

PUBLIC VERSION

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

In The Matter Of:)	
)	
)	
Determination of Royalty Rates)	14-CRB-0001-WR (2016-2020)
for Digital Performance in Sound)	
Recordings and Ephemeral)	
Recordings (Web IV))	

**WRITTEN DIRECT STATEMENT OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

Volume 1 of 3

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The National Association of Broadcasters**

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A

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**INTRODUCTORY MEMORANDUM
TO THE WRITTEN DIRECT STATEMENT
OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”) respectfully submits this Introductory Memorandum to its Written Direct Statement. This Memorandum includes a summary of NAB’s Direct Case and describes the testimony of its witnesses.

Summary

The National Association of Broadcasters (“NAB”) represents local radio broadcasters nationwide, many of which stream their broadcasts over the Internet and who will therefore be directly and significantly affected over the next five years by the rates set by the Judges in this proceeding.

NAB’s evidence will demonstrate that the Judges should start from scratch in this case in order to set sound recording license fees for streaming that represent rates that would be agreed upon by a willing buyer and a willing seller in an “effectively competitive” market, as required by the Copyright Act. The existing rates are principally a legacy of the rates set by the Judges in the second Webcasting proceeding (“Web II”) that concluded in 2007. Those rates were established based on flawed evidence and analysis of selected licenses in a market that was

decidedly not effectively competitive – the licenses granted by the major record labels to interactive on-demand services.

NAB will present economic testimony explaining that the absence of competition among the labels in the interactive services market should preclude consideration of agreements from that market as a benchmark. NAB will also show that, even on its own terms, the SoundExchange analysis of the interactive services market in Web II was fundamentally flawed, as it failed to account for significant differences between the two types of services. Among other flaws, SoundExchange’s analysis failed to take into account the huge and persisting disparities in revenue per play between the exclusively subscription-based interactive services in the purported benchmark market and the overwhelmingly non-subscription (advertising supported) services in the target market. Moreover, NAB will demonstrate that the benchmark market relied upon by SoundExchange in Web II was unstable. All but one of the seven benchmark services failed to sustain their businesses at the license fees rates on which SoundExchange (and the Judges) relied.

NAB will also present evidence that NAB-SoundExchange Webcaster Settlement Act (“WSA”) agreement, which was heavily influenced by the rates established by the Judges in Web II, does not represent an agreement between a willing buyer and a willing seller. Rather, as the testimony of NAB’s lead negotiator of the agreement will demonstrate, following the Web II decision, which dramatically hiked streaming rates, NAB lacked any reason to believe that another litigation would lead to a better result from the same Judges. Moreover, NAB faced, in SoundExchange, a party that knew it had all of the leverage while NAB had none. Thus, the agreement was really a take-it-or-leave-it result between a monopoly seller and a buyer that had no viable alternatives.

In addition, NAB will present evidence that the prevailing rate structure, including the Web II rates and the rates established in the WSA agreement, has proven to be too far too high in practice to allow broadcasters to achieve a return on streaming. NAB will present evidence from multiple broadcasters showing that they cannot make money on streaming, despite having made significant efforts to do so. Some have reached a business decision to limit their streaming or not to stream at all, despite the potential to expand their listening audience. For all of these reasons, a significant rate reset is necessary so that streaming can be a viable business that will allow broadcasters to provide streaming services to the audiences that rely on them and benefit from them.

The Judges will hear from broadcaster witnesses that music is only a part of what a music-formatted radio station offers to its audience, and that the challenge in attracting listeners is differentiating their programming from others in the market. Music does not differentiate. Rather, broadcasters devote their resources to developing personalities who can connect with and form relationships with listeners, to producing the non-music elements of their programming, and to finding other ways to connect with and serve their audience. Broadcasters will testify that the audiences who listen to their streams are not typically looking for a music delivery service – rather, they want to maintain their connection with their local station.

Small-station broadcasters will explain that advertisers do not value and are not willing to pay for audiences that have fewer than 100 to 200 average concurrent listeners. These smaller broadcasters, thus, face economic conditions comparable to those that led the Judges to adopt a flat \$500 fee for non-commercial radio stations in the remand decision of the third Webcasting proceeding (“Web III”).

NAB will present evidence that radio station streaming provides significant promotional benefits to record labels and artists. As NAB's witnesses explain in their testimony, labels and artists devote immense resources to securing spins on radio. In addition, labels seek to harness the influence and relationships that radio stations and on-air personalities have built with their listeners and local communities in order to promote sound recordings. As a result of that promotional value, NAB's economic expert will testify that a lower bound of a "zone of reasonableness" for the sound recording royalty would actually approach zero.

In addition, NAB's economic expert will analyze the rate established by the Judges in the recent SDARS II case and will conclude that the 13% of revenue rate relied on by the Judges in that case, which also stemmed from an analysis of the non-competitive interactive service benchmark, is above the upper bound of a zone of reasonable rates.

Witness Testimony

The National Association of Broadcasters' direct case comprises the following witness statements and accompanying exhibits:

Michael Katz is NAB's expert economist. He holds the Sarin Chair in Strategy and Leadership at the University of California at Berkeley. He also holds a joint appointment at the Haas School of Business Administration and the Department of Economics at Berkeley. He specializes in the economics of industrial organizations, which includes the study of competition and pricing, as well as antitrust and regulatory policy. He has published numerous works in the field of economics and has previously served as Chief Economist at the Federal Communications Commission and as Deputy Assistant Attorney General for the United States Department of Justice. He earned his A.B. in economics from Harvard University and his doctorate in economics from Oxford University.

Drawing on his training and experience as an economist, Dr. Katz has conducted a detailed economic analysis of critical issues in the current proceeding. He first discusses principles that should guide application of the willing-buyer/willing-seller standard. He testifies that, from the perspective of economics, the willing-buyer/willing-seller standard is most appropriately interpreted as asking what would happen in an effectively competitive market in the absence of the statutory licensing regime. Congress's decision to create a rate-determination process with a willing-seller/willing-buyer standard can best be reconciled with economic principles and common sense by interpreting willing buyers as those who have meaningful choices among competing sellers, rather than facing a single, all-or-nothing offer from a monopolist or sellers with equivalent market power.

Dr. Katz explains in his testimony that effectively competitive prices promote consumer welfare and economic efficiency. Thus, from the perspective of economics, a standard requiring royalty rates to be set at the levels that would emerge from an effectively competitive market is a sound one. Economists and public policy makers have long recognized that competition delivers benefits to consumers in the form of lower, cost-based prices, greater innovation and variety, and/or improved product and service quality. Promoting efficiency through competition is widely recognized as the most effective means in most markets to promote overall consumer welfare. And, in particular, competitive prices are recognized as providing incentives to buyers and sellers alike to behave in ways that maximize the total benefits society enjoys from available resources.

Dr. Katz notes that effectively competitive prices will both tend towards the seller's cost and will reflect any other benefits that the buyer provides to the seller. In particular, to the extent that a licensee provides valuable promotional benefits to the seller, a competitive seller will be

willing to accept a lower—and, in some cases, even negative—price in recognition of the fact that those promotional benefits are a form of compensation to the seller.

Dr. Katz testifies that a market cannot be effectively competitive in the absence of buyer choice. Competition arises only when buyers have the ability substitute the offerings of one seller for those of another. It is this possibility of substitution that drives different sellers to offer higher quality and lower prices in order to attract buyers to themselves rather than their rivals. For this reason, a market with a single, monopoly seller cannot be effectively competitive: there are no alternative suppliers to which buyers can turn for substitutes. It is also the case that a market in which suppliers offer strongly complementary products cannot be effectively competitive. These principles guide Dr. Katz's analysis of the existing rates and the benchmarks used to establish them.

Dr. Katz's central finding with respect to existing statutory rates and those benchmarks is that the rates adopted in Web II were based on a severely flawed interactive services benchmark analysis that led to rates well in excess of those that would have been negotiated by a willing buyer and willing seller in an appropriate market. Dr. Katz shows that the licenses to the major labels' catalogs were complements for interactive services providers and therefore licensors did not compete with respect to those providers; as such, the interactive services market was not effectively competitive (or competitive at all) and could not serve as a proper benchmark. In addition, the business models of interactive services providers in the purported benchmark market and the non-interactive services providers in the target market were and are substantially different. Among other distinctions, interactive services were exclusively subscription based and non-interactive services were overwhelmingly advertising supported. Revenues per play generally are far lower from advertising than from subscription. None of these differences

between the benchmark and target markets was properly considered in the analysis, nor did the analysis consider the extent to which the benchmark market was not effectively competitive or stable and mature.

Dr. Katz concludes for multiple reasons that the negotiated license fees in the NAB/SoundExchange WSA Agreement are not a valid benchmark. The unreasonably high Web II rates strongly influenced the negotiations and the resulting rates. The Web II rates established the parties' expectations and eliminated any incentive of the NAB to rely on a possible return to the Copyright Royalty Board ("CRB") to set rates for 2011 through 2015. In addition to the effects of Web II on the WSA negotiations, the NAB faced a monopoly seller in SoundExchange. Accordingly, the NAB/SoundExchange WSA Agreement cannot be considered to reflect rates that would exist in an effectively competitive market.

With respect to appropriate benchmarks for the current proceeding, Dr. Katz concludes that an analysis of the economic relationship between record companies and terrestrial radio broadcasters establishes that the lower bound for reasonable royalties to be paid by webcasters that simulcast terrestrial radio broadcasts ("simulcasters") is near zero because the evidence shows that simulcasting generates significant promotional benefits. Further, an analysis of the statutory rate established for Satellite Digital Audio Radio Services in the SDARS II proceeding, subject to appropriate adjustments, establishes that, when expressed as a percentage of a music-formatted radio station's simulcasting revenue attributable to the performance of programming featuring copyrighted sound recordings, a royalty of 13 percent or higher would be unreasonably high. In fact, percentage or per-play royalties that were equivalent to a rate near 13 percent would also be unreasonably high. Given the data available at this point in the current proceeding, Dr. Katz states that he unable to reach a conclusion as to precisely how much lower

than 13 percent the upper bound on reasonable rates for simulcasting is, but that he anticipates being able to reach such a conclusion after reviewing contracts likely to be introduced into the record by other parties.

David B. Pakman is a Partner at the capital firm Venrock, where he has worked since 2008. At Venrock, Mr. Pakman focuses on investing in, and helping build, early-stage internet, digital media, and consumer companies. He also has extensive prior experience in the digital music industry, not only as an investor, but also as the founder of a digital music services company and as a CEO and employee of others, including Apple (co-founder of the original Apple Music Group), N2K, Myplay, Inc., and eMusic. He has spent more than 14 years in the digital music industry, negotiated hundreds of licensing agreements with major and independent labels, music publishers and performing rights organizations, sold music and music-related services to millions of consumers, and built and launched multiple successful digital consumer products.

Mr. Pakman explains the negative effect that the royalty rates for digital sound recording performances have had on webcasters and other the digital music services and on investors' willingness to invest in those services. He testifies, based on his long personal experience in this industry and evaluation of potential investments while at Venrock, that the digital music services industry has fared poorly due primarily to royalty rates being too high. This is evidenced by, among other things, a high failure rate for webcasting services and a lack of investment in these services relative to other digital industries. Mr. Pakman further testifies that he is unaware of any standalone webcaster that is profitable. In that context, he also details that a number of the digital music services whose license agreements were relied upon to set rates in the second webcasting proceeding are no longer in business.

Steve Newberry is the President and Chief Executive Officer of Commonwealth Broadcasting Corporation, which is a twenty-station radio group located in Kentucky. As an owner and operator of radio stations and as a longtime veteran of the radio industry, Mr. Newberry explains that local radio serves the community of which it is a part and is not just a music service. Mr. Newberry discusses how Commonwealth's stations provide information to the community and participate in community events, and how their streams serve this same purpose of helping to create the sense of community that is the heart of local radio.

Mr. Newberry also discusses the 2009 negotiations between the NAB and SoundExchange under the Webcaster Settlement Act, in which he led the NAB negotiating team. He explains that, as a result of multiple factors, including the 2007 decision by the CRB raising rates, the lack of any plausible reason to believe that another litigation before the same judges would lead to a different and better result, the economic hardship in the radio industry during the 2008-09 recession, and a disparity in the relative bargaining positions of the parties, the resulting agreement was really between a powerful seller and a buyer that had no viable alternatives, not between a willing buyer and a willing seller.

John Dimick is the Senior Vice-President of Programming and Operations at Lincoln Financial Media Company ("LFMC"), which operates radio stations in the Atlanta, Miami/Ft. Lauderdale, Denver, and San Diego markets. He describes the economics of Internet simulcasts of LFMC's over-the-air radio broadcasts. He explains that, while LFMC has been attempting to make streaming of its music-formatted stations profitable for many years, streaming is not now profitable and it never has been. One of the major reasons for this is the cost of sound recording royalties, which are LFMC's largest streaming expense by a substantial margin. He testifies that, if a per performance rate were lowered to a fee on the order of \$0.0005, streaming might be

profitable and LFMC could pursue expansion of its streaming audience more aggressively without incurring a loss.

Mr. Dimick also explains how over-the-air radio and simulcast streams provide enormous promotional value to labels and artists. He provides examples showing that labels and artists know this as well, as evidenced by their behavior. Among other things, labels and artists stay in constant contact with LFMC's programming personnel through multiple avenues (in person visits, phone calls, emails and texts, etc.), provide stations with notification and copies of new and pre-release music, engage independent third parties to promote their artists and recordings to broadcasters, and make artists available to stations for in-studio performances and appearances.

Robert Francis Kocak, who is known professionally as **Buzz Knight**, is the Vice President of Program Development at Greater Media, Inc., which is a privately owned company that operates radio stations in the Boston, Charlotte, Detroit, and New Jersey markets. Mr. Kocak's testimony describes how most successful radio stations, including most music-formatted stations, owe their success to elements other than music. He explains that successful radio stations must bring something unique and different in order to stand out and that the key to success is to build an individual brand identity for each station and to integrate that station into its local community so that it becomes prominent and well-known. Among other things, that effort requires: a substantial commitment to memorable on-air talent; consistent and prominent station involvement in the community; informative and interesting on-air coverage of local issues and events; and active promotion of the station's brand, including through social media. Over time, these efforts lead to loyal listener bases, both for over-the-air broadcasts and streams. In contrast, Mr. Kocak testifies that the music that a radio station plays is not exclusive to that station, and in order to succeed at a high level, stations must do much more than play music.

Mr. Kocak also testifies that, throughout his long career in radio, record labels have sought to leverage radio stations' relationships with their listeners in order to promote their artists and recordings. Record label representatives and artists actively seek spins on Greater Media stations, including their streams, through personal visits, calls, emails, provision of recordings, and participation in promotions, including artist visits and giveaways. Record labels and artists also seek the endorsement of songs and artists by Greater Media's on-air talent, whose opinions and recommendations listeners trust.

Johnny Chiang, Program Director at Cox Media Group, testifies that record labels expend significant effort to ensure airplay and artist exposure. This includes: hiring managers and outside promoters who are in constant contact with radio stations encouraging airplay; providing radio stations with free opportunities to download music; scheduling expensive radio tours for artists; and providing free opportunities to meet artists and see them perform. Further, the labels clearly believe that radio airplay promotes the sale of music. The promoters openly talk about how radio airplay turns into sales, and have provided many documented examples of how increased sales in the Houston market resulted from increased spins on the air.

Ben Downs is Vice President and General Manager of Bryan Broadcasting Corporation, which owns and operates nine radio station formats located in and around College Station, Texas. Mr. Downs, who has over 45 years of experience as a broadcaster and has been managing these stations for nearly 25 years, discusses his company's inability to make streaming a viable business operation. He describes how the current SoundExchange royalties have outpaced the company's ability to generate streaming revenue and resulted in significant financial loss. He explains that advertisers lack interest in either the local or non-local components of his stations' streaming audiences and will not pay for broadcast ads to be

streamed. He further explains that his streaming provider has never generated more than minimal ad insertion revenues while SoundExchange fees have increased significantly.

Mr. Downs also describes how the success of his music-formatted radio stations is largely driven by non-music related factors such as the local interest content his stations broadcast, the stations' close ties to their local communities, and the listener loyalty that is created through the audience's interactions with the stations' on-air personalities. He explains how his stations support artists, who value the added exposure they get from making appearances on the stations. Finally, he testifies that the company's inability to run its streaming operations without incurring significant losses has led him to conclude that the company should seriously consider no longer providing music streaming services to its listeners unless sound recording performance fees are reduced significantly.

Julie Koehn is President and General Manager of Lenawee Broadcasting Company, the licensee of WLEN Radio, in Adrian, Michigan. Ms. Koehn explains, based on her decades of industry experience, why radio broadcasters and the programming they transmit are so important to the communities they serve. She describes the ways WLEN, in particular, fulfills this important role in the Lenawee County community by focusing on local news and local community information. She describes the local content on her station broadcasts, including local weather, community calendars, local high school and college sports, and daily shows with on-air talent who have developed listener loyalty over many years. Ms. Koehn also discusses the strong ties WLEN has with its local community and how the station has earned its listeners' loyalty not only through its unique programming but also its strong commitment to community welfare and charitable causes. She explains that these attributes, and not music content, are why listeners tune in to WLEN.

Ms. Koehn further explains that Lanawee Broadcasting made a conscious decision not to stream music on the Internet because it believes that the current rate structure for SoundExchange royalties could result in unpredictable financial losses to the company. She describes the company's concern that, if WLEN were successful in building a streaming audience as large as 100 average listeners, it could not generate sufficient additional revenues to offset the high royalty fees it would incur. She testifies that if the formula for streaming royalties becomes predictable, stable, and reasonable, Lenawee Broadcasting would reconsider its decision not to stream.

Jean-Francois Gadhoury is the Chief Technology Officer of Triton Digital, which provides streaming-related technology services to many leading radio broadcasters. Mr. Gadhoury's testimony explains certain situations that can lead to overcounting of sound recording performances over a stream. In particular, Mr. Gadhoury discusses how discovery connections from a listening device can lead to two performances being recorded even when only one actual connection is being made that results in a listener hearing a performance of a sound recording. Mr. Gadhoury also explains how instability in the Internet can result in temporary lost connections followed by immediate reconnection. In these situations, which may be so brief that the listener is unaware of them, two performances may be recorded even though the listener has only heard a single sound recording.

**CONTENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS
WRITTEN DIRECT STATEMENT**

Volume 1 consists of (A) this Introductory Memorandum; (B) The National Association of Broadcasters' royalty rate proposal, pursuant to 37 C.F.R. § 351.4(b)(3); (C) an index of the National Association of Broadcasters' written testimony; (D) an index of the National Association of Broadcasters' exhibits, which includes identification of restricted exhibits; and (E) the redaction log required pursuant to the Interim Protective Order entered in this case. Pursuant to 37 C.F.R. § 350.4(a), the National Association of Broadcasters is filing an original and five copies of the materials in Volume 1, and will file two copies of Volume 1 with the Public Version of its direct statement.

Volume 2 consists of the National Association of Broadcasters' written direct testimony. Pursuant to 37 C.F.R. § 350.4(a), the National Association of Broadcasters is filing an original and five copies of the Restricted Version of the testimony in its entirety – including those portions that include Restricted and Confidential materials – and will file five copies of the Public Version of this testimony with the Restricted and Confidential portions redacted.

Volume 3 consists of the National Association of Broadcasters' exhibits, including both the Public Versions as well as the Restricted and Confidential Versions, designated as such on the index of exhibits.

Statements or exhibits from three of NAB's witnesses include Restricted Information under the Interim Protective Order. NAB will seek protection of that information under the final Protective Order when that order is entered.

Respectfully submitted,

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B

NAB's Proposed Rates and Terms

37 C.F.R. § Part 380 Subpart B (Rates and Terms Applicable to Broadcasters)¹

§380.10 General.

(a) Scope. This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by or on behalf of Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by or on behalf of Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2016, through December 31, 2020.

(b) Legal compliance. Broadcasters 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 not inconsistent with the rates and terms set forth herein.

(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 digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§380.11 Definitions.

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

Aggregate Tuning Hours means the total hours of programming transmitted by or on behalf of the Broadcaster during the relevant period to all listeners within the United States of Broadcast Retransmissions from a single terrestrial AM or FM radio station . In computing Aggregate Tuning Hours, a Broadcaster may exclude any discrete programming segments and any half hours of programming that do not include any Performance. By way of example, if a service transmitted one hour of programming containing Performances to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If one half hour of that hour did not include any Performance, the service's Aggregate Tuning Hours would equal 5. As an additional example, if one listener listened to a service for 10 hours and all 10 hours contained Performances, the service's Aggregate Tuning Hours would equal 10.

¹ The National Association of Broadcasters are participating in the Judges' separate rulemaking on notice and recordkeeping (including reports of use). Docket No. 14-CRB-0005 (RM). NAB understands that to be the proceeding in which the Judges are considering notice and recordkeeping issues. Accordingly, NAB does not address such issues in this proceeding or in these proposed rates and terms. NAB's position on notice and recordkeeping issues and its proposed regulations are set forth in the Joint Comments of the National Association of Broadcasters and the Radio Music License Committee Regarding the Copyright Royalty Judges' Notice and Recordkeeping Rulemaking, June 30, 2014, and those parties' Joint Reply Comments in that same rulemaking, filed on September 5, 2014.

Broadcaster means an entity that:

(1) Has, either directly or through an affiliated entity that controls, is controlled by, or is under common control with Broadcaster, a business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions of sound recordings pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114, and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcast Retransmissions means transmissions made by or on behalf of a Broadcaster over the Internet, wireless data networks, or other similar transmission facilities that are primarily retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including transmissions containing (1) substitute advertisements; (2) other programming substituted for programming for which requisite licenses or clearances to transmit over the Internet, wireless data networks, or such other transmission facilities have not been obtained, (3) substituted programming that does not contain Performances licensed under 17 U.S.C. 112(e) and 114, and; (4) occasional substitution of other programming that does not change the character of the content of the transmission.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges.

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(f).

Eligible Transmission shall mean a Broadcast Retransmission that is subject to licensing under 17 U.S.C. §114(d)(2) and the payment of royalties under 37 C.F.R. Part 380.

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

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission but excluding the following:

(1) A performance of a sound recording that does not require a license under the United States Copyright Act, 17 U.S.C. §§ 101, et. seq. (e.g., a sound recording fixed before February 15, 1972);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording;

(3) 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);

(4) A performance of a sound recording that is 15 seconds or less in duration; or

(5) A second connection to the same sound recording from someone from the same IP address.

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 licensed in the jurisdiction where it seeks to conduct a verification.

Small Streaming Station is a terrestrial AM or FM radio station with respect to which Broadcast Retransmissions by or on behalf of the Broadcaster meet the following eligibility criteria:

(1) During the prior year Eligible Transmissions by or on behalf of the Broadcaster totaled less than 876,000 Aggregate Tuning Hours; and

(2) During the applicable year Broadcaster reasonably expects Eligible Transmissions of Broadcast Retransmissions to total less than 876,000 Aggregate Tuning Hours.

§380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) Royalty rates. (1) For each of its Small Streaming Stations, Broadcasters shall pay only the minimum fee (as provided in §380.12(c)); provided that, one time during the period 2016-2020, a Broadcaster's station that qualified under the Small Streaming Station definition as of January 31 of one year unexpectedly made Eligible Transmissions in excess of 876,000 Aggregate Tuning Hours during that year, may choose to be treated as a Small Station during the following year notwithstanding paragraph (1) of the definition of "Small Station" if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 876,000 Aggregate Tuning Hours during that following year.

(2) In all other cases, 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 §380.13(g)(3), be payable at the rate of \$0.0005 per Performance for the period January 1, 2016 through December 31, 2020.

(b) Ephemeral royalty. The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions made pursuant to 17 U.S.C. 114 as and when provided in this section is deemed to be included within, and constitute 5% of, such royalty payments.

(c) Minimum fee. Each Broadcaster will pay an annual, nonrefundable minimum fee of \$500 for each of its terrestrial AM and FM radio stations for which Eligible Transmissions are made by or on behalf of such Broadcaster for each calendar year or part of a calendar year during 2016-2020 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 such radio stations). For the purpose of this subpart, each individual stream (e.g., primary radio station, HD multicast 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 additional royalties payable for the same calendar year for the same channel or station.

(d) Programming Provided by Third Parties. In the case of programming provided by third parties to a Broadcaster, the Broadcaster shall make commercially reasonable, good-faith efforts to cause such third parties to provide information regarding the number of Performances in such programming. If, however, some or all of that information is not provided to the Broadcaster, the Broadcaster may either (i) make a good faith estimate of the total number of Performances in such programming, multiplied by the number of Aggregate Tuning Hours of transmissions of such programming if the Broadcaster has a reasonable basis for such estimate, or (ii) estimate the number of Performances in such programming by multiplying the total number of Aggregate Tuning Hours of transmissions of such programming by 1 Performance per hour in the case of radio station programming reasonably classified as news, business, talk or sports and 12 Performances per hour in the case of transmissions or retransmissions of all other radio station programming.

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

(a) Payment to the Collective. A Broadcaster shall make the royalty payments due under §380.12 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 Broadcasters due under §380.12 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) and 114(g).

(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 Board 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(g) that have themselves authorized such 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. Broadcasters must make monthly payments where required by §380.12, and provide statements of account, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(d) Minimum payments. A Broadcaster shall make any minimum payment due under §380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) Late fees. A Broadcaster shall pay a late fee for each instance in which any payment or any statement of account is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be the underpayment rate identified in 26 U.S.C. § 6621 applied to the amount of the late payment or the payment associated with a late statement of account. The late fee shall accrue from the due date of the payment or statement of account until the payment and statement of account are received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective. A single late fee shall be due in the event both a payment and statement of account are received by the Collective after the due date. SoundExchange may compromise or elect to forego the late fee in the case of minor or inadvertent failures of a Broadcaster to make a timely payment or submit a timely statement.

(f) Statements of account. Any payment due under §380.12 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 payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) 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:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation 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 owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it fairly presents, in all material respects, the liabilities of Broadcaster pursuant to 17 U.S.C. 112(e) and 114.

(g) Distribution of royalties. (1) The Collective shall promptly distribute royalties received from Broadcasters 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 and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in §370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors. The Collective shall use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 5 years from the date the Collective first distributes any other royalties for the same reporting period, then such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) Retention of records. Books and records of a Broadcaster 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.

§380.14 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 the number of Performances, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster 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 written confidentiality agreement or an ethical obligation to maintain the Confidential Information of the Collective, who are engaged in the collection and distribution of royalty payments hereunder and activities related directly 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 written confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Broadcaster’s statement of account pursuant to §380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §380.16;

(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(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate written 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 written 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(f) 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 not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§380.15 Verification of royalty payments.

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

(b) Frequency of verification. The Collective may conduct a single audit of a Broadcaster, 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 Board a notice of intent to audit a particular Broadcaster, 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 Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all parties. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Broadcaster.

(d) Acquisition and retention of report. The Broadcaster 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 of Broadcaster's books and records, 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 Broadcaster 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 Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error 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 Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§380.16 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 or Performer must file with the Copyright Royalty Board 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 who may not be retained on a contingency fee basis and who shall be obligated to verify any underpayment or overpayment of royalties. The designation of the Qualified Auditor shall be binding on all Copyright Owners and Performers. Any such audit shall be completed within 6 months of the date of the notification of intent to audit is served on the Broadcaster.

(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 of Broadcaster's books and records, 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 any interim or final written report to a Copyright Owner or Performer, except where the Qualified Auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the Qualified Auditor, prejudice the investigation of such suspected fraud, the Qualified 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 Qualified 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 reasonable fees paid to the Qualified Auditor by the Collective for the verification procedure.

§380.17 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 5 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 5-year period. After expiration of this period, and except as may be subject to the common law or statutes of any State, the Collective may apply the unclaimed funds solely to offset any costs deductible under 17 U.S.C. 114(g)(3)(A). Nothing in this subsection is intended to preempt the laws of any State. The Collective shall render its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them under section 112(e) or 114(d)(2) of title 17, United States Code, or both. Such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

§380.18 Notice and Cure

For any material breach of these regulations by a Broadcaster that the Collective intends to assert in any way against the Broadcaster, the Collective shall first provide notice of such material breach to the Broadcaster by certified mail, and the Broadcaster shall have 30 days from the receipt of such notice of material breach to cure such material breach.

C

Index of Witness Testimony

<u>Tab</u>	<u>Witness</u>	<u>Title</u>
A	Michael L. Katz, Ph.D.	Professor of Business Administration and Economics, University of California at Berkeley
B	Steven W. Newberry	President and Chief Executive Officer, Commonwealth Broadcasting Corporation
C	John Dimick	Senior Vice President of Programming and Operations, Lincoln Financial Media Company
D	Robert Francis Kocak (Buzz Knight)	Vice President of Program Development, Greater Media, Inc.
E	Johnny Chiang	Program Director, Cox Media Group
F	Ben Downs	Vice President and General Manager, Bryan Broadcasting Corporation
G	Julie Koehn	President and General Manager, Lenawee Broadcasting Company
H	Jean-Francois Gadoury	Chief Technology Officer, Triton Digital

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Index of Exhibits

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NAB Ex. 2		John Dimick	Selected web pages from Lincoln Financial Media Company (“LFMC”) station websites, reflecting community events
NAB Ex. 3		John Dimick	Selected web pages reflecting LFMC fundraising events
NAB Ex. 4		John Dimick	Selected web pages from LFMC station websites, reflecting station contests
NAB Ex. 5		John Dimick	Selected web pages from LFMC station websites, reflecting station blogs and local news
NAB Ex. 6		John Dimick	Web pages from KYGO reflecting the station’s “Wall of Honor”
NAB Ex. 7		John Dimick	Selected pages from LFMC station social media sites
NAB Ex. 8		John Dimick	Messages from labels to LFMC personnel requesting airplay and expressing appreciation for support
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NAB Ex. 10		Ben Downs	Selected web pages from WTAW’s website, http://wtaw.com
NAB Ex. 11		Ben Downs	Selected web pages from KZNE (The Zone)’s website, http://zone1150.com
NAB Ex. 12		Ben Downs	Selected web pages from KNDE-FM (Candy 95)’s website, http://candy95.com
NAB Ex. 13		Ben Downs	Selected web pages from KPWJ (Peace 107)’s website, http://peace107.com

NAB Ex. 14		Ben Downs	Selected web pages from KAGC (Christian Family Radio)'s website, http://kagc1510.com
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NAB Ex. 16		Ben Downs	Selected web pages from Rock Candy's website, http://aggielandsrock.com
NAB Ex. 17		Ben Downs	Selected web pages from KNDE-HD4 (Maverick 102.7)'s website, http://maverickradio.com
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NAB Ex. 19	Yes	Ben Downs	Compilation of Bryan Broadcasting SoundExchange Statements [RESTRICTED]
NAB Ex. 20	Yes	Ben Downs	Spreadsheet of Bryan Broadcasting streaming bandwidth expenses [RESTRICTED]
NAB Ex. 21	Yes	Ben Downs	Spreadsheet of Bryan Broadcasting stream player expenses [RESTRICTED]
NAB Ex. 22		Ben Downs	Screenshots of Candy 95 music-related Facebook postings
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NAB Ex. 24		Julie Koehn	WLEN Program Guide
NAB Ex. 25		Julie Koehn	2013 WLEN Report to the Community
NAB Ex. 26		Johnny Chiang	Email from Capitol Records Nashville promoting the release of new music and access to download free track for radio airplay
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Written Direct Statement Redaction Log

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Direct Testimony of Michael L. Katz	¶ 63, p. 42-43	Restricted financial information received in confidence from Pandora Media, Inc.
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Direct Testimony of John Dimick	¶ 26, p. 11	Financial information related to the amount of SoundExchange royalties paid by Lincoln Financial Media Company (“LFMC”) (for 2009-2013).
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Direct Testimony of Ben Downs	¶ 20, p. 12	Bryan's financial information related to streaming revenue and costs.
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2014, I caused a copy of the foregoing Written Direct Statement of the National Association of Broadcasters to be served via electronic mail on the parties listed below, who have consented to electronic mail service. In addition, a copy of the foregoing Written Direct Statement of the National Association of Broadcasters is being served for overnight delivery on the parties listed below.

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