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**for the Written Rebuttal Statement of SoundExchange, Inc.**  
**2011-1 CRB PSS/Satellite II**

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

In the Matter of:

Determination of Rates and Terms for  
Preexisting Subscription Services and  
Satellite Digital Audio Radio Services

Docket No. 2011-1  
CRB PSS/Satellite II

**INTRODUCTORY MEMORANDUM TO THE  
WRITTEN REBUTTAL CASE OF SOUNDEXCHANGE, INC.**

SoundExchange, Inc. (“SoundExchange”), through its undersigned counsel, respectfully submits this Introductory Memorandum to its written rebuttal case in accordance with 37 C.F.R. § 351.4. This Memorandum describes the contents of SoundExchange’s written rebuttal case and briefly summarizes the testimony of its witnesses.

**CONTENTS OF SOUNDEXCHANGE’S WRITTEN DIRECT CASE**

Volume 1 contains: (A) this Introductory Memorandum; (B) SoundExchange’s Revised Proposed Rates and Terms; (C) an index of SoundExchange’s witness testimony; (D) an index of SoundExchange’s exhibits; and (E) a certificate of service.

Volume 2 contains the written rebuttal testimony of SoundExchange’s nine witnesses.

Volumes 3 and 4 contain SoundExchange’s rebuttal exhibits.

Volume 5 contains designated testimony from the *SDARS I* Proceeding (Docket No. 2006-1 CRB-DSTRA) that SoundExchange is submitting in this proceeding. SoundExchange is designating testimony from the following witnesses from *SDARS I*: Bruce Elbert (rebuttal); Charles Ciongoli (rebuttal); Mark Eisenberg (direct and rebuttal); and Lawrence Kenswil

(direct). To the extent a sponsoring witness is needed to move this designated testimony into evidence, Dr. George Ford will sponsor this testimony.

Pursuant to 37 C.F.R. § 350.4(a), § 351.4(a), and the Court's Order of August 17, 2011, SoundExchange is filing an original, five copies, and an electronic copy of the materials in Volumes 1, 2, 3, 4, and 5.

The written testimony of several of SoundExchange's witnesses contains information that SoundExchange has marked as Restricted, as that term is defined in Section 2 of the Protective Order entered by this Court on November 16, 2011. SoundExchange is filing a motion for application of the Protective Order to the portions of the testimony it has marked as Restricted. In connection with that motion, SoundExchange is filing a Declaration and Rule 11 Certification of Jared Freedman and a redaction log identifying the page number, and where appropriate the line number, of each proposed redaction and briefly describing the nature of the Protected Material proposed to be redacted.

As set forth in its motion for application of the Protective Order, SoundExchange requests that, in the event the Court declines to apply the Protective Order to any portion of the information that SoundExchange has marked Restricted, the Court provide SoundExchange the opportunity to withdraw the information from its written direct case, or replace it with publicly available information, before the materials are made publicly available.

## **SUMMARY OF SOUNDEXCHANGE'S WRITTEN REBUTTAL CASE**

### **A. Revised Proposed Rates and Terms**

SoundExchange's rate proposal is mostly unchanged. The proposed royalty rates for both the SDARS and the PSS set forth in SoundExchange's Revised Proposed Rates and Terms are the same as proposed in SoundExchange's original rate proposal. SoundExchange's proposal

has been revised in two ways. First, SoundExchange has proposed a revision to address the fact that Sirius XM has executed a number of direct licenses with independent record labels, whose sound recordings Sirius XM intends to use (or already uses) on its SDARS service.

SoundExchange has proposed four alternative methods for calculating a reduction in Sirius XM's statutory royalty payments to the extent that it relies on direct licenses. Second, SoundExchange is proposing a revision to paragraph (3)(iv)(C) of the proposed definition of gross revenues to clarify that all revenues associated with separately-licensed services provided on a standalone basis may be excluded from the SDARS gross revenues calculation.

## **B. Witness Testimony**

SoundExchange's written rebuttal case includes the written testimony of the following six expert and three fact witnesses.

### **1. Expert Witnesses**

Janusz A. Ordover, Ph.D., is a Professor of Economics and former Director of the Masters in Economics Program at New York University. Prof. Ordover's testimony rebuts the testimony of Sirius XM's expert economist, Prof. Roger Noll. First, Prof. Ordover testifies that Prof. Noll's reliance on a small number of direct licenses executed by Sirius XM with small independent record labels as the benchmark for establishing the statutory royalty rate is severely flawed. Second, Prof. Ordover testifies that the basis for Dr. Noll's reliance on non-interactive services as a benchmark is faulty, and that the implementation of Dr. Noll's non-interactive services benchmark suffers from additional defects. Prof. Ordover concludes that neither of the benchmark approaches put forward by Dr. Noll represents an economically reasonable basis on which to determine the licensing rates Sirius XM should pay for access to sound recording performance rights for its satellite radio service.

Thomas Z. Lys, Ph.D., is the Eric L. Kohler Chair in Accounting and Professor of Accounting and Information Management at the Kellogg School of Management, Northwestern University. His testimony rebuts the testimony of Sirius XM's fact and expert witnesses, including Mr. Frear, Mr. Karmazin, and Mr. Stowell, related to Sirius XM's claims that any increase in the royalty rate will significantly increase the likelihood that Sirius XM's business will be disrupted. Dr. Lys concludes that SoundExchange's proposed royalty rate schedule of 12 percent for 2013, 14 percent for 2014, 16 percent for 2015, 18 percent for 2016, and 20 percent for 2017 applied to Sirius XM's revenue would not be disruptive to Sirius XM's business. Dr. Lys demonstrates that Sirius XM's own internal forecasts and analyst projections plainly show that the company can easily afford to pay the royalty rate proposed by SoundExchange. Moreover, he concludes that Sirius XM's attempts to portray those projections as unduly optimistic are flawed. Furthermore, Dr. Lys explains that Sirius XM has been able to pass through prior royalty rate increases to its subscribers and has the intent and ability to do so in the future, by way of either price increases or the U.S. Music Royalty Fee, further lowering any possibility of disruption. Finally, Dr. Lys concludes that from an accounting and auditing perspective, Sirius XM's proposed revenue definition is deficient and should be rejected. Dr. Lys also shows that Dr. Noll's analysis of Sirius XM's "unique costs of delivery" is unreliable.

David Pearlman is the President of Pearlman Advisors, LLC, a consulting firm. He has extensive experience in the radio business. His testimony rebuts many of the opinions and prognostications of Sirius XM's witnesses related to the competitive effect of Internet Radio on Sirius XM, particularly concerning the market for listeners in the car. He explains that any claims that Internet Radio is "life-threatening" to Satellite Radio are simply incorrect, noting that Sirius XM has prospered as Internet Radio has grown, and opining that it will continue to

prosper going forward. He points to several reasons for Sirius XM's success, including that it is an extremely profitable company without having a majority (or anything close to a majority) of the market for audio entertainment, that Internet Radio services are not a good substitute for the commercial-free channels that Sirius XM offers, and that Sirius XM enjoys an unmatched OEM distribution system for its product. With respect to the upcoming rate period, he strongly disputes that Sirius XM's growth and profitability is seriously threatened by Internet Radio. Among other reasons, Sirius XM has a lead in automobile installations that is all but insurmountable over the next five years, and by 2018 there will be a 100 million cars with Sirius XM installed. In addition, Internet Radio is limited by the cellular network on which it runs, and 3G technology is not well-suited for mass streaming of audio content. Moreover, Internet Radio services require consumers to pay for a data plan with their cellular phone company. And cellular phone companies are jettisoning their unlimited data plan options, precisely because high-data volume applications like Internet Radio are uneconomical for the cellular companies. For all these reasons, Mr. Pearlman concludes that from now through 2017, Sirius XM has a distribution and programming advantage that will allow the company to continue to grow its revenue and profits.

George S. Ford, Ph.D., is the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis. He is also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies and an Adjunct Professor at Samford University in Birmingham, Alabama. His written rebuttal testimony responds to Music Choice's direct case and proposed rate. He identifies several flaws in Music Choice's testimony and rate proposal, including the following. First, Music Choice is a heavy user of sound recordings, as reflected in the amount of time that cable subscribers spend listening to the

company's music channels. The intensity of usage must be taken into account in establishing the appropriate royalty rate, and Dr. Crawford failed to do so. Second, Dr. Crawford's analysis rests on a benchmark – the royalty rate paid by Music Choice for the performance of musical works – that has been repeatedly rejected by this Court as an appropriate benchmark for setting sound recording performance royalties under statutory licenses. Third, Dr. Crawford's application of the Nash Bargaining Solution to the question of the appropriate royalty rate for the PSS rests on a faulty premise regarding the promotional effect of Music Choice on the sale of sound recordings and the resulting impact of that purported effect on the owners of sound recordings and the owners of musical works. Fourth, Dr. Crawford fails to adequately account for the distorting effect of Music Choice's ownership structure on the revenue that Music Choice obtains for its services and obscures the actual value of the PSS to end users, the cable subscribers. Finally, the financial analysis conducted at Dr. Crawford's direction, and that he claims corroborates the conclusions from the Nash Bargaining Solution, presents a misleading picture of Music Choice's financial condition.

Itamar Simonson, Ph.D., is the Sebastian S. Kresge Professor of Marketing at the Graduate School of Business, Stanford University. The purpose of his testimony is to evaluate the methodology, results and conclusions reported by Sirius XM's expert survey witness, Dr. Hauser. He concludes that the Hauser Survey is methodologically flawed in numerous respects that largely predetermined its findings; as a result, the survey greatly underestimated the value of music. Dr. Hauser's survey effectively presumed that all features of the satellite radio service, including music, were equally important. However, Dr. Simonson explains that Sirius XM's own internal surveys have shown that music is the most important feature of the service. And although the Hauser Survey severely underestimated the value of music, the survey results

similarly found that music is the most important feature. Dr. Simonson identifies several methodological flaws that resulted in Dr. Hauser's under-valuing music. Despite those flaws, Dr. Simonson shows that based on the Hauser Survey results, the value of music range is between \$10.37 and \$5.75 (before taking into account the Music Royalty Fee and Sirius XM's recent price increase), and that considering that music is the most important feature for the majority of Sirius XM subscribers, the value of music for the average Sirius XM subscriber is much closer to the high end of the range.

Mark Eisenberg is the Co-Founder and Chief Operating Officer of LatticeWorks Media and a consultant to a variety of media, entertainment, and technology companies, drawing on his expertise in both digital and traditional media. Mr. Eisenberg, who has years of experience in the music industry negotiating licensing agreements and substantial knowledge about contractual arrangements between artists and record labels, analyzes the direct licenses with independent labels that Sirius XM is relying on in this proceeding. He concludes that the operational and business challenges facing independent labels, when taken together with favorable royalty accounting provisions in the underlying label-artist contractual relationship, created unique incentives for a small number of independent labels to enter into direct licenses with Sirius XM that have little or nothing to do with the headline rate that was offered in those deals.

## **2. Fact Witnesses**

Jonathan Bender is the Chief Operating Officer of SoundExchange. His rebuttal testimony describes how SoundExchange's revised rate proposal addresses issues raised by Sirius XM's direct licensing. Because direct licensing has become a conspicuous issue in this proceeding, SoundExchange is proposing to make a direct license adjustment to the definition of revenue in a way that would be fair and transparent. Mr. Bender's testimony discusses the four

alternative approaches for implementing such an adjustment, as set forth in SoundExchange's revised rate proposal.

Aaron Harrison is Vice President, Business & Legal Affairs, Global Digital Business for UMG Recordings, Inc. ("UMG"). In that role, he negotiates deals with various digital music services that use UMG's repertoire of sound recordings. His testimony rebuts the testimony of Sirius XM witnesses Dr. Roger Noll, Mr. Steven Blatter, and Mr. Ron Gertz, as well as Music Choice witness Dr. Gregory Crawford, concerning the market rate for sound recordings on their services. Mr. Harrison testifies that the agreements that Dr. Noll has offered as benchmarks for the SDARS statutory license are outliers in the marketplace for sound recordings, and additional context is necessary to illustrate how a major record label would understand their financial terms. As for the direct licenses MRI negotiated on behalf of Sirius XM, UMG would never have accepted such a low royalty rate, and while certain features of the license may have appealed to a small segment of the independent record industry, those features do not hold the same interest for UMG. Mr. Harrison also explains why the claims made for the promotional effect of Sirius XM and Music Choice's programming would not be persuasive in a market negotiation for those services. Finally, he testifies that Music Choice's proposed musical works benchmark is inappropriate given the market evidence that sound recordings are worth much more than musical works.

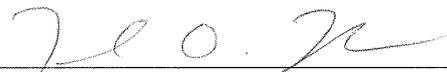
Michael Powers is the President of Yellow Dog Records, a boutique independent record label that signed a direct license with Sirius XM. Mr. Powers' testimony describes the reasons that Yellow Dog Records agreed to a direct license, noting that his decision to sign the direct license was based in significant part on features of the direct license other than the royalty rate. Mr. Powers explains why he does not believe that the pro rata royalty rate that Yellow Dog

Records agreed to in the direct license with Sirius XM is an appropriate basis for setting statutory royalty rates for the vast majority of record labels that have not signed direct licenses.

Respectfully submitted,

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July 2, 2012

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

In the Matter of:

Determination of Rates and Terms for  
Preexisting Subscription Services and  
Satellite Digital Audio Radio Services

Docket No. 2011-1  
CRB PSS/Satellite II

**REVISED PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC.**

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange, Inc. (“SoundExchange”) proposes the rates and terms set forth herein for digital audio transmissions made by Preexisting Satellite Digital Audio Radio Services as defined in 17 U.S.C. § 114(j)(10) (“SDARS”) and Preexisting Subscription Services as defined in 17 U.S.C. § 114(j)(11) (“PSS”) under the statutory license provided by 17 U.S.C. § 114, together with the making of ephemeral recordings necessary to facilitate such transmissions under the statutory license provided by 17 U.S.C. § 112(e) during the period January 1, 2013 through December 31, 2017.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange reserves the right to revise its proposed rates and terms at any time during the proceeding up to, and including, the filing of its proposed findings of fact and conclusions of law.

**I. ROYALTY RATES**

**A. SDARS**

**1. PERCENTAGE RATES**

For all licensed transmissions and related ephemeral recordings by an SDARS, SoundExchange requests royalty rates that are a percentage of “Gross Revenues” as set forth below:

<u>Year</u>	<u>Percentage</u>
2013	12%
2014	14%
2015	16%
2016	18%
2017	20%

**[Note: This is consistent with SoundExchange’s proposal of November 29, 2011.]**

**2. DEFINITION OF GROSS REVENUES**

SoundExchange proposes that the foregoing percentages be applied to a royalty base determined by the following definition of Gross Revenues:

(1) Gross Revenues shall mean revenues recognized by the Licensee in accordance with GAAP from the operation of an SDARS in the U.S., and shall be comprised of the following:

(i) All subscription, activation, subscription-related and other revenues recognized by Licensee from fees paid or payable by or for U.S. subscribers to Licensee’s SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below;

(ii) Licensee’s advertising revenues, or other revenues from sponsors, if any, attributable to advertising on channels of Licensee’s SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) through (iii) of the definition of “Gross Revenues” to which Licensee is entitled but which are paid to a parent, subsidiary or division of Licensee.

(3) To the extent otherwise included by paragraph (1), Gross Revenues shall exclude:

(i) Royalties paid to Licensee by persons other than subscribers, advertisers and sponsors for intellectual property rights;

(ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

(iii) Sales and use taxes; and

(iv) Revenues recognized by Licensee for the provision of –

(A) Data services (*e.g.*, weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time, but not transmission of sound recording data), when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee’s SDARS, and offered at the same price both to subscribers to Licensee’s SDARS and persons who are not subscribers to Licensee’s SDARS);

(B) Channels, programming, products and/or other services provided outside of the United States; and

(C) Separately licensed services, including webcasting, interactive services, transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee’s SDARS, and offered at the same price both to subscribers to Licensee’s SDARS and persons who are not subscribers to Licensee’s SDARS).

**[Note: Except for a correction to the introductory clause of paragraph (3)(iv)(C), this is consistent with SoundExchange’s proposal of November 29, 2011.]**

### 3. DIRECT LICENSE ADJUSTMENT

SoundExchange proposes that the payable statutory royalty amount be determined by reducing the product of the percentage rate and Gross Revenues (as defined above) by a percentage representing the value of the directly-licensed usage and corresponding to (or approximating) the proportion of listens for which an SDARS relies upon direct licenses rather than the statutory license (the “Direct License Share”). SoundExchange proposes four alternative means of computing the Direct License Share, in order of decreasing preference, and requests that the Judges adopt one of these if they determine that a direct license adjustment is warranted.<sup>1</sup>

#### Alternative 1 – Based on Actual Total Performances

The regulations at 37 C.F.R. § 370.4(d)(2)(vii) specify that an SDARS is required either to include in its reports of use the actual total performances (as defined in 37 C.F.R. § 370.4(b)(4)) of each sound recording used, or to report usage on a per-channel basis with the aggregate tuning hours (as defined in 37 C.F.R. § 370.4(b)(1)) for each channel. While those terms, as defined for reporting purposes in Section 370.4, exclude directly-licensed recordings, the same concepts can be applied to directly-licensed recordings as easily as other recordings.<sup>2</sup> SoundExchange understands that Sirius XM has not implemented systems to measure actual total performances. Had Sirius XM done so, SoundExchange’s preferred mode for calculating the Direct License Share would use actual total performances, as follows:

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<sup>1</sup> If the Judges determine that a direct license adjustment should be implemented in the manner proposed by SoundExchange, it would be improper also to include such an adjustment in the definition of Gross Revenues.

<sup>2</sup> In its proposed regulatory language, SoundExchange has incorporated versions of part 370 definitions adapted to the context of this proposal.

- For each month, divide actual total performances of directly-licensed recordings by the SDARS by actual total performances of all recordings by the SDARS to determine the Direct License Share.

#### Alternative 2 – Based on Aggregate Tuning Hours

SoundExchange's next preferred mode for calculating the Direct License Share would use aggregate tuning hour data to approximate relative listenership to directly-licensed recordings and other recordings, as follows:

- For each channel each month, divide the plays ("spins") of directly-licensed recordings by the total number of plays of all recordings on the channel to determine a percentage of directly licensed plays for the channel.
- For each channel each month, multiply the percentage of directly licensed plays for the channel by the aggregate tuning hours for the channel (including all recordings) to determine the approximate aggregate tuning hours of directly-licensed recordings on the channel.
- For each month, add the approximate aggregate tuning hours of directly-licensed recordings on all channels to determine a total approximate aggregate tuning hours of directly-licensed recordings on the SDARS.
- For each month, divide the total approximate aggregate tuning hours of directly-licensed recordings on the SDARS by the aggregate tuning hours of all recordings on the SDARS to determine the Direct License Share.

### Alternative 3 – Based on Independent Audience Measurement Data

If Alternative two is impracticable, SoundExchange understands that audience measurement data, such as average quarter hour (“AQH”) shares, is potentially available for Sirius XM’s service from audience measurement firms such as Arbitron, and that Sirius XM uses some such data to sell advertisements on its non-music channels. SoundExchange’s next preferred mode for calculating the Direct License Share would use this kind of data to approximate relative listenership to directly-licensed recordings and non-directly-licensed recordings on the SDARS’ music channels, as follows:

- For each channel each month, divide the plays (“spins”) of directly-licensed recordings by the total number of plays of all recordings on the channel to determine a percentage of directly licensed plays for the channel.
- For each channel each month, multiply the percentage of directly licensed plays for the channel by a statistically-valid measure of relative listenership on the channel (such as an AQH share) measured by a reputable, independent audience measurement firm for the month (the “Listenership Measure”), to determine a “Direct License Factor” for the channel.
- For each month, add the Direct License Factors for all channels to determine a “Total Direct License Factor” for the SDARS.
- For each month, add the Listenership Measure as originally measured for all channels (not adjusted for direct licensing) to determine a “Total Listenership Measure” for all recordings on the SDARS.
- For each month, divide the Total Direct License Factor by the Total Listenership Measure to determine the Direct License Share.

The foregoing assumes the existence of a Listenership Measure as defined above. A Licensee desiring to take a Direct License Share adjustment based on this Alternative 3 would need to procure such data from a source such as Arbitron and disclose it to SoundExchange. Otherwise, a Direct License Share adjustment would not be available. SoundExchange would use the same channel listenership data in allocating royalty distributions to sound recordings according to the channels on which the sound recordings were played.<sup>3</sup>

#### Alternative 4 – Based on Analogous Internet Data

If all the foregoing alternatives are impracticable, SoundExchange knows that Sirius XM provides Internet webcast versions of some of its SDARS channels and measures and reports such webcast performances. It thus is clearly practicable, although a less accurate indicator of SDARS listenership than the foregoing alternatives, to use information about Internet webcasts to calculate the Direct License Share. Accordingly, SoundExchange's least preferred mode for calculating the Direct License Share would use Internet webcast data to approximate relative listenership to directly-licensed recordings and other recordings, as follows:

- For each month, identify the Internet webcast music channels offered by the Licensee that directly correspond to music channels offered on its SDARS (the "Reference Channels").
- For each month, divide the Internet performances of directly-licensed recordings on the Reference Channels by the total number of Internet performances of all recordings on the Reference Channels to determine the Direct License Share.

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<sup>3</sup> For the time being, the specific data set satisfying these requirements could be selected by the Licensee. However, it may be appropriate to address measurement of usage of satellite radio in a future notice and recordkeeping proceeding.

The foregoing assumes that the Reference Channels constitute a large majority of the music channels offered on the SDARS and are generally representative of the music channels offered on the SDARS. SoundExchange understands this to be true of the Internet webcast music channels offered by Sirius XM today. A Direct License Share adjustment based on this Alternative 4 would not be available if Sirius XM were to change its offerings so that this condition were no longer true.

#### **4. ALLOCATION BETWEEN SECTION 112 AND 114**

SoundExchange proposes that the combined Section 112/114 royalty described above be allocated 5% to Section 112 and 95% to Section 114.

**[Note: This is consistent with SoundExchange’s proposal of November 29, 2011 and the participants’ stipulation of May 24, 2012.]**

#### **5. EPHEMERAL ROYALTY MINIMUM FEE**

Pursuant to 17 U.S.C. § 112(e)(3) and (4), SoundExchange proposes that an SDARS pay an annual, nonrefundable minimum fee of \$100,000 creditable to ephemeral royalty payments.

**[Note: This is consistent with SoundExchange’s proposal of November 29, 2011 and the participants’ stipulation of May 24, 2012.]**

### **B. PSS**

#### **1. PERCENTAGE RATES**

For all licensed transmissions and related ephemeral recordings by a PSS, SoundExchange requests royalty rates that are a percentage of “Gross Revenues” as set forth below:

<u>Year</u>	<u>Percentage</u>
2013	15%
2014	20%
2015	25%
2016	35%
2017	45%

**[Note: This is consistent with SoundExchange’s proposal of November 29, 2011.]**

## **2. DEFINITION OF GROSS REVENUES**

SoundExchange proposes that the foregoing percentages be applied to a royalty base determined by the definition of Gross Revenues presently set forth in 37 C.F.R. § 382.2(e) (although SoundExchange proposes relocating that definition within the applicable regulations and adjusting internal cross references accordingly).

**[Note: This is consistent with SoundExchange’s proposal of November 29, 2011.]**

## **3. ALLOCATION BETWEEN SECTION 112 AND 114**

SoundExchange proposes that the combined Section 112/114 royalty described above be allocated 5% to Section 112 and 95% to Section 114.

**[Note: This is consistent with SoundExchange’s proposal of November 29, 2011 and the participants’ stipulation of May 24, 2012.]**

## **4. MINIMUM FEE**

SoundExchange proposes that a PSS pay an annual, nonrefundable minimum fee of \$100,000 creditable to all its statutory royalty payments, in the manner presently set forth in 37 C.F.R. § 382.2(c) (subject to technical and conforming changes in the regulation setting forth such arrangement).

**[Note: This is consistent with SoundExchange’s proposal of November 29, 2011 and the participants’ stipulation of May 24, 2012.]**

## II. TERMS

SoundExchange proposes that the terms currently set forth in 37 C.F.R. Part 382 for the most part be continued, subject to generally technical and conforming changes. The majority of these changes consist of conforming the PSS terms to the SDARS terms. These changes are described in the testimony of Jonathan Bender.

SoundExchange has set forth its proposed terms (along with its proposed rates) in proposed regulations attached hereto. Exhibit A is a clean copy of the proposed regulations, and Exhibit B is redlined to show changes from the regulations currently provided in 37 C.F.R. Part 382.

Respectfully submitted,

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July 2, 2012

**Exhibit A**  
**Proposed Regulations**

**PART 382—RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES**

**Subpart A—Preexisting Subscription Services**

Sec.

- 382.1 General.
- 382.2 Definitions.
- 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.
- 382.4 Terms for making payment of royalty fees and statements of account.
- 382.5 Confidential information.
- 382.6 Verification of royalty payments.
- 382.7 Verification of royalty distributions.
- 382.8 Unclaimed funds.

**Subpart B—Preexisting Satellite Digital Audio Radio Services**

- 382.10 General.
- 382.11 Definitions.
- 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.
- 382.13 Terms for making payment of royalty fees and statements of account.
- 382.14 Confidential information.
- 382.15 Verification of royalty payments.
- 382.16 Verification of royalty distributions.
- 382.17 Unclaimed funds.

**Authority:** 17 U.S.C. 112(e), 114 and 801(b)(1).

**Subpart A—Preexisting Subscription Services**

**§ 382.1 General.**

(a) This subpart establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this subpart, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

### **§ 382.2 Definitions.**

For purposes of this subpart, the following definitions shall apply:

*Collective* is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

*Copyright Owners* are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

*Ephemeral Recording* is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

*Gross revenues* shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

- (i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;
- (ii) Licensee's advertising revenues (as billed), or other monies received from sponsors, if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;
- (iii) Monies received for the provision of time on the programming service to any third party;
- (iv) Monies received from the sale of time to providers of paid programming such as infomercials;
- (v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;
- (vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (1)(i) through (vii) of this definition.

(2) Gross revenues shall include such payments as set forth in paragraphs (1)(i) through (viii) of this definition to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (1) of this definition for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

*Licensee* means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

*Performers* means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C), and the parties identified in 17 U.S.C. 114(g)(2)(D).

*Qualified Auditor* is a Certified Public Accountant.

**§ 382.3 Royalty fees for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services.**

(a) Commencing January 1, 2013, and continuing through December 31, 2017, the monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114 and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be a percentage of monthly Gross Revenues resulting from residential services in the United States as follows: for 2013, 15%; for 2014, 20%; for 2015, 25%; for 2016, 35%; and for 2017, 45%.

(b) Each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114 and Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraph (a) of this section shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(c) The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received.

**§ 382.4 Terms for making payment of royalty fees and statements of account.**

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.3 to the Collective.

(b) *Timing of payment.* A Licensee shall make any payments due under §382.3 on a monthly basis on or before the 45th day after the end of each month for that month.

(c) *Statements of Account.* Licensees shall submit monthly statements of account on a form provided by the Collective. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payments;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) The signature of a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and
- (8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(d) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.3 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (c)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.8.

(e) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

### **§ 382.5 Confidential information.**

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee’s statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

#### **§ 382.6 Verification of royalty payments.**

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of five (5) percent or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

### **§ 382.7 Verification of royalty distributions.**

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of five (5) percent or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

**§ 382.8 Unclaimed funds.**

If the Collective is unable to identify or locate a copyright owner or performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

## **Subpart B—Preexisting Satellite Digital Audio Radio Services**

**Authority:** 17 U.S.C. 112(e), 114, 804(b)(3).

### **§ 382.10 General.**

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period from January 1, 2013, through December 31, 2017.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

### **§ 382.11 Definitions.**

For purposes of this subpart, the following definitions shall apply:

*Collective* is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2013–2017 license period, the Collective is SoundExchange, Inc.

*Copyright Owners* are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

*Directly-Licensed Recording* is a sound recording for which the Licensee has previously obtained a license from the Copyright Owner of such sound recording.

*Ephemeral Recording* is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114 and subject to the limitations specified in 17 U.S.C. 112(e).

*GAAP* shall mean generally accepted accounting principles in effect from time to time in the United States.

*Gross Revenues.* (1) Gross Revenues shall mean revenues recognized by the Licensee in accordance with GAAP from the operation of an SDARS in the U.S., and shall be comprised of the following:

(i) All subscription, activation, subscription-related and other revenues recognized by Licensee from fees paid or payable by or for U.S. subscribers to Licensee's SDARS with respect to any and all services provided by the Licensee to such subscribers, unless excluded by paragraph (3) below;

(ii) Licensee's advertising revenues, or other revenues from sponsors, if any, attributable to advertising on channels of Licensee's SDARS in the U.S. other than those that use only incidental performances of sound recordings, less advertising agency and sales commissions attributable to advertising revenues included in Gross Revenues; and

(iii) Revenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor.

(2) Gross Revenues shall include such payments as set forth in paragraphs (1)(i) through (iii) of the definition of "Gross Revenues" to which Licensee is entitled but which are paid to a parent, subsidiary or division of Licensee.

(3) To the extent otherwise included by paragraph (1), Gross Revenues shall exclude:

(i) Royalties paid to Licensee by persons other than subscribers, advertisers and sponsors for intellectual property rights;

(ii) Revenues from the sale of phonorecords and digital phonorecord deliveries sold by Licensee (but not any affiliate fees or other payments by a third party for advertising of downloads sold by a third party);

(iii) Sales and use taxes; and

(iv) Revenues recognized by Licensee for the provision of –

(A) Data services (*e.g.*, weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time, but not transmission of sound recording data), when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS);

(B) Channels, programming, products and/or other services provided outside of the United States; and

(C) Separately licensed services, including webcasting, interactive services, transmissions to business establishments, and audio services bundled with television programming and subject to the rates provided in part 383, when such services are provided on a standalone basis (*i.e.*, priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS).

*Licensee* is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio service, and has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

*Performers* means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C), and the parties identified in 17 U.S.C. 114(g)(2)(D).

*Qualified Auditor* is a Certified Public Accountant.

*SDARS* means the preexisting satellite digital audio radio services as defined in 17 U.S.C. 114(j)(10).

### **§ 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.**

(a) *In general.* The monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be a percentage of monthly Gross Revenues as follows: for 2013, 12%; for 2014, 14%; for 2015, 16%; for 2016, 18%; and for 2017, 20%, except that the royalty fee so determined may be reduced by the direct license share as described in paragraph (d) of this section.

(b) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of phonorecords used by the Licensee solely to facilitate transmissions for which it pays royalties as and when provided in this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(c) *Ephemeral recordings minimum fee.* Each Licensee making Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but the Ephemeral Recordings royalties due and payable for a given year or any month therein under subsections (a) and (b) shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(d) *Direct license share.* The percentage of monthly Gross Revenues royalty fee specified in paragraph (a) of this section may be reduced by a percentage as set forth in this paragraph (referred to herein as the “direct license share”).

#### Alternative 1 – Based on Actual Total Performances

(1) For each month, the direct license share is the result of dividing the actual total performances of Directly-Licensed Recordings through the Licensee’s SDARS by actual total performances of all sound recordings through the Licensee’s SDARS.

(2) For purposes of paragraph (d)(1) of this section, a “performance” is each instance in which any portion of a sound recording is publicly performed to a listener within the United States by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding an incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

#### Alternative 2 – Based on Aggregate Tuning Hours

(1) For each month, the direct license share is calculated as follows:

(i) For each channel, divide the play frequency of Directly-Licensed Recordings on the channel by the play frequency of all sound recordings on the channel to determine a percentage of directly-licensed plays for the channel.

(ii) For each channel, multiply the percentage of directly-licensed plays for the channel by the aggregate tuning hours for the channel to determine the approximate aggregate tuning hours of Directly-Licensed Recordings on the channel.

(iii) Add the approximate aggregate tuning hours of Directly-Licensed Recordings on all channels of the Licensee’s SDARS to determine a total approximate aggregate tuning hours of Directly-Licensed Recordings on the Licensee’s SDARS.

(iv) Divide the total approximate aggregate tuning hours of Directly-Licensed Recordings on the Licensee’s SDARS by the aggregate tuning hours of all sound recordings on the Licensee’s SDARS to determine the direct license share.

(2) For purposes of paragraph (d)(1) of this section:

(i) “Aggregate tuning hours” are the total hours of programming that Licensee’s SDARS has transmitted during the month to all listeners within the United States over the relevant channels. For example, if a Licensee transmitted one hour of programming to 10 simultaneous listeners, the Licensee’s Aggregate Tuning Hours would equal 10.

(ii) “Play frequency” is the number of times a sound recording is publicly performed by a Licensee during the relevant period, without respect to the number of listeners receiving the sound recording.

Alternative 3 – Based on Independent Audience Measurement Data

(1) Subject to paragraph (d)(3) of this section, for each month, the direct license share is calculated as follows:

(i) For each channel, divide the play frequency of Directly-Licensed Recordings on the channel by the play frequency of all sound recordings on the channel to determine a percentage of directly-licensed plays for the channel.

(ii) For each channel, multiply the percentage of directly-licensed plays for the channel by the listenership measure for the channel to determine a “direct license factor” for the channel.

(iii) Add the direct license factors for all channels of the Licensee’s SDARS to determine a total direct license factor for the Licensee’s SDARS.

(iv) Add the listenership measures for all channels of the Licensee’s SDARS to determine a “total listenership measure” for all sound recordings on the Licensee’s SDARS.

(v) Divide the total direct license factor by the total listenership measure to determine the direct license share.

(2) For purposes of paragraph (d)(1) of this section:

(i) The “listenership measure” is a statistically-valid measure of relative listenership for a channel (such as an average quarter-hour (AQH) share) within the United States measured by a reputable, independent audience measurement firm for the relevant month.

(ii) “Play frequency” is the number of times a sound recording is publicly performed by a Licensee during the relevant period, without respect to the number of listeners receiving the sound recording.

(3) A Licensee desiring to take a direct license share adjustment as described in paragraph (d) of this section is responsible for procuring listenership measure data, and must provide such data to the Collective no later than the time it delivers the relevant statement of account to the Collective. Otherwise, a direct license share adjustment shall not be available to the Licensee. The Collective may use such data to allocate royalties to channels in the same proportion as used in the calculation of the direct license share. If, after the date of these regulations, the Copyright Royalty Judges adopt notice and recordkeeping regulations specifying a specific listenership measure to be included on reports of use, such data shall be used in this calculation, and if such data are required to

be reported on a more granular basis than channel and month, this calculation shall be performed on that more granular basis.

Alternative 4 – Based on Analogous Internet Data

(1) Subject to paragraph (d)(3) of this section, for each month, the direct license share is the result of dividing the Internet performances of Directly-Licensed Recordings on the reference channels by the total number of Internet performances of all sound recordings on the reference channels.

(2) For purposes of paragraph (d)(1) of this section:

(i) A “performance” is each instance in which any portion of a sound recording is publicly performed to a listener within the United States by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding an incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(ii) The “reference channels” are Internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee’s SDARS on which the programming consists primarily of music.

(3) A direct license share adjustment as described in paragraph (d) of this section is available to a Licensee only if the reference channels constitute a large majority of the music channels offered on the Licensee’s SDARS and are generally representative of the music channels offered on the Licensee’s SDARS

**§ 382.13 Terms for making payment of royalty fees and statements of account.**

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under §382.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under §382.12 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.

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114 that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under §382.12 on a monthly basis on or before the 45th day after the end of each month for that month. All payments shall be rounded to the nearest cent.

(d) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the statement of account are received by the Collective.

(e) *Statements of account.* Any payment due under §382.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payments;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) The signature of a duly authorized officer or representative of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in relation to the Licensee by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(f) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in §370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §382.17.

(g) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

#### **§ 382.14 Confidential information.**

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of

performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §382.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §382.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

### **§ 382.15 Verification of royalty payments.**

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

#### **§ 382.16 Verification of royalty distributions.**

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner and Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

### **§ 382.17 Unclaimed funds.**

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

## Index of Witness Statements

<b>Tab</b>	<b>Witness</b>	<b>Title</b>
1	Janusz Ordover	Professor of Economics and former Director of the Masters in Economics Program at New York University
2	Thomas Lys	Eric L. Kohler Chair in Accounting and Professor of Accounting and Information Management, Kellogg School of Management, Northwestern University
3	Mark Eisenberg	Co-Founder and Chief Operating Officer of LatticeWorks Media
4	David Pearlman	President, Pearlman Advisors, LLC
5	Itamar Simonson	Sebastian S. Kresge Professor of Marketing at the Graduate School of Business, Stanford University
6	George Ford	President, Applied Economic Studies
7	Jonathan Bender	Chief Operating Officer of SoundExchange, Inc.
8	Aaron Harrison	Vice President, Business & Legal Affairs, Global Digital Business, UMG Recordings, Inc.
9	Michael Powers	President, Yellow Dog Records

## Index of Public Exhibits

Exhibits 206 – 210 Intentionally Omitted  
 Exhibits 217 – 220 Intentionally Omitted  
 Exhibits 243 – 300 Intentionally Omitted  
 Exhibits 348 – 350 Intentionally Omitted

<b>Exhibit No.</b>	<b>Sponsored By</b>	<b>Description</b>
SX Ex. 211-RP	Pearlman	Form 8K including Sirius XM 2012 Stockholder Meeting Presentation
SX Ex. 213-RP	Pearlman	Form 8K including Sirius XM Press Release on First Quarter 2012 Results
SX Ex. 214-RP	Pearlman	Transcript of Credit Suisse Global Media and Communications Convergence Conference, March 8, 2011 (SXM_CRB_DIR_00020608)
SX Ex. 215-RP	Pearlman	Transcript of UBS Global Media and Communications Conference, December 5, 2011 (SXM_CRB_DIR_00020710)
SX Ex. 216-RP	Pearlman	Transcript of Liberty Media Capital Investor Meeting, November 17, 2011 (SXM_CRB_DIR_00020733)
SX Ex. 221-RP	Lys	Sirius XM, Q1 2012 Earnings Call, May 1, 2012
SX Ex. 222-RP	Lys	Sirius XM Radio CEO Mel Karmazin Speaks with CNBC's Jim Cramer Tonight on Mad Money w/Jim Cramer, March 9, 2012
SX Ex. 223-RP	Lys	Sirius XM at Morgan Stanley Technology, Media & Telecom Conference, February 28, 2012
SX Ex. 224-RP	Lys	Sirius XM, Q4 2011 Earnings Call, February 9, 2012
SX Ex. 225-RP	Lys	Sirius XM at Citi Entertainment, Media and Telecommunications Conference, January 4, 2012
SX Ex. 226-RP	Lys	Sirius XM, Q3 2011 Earnings Call, November 1, 2011
SX Ex. 227-RP	Lys	Sirius XM at BofA Media, Communications & Entertainment Conference, September 14, 2011
SX Ex. 228-RP	Lys	Sirius XM, Q4 2010 Earnings Call, February 15, 2011 (SXM_CRB_DIR_00020688)
SX Ex. 229-RP	Lys	Sirius XM, Q4 2009 Earnings Call, February 25, 2010
SX Ex. 230-RP	Lys	Audio Recordings of Conference Calls, Investor Meetings, and CNBC Mad Money Show

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SX Ex. 231-RP	Lys	Sirius XM Form 10-K, 2011 Annual Report, December 31, 2011
SX Ex. 232-RP	Lys	Sirius XM Form 10-Q, First Quarter 2012 Quarterly Report, May 1, 2012
SX Ex. 238-RP	Lys	"Rush Limbaugh Should Want to Work for Sirius XM" (Forbes, April 6, 2012)
SX Ex. 343-RP	Eisenberg	K-Tel Greatest Hits - Chubby Checker Overview (AllMusic)
SX Ex. 344-RP	Eisenberg	The Very Best of the K-Tel Recordings - Chubby Checker Overview (AllMusic)
SX Ex. 345-RP	Eisenberg	Greatest Hits & Black Beauties - L.A. Guns Overview (AllMusic)
SX Ex. 346-RP	Eisenberg	Grammercy Records Website on Grammercy Jazz
SX Ex. 351-RP	Ford	David Del Beccaro Testimony from SDARS I Proceeding, October 30, 2006
SX Ex. 352-RP	Ford	"The Elusive Symbiosis: The Impact of Radio on the Record Industry" (Review of Economic Research on Copyright Issues, 2004)
SX Ex. 353-RP	Ford	"Don't Play it Again Sam: Radio Play, Record Sales, and Property Rights", January 5, 2007
SX Ex. 354-RP	Ford	"Beyond Product Substitution: The Impact of Satellite Radio on Sales of CDs and Music Downloads", September 11, 2007

**Index of Restricted Exhibits**  
**(NOT INCLUDED IN PUBLIC VERSION)**

Exhibits 206 – 210 Intentionally Omitted  
Exhibits 217 – 220 Intentionally Omitted  
Exhibits 243 – 300 Intentionally Omitted  
Exhibits 348 – 350 Intentionally Omitted

<b>Exhibit No.</b>	<b>Sponsored By</b>	<b>Description</b>
SX Ex. 201-RR	Simonson	Native Spreadsheet, New DB -- Total Listeners (SXM_CRB_DIR_00042587)
SX Ex. 202-RR	Simonson	"Toyota Executive Checkpoint: March 31, 2009," Sirius XM Presentation Slides (SXM_CRB_DIR_00021755)
SX Ex. 203-RR	Simonson	"Sirius XM Customer Satisfaction and Risk Assessment 2009 - Wave I Final Report," Sirius XM Presentation Slides (SXM_CRB_DIR_00042957)
SX Ex. 204-RR	Simonson	"National Brand Tracking for XM Satellite Radio: An End-of-Year Analysis," Presentation Slides prepared by The Brandware Group (SXM_CRB_DIR_00042861)
SX Ex. 205-RR	Simonson	Sirius XM Customer Satisfaction Study Report, November 18, 2011 (SXM_CRB_DIR_00045720)
SX Ex. 212-RR	Pearlman	Sirius XM Competitive Assessment, May 2011 (SXM_CRB_DIR_00001807)
SX Ex. 233-RR	Lys	January 2010 Ratings Agency Update (SXM_CRB_DIR_00021075)
SX Ex. 234-RR	Lys	Sirius XM Board Presentation, 2010 Results and 2011 Budget (SXM_CRB_DIR_00015551)
SX Ex. 235-RR	Lys	Sirius XM Board Presentation, Capital Structure Update (SXM_CRB_DIR_00015682)
SX Ex. 236-RR	Lys	Sirius XM February 2010 Board Presentation (SXM_CRB_DIR_00015885)
SX Ex. 237-RR	Lys	2009 Q3 Finance Long Range Plan Board Presentation (SXM_CRB_DIR_00016102)
SX Ex. 239-RR	Lys	Sirius XM Presentation, MRF Update – July 8, 2010 (SXM_CRB_DIR_00057924)
SX Ex. 240-RR	Lys	Music Royalty Fee Sheet (SXM_CRB_DIR_00057912)
SX Ex. 241-RR	Lys	Sirius XM letter to FCC, May 12, 2010 (SXM_CRB_DIR_00017721)

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SX Ex. 242-RR	Lys	December 2009 SDARS Royalty Calculation (SXM_CRB_DIR_00030512)
SX Ex. 301-RR	Eisenberg	Native Spreadsheet, Sirius XM Label Licensing Status Report (SXM_CRB_DIR_00089871)
SX Ex. 302-RR - SX Ex. 315-RR; SX Ex. 319-RR; SX Ex. 329-RR - SX Ex. 330-RR; SX Ex. 332-RR; SX Ex. 336-RR - SX Ex. 342-RR	Eisenberg	Negotiating Emails between MRI and Record Labels
SX Ex. 316-RR	Eisenberg	All Music Guide -- Music Biography, Credits and Discography of musical group, the identity of which has been designated Restricted by Sirius XM
SX Ex. 317-RR	Eisenberg	New York Times article regarding record label, the identity of which has been designated Restricted by Sirius XM
SX Ex. 318-RR	Eisenberg	Law Journal Article regarding business practices of record label, the identity of which has been designated Restricted by Sirius XM
SX Ex. 320-RR - SX Ex. 328-RR; SX Ex. 331-RR	Eisenberg	Direct Licenses and related agreements between Sirius XM and Record Labels
SX Ex. 333-RR	Eisenberg	MRI Royalty Calculation Summary for Magnatune, 2011 Q4 (SXM_CRB_DIR_00088833)
SX Ex. 334-RR	Eisenberg	MRI Royalty Calculation Track Listing for Magnatune, 2011 Q4 (SXM_CRB_DIR_00088799)
SX Ex. 335-RR	Eisenberg	Magnatune Website description of particular artist
SX Ex. 347-RR	Eisenberg	Email from K. Ulman to C. Greer, P. Donnelly and D. Frear (SXM_CRB_DIR_00046158)
SX Ex. 355-RR	Ford	"Music Choice and Time Warner Cable", January 2012 (PSS_023626)
SX Ex. 356-RR	Ford	Music Choice Partner Affiliation Agreement with Time Warner, January 21, 2000 (PSS_361793)
SX Ex. 357-RR	Ford	Music Choice Partner Affiliation Agreement with Cox Communications, November 15, 2005 (PSS_358339)

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SX Ex. 358-RR	Ford	Music Choice Music Video Network Business Plan, December 2008 (PSS_011950)
SX Ex. 359-RR	Ford	Email from R. Dawson to A. Rosenberg and E. Goldberg re SWRV, May 21, 2010 (PSS_021517)
SX Ex. 360-RR	Ford	Music Choice Consolidated Balance Sheet, December 2008 (PSS_021199)
SX Ex. 361-RR	Ford	Music Choice Consolidated Balance Sheet, December 2009 (PSS_021218)
SX Ex. 362-RR	Ford	Music Choice 2007-2008 Consolidated Financial Statements

## CERTIFICATE OF SERVICE

I, Jeffrey Phillips, do hereby certify that copies of the foregoing **WRITTEN REBUTTAL STATEMENT OF SOUNDEXCHANGE, INC.** (Public version) were sent via electronic mail (without exhibits) and overnight mail (with exhibits) on the 6<sup>th</sup> day of July, 2012, to the following:

<p>R. Bruce Rich Bruce S. Meyer Todd D. Larson WEIL, GOTSHAL &amp; MANGES LLP 767 Fifth Avenue New York, New York 10153 Fax: (212) 310-8007 r.bruce.rich@weil.com bruce.meyer@weil.com todd.larson@weil.com</p> <p><i>Counsel for Sirius XM Radio Inc.</i></p>	<p>Paul M. Fakler Eric Roman ARENT FOX LLP 1675 Broadway New York, New York 10019-5874 Fax: (212) 484-3990 fakler.paul@arentfox.com roman.eric@arentfox.com</p> <p><i>Attorneys for Music Choice</i></p>
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Jeffrey Phillips