td>
</tr>
<tr>
<td>P2</td>
<td>$9.95</td>
<td>BUY</td>
</tr>
<tr>
<td>P3</td>
<td>$19.95</td>
<td>BUY</td>
</tr>
<tr>
<td>P4</td>
<td>$29.95</td>
<td>BUY</td>
</tr>
<tr>
<td>P5</td>
<td>$39.95</td>
<td>BUY</td>
</tr>
<tr>
<td>P6</td>
<td>$59.95</td>
<td>BUY</td>
</tr>
<tr>
<td>P7</td>
<td>$99.95</td>
<td>BUY</td>
</tr>
</tbody>
</table>

*Basic Listeners when your playlist and tracks reside on Live365's servers. Live Listeners when your station is being streamed from your own computer and served by Live365.*

https://store.live365.com/orders/orderform.live

SX Trial Ex. 15

4/24/2010
### Compare Broadcasting Packages

**Upgrade any time!**

- **Royalties Paid by Live365**: Provided
- **Revenue Share**: Provided
- **Disk Space**:
  - 200 MB (7 hour playlist)
  - 300 MB (10 hour playlist)
  - 400 MB (14 hour playlist)
  - 700 MB (20 hour playlist)
  - 1,000 MB (22 hour playlist)
  - 3,000 MB (104 hour playlist)
  - 6,000 MB (232 hour playlist)
- **Max. Listening Hours per Month**:
  - 2,233 (unlimited VIPs)
  - 7,440 (unlimited VIPs)
  - 14,880 (unlimited VIPs)
  - 29,760 (unlimited VIPs)
  - 41,640 (unlimited VIPs)
  - 59,520 (unlimited VIPs)
  - 74,400 (unlimited VIPs)
- **Max. Simultaneous Listeners (SL)**:
  - Basic Listeners: 3 SL, 10 SL, 20 SL, 40 SL, 60 SL, 80 SL, 100 SL
- **Audio Quality**: Up to 128kb, Up to 128kb, Up to 128kb, Up to 128kb, Up to 128kb, Up to 128kb
- **Price**: 1 yr. starting at $5.95, 1 yr. starting at $9.95, 1 yr. starting at $19.95, 1 yr. starting at $29.95, 1 yr. starting at $39.95, 1 yr. starting at $59.95, 1 yr. starting at $99.95

*Disk space is only necessary for archived broadcasting, there are no playlist duration limits on live broadcasts.*

**How Broadcasting Works** | **How to Broadcast** | **Give Broadcasting** | **Send a Live365 Gift Certificate**

You can upgrade your package at any time by returning and selecting a different package. We do not offer refunds on prepaid services. See our cancellation policy for more info.

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This exhibit is Restricted (under the Protective Order) in its entirety and is therefore omitted from this public version of the exhibits binder.
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This exhibit is Restricted (under the Protective Order) in its entirety and is therefore omitted from this public version of the exhibits binder.
Company Meeting

November 7, 2008
The Numbers

standard month to month review
7 year overview
Pages LIVE 012872-12875 are Restricted (under the Protective Order) in their entirety and are therefore omitted from this public version of the exhibits binder.
WHAT'S GOING ON?

• PRODUCT DEVELOPMENT

  Weekly Monday morning status review
  Project Tracking Worksheet
  PPC Committee: Proposals, Review, Approval & Prioritization

• MARKETING ACTIVITY

  Team Driven Projects
  Project Tracking Worksheet
  MBD Committee: Proposals, Review, Approval & Prioritization
Happy Birthday!!

Lawrence A
Kevin
Hubert
Svetlana
Tony
John G
Company Meeting

December 11, 2009
The Numbers
Pages LIVE 013019-013020 are Restricted (under the Protective Order) in their entirety and are therefore omitted from this public version of the exhibits binder.
Legal Update

- Constitutional Law Challenge
  
  Redacted

- CRB – Discovery Upcoming
  
  Redacted
Page LIVE 013023 is Restricted (under the Protective Order) in its entirety and is therefore omitted from this public version of the exhibits binder.
Investors Representative’s visit

- Investors’ representative, Mr. Ho, will be here the week of November 30

- Meetings will be scheduled for various managers
Live365 Christmas Party

12/12/2009 Saturday 3-6PM
Hornblower Cruises, Pier 3
(next to the Ferry Building)

- Hors d'oeuvres, Desserts, Wine and Drinks will be served at the party
- $10 parking fee at the Hornblower Cruises parking lot
- Please attend the party if you've already RSVP
Happy Birthday!!

Melody
Walter
Adam
Thank You

LIVE365.COM
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

JANUSZ ORDOVER

Professor of Economics
and former Director of the Masters in Economics Program at New York University

Witness for SoundExchange, Inc.
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

JANUSZ ORDOVER

Professor of Economics
and former Director of the Masters in Economics Program at New York University

June 2010
I. **Introduction and Qualifications**

1. My name is Janusz A. Ordover. I am Professor of Economics and former Director of the Masters in Economics Program at New York University, where I have taught since 1973. During 1991-92, I served as Deputy Assistant Attorney General for Economics at the Antitrust Division of the United States Department of Justice. As the chief economist for the Antitrust Division, I was responsible for formulating and implementing the economic aspects of antitrust policy and enforcement of the United States, including co-drafting the 1992 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines. I also had ultimate responsibility for all of the economic analyses conducted by the Department of Justice in connection with its antitrust investigations and litigation.

2. My areas of specialization include industrial organization economics, particularly antitrust and regulatory economics. I served on the Board of Editors of *Antitrust Report* and as an advisor on antitrust, regulatory, and intellectual property issues to many organizations, including the American Bar Association, the World Bank, the Organization for Economic Cooperation and Development (OECD), the Inter-American Development Bank, and the governments of Poland, Hungary, Russia, the Czech Republic, Australia, and other countries. I have provided economic testimony in policy hearings conducted by the Federal Trade Commission and the United States Senate.

3. Finally, I have on numerous occasions served as a consulting or testifying expert in matters involving the music, and other content, industries. In this regard, I previously served as an expert economist for SoundExchange in its proceeding with

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\[1\] A copy of my *curriculum vitae* and a list of recent testimony are attached as Appendix One.
the satellite radio operators, and for Sony and BMG in connection with their recorded music joint venture. I also testified on behalf of Universal Music in support of the company’s petition to adjust the royalty rate for mechanical rights in the European Union, and in connection with the FTC’s investigation of the Three Tenors joint venture. I have conducted several analyses of issues relating to the distribution and pricing of content in the cable television industry, and have written and testified in many proceedings dealing with pricing of access to telecommunications networks. Finally, I served as an economic consultant to the Commission on New Technological Uses of Copyrighted Works (CONTU) with respect to the pricing of copyrighted materials.

II. Assignment and Overview of Testimony

A. Assignment

4. I have been asked by SoundExchange, through its counsel, to assess from an economic perspective the opinions and analyses put forward by Dr. Mark Fratrik, the economic expert for Live365. My review of Dr. Fratrik’s testimony focused principally on two areas: (i) his proposed methodology for developing a schedule of royalty rates over the period 2011-2015 for the compulsory license covering digital audio transmission of sound recordings by statutory webcasters; and (ii) his conclusion that the rates negotiated between SoundExchange and the NAB do not fall within the range of rates consistent with the willing buyer/willing seller standard that guides the Copyright Royalty Judges’ (the “Judges”) determination in this matter.

B. Summary of Conclusions

5. Based on my review and consideration of Dr. Fratrik’s testimony, I have reached the following key conclusions.

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2 In the Matter of Determination Of Rates And Terms For Preexisting Subscription Services And Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA (“SDARS Proceeding”).
6. To begin with, the methodology Dr. Fratrik employs to develop his recommended rates is severely flawed in several respects.

a. First, Dr. Fratrik’s framework is premised on his assertion that Live365 is a representative (or typical) webcaster. This assertion is implausible. The webcasting industry is highly diverse, especially with respect to the business models employed by webcasters. Given this diversity in business models, Dr. Fratrik’s assumption that Live365 is somehow typical is unsupported and untenable, particularly because Live365’s business model integrates webcasting and broadcasting services in a manner that is, to my knowledge, unusual if not unique. There is no reason to think that Live365’s operating costs and subscription revenues, as well as the percentage breakdown in Live365’s revenues between advertising and subscription, can serve as reasonable proxies for webcasters more generally.

b. Second, Dr. Fratrik’s framework seeks to determine a rate for digital performance rights that is calibrated in such a way as to permit a webcaster to earn a minimum expected operating margin of 20%. I see no sound economic principle guiding the willing buyer/willing seller construct that is consistent with such an approach. Dr. Fratrik’s selection of a minimum expected margin of 20% is based on margins earned by terrestrial radio broadcasters, who operate in a market with higher fixed capital and other costs and therefore do not provide a useful benchmark from which to determine a reasonable operating margin.

7. My second key conclusion is that the voluntarily negotiated licensing deals between SoundExchange and the National Association of Broadcasters (and Sirius-

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XM) should inform the Judges’ determination of a rate schedule for other webcasters who are parties to the 2011-2015 Webcasting Proceeding. Dr. Fratrik asserts that the Judges should not consider, without substantial adjustment, the voluntary agreement between SoundExchange and the NAB governing the rates and terms for simulcasts of terrestrial radio signals (the “NAB Agreement”). However, he fails to support his criticisms of the NAB Agreement with sound economic analysis. Indeed, his criticisms are inconsistent with standard economic theory. As I demonstrate later in this report, the rates from the NAB agreement are highly probative of rates consistent with the statutory standard.

a. Dr. Fratrik asserts that the NAB Agreement provides little useful information because the broadcasters who are the beneficiaries of that Agreement have a lower cost structure than commercial webcasters such as Live365. Even if that is true – an issue on which I do not opine – it does not matter because SoundExchange cannot directly control the magnitude of listener consumption at each of the services, i.e., SoundExchange cannot take measures to limit listening at services that pay a low rate. Consequently, SoundExchange would be unlikely to agree to rates below those in the NAB Agreement. In other words, while SoundExchange can agree to different rates across webcasters, it cannot control the consumption of music on the various webcasting services. Thus, a relatively low rate offered to one webcaster, insofar as that rate makes the webcaster a more effective competitor in the marketplace, can shift demand away from webcasters who are paying higher rates, quite likely leading to a reduction in total royalty payments collected by SoundExchange from statutory webcasters.

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6 Fratrik Corrected & Amended Testimony at pp. 40-44.
b. Dr. Fratrik also suggests that the parties' desire to avoid the costs of litigation, and the fact that the buyers obtained a limited performance complement waiver from each of the four major record companies, may have had an impact on the ultimately negotiated rate. In my opinion it is not likely that such considerations lowered the negotiated rates. This is so because the parties likely both wished to avoid the costs of litigation, and the performance complement waivers provided benefits to both the buyers and the record companies.
d. In addition, the statutory standard, as interpreted by the Judges, raises a second theoretical issue because the NAB Agreement involved on the seller side the record companies negotiating under the auspices of SoundExchange. The statutory standard, on the other hand, contemplates on the seller side the individual record companies each separately licensing its own catalog of sound recordings.9 In the circumstances of this case, however, where the NAB companies needed to acquire rights from all four major record companies, economic theory indicates that SoundExchange might well have offered a lower royalty than the aggregate rate that NAB could have obtained had it negotiated separately with each of the four major record companies.

8. In the remainder of this report, I discuss more fully the general conclusions summarized above.

III. Dr. Fratrik’s Methodology

A. Overview

9. Dr. Fratrik’s proposed methodology for determining compulsory license rates rests on the premise that a webcaster is entitled to earn a “fair operating margin” and that the royalty rate for music should be set in such a way as to ensure (presumably in the expected value sense) that the webcaster earns such a rate.10 In order to calculate such a rate, he analyzes the revenue and cost data for Live365, which he treats as a reasonable proxy for the financial performance of webcasters more generally.11 That is, he concludes that the rates derived on the

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10 Fratrik Corrected & Amended Testimony at p. 5.
11 Id. at pp. 4-5; Fratrik Deposition at pp. 65-66, 165.
basis of Live365’s revenue and cost data can be used to calculate the rates for other webcasters.

10. Dr. Fratrik presents three different versions of calculations to derive a recommended royalty. In the first, he uses all components of Live365’s revenues and costs allegedly related to its webcasting operations, except the royalty payments due to SoundExchange pursuant to the compulsory license that is the subject of this proceeding. He also includes as an element of cost a guaranteed operating margin (operating income/revenues) of 20% net of all costs, including digital performance royalty payments. This enables him to calculate the royalty rate and resulting royalty payments at which Live365, based upon its fiscal year 2008 webcasting operations,\(^\text{12}\) would have achieved a net operating margin of 20%.\(^\text{13}\) Dr. Fratrik’s second and third versions use estimates of total Internet radio advertising revenues rather than company-specific data for Live365; in each version he uses Live365 subscription revenue and operating cost data.\(^\text{14}\)

11. Dr. Fratrik’s methodology, and hence the recommended royalty rate derived from it, is deeply flawed as a matter of economics. The specific critiques that I offer below are not an exhaustive list of the problems in Dr. Fratrik’s analysis, but merely represent some of the more glaring and critical flaws.

**B. Conceptual Flaws in Dr. Fratrik’s Methodology**

12. The starting point for Dr. Fratrik’s proposed framework is his assumption that Live365 is a typical webcaster in terms of its operating costs and subscriber revenues. Dr. Fratrik offers no analysis in support of this assertion.\(^\text{15}\) Rather, he

\(^{12}\) Live365’s fiscal year 2008 covers the period October 1, 2007 through September 30, 2008. (Fratrik Corrected & Amended Testimony at p. 18.)

\(^{13}\) Fratrik Corrected & Amended Testimony at p. 21 (Table 2).

\(^{14}\) Id. at p. 26 (Table 4) and p. 28 (Table 5).

\(^{15}\) See, e.g., Hearing Transcript – Volume VI, April 27, 2010, at p. 1224 (Dr. Fratrik has not verified that Live365’s costs are typical of other webcasters.).
bases his assumption on the fact that Live365 is a relatively mature webcaster, *i.e.*, it has operated as a webcaster for more than ten years, has reached a scale of operation sufficient to realize certain scale economies, and has recently executed various cost-cutting measures.\(^{16}\) Of course, Live365’s longevity does not imply its “typicality” as a webcaster.

13. Even a cursory assessment of the webcasting industry makes clear that Dr. Fratrik’s characterization of Live365 as a typical webcaster is not defensible. With respect to Live365 itself, Dr. Fratrik claims that the company operates a webcasting business that generates revenues from both advertising and subscriptions, and a so-called “broadcast-services” business that generates an additional revenue stream related to the provision of services that enable operators of individual Internet radio stations to promote and transmit their programming to listeners.\(^{17}\) Live365’s provision of broadcast services is relatively unique among statutory webcasters. Moreover, unlike almost all other statutory webcasters, Live365 does not develop its own programming and thus does not incur the costs associated with such efforts. Instead of providing its own programming, Live365 operates as an aggregator of thousands of individual webcasters that independently program their own channels. Those webcasters that sign up with Live365 are listed on the company’s directory of available channels.\(^{18}\)

14. Dr. Fratrik ignores the broadcast-services portion of Live365’s business by attempting to construct a financial profile limited to the company’s webcasting operation. Such an exercise is necessarily arbitrary and unreasonable in my view.

\(^{16}\) Fratrik Corrected & Amended Testimony at p. 16; Hearing Transcript – Volume VI, April 27, 2010, at p. 1105.

\(^{17}\) In analyzing Live365’s business model, and specifically its division of its business into two components, I am relying on the definitions offered by Live365. I understand that Live365 classifies as “broadcast-services” the components of its business that individual webcasters purchase to allow them to webcast through Live365. (Deposition of N. Mark Lam, January 28, 2010 (“Lam Deposition”), at pp. 24-28, Hearing Transcript – Volume VI, April 27, 2010, at pp. 1204-09.)

\(^{18}\) Lam Deposition at pp. 34-38.
because it disregards the wholly integrated (i.e., synergistic) nature of Live365's business. In particular, Live365's webcasting service helps it to promote its broadcasting services, and the royalty rate that Live365 would be willing to pay necessarily is influenced by the revenue it generates through its broadcasting services.\(^\text{19}\) As a result, even if one assumes (contrary to sound economics) that Live365's financial performance has some relevance for purposes of determining a reasonable rate (or range of rates) in this proceeding, an assessment of the company's financial performance should not arbitrarily attempt to carve out the webcasting segment of the overall business.

15. As the above description of Live365's business model shows, it is not a "typical" webcaster – assuming even that a typical webcaster exists – in any material sense because it combines webcasting with broadcast services that few if any other webcasters offer. More broadly, webcasters operate a number of different business models, which makes it improper to characterize Live365 as typical of the whole. I will quickly note several different types of webcasters to illustrate the point that Live365 reasonably cannot serve as a proxy for webcasters in general.

a. **Simulcasters:** A number of terrestrial radio broadcasters transmit their programming over the Internet. These services typically are available for free (ad-supported basis), \( i.e. \), there is no subscription option available. Besides generating revenues directly through ad sales, an online simulcast benefits the broadcaster to the extent it helps the broadcaster to maintain or gain terrestrial audience.\(^\text{20}\)

\(^{19}\) Dr. Fratrik's allocation of the joint and common costs of operating Live365's business and the revenues it generates highlights the synergistic nature of the two components of the business that Dr. Fratrik arbitrarily attempts to segregate. Specifically, customers of Live365's broadcasting services, \( i.e. \), independent webcasters who pay Live365 to transmit their channels, pay fees to Live365 intended to cover the royalties incurred through their webcasting channels and the accompanying bandwidth. Under this arrangement, Live365 is actually paid fees by its broadcasting-services customers that cover the most fundamental costs incurred by all webcasters. Yet in his calculations, Dr. Fratrik excludes all revenue related to broadcasting services, but at the same time allocates all of the costs associated with, among other things, bandwidth, to the webcasting service. (Hearing Transcript – Volume VI, April 27, 2010, at pp. 1190-92, 1210-18, 1275.)

\(^{20}\) Insofar as Internet radio competes with terrestrial broadcasts, simulcasting provides a terrestrial broadcaster with an ability to internalize some listener substitution to Internet radio.
b. **Portals:** Companies like AOL and Yahoo! provide webcasting services not just to generate advertising and subscription revenues but also to drive traffic to their other revenue-producing websites. Dr. Fratrik acknowledges that the value of music to portals might differ from the value of music to a webcaster like Live365.21

c. **Custom radio:** These are webcasting services that provide consumers with a greater degree of control over their listening experience relative to webcasters in general. Dr. Fratrik acknowledges that custom radio services might have higher or lower cost structures relative to Live365. Similarly, he acknowledges that custom radio operators might have a greater or lesser ability to monetize their services.22

d. **Services that use statutory webcasting to stimulate sales of another product or service:** Certain firms offer statutory webcasting as a way to entice listeners to purchase another service. A prime example of this type of service is Rhapsody, which offers statutory webcasting as “Rhapsody Radio” in an effort to attract subscribers to its interactive on-demand audio streaming service. Indeed, Live365 uses webcasting to sell its broadcasting services, which appear to be highly profitable.23

e. **Traditional Internet-only webcasters:** These webcasters offer only fully pre-programmed, non-customized audio streaming. Some are dedicated to specific genres of music, while others offer a wide variety of programming across multiple genre-specific channels. These services are primarily ad-supported but often also offer monthly subscription-based services that provide higher audio quality and no advertisements.

f. **Subscription Services:** Sirius-XM, the satellite radio service that is only available via subscription, offers webcasting of much of its programming to subscribers. This service operates in a similar manner to simulcasting, in that the webcasted content is also available through another delivery method. But unlike simulcasters, Sirius-XM is subscription-only, and there is no free to the consumer, ad-supported option.

16. The variety of uses of statutory webcasting highlights the serious problems in Dr. Fratrik’s assumption that Live365 is typical of this category of services. All of these types of webcasting services compete with each other for listeners and, in many
cases, for ad revenue as well. These services are characterized by varying ratios of subscription and ad-supported listening. The substantial degree of heterogeneity across the existing webcasting business models makes any attempt to characterize Live365 as a typical webcaster fatally flawed.

17. The data that Dr. Fratrik ultimately relies upon to calculate his recommended rate further exposes the inherent problem of seeking typicality in the webcasting marketplace. Dr. Fratrik’s recommended rate of $0.0009 per performance is derived from Live365’s costs and subscription revenue data, and also from industry-wide advertising revenue data reported by ZenithOptimedia. Notably, because Dr. Fratrik’s calculations generate a significantly higher advertising revenue per aggregate tuning hour (ATH) using the ZenithOptimedia data as compared to Live365’s own data, his recommended rate is above the rate at which Live365 would have earned a 20% operating margin for its webcasting service in its fiscal year 2008. In other words, Dr. Fratrik’s methodology is premised on the notion that the rate for digital performance rights should be set at a level that allows a “typical” webcaster (such as Live365, using Dr. Fratrik’s framework) to earn a 20% margin, but in the end, his recommended rate does not accomplish this objective because Live365 itself would not earn a 20% margin for its webcasting business under Dr. Fratrik’s proposed rate. In fact, at Dr. Fratrik’s proposed rate of $0.0009, the operating margin for the fiscal year 2008 for Live365’s webcasting business would have been negative.

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24 Id. at p. 1249.
25 Dr. Fratrik recommends that a rate of $0.0009 per performance be applied to all “commercial webcasters” in each of the five years during the statutory period (2011-2015). (Fratrik Amended & Corrected Testimony at p. 5.) Dr. Fratrik recommends a different, and lower, rate for “aggregation services,” or Internet radio operators that combine at least one hundred small, independently operated webcasters into a single network. (Id. at p. 4.)
26 Dr. Fratrik does not use Live365’s advertising revenue data in the calculations used to generate his recommended rate. (Fratrik Corrected & Amended Testimony at p. 28 (Table 5).)
27 Fratrik Corrected & Amended Testimony at p. 21 (Table 2).
18. I should also point out Dr. Fratrik's conclusion that a webcaster would be unwilling to license digital performance rights at a rate that results in an operating margin of less than 20%. What this means is that under a literal application of Dr. Fratrik's methodology, Live365 should either exit the webcasting business or continue to webcast only if it is paid by the record labels to play their music. This outcome highlights the fallacy of his treatment of Live365 as a typical webcaster, and more generally demonstrates the unsound nature of his proposed framework.

19. Moreover, the figure for advertising revenue per-ATH calculated by Dr. Fratrik from the ZenithOptimedia data is nearly double the analogous figure generated from Live365's financial data. In any case, whether or not the advertising revenue per-ATH figure from the ZenithOptimedia is representative of a typical webcaster, Dr. Fratrik's methodology is fatally flawed. If the figure is representative of a typical webcaster, the fact that it is nearly two times the analogous value obtained from Live365's financial data precludes Dr. Fratrik from utilizing Live365 as a representative webcaster. If, on the other hand, the figure is not representative of a typical webcaster, then it should not serve as the basis for Dr. Fratrik's recommended rate.

20. In sum, one principal shortcoming of Dr. Fratrik's proposed framework is that it is premised on an assumption that Live365 is a typical webcaster. This assumption is inconsistent with marketplace realities. Even if Dr. Fratrik's assumption about the typicality of Live365 were correct, however, his approach has another serious flaw.

21. Dr. Fratrik's selection of a 20% floor is inconsistent with the relatively low barriers to entry into webcasting. He selects 20% as a "reasonable" operating profit margin.
based upon his conclusion that companies in a “comparable” industry – terrestrial radio – earn operating margins, on average, slightly above 20%. However, as Dr. Fratrik acknowledged, the terrestrial radio industry has substantially higher barriers to entry and higher capital costs than webcasting. As Dr. Fratrik concedes, firms in an industry with low barriers to entry and low capital costs will earn lower operating margins, all else being the same, than firms in an industry with high barriers to entry and high capital costs. This is the case because the long-run economic viability of a firm requires recoupment of all of its costs, including fixed costs. When there are high fixed costs and low variable costs, the firm must earn higher operating margins in order to recover its fixed expenditures. Alternatively, when the fixed costs associated with firm’s operations are relatively modest, i.e., entry barriers are low, recoupment of fixed costs requires less contribution from the firm’s operating margins. In either case, competition is expected to drive margins down toward the point where the firm earns a normal, risk-adjusted rate of return on its invested capital.

22. Highlighting the arbitrariness of Dr. Fratrik’s selection of a 20% operating margin benchmark is that Live365, based upon its fiscal year 2008 financials, would be unable to earn such a margin while paying any positive royalty rate. Indeed, SoundExchange would be required to pay Live365 in order to generate Dr. Fratrik’s proposed benchmark margin. Of course, Dr. Fratrik does generate a positive recommended rate, but only because he adopts an estimate of industry advertising revenues that is substantially greater than Live365’s own data.

31 Fratrik Corrected & Amended Testimony at pp. 17, 21-22.
33 Id. at pp. 1170-71.
IV. Dr. Fratrik’s Critiques of the SoundExchange-NAB Rates Are Unfounded

23. Dr. Fratrik offers several arguments why the SoundExchange-NAB rates do not, without substantial downward adjustment, reflect an outcome that would obtain through unfettered market bargaining. His arguments are flawed, as I will show presently.

A. The Higher Cost Structure of Commercial Webcasters

24. Dr. Fratrik’s first contention is that the higher cost structure of commercial webcasters as compared to terrestrial broadcasters would make them unwilling to pay rates at the level of those contained in the NAB Agreement. There is, however, no principle underlying the willing buyer/willing seller construct that acts to protect the economic viability of any particular webcaster. If a webcaster is unable to earn an at least normal risk-adjusted rate of return at appropriately determined market-based rates for digital performance rights, then economic efficiency mandates not a lower rate but rather a realignment of the webcaster’s business model or its exit from the marketplace.

25. The fact that some webcasters might not be able or willing to pay the rates established in the NAB Agreement because of their cost structure does not necessarily mean that record companies or SoundExchange would offer them a

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34 Fratrik Corrected & Amended Testimony at pp. 40-41.

35 Id. at pp. 41-42. For purposes of my discussion I accept as true Dr. Fratrik’s assertion that commercial webcasters do indeed have higher cost structures. In doing so, I do not convey my agreement with this assertion.

36 One might argue that the incremental cost of licensing digital performance rights to any given webcaster is zero, and thus that economic efficiency is enhanced by licensing the rights to a webcaster at any rate that covers this incremental cost. Such an argument is flawed for several reasons. First, relevant incremental cost in this instance is not necessarily zero because lower (or zero) rates provided to higher-cost webcaster can distort competitive forces in the downstream market (distribution of music to listeners), i.e., shift listener demand away from lower-cost webcasters that are paying higher rates. Second, in the same vein, insofar as webcasting cannibalizes other sources of revenues for the record companies, e.g., downloads, the marginal cost associated with licensing digital performance rights to webcasters is not zero. And third, if suppliers in all channels of distribution paid only the incremental cost of licensing digital performance rights to them, record companies and artists would not receive sufficient revenues to cover their upfront investments and in the long-run the supply of music would either dry up or be vastly curtailed.
lower rate. As a matter of standard economics, a licensor likely will be unwilling to offer lower rates to a higher-cost licensee unless it has the ability to price discriminate at the level of the ultimate consumer. SoundExchange can, of course, price discriminate between various licensees; it can offer a lower rate to one licensee without concern that another licensee will be able to take advantage of that lower rate, i.e., there is little possibility of arbitrage across licensees.

However, the ability to price discriminate at the level of licensee is not the only relevant focus of the analysis. This is because SoundExchange is concerned about the revenues it collects on behalf of its members, and if a lower rate has the effect of shifting listener demand towards the services paying the lower rate, the result may be that the revenues collected by SoundExchange will decrease.

26. There is reason to believe that lower rates for higher-cost webcasters would indeed shift some consumer demand to those services. Dr. Fratrik agrees that both terrestrial broadcasters (simulcasters) and commercial webcasters compete for listeners and advertisers. Lower rates offered to certain webcasters may allow them to compete more successfully for listeners. With the benefit of a lower rate,

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37 In this discussion, I use the term “higher-cost webcaster” as shorthand for a webcaster with relatively low profitability (gross of digital performance license fees) and thus a lower willingness to pay for digital performance rights relative to a “lower-cost webcaster,” i.e., one with relatively high profitability and thus a higher willingness to pay.


39 Given the already large number of webcasters operating different business models and offering thousands of individual channels of music, as a general proposition it seems unlikely that offering lower rates to higher cost webcasters will substantially stimulate overall demand for music and thus overall revenues to SoundExchange. This is so for the simple reason that, given that many already existing choices, demand is likely to be stimulated only if lower rates allow a webcaster with a materially different product (service) offering to enter the market. Thus, one might hypothesize that SoundExchange could agree to a lower rate for a higher cost webcaster (or category of webcasters) only if that webcaster offered a service that for whatever reason is expected to fill an important consumer demand and stimulate (after accounting for demand diversion) net consumer demand for music beyond existing levels. Absent such meaningful product differentiation from the entrant, SoundExchange is unlikely to have any incentive to offer lower rates to higher-cost webcasters because the likely effect of such rates will be to divert demand from webcasters who pay higher rates.

these webcasters may be able to charge a lower subscription price than they otherwise would, enhance their service offering, or otherwise compete more effectively for listeners. Alternatively, with the benefit of a lower rate, such webcasters may simply remain in the market as a competitive alternative when they might otherwise withdraw from the market. By shifting demand away from webcasters who pay higher royalties relative to the higher-cost webcasters who receive a lower rate, the revenues collected by SoundExchange, and ultimately record companies and artists, can decline and thereby impair production of new music.\textsuperscript{41} This suggests that SoundExchange would be unwilling to agree to a rate structure for commercial webcasters below the structure in its agreement with the NAB.

B. Threat of Litigation

27. Dr. Fratrik's second argument is that a desire to avoid the costs of litigation led the NAB to agree to higher rates relative to those that would obtain in the absence of a regulatory default for setting rates.\textsuperscript{42} For reasons that I discuss below, both SoundExchange and the NAB likely have a high degree of confidence that the Judges will establish rates that are consistent with the willing buyer/willing seller construct. Accordingly, I would expect that neither party likely would be willing to incur litigation costs in the event of a disagreement insofar as the predicted outcome would be a schedule of rates to which both sides likely would have been willing to agree in any event.

28. Dr. Fratrik further claims that the desire to avoid litigation costs is one-sided insofar as these costs are nonrecoverable by webcasters but can be funded by SoundExchange through the collection of royalties from webcasters.\textsuperscript{43} Dr. Fratrik's

\textsuperscript{41} Such lower revenues would have the effect of weakening incentives to create and promote musical content in the first place.

\textsuperscript{42} Fratrik Corrected & Amended Testimony at p. 43.

\textsuperscript{43} Id.
assertion is without merit. Webcasters collect revenues from their transmission of music to listeners and/or from the advertising revenues they earn as a function of the size of their listening audience. The fact that the source(s) of revenues for webcasters differ from the source of SoundExchange’s revenues does not mean that webcasters lack the ability to fund the costs of litigation. For both sides, the payment of litigation costs is a first-order loss in income or profits.

Moreover, it is worth pointing out that the NAB, or any individual webcaster (or group of webcasters), need not settle in order to avoid litigation costs. The NAB simply could elect not to participate in the proceeding before the Judges. In such a case, it is my understanding that rates paid by the NAB would be established by the Judges. These rates similarly would apply to all statutory webcasters unless they are a party to a voluntary agreement with SoundExchange. It does not follow that the NAB would agree to a higher-than-market rate in order to avoid litigation, when it was not compelled to litigate in any event.

C. Sound Recording Performance Complement Waiver

Dr. Fratrik highlights the fact that in addition to the NAB Agreement negotiated with SoundExchange, the NAB negotiated independently with each of the four major record labels to obtain a limited waiver of the sound recording performance complement rules. According to Dr. Fratrik, because the waiver has unique value to NAB members, the NAB rates reflect a higher willingness to pay relative to commercial webcasters.

Footnotes:

44 In the Webcasting II decision, for example, the Judges set rates for commercial webcasters and non-commercial webcasters, and a webcaster was required to pay whichever rate applied based on the relevant definitions.

45 The sound recording performance complement limits the number and frequency of recordings by a given artist or from a given album that may be played within a specified time period. (Testimony of W. Tucker McCrady, September 2009, at p. 5.)

46 Fratrik Corrected & Amended Testimony, at pp. 43-44.
31. Dr. Fratrik's argument is not compelling. First, the record labels did not negotiate similar waivers of the performance complement rules with Sirius-XM, and yet the Sirius-XM Agreement stipulates nearly identical rates vis-à-vis the NAB rates. This suggests that the market value of the waiver is quite small. Second, even assuming that the waiver provides significant value for NAB members, it also appears to be the case that the waiver provides value to the record labels. Following the execution of the NAB Agreement and the performance complement waivers, close to 100 terrestrial broadcasters, accounting for over 300 individual stations, that had not previously been paying SoundExchange webcasting royalties began doing so. The initiation of webcasting royalty payments to SoundExchange following execution of the NAB agreement suggests that these webcasting services were launched after the NAB agreement was finalized. Thus, there is no reason to believe that inclusion of the waiver had the effect of elevating the SoundExchange-NAB rates to any material degree (if at all) above the rates the parties would have agreed to without the waiver provision.
E. There Is No Basis to Conclude that the SoundExchange-NAB Rates Are Elevated as a Result of an Exercise of Market Power by SoundExchange

43. A further issue regarding the probative value of recently negotiated rates concerns the fact that these rates were negotiated collectively by the record companies under the auspices of SoundExchange, and thus may reflect, to some extent, the additional bargaining power held by SoundExchange relative to the bargaining power held by individual record companies. In other words, the concern might be that the negotiated rates include a premium attributable to the hypothesized incremental bargaining advantage in the hands of SoundExchange. While this concern may be valid under certain market conditions, it is also the case that economic theory actually predicts the opposite outcome under certain relevant market conditions, i.e., there are plausible conditions under which the rate negotiated by SoundExchange would be lower than the average rate that would obtain if record companies negotiated individually.

44. In order to assess the consequences of SoundExchange’s operation as the negotiating entity on the NAB-SoundExchange rates it is important to ask if it effectively operates as a cartel. By this I mean whether SoundExchange replaces the record labels in the sense that they can no longer negotiate individually. If the answer is yes, then concerns regarding SoundExchange’s bargaining power (relative to an individual label) plausibly warrant examination. Alternatively, if SoundExchange properly is viewed as another licensor of digital performance rights, i.e., in addition to the individual record labels, then concerns regarding SoundExchange’s bargaining power likely are at least mitigated.

45. It is my understanding that SoundExchange, under the law, is permitted to negotiate the statutory webcasting rates only on a non-exclusive basis. That is, SoundExchange does not replace the record companies but rather operates as an
additional seller through which the record companies have the opportunity, but not the obligation, to bargain collectively. The testimony presented by Live365 offers no evidence that SoundExchange did, in fact, act as a cartel, and I am not otherwise aware of any evidence that SoundExchange effectively acts as a cartel.

Moreover, it should be pointed out that the NAB may also enjoy some degree of added bargaining power relative to that held by individual broadcasters precisely because it negotiates on behalf of a large group of buyers. According to data from SoundExchange, the broadcasters on whose behalf the NAB negotiated accounted for over 50% of the royalty revenues received by SoundExchange from webcasters in 2008, the last full year prior to the negotiation of the NAB Agreement. Such added market power on the buyer side tends to mitigate, if not fully offset, additional leverage that SoundExchange might bring to the negotiations.

Finally, if SoundExchange indeed functioned as a cartel, its ability to extract above-market rates in a negotiation with the NAB would be limited to some degree by the existence of the regulatory process. At some point, buyers such as the NAB members would simply elect to seek rates established by the Judges—which would be free of any potential cartel effects—rather than voluntarily agree to pay above-market rates.

Accordingly, I do not assume that SoundExchange functions as a cartel, or that if it did so, its market power would not be mitigated by corresponding market power resulting from the buyers acting through a single entity, or by the existence of a regulatory rate-setting mechanism. Nevertheless, in the analysis that follows, I will show that SoundExchange, acting as a single seller in an unregulated market, might well agree to lower royalty rates compared to the average of the rates that would emerge in a market in which individual record companies function as sellers.

The directional effect of the record companies negotiating as a single entity under the auspices of SoundExchange depends partially on the assumption one makes about whether a webcaster requires access to the repertoires of all four major
record companies in order to operate an economically viable business, or only to a subset. If one assumes that the catalogs of all four majors are needed,\textsuperscript{52} then economic theory predicts that a rate negotiated with SoundExchange can actually be lower than the average rate that would be reached through individual negotiations.\textsuperscript{53}

50. I have undertaken no independent assessment regarding the validity of this assumption with respect to all webcasters. If it were the case that the catalogs of all four majors were not needed to operate an economically viable service, then the effect of the four majors negotiating as a collective unit under the auspices of SoundExchange, as compared to individual negotiations, could go either way depending upon several factors, including the minimum number of major record company catalogs required and the incremental value to the distribution service from adding each additional catalog.

51. In this context, it is important to note that the webcasters on whose behalf NAB negotiated a deal with SoundExchange are predominantly simulcasters, \textit{i.e.}, entities that offer terrestrial broadcasts of their programming and simultaneously transmit that same programming on the Internet. The core business of these entities is the terrestrial broadcast of programming, and for their terrestrial broadcasts these companies are not required to pay a sound recording royalty. In order to maximize listener volumes and hence advertising revenues, one would expect these entities to include in their terrestrial programming sound recordings from the catalogs of all four major record companies and at least some independent record companies. This is especially the case given that a

\textsuperscript{52} See, \textit{e.g.}, In the Matter of Digital Performance Right in Sound Recordings And Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, Hearing Transcript - Volume 22, June 21, 2006, at pp 313-15 (Robert Roback testifying that “to offer the most competitive and compelling product you need the entire catalogue for your radio offering”).

\textsuperscript{53} The average rate is best understood as the sum of the rates paid to all holders of the relevant copyrights, with each rate scaled (weighted) according to the fraction of total music played from each copyright holder.
performance rights license is not required for the terrestrial broadcast of sound recordings. Having programmed their terrestrial broadcasts to include sound recordings from all of the major record companies, however, the failure to obtain licenses from all of the majors in connection with their webcasting services would, by definition, eliminate the ability to simulcast. Because they cannot re-broadcast their terrestrial signal over the Internet without access to the catalogs of the four majors, economic theory would predict that the rates voluntarily negotiated between SoundExchange and the NAB are actually lower than the rates that would obtain through negotiations between a single NAB member and one of the four major labels, i.e., through arms-length bargaining between a willing buyer and a willing seller.\textsuperscript{54}

52. Support for this outcome comes from the economic literature on royalty stacking, which refers to situations wherein a downstream firm requires licenses to multiple upstream patents in order to sell lawfully its product in the marketplace.\textsuperscript{55} In such a setting, failure to strike a deal with every relevant patent-holder precludes the supplier from operating its business. Royalty stacking is an extreme version of the situation facing simulcasters, and perhaps webcasters more generally, insofar as they require licenses to the digital performance rights pertaining to the music content of all four major record companies in order to operate an economically viable service.

53. More specifically, under the condition that webcasters require licenses from all major record companies, a setting in which multiple record companies negotiate their licenses separately rather than cooperatively is expected to increase the

\textsuperscript{54} The points made in this paragraph apply with equal force to Sirius-XM, whose webcasting operations consist of simulcasting the company's core satellite radio transmissions and thus require access to the catalogs of the four majors plus numerous independent labels.

average royalty rate paid by downstream webcasters. The reason is that individual negotiations give rise to a well-known pricing issue commonly referred to by economists as Cournot-complements. As a result, the overall demand for music would tend to decline and also the overall revenues from music licensing. Thus, under some conditions, individualized licensing is a “loss-loss” proposition for all the stakeholders. Below and in Appendix Two, I explain this effect in more detail.

54. The revenue earned by each record company can be calculated as the royalty rate charged by the record company multiplied by the total quantity sold to consumers (in the instant case the number of performances). A higher royalty rate charged by a record company increases the marginal costs incurred by each webcaster. Because webcasters pass on to downstream consumers at least some portion of the increase in marginal costs in the form of higher prices, the result of a higher royalty rate charged by any record company is decreased demand for the webcaster’s service by downstream consumers, and hence for music. In turn, this decreased demand negatively affects the revenues earned by all record companies, not just the company charging a higher royalty rate.

55. Stated differently, when a record company charges a higher royalty rate it imposes an externality on all other record companies because each and every record company is impacted adversely by the resulting lower demand for the webcaster’s service. However, an individual record company only takes into account the adverse effect of lower demand on its own revenues, ignoring the effect that its decision imposes on the revenues of the other record companies. This failure to account for the full effect of reduced demand weakens the constraint faced by an individual firm when it contemplates an increase to its royalty rate.\footnote{Importantly, this same dynamic can operate in situations involving webcasters that provide ad-supported (free) services to consumers. While higher royalty rates should not lead to higher subscription fees (because the services are designed to be free to listeners), the services could adopt other measures to account for increases in marginal cost due to hypothesized higher royalty payments. In particular, the services could respond to higher royalty rates (footnote continued ...)}
56. In contrast, under a scenario in which a single firm (SoundExchange) effectively controls all pertinent copyrights, the firm will set a royalty rate that fully accounts for the effect of that rate on the downstream supplier's output, i.e., the firm will internalize the full effect that a higher royalty has on market demand. Such internalization tightens the constraint faced by the firm when it considers raising its royalty, which results in lower rates compared to individually-negotiated rates.

57. Appendix Two presents a numerical example that illustrates this idea. Moreover, the Appendix illustrates a well-known result that the more independent licensors there are, the lower is the royalty rate applied to the whole repertoire as a result of collective negotiations vis-à-vis the rates that would emerge through individual negotiations.

58. Thus, insofar as there are concerns about SoundExchange's market power and how the exercise of that market power might lead to higher negotiated rates, economic theory predicts that rates negotiated by SoundExchange can, in fact, be lower relative to the average of individually negotiated rates at least under a scenario that assumes each webcaster requires access to the catalogs of all four major record companies in order to remain economically viable.

V. Conclusion

59. For the reasons detailed above, I conclude that there is no sound economic basis for the Judges to adopt the analysis and recommended rate presented by Dr. Fratrik and Live365. The assumptions at the core of his financial modeling are unsupported and indefensible. Furthermore, contrary to Dr. Fratrik, I believe that

(footnote continued)

by placing caps on listening time, which would reduce the volume of royalty-bearing performances, and hence royalty payments. It is my understanding that Live365 has implemented caps on listening time for this very purpose. (Lam Deposition, at pp. 42-44.) An ad-supported service could also attempt to run more advertising in order to defray the increase in marginal costs arising from higher royalty rates. Insofar as a webcaster undertook any measure that degraded the overall quality of the service, demand for the service would be expected to decline.
economic theory supports the use of the negotiated rates in the NAB Agreement as probative evidence of rates that would occur under the willing buyer/willing seller statutory standard.
I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: June 7, 2010

[Signature]

Janusz A. Ordover
Appendix One

JANUSZ ALEKSANDER ORDOVER

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EDUCATION

Graduate Department of Economics and European Institute of the School of International Affairs

1967-1968 McGill University, Montreal, Canada
Departments of Economics and Political Science

1963-1966 Warsaw University, Warsaw, Poland

HONORS

1973 Columbia University: Highest distinction for the doctoral dissertation
1971-1972 Columbia University: Honorary President's Fellow
1969-1971 Columbia University: President's Fellow
1967-1968 McGill University: Honors Student
1964, 1965 Warsaw University: Award for Academic Achievement, Department of Political Economy

Who's Who in the World
Who's Who in America
Who's Who in the East

PROFESSIONAL EXPERIENCE

June 1982 - present Professor of Economics
Department of Economics, New York University, New York, New York

Sept. 1996 - Aug. 2001 Director of Masters in Economics Program
Department of Economics, New York University, New York, New York
Summer 1996-2000 Lecturer
International Program on Privatization and Reform
Institute for International Development, Harvard University, Cambridge, Massachusetts

Aug. 1991 - Deputy Assistant Attorney General for Economics
Oct. 1992 Antitrust Division
United States Department of Justice, Washington, D.C.

Sept. 1989 - Visiting Professor of Economics
July 1990 School of Management, Yale University, New Haven, Connecticut
Lecturer in Law
Yale Law School

Mar. 1984 - Visiting Professor of Economics
June 1988 Universita Commerciale "Luigi Bocconi", Milan, Italy

June 1982 - Director of Graduate Studies
Feb. 1985 Department of Economics, New York University

Sept. 1982 - Adjunct Professor of Law (part-time)
June 1986 Columbia University Law School, New York, New York

Feb. 1982 - Acting Director of Graduate Studies
June 1982 Department of Economics, New York University

June 1978 - Associate Professor of Economics
June 1982 Department of Economics, New York University

Sept. 1979 - Lecturer in Economics and Antitrust
May 1990 New York University Law School

Sept. 1977 - Member, Technical Staff
June 1978 Bell Laboratories, Holmdel, New Jersey

Associate Professor of Economics
Columbia University

Visiting Research Scholar
Center for Law and Economics, University of Miami, Miami, Florida

Sept. 1973 - Assistant Professor of Economics
Aug. 1977 New York University

Summer 1976 Fellow, Legal Institute for Economists,
Center for Law and Economics, University of Miami

Summer 1976 Visiting Researcher Bell Laboratories, Holmdel, New Jersey
OTHER PROFESSIONAL ACTIVITIES

2006 - present  Special Consultant, Compass Lexecon (formerly Compass)/FTI Company, Washington, D.C.
2003 - 2006  Director, Competition Policy Associates, Inc. (“Compass”), Washington, D.C.
1997 – present  Board of Editors, Antitrust Report
1998 – 2004  Senior Consultant
Applied Economic Solutions, Inc., San Francisco, California
1995 - 2000  Senior Affiliate
Cornerstone Research, Inc., Palo Alto, California
various  Testimony at Hearings of the Federal Trade Commission
1994 - 1996  Senior Affiliate
Law and Economics Consulting Group, Emoryville, California
1994 - 2000  Senior Affiliate
Consultants in Industry Economics, LLC, Princeton, New Jersey
1993 - 1994  Director
Consultants in Industry Economics, Inc., Princeton, New Jersey
1992 - 1993  Vice-Chair (pro tempore)
Economics Committee, American Bar Association, Chicago, Illinois
1990 - 1991  Senior Consultant
1991  Member
Ad hoc Working Group on Bulgaria's Draft Antitrust Law
The Central and East European Law Initiative
American Bar Association
1990 - 1991  Advisor
Polish Ministry of Finance and Anti-Monopoly Office
Warsaw, Poland
1990 - 1991  Member
Special Committee on Antitrust
Section of Antitrust Law, American Bar Association
1990 - 1991  Director and Senior Advisor
Putnam, Hayes & Bartlett, Inc., Washington, D.C.
1990 - 1996  Member
Predatory Pricing Monograph Task Force
Section of Antitrust Law, American Bar Association
MEMBERSHIPS IN PROFESSIONAL SOCIETIES

American Economic Association
American Bar Association
PUBLICATIONS

A. Journal Articles


### B. Books and Monographs


### C. Book Chapters


D. Other Publications


"Poland: The First 1,000 Days and Beyond," Economic Times, vol. 3, no. 9, October 1992, 6-7.


"Herfindahl Concentration Index," with R.D. Willig, Memorandum for ABA Section 7 Clayton Act Committee, Project on Revising the Merger Guidelines, March 1981.


UNPUBLISHED PAPERS


GRANTS RECEIVED


Regulation of Economic Activity Program, National Science Foundation, Microeconomic Analysis of Antitrust Policy, Principal Investigator, April 1, 1983 - March 31, 1984.

Economics Division of the National Science Foundation, "Political Economy of Taxation," Principal Investigator, Summer 1982.

Sloan Workshop in Applied Microeconomics (coordinator), with W.J. Baumol (Principal Coordinator), September 1977 - August 1982.

Economics Division of the National Science Foundation, "Collaborative Research on the Theory of Optimal Taxation and Tax Reform," July 1979 to September 1980, with E.S. Phelps.


National Science Foundation Institutional Grant to New York University for Research on Taxation and Distribution of Income, Summer 1974.
Expert Testimony Provided by
Dr. Janusz A. Ordover 2003 – 2010

In Re: Gemstar Development Corporation Patent Litigation, MDL-1274-WBH (N.D. Ga.) (deposition testimony)

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Carolyn Fears, et al., v. Wilhelmina Model Agency, Inc., et al., U.S. Dist. Court, S.D.N.Y., Case No. 02-CV-4911 (HB)(HBP) (deposition testimony)


Qantas Airways Ltd. and Air New Zealand Ltd. v. ACCC, (The Australian Competition Tribunal, Sydney, Australia) (tribunal testimony)

GE v. Commission, (Case T-210/01) (The Court of First Instance, Luxembourg) (Testimony for the Commission of the European Communities) (Testimony at the Hearing for UTC In re GE/Honeywell Merger, European Commission, Brussels, Belgium)

Sony/BMG Joint Venture (Case No. Comp/M3333) (Oral hearing testimony at the EC, Brussels, Belgium)

In Re: Remeron Direct Purchaser Antitrust Litigation, Master Docket No.03-CV-85 (FSH)(New Jersey) (deposition testimony)

Qantas Airways Ltd. and Air New Zealand Ltd. v. NZ Commerce Commission (High Court of New Zealand, Auckland Registry Case CIV 2003 404 6590, Auckland, New Zealand) (Appeal hearing testimony)

Reading International, Inc., et al., v. Oaktree Capital Management, et al., No. 03 Civ. 1895, (S.D. NY), (deposition testimony)

Natural Gas Anti-Trust Cases I, II, III, & IV (J.C.C.P. Nos. 4221 through 00000), Superior Court of the State of California, County of San Diego (deposition testimony)


Canadian Lumber Trade Alliance, et al. v. United States, et al. and Coalition for Fair Lumber Imports Executive Committee, et al. Consolidated Court No. 05-00324 (U.S. Court of International Trade) (deposition and trial testimony)

Jason White, et al. v. NCAA, U.S. Dist. Court, Central District of California, No. CV06-0999 RKG (MANx) (deposition testimony)


Rochester Medical Corp. v. C.R. Bard International et al., U.S. Dist. Court, E.D. of Texas (Texarkana Div.), No. 504-CV-060 (deposition testimony)

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Delco LLC and Edward Decker v. Giant of Maryland LLC, Wakefern Food Corp., and Stop & Shop Supermarket Company LLC, U.S. Dist. Court, District of New Jersey (Camden Vicinage), No. 07-CV-03522 (JBS-AMD) (deposition and PI hearing testimony)

Woolworths Ltd. and The Warehouse Group v. The Commerce Commission, High Court of New Zealand, Wellington Registry, CIV 2007-485-1255 (hearing on the appeal from the determination of the NZ Commerce Commission)

IGT v. Alliance Gaming et al., U.S. Dist. Court, Dist. of Nevada, No. CV-S-04 (1676-RCJ-RJJ) (deposition testimony)

In Re: New Motor Vehicle Canadian Export Antitrust Litigation, MDL Docket No. 03-md-1532-P-H (All Cases) (deposition testimony)

The European Commission Case Comp. 39.188 Bananas, European Commission, Brussels, Belgium (Oral Hearing testimony)

The European Commission Case Comp. 37.990 Intel, European Commission, Brussels, Belgium (Oral Hearing testimony)

Appeal No. 25: PCCW versus Telecommunications Authority, In the Telecommunications (Competition Provisions) Appeal Board, Hong Kong (Testimony)

Michael Siegel et al., v. Shell Oil Co., et al., U.S. District Court, Northern District of Illinois, Eastern Div., No. 06 C 0035 (deposition testimony)

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FTC v. CCC Holdings, Inc., et al, U.S. District Court for the District of Columbia, CA 08-2043 (deposition and trial testimony)

Rambus Inc. v. Micron Technology, Inc. et al., Superior Court of the State of California, County of San Francisco, Case No. 04-431105 (deposition testimony)


In the matter of BP America Production Company v. Repsol YPF, S.A., Arbitration under the Uncitrat Arbitration Rules (testimony in an arbitration hearing)

Tessera Technologies, Inc. v. Hynix Semiconductor, Inc., Case No. 106CV-07668, Sup. Ct. of the State of California, County of Santa Clara (deposition testimony)

In Re: TFT-LCD (Flat Panel) Antitrust Litigation, U.S. Dist. Court, N.D. of California, No. M 07-1827 SI, MDL No. 1827

Enron Coal Services Ltd. And English Welsh and Scottish Railway Ltd., In the Competition Appeal Tribunal (London, U.K.), Case No. 1106/5/7/08 (testimony in the Hearing)


Darren Berry, et al v. Volkswagen of America, Inc., Case No. 0516-CV01171-01, Cir. Court of Jackson County, Missouri at Independence (deposition testimony)

Appendix Two

1. In this appendix, I illustrate with straightforward numerical examples the arms-length bargaining outcomes predicted by economic theory under two different scenarios: negotiations between a webcaster and individual record companies and, alternatively, negotiations between a webcasters and the record companies represented collectively by SoundExchange. I also present a model to demonstrate the more general result that the more licensors there are in the market, the lower will be the combined royalties charged by the companies under collective negotiations vis-à-vis individual negotiations.

2. Suppose that there are two symmetric record companies in the market, Company 1 and Company 2. Webcasters in this example are assumed to be perfectly competitive, and each webcaster must obtain a license from both Company 1 and Company 2 in order to operate an economically viable service. Let \( R_1 \) and \( R_2 \) denote the royalties charged by Company 1 and Company 2, respectively. For simplicity, assume that webcasters have no costs other than the royalties paid pursuant to their license agreements with the record companies. Webcasters sell to downstream consumers, whose total demand is given by the function \( D = 12 - P \), where \( D \) denotes total demand and \( P \) denotes the price charged by webcasters.

3. First, assume that Company 1 and Company 2 negotiate their licenses collectively. Because webcasters are perfectly competitive, they fully pass the royalty costs to downstream consumers and therefore the price charged to downstream consumers is exactly equal to the sum of the royalties charged by the two firms, i.e., \( P = R_1 + R_2 \). The combined profit of the record companies is \( (R_1 + R_2) \times D \), or equivalently \( (R_1 + R_2) \times (12 - P) \), or equivalently \( (R_1 + R_2) \times (12 - (R_1 + R_2)) \). The first order condition dictates that \( 12 - 2 \times (R_1 + R_2) = 0 \), and therefore the royalty that maximizes the combined profit is \( R_1 + R_2 = 6 \). The market outcome is such that \( P = (R_1 + R_2) = 6, D = 12 - P = 12 - 6 = 6 \), and
the combined profit of the two companies is equal to $P \times D = 6 \times 6 = 36$. Consumer surplus is $(12 - 6) \times 6/2 = 18$.

4. Now suppose that each company sets its royalty individually. Under this scenario, each company can only affect its own royalty while taking the royalty charged by the other company as given. Take the decision of Company 1. The profit of company 1 is given by $R_1 \times D = R_1 \times (12 - P) = R_1 \times (12 - (R_1 + R_2))$.

Maximizing with respect to $R_1$, the first order condition faced by Company 1 is $12 - 2R_1 - R_2 = 0$, or $R_1 = \frac{12 - R_2}{2}$. Company 2 solves a symmetric problem, and therefore its first order condition is $R_2 = \frac{12 - R_1}{2}$. Solving for $R_1$ and $R_2$, it is easy to show that $R_1 = R_2 = 4$. The combined royalty charged by the two companies is $4 + 4 = 8$. Demand is given by $D = 12 - P = 12 - (R_1 + R_2) = 12 - 8 = 4$. Each company earns a profit equal to its royalty times the demand, or $4 \times 4 = 16$. Consumer surplus in this case is $(12 - 8) \times 4/2 = 8$.

5. Comparing the outcomes of these two scenarios, it is easy to see that when the two companies negotiate collectively, the combined royalties that they charge are lower, the market price is lower, market demand is higher, and therefore consumer surplus is also higher. This result is based on the intuition discussed in Section V: collective negotiations allow the two companies to internalize the negative effect that their royalties impose on market demand, resulting in lower royalties and lower market prices.

6. More generally, suppose that there are $N$ symmetric record companies in the market, denoted Company 1, Company 2, ..., Company $N$. Let $R_i$ denote the royalty charged by Company $i$, where $i = 1, 2, ..., N$. As in the numerical example, Webcasters are perfectly competitive, and each webcaster must obtain a license from all record companies in order to operate an economically viable service. Webcasters sell to downstream consumers, whose total demand is given by the function $D = A - BP$, where $D$ denotes total demand, $P$ denotes the price charged by webcasters, and $A$ and $B$ are parameters.
7. Suppose that Companies 1, 2, ..., N negotiate their licenses collectively. As before, the fact that webcasters are perfectly competitive implies that \( P = R_1 + R_2 + \cdots + R_N \). The combined profit of the record companies is \( P \times D \), or equivalently \( P \times (A - BP) \). The first order condition dictates that \((A - BP) + P(-B) = 0\), and therefore \( P = \frac{A}{2B} \).

8. Now suppose that each company sets its royalty individually. The profit of each company \( i \) is given by \( R_i \times D \), or equivalently \( R_i \times (A - BP) = R_i \times (A - B(R_i + P_{-i})) \) where \( P_{-i} \) denotes the sum of the royalties of all the companies except for company \( i \). As in the numerical example, each company takes \( P_{-i} \) -- i.e. the prices of the other companies -- as given. Maximizing with respect to \( R_i \), the first order condition faced by Company \( i \) is \((A - B(R_i + P_{-i})) + R_i(-B) = 0\), which implies that \( R_i = \frac{A - BP_{-i}}{2B} \). Since all the companies are symmetric, in equilibrium it is the case that \( P_{-i} = (N - 1)R_i \), and therefore \( R_i = \frac{A - B(N - 1)R_i}{2B} \), or \( R_i = \frac{1}{N+1} \frac{A}{B} \). The sum of the prices of all the companies is equal to \( P = N \times R_i = \frac{N}{N+1} \frac{A}{B} \).

9. The market price under individual bargaining, \( \frac{N}{N+1} \frac{A}{B} \), is always higher than the market price under collective bargaining, \( \frac{A}{2B} \). This implies that under collective bargaining the quantity is higher and therefore consumer surplus is higher. Moreover, the difference between the two prices, \( \frac{N}{N+1} \frac{A}{B} - \frac{1}{2B} = \frac{N-1}{2(N+1)} \frac{A}{B} \), is increasing in the number of firms \( N \). Therefore, the more licensors there are in the market, the higher the combined royalties charged by the companies (and the lower the consumer surplus) under individual negotiations vis-à-vis collective negotiations.
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:
Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

KYLE FUNN

Manager, Licensing & Enforcement
SoundExchange, Inc.

Witness for SoundExchange, Inc.
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

WRITTEN REBUTTAL TESTIMONY OF

KYLE FUNN

Manager, Licensing & Enforcement
SoundExchange, Inc.

June 2010
WRITTEN REBUTTAL TESTIMONY OF KYLE FUNN

Background and Qualifications

I am Manager, Licensing and Enforcement, at SoundExchange. I have worked at SoundExchange since May 2005. I have held my current position since early 2008. I previously served as Licensing and Enforcement Specialist at SoundExchange. My current job responsibilities include monitoring licensees' compliance with the regulations related to payment and reports of use, and communicating deficiencies to them. I act as a liaison between SoundExchange and licensees related to their compliance with statutory and regulatory requirements. In monitoring licensees’ compliance, I work both with SoundExchange’s finance department, which receives and processes royalty payments and statements of account from licensees, and its distribution services department, which receives and processes reports of use. In addition, I field questions from current and prospective licensees regarding general licensing, reporting and payment issues.

Discussion

I am submitting this rebuttal testimony to respond to Live365’s proposal that it should receive a 20% aggregator discount from its proposed rates applicable to commercial webcasters. Live365 has proposed that “a streaming service that operates a network of at least one hundred (100) independently-operated ‘aggregated webcasters’” should receive a 20% discount from the royalty rate set for commercial webcasting services. See Live365 Rate Proposal, Section I.B (Sept. 29, 2009). Live365 claims that it is entitled to this discount because of alleged “administrative savings” and other benefits it provides to copyright owners and SoundExchange. See, e.g., Corrected and Amended Testimony of Mark R. Fratrik at 38-39.
In reality, however, Live365 has engaged in conduct that has created more work for
SoundExchange, not less. As I understand the Court has already heard from other witnesses,
after the Webcasting II decision, Live365 paid royalties at the incorrect royalty rate. In May
2008, we sent a letter to Live365 that notified Live365 that, among other things, it was failing to
pay at the appropriate royalty rates. In April 2009 and August 2009, we contacted Live365 again
because it still was not complying with the rates and terms set in the Webcasting II proceeding,
and we repeated our demand that it pay in compliance with the regulations. Despite our repeated
efforts, Live365 did not comply with the rates set in the Webcasting II proceeding until very
recently.

Live365's decision not to pay royalties in compliance with the Webcasting II decision
imposed a burden on SoundExchange. Over the course of approximately two years,
SoundExchange had to spend time and money analyzing Live365’s lack of compliance and
repeatedly notifying Live365 about its failure to pay royalties at the correct rates. Moreover,
because Live365 pays royalties to SoundExchange on behalf of thousands of webcasters, when
Live365 was paying at the incorrect rates, it was causing thousands of webcasters to be out of
compliance with the statutory license, even as those webcasters may have believed that they
were compliant. And because Live365 has not provided SoundExchange with a list of the
thousands of webcasters for whom it purports to pay SoundExchange, it can be more time-
consuming for SoundExchange to determine whether a webcaster is complying with the statutory
licenses.

Live365 also interfered with SoundExchange’s collection and processing of information
related to the webcasters for whom Live365 pays and reports to SoundExchange. In order to
collect information in an efficient and uniform fashion from licensees, SoundExchange makes
template statement of account forms available on its web site. I am attaching the template 2009 statement of account for commercial webcasters as SoundExchange Rebuttal Exhibit 1 to my testimony. That template provides spaces for a webcaster to input the number of performances for each month, and then directs webcasters to multiply the number of performances by the applicable royalty rate for 2009 ($0.0018). The template statement of account form is designed to make it as easy as possible for webcasters to calculate the royalties they owe to SoundExchange. Most webcasters that pay SoundExchange use the template statement of account forms. Having the statement of account information in a standardized format makes it easier to review, and decreases the potential for errors due to human intervention and discretion. It is for this reason that SoundExchange is proposing in its revised rate proposal that webcasters be required to use the template statement of account form that SoundExchange makes available on its web site.  

If a webcaster does not use the standard statement of account form, it creates additional work for SoundExchange because the information that is submitted in a non-standard format cannot be processed as easily. Unfortunately, after the Webcasting II decision, Live365 did not use the correct statement of account template, and instead submitted statement of account forms that appear to have been doctored. For example, in December 2009, Live365 submitted the statement of account form that is attached hereto as SoundExchange Rebuttal Exhibit 2 (Restricted). The form that Live365 submitted appears designed to look like an official SoundExchange form, but it calculates royalties at incorrect royalty rates for the current rate period. It appears that Live365 took a statement of account form from the prior rate period and

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1 In connection with statement of account forms, SoundExchange is also proposing that licensees should be allowed to submit electronic signatures instead of handwritten signatures. The purpose of this proposal is to make it easier for licensees to submit statements of account.
altered it so that it purports to be a 2009 form. As you can see from looking at this exhibit, the
form claims to be a “Statement of Account for Commercial Webcasters Per Performance 2009,”
and includes the SoundExchange logo and other information that make it look like a form issued
by SoundExchange for 2009. But on the first page of the form, in the section where a webcaster
calculates the royalties due, the form instructs a webcaster to multiply its total performances by
“$0.000762,” and it instructs the webcaster to take a 4% deduction on the total number of
reported performances. That, of course, is the Webcasting I rate and was not applicable in 2009.
By submitting doctored Statement of Account forms, Live365 interfered with SoundExchange’s
efforts to administer the statutory licenses as efficiently as possible. This deliberate non-
compliance creates additional work for SoundExchange and undermines the claim that Live365
should receive a discount.

Finally, I should also note that Live365 and other services with 100 or more stations or
channels already obtain a benefit from SoundExchange that is not available to other services.
Under the final regulations adopted by the CRJs for 2006 - 2010 (37 C.F.R. § 380.3(b)(1)), and
under the Stipulation (May 14, 2010) submitted by Live365 and SoundExchange in Webcasting
III for 2011 - 2015, the $500 per station or channel minimum fee is capped at $50,000. Thus, a
service such as Live365 that aggregates thousands of stations already receives a substantial
benefit because it is required to pay only $50,000 in minimum fees as opposed to, for example,
the $2.5 million it would have to pay in minimum fees if it paid minimum fees for 5,000 stations
or channels.
I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 06/07/2010

[Signature]

Kyll Funn
# STATEMENT OF ACCOUNT FOR A COMMERCIAL WEBCASTER

## 2009 USAGE

**Send payments and statements to:**

SoundExchange, Inc.
1121 Fourteenth St., N.W., Suite 700
Washington, DC 20005
Attn: Royalty Administration

Please refer to page 4 for instructions to filling out this form.

<table>
<thead>
<tr>
<th>1 For the 2009 month of:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2 Name of service:</td>
<td></td>
</tr>
<tr>
<td>3 URL:</td>
<td></td>
</tr>
<tr>
<td>Station/channel name (e.g., call letters)*:</td>
<td></td>
</tr>
<tr>
<td>4 *If reporting more than one, list on page 3</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2009 Month</th>
<th>Total Performances</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td></td>
</tr>
<tr>
<td>February</td>
<td></td>
</tr>
<tr>
<td>March</td>
<td></td>
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<tr>
<td>April</td>
<td></td>
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<tr>
<td>May</td>
<td></td>
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<tr>
<td>June</td>
<td></td>
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<tr>
<td>July</td>
<td></td>
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<tr>
<td>August</td>
<td></td>
</tr>
<tr>
<td>September</td>
<td></td>
</tr>
<tr>
<td>October</td>
<td></td>
</tr>
<tr>
<td>November</td>
<td></td>
</tr>
<tr>
<td>December</td>
<td></td>
</tr>
<tr>
<td>Sum of lines 5 - 16 above</td>
<td>0</td>
</tr>
</tbody>
</table>

| Line 17 multiplied by $0.0018 | $ |

19 Enter the total amount of stations/channels transmitting in 2009.

<table>
<thead>
<tr>
<th>Line 19 multiplied by $500.</th>
<th>This is your total 2009 minimum fee liability.</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>The greater of (a) Line 18 or (b) Line 20.</td>
<td>This is the total current 2009 liability for the station(s) or channel(s) listed on Line 4.</td>
<td>$</td>
</tr>
</tbody>
</table>

21 Enter amounts previously paid for 2009 liability (including both usage and minimum fee payments).

| Line 22 subtracted from Line 21. | This is the current amount that is due. | $ |
| Payments are due within 45 days of the end of each month, and must be accompanied by a statement of account form. | |

Page 1 of 4

(OFFICE USE ONLY - CRB 2006-2010)

SX Rebuttal Ex. 1
STATEMENT OF ACCOUNT FOR A COMMERCIAL WEBCASTER
2009 USAGE
CERTIFICATION PAGE

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this Statement of Account and hereby certify that the information provided herein is true, accurate and complete to my knowledge after reasonable due diligence.

[All of the below information is required by federal regulations. See 72 Fed. Reg. 24,084, (May 1, 2007) (37 C.F.R. § 380.4(f).]

Signature: ________________________________

Name: ________________________________

Title: ________________________________

E-mail Address: ________________________________

Address: ________________________________

City, State, Zip: ________________________________

Telephone Number: ________________________________

Date: ________________________________
<table>
<thead>
<tr>
<th>STATION/CHANNEL NAME (e.g., Call Letters)</th>
<th>URL</th>
<th>DATE OF INITIAL TRANSMISSION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td></td>
<td></td>
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<tr>
<td>2</td>
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<td>24</td>
<td></td>
<td></td>
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<tr>
<td>25</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(If the number of stations/channels exceed 25, please submit an accompanying list to accommodate.)
STATEMENT OF ACCOUNT FOR A COMMERCIAL WEBCASTER

2009 USAGE

INSTRUCTIONS

1. Enter the month for the most recent usage reported on the statement of account.
2. Enter the "name of service" as listed on the Licensee's Notice of Use filed with the Copyright Office. If you have not submitted a Notice of Use form, please do so immediately. Notices of Use may be downloaded from either www.copyright.gov or www.soundexchange.com.
3. Enter the URL listed on the Licensee's Notice of Use.
4. Enter the applicable station or channel name. For example, if a station has "call letters," they would be entered here. If the statement of account reports the usage of multiple stations or channels, please list them accordingly on page 3.

For lines 5 through 16, enter the total amount of performances, year to date, for ALL months from January through, and including, the month indicated on Line 1. If there are any adjustments from previously submitted performances, services must complete and submit Worksheet A, available on our website (www.soundexchange.com).

5-16

Enter the sum of Lines 5 through 16.

17

Multiply Line 17 by $0.0018. This is the 2009 rate.

18

Enter the total number of stations or channels that are operating under statutory licensing in 2009. If this number includes stations or channels that were not included on previous submissions, please ensure that they are listed on page 3.

19

Multiply Line 19 by $500. This represents your total current minimum fee liability for 2009.

20

Enter the greater of your usage liability (Line 18) or your minimum fee liability (Line 20). This is the current total 2009 liability for the station or channel.

21

Enter any previous payments to SoundExchange for 2009 liability. This includes any prior minimum fee and/or usage payments. If the statement of account reports multiple stations or channels, please ensure that the previous payments correspond accordingly. Likewise, if the statement of account only represents a single station or channel, please ensure that other payments for other stations or channels or not represented.

22

Enter the amount of Line 22 subtracted from Line 21. This is the total amount that is due. Payments are due within 45 days of the end of each month, and must be accompanied by a statement of account form.

23

(For more information regarding webcasting rates and terms, including definitions, please see 37 C.F.R. § 380.)

NOTICE

SoundExchange will not confirm receipt of payments or statements of account. If a service requires confirmation of receipt, please use registered mail, return receipt requested, or an express/overnight delivery service with tracking ability.

Services that have filed a Notice of Use of Sound Recordings under Statutory License with the Copyright Office are obligated to comply with all requirements of the statutory licenses under Sections 112 and 114 of the Copyright Act. It is the responsibility of each such service to ensure that it is in full compliance with the requirements of the statutory licenses under 17 U.S.C. §§ 112 & 114. SoundExchange is not in a position to determine whether each of the many services that rely on these statutory licenses is eligible for statutory licensing and does not in fact make any such determination. Nor does SoundExchange verify that such services are in full compliance with all applicable requirements of the two statutory licenses. Accordingly, SoundExchange's acceptance of a service's payment does not express or imply any acknowledgment that a service is in compliance with the requirements of the statutory licenses. SoundExchange, its members and other copyright owners reserve all their rights to take enforcement action against a service that is not in compliance with those requirements, regardless of any royalty payments such service may have made to SoundExchange.
The attachment “SX Rebuttal Ex. 2” is Restricted (under the Protective Order) in its entirety and is therefore omitted from this public version of the exhibits binder.