

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

In the Matter of:

Determination of Royalty Rates and Terms  
for Transmission of Sound Recordings by  
Satellite Radio and “Preexisting”  
Subscription Services (SDARS III)

Docket No. 16-CRB-0001 SR/PSSR  
(2018-2022)

**WRITTEN REBUTTAL TESTIMONY OF**

**George Ford**

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**February, 2017**

## WRITTEN REBUTTAL TESTIMONY OF GEORGE S. FORD

### Introduction and Summary

My name is George S. Ford, Ph.D. I previously submitted written direct testimony in this proceeding.

My written direct testimony offered a simple bargaining model showing that promotion and substitution effects are already incorporated into the market determination of music royalties.<sup>1</sup> Using the ideas conveyed by that model, my direct testimony also showed why it would be exceedingly difficult to quantify net and relative promotional effects in the modern music marketplace, a position shared by all the economists filing testimony in this proceeding. This conceptual framework bears out the Judges' conclusion in previous cases that, because such effects are "baked in" to negotiated market rates, the analysis of promotional effects must focus on the relative promotion between the benchmark and target services and not merely the absolute promotional effects of the target service. As I am unaware of any evidence demonstrating the net relative promotional effects across any two music delivery platforms, and no such evidence has been submitted in this proceeding, there is no reason to adjust any proposed benchmark rate on account of promotion. The same cannot be said about substitution effects, as the record does contain evidence demonstrating that music platforms are, in fact, substitutes for one another.

Counsel for SoundExchange asked me to respond to the services' direct testimony as it relates to promotion and substitution effects. Specifically, Sirius XM and Music Choice have submitted testimony from Steven Blatter and Damon Williams, respectively, who assert the services are highly promotional of record sales. This testimony is no different than the type of testimony that the Services have submitted before and the Judges have consistently rejected before: It consists only of anecdotal claims of a qualitative nature, and does nothing to address the issues raised in earlier decisions by the Judges or in my testimony.<sup>2</sup>

Notably, neither of the services' own economic experts relies on Mr. Blatter's or Mr. Williams' anecdotes. Rather, the services' economists, Dr. Carl Shapiro and Dr. Gregory Crawford, acknowledge there is no quantitative evidence to support a promotional adjustment. Neither makes any such adjustment in support of the services' rate proposals.<sup>3</sup> In fact, the services never request that the Judges apply a promotional discount of *any particular size* or suggest how one might calculate such a discount. The services' failure to quantify or otherwise address how any purported promotional effect might bear on statutory rates makes this issue irrelevant to any reasoned calculation of a rate.

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<sup>1</sup> The Written Direct Testimony of Dr. Carl Shapiro, submitted on behalf of Sirius XM ("Shapiro WDT") offers a theoretical analysis reaching essentially the same conclusions as the model offered in my direct testimony. See Shapiro WDT at Appendix D.

<sup>2</sup> *In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV)*, 81 FR 26316-01, 26367 n.41 (2016) (hereinafter "*Web IV*"); *In the Matter of Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 FR 23054, 23066 (2013) (hereinafter "*SDARS II*"); *id.* at 23092 (Roberts, J., dissenting); *In the Matter of Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 FR 4080, 4095 (2008) (hereinafter "*SDARS I*").

<sup>3</sup> See Part III *infra*.

Nonetheless, my rebuttal testimony details the shortcomings of the treatment of promotion in the services' direct cases. First, I explain why anecdotal evidence of the kinds presented by Mr. Blatter and Mr. Williams is not helpful, and even if it showed a promotional effect, such a demonstration would not justify a promotional discount. Second, I show that the services' anecdotes themselves are flawed and likely overstate the services' promotional effects. Finally, I describe why the testimony of the services' economic experts does not otherwise refute my previous testimony.

To inform the economic analysis in my rebuttal testimony, I participated in a number of teleconferences with record label and distribution company executives responsible for marketing, promotions, sales and business affairs.<sup>4</sup> In these calls, we discussed their marketing and promotion practices with specific reference to Sirius XM, Music Choice, and other music services, as well as some of the specific examples the services cite. My testimony incorporates information obtained during these teleconferences.

Ultimately, nothing in the services' testimony leads me to change the opinions or analyses presented in my direct testimony, and nothing in the services' testimony reflects any effort to address the Judges' prior criticisms of this sort of evidence. Mr. Blatter's and Mr. Williams' contentions that their respective services are promotional of record sales merely repeat losing arguments from prior proceedings, offer no evidence of relative promotion, and in some cases exaggerate the claimed promotional effects. In my opinion, there remains no reason for the Judges to apply a discount based on purported promotional effects.

## **I. The Services' Anecdotal Evidence Is Irrelevant and Should Be Rejected**

The services' fact witnesses, particularly Mr. Blatter and Mr. Williams, provide only anecdotal evidence of alleged promotional influences, and this evidence covers only tiny portions of the content the two services use to earn income from subscriptions to their services. As explained in my direct testimony, this type of evidence is unhelpful for setting a statutory rate and should be rejected, just as it has been repeatedly in prior proceedings before the Judges.

### **A. The Services' Anecdotes Are Not Representative of the Usage for Which the Judges Must Set Rates**

First it must be observed that even a few dozen anecdotes do not represent the range of music usage on the services for which the Judges must set rates in this proceeding. The anecdotes presented by Mr. Blatter and Mr. Williams span a period from late 2012 to late 2016 – a period of approximately four years.<sup>5</sup> By way of comparison, in the first 11 months of 2016 alone, Sirius XM reported to SoundExchange having used approximately [REDACTED] unique recordings under the statutory license, and Music Choice reported having used approximately [REDACTED] unique

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<sup>4</sup> Executives with whom I spoke are listed in Appendix A.

<sup>5</sup> E.g., Written Direct Testimony of Steven Blatter ("Blatter WDT"), at ¶ 23 (referring to an Alt J release (probably "An Awesome Wave") that was released in late 2012, and the subject of the early 2013 email in Sirius XM Dir. Ex. 17); Written Direct Testimony of Damon Williams ("Williams WDT"), at 33 (referring to Music Choice promotions commencing January 2013).

recordings. The anecdotes provided thus constitute a miniscule sliver of the recordings used by the services over the period they span.

The services provide no reason to believe that their anecdotes are representative. For instance, the services' anecdotes generally pertain to new releases, not to the range of new and older catalog recordings the services use. Similarly, the services' anecdotes tend to focus on recordings that were played a lot;<sup>6</sup> whereas many recordings used by the services are played on a particular channel only one or two times a month.<sup>7</sup> By contrast, the range of usage for which the Judges must set rates in this proceeding covers virtually all recorded music<sup>8</sup> that the services play. Thus, in determining the appropriate rate, the relevant questions are: (1) what is the average promotional effect across *all* recordings?; and (2) how does this average promotional effect compare to the average promotional effect on the chosen benchmark services? The services present no evidence on either of these questions.

The services' anecdotes also conflate two distinct phenomena that I think are best considered separately. The first is what I will refer to as a "promotional event." These are instances in which a radio station or service, a label, and frequently an artist voluntarily agree to do something collaborative above and beyond simply playing a recording. Examples of such promotional events include special artist appearances (either in-studio performances or interviews),<sup>9</sup> artist-hosted channels,<sup>10</sup> album premieres,<sup>11</sup> contests and give-aways,<sup>12</sup> cross-promotion through social media and other outside channels,<sup>13</sup> and waivers of the sound recording performance complement to permit high-density play of a particular artist's recordings in connection with a particular event.<sup>14</sup> The other possible phenomenon is what I will refer to as a "promotional effect," by which I mean the possibility that simply playing recordings generates a positive net additional income for the label by stimulating total sales sufficient to offset any substitution effects.

Promotional events and possible promotional effects are very different things, and anecdotes about promotional events are entirely irrelevant to this proceeding. Because promotional events are consensual, they are, in effect, separate transactions entirely removed from the statutory license. These consensual transactions would not happen unless they were mutually beneficial to the participants. It is clear from the exhibits that Music Choice provided that this is the case. Music Choice actively seeks out opportunities for promotions.<sup>15</sup> It does so for its own strategic purposes, such as to boost its brand awareness and benefit from artists' social media followers.<sup>16</sup>

<sup>6</sup> E.g., Blatter WDT, at ¶ 60 ("well over [REDACTED] spins per week"); Williams WDT, at 17-18 ("over twenty spins a week"), 26 ("seventy times a week").

<sup>7</sup> E.g., Shapiro WDT, at 39.

<sup>8</sup> At the least, the statutory license rates covers all copyrighted music recorded after 1971.

<sup>9</sup> E.g., Blatter WDT, at ¶ 31, 61-65; Williams WDT, at 15-18, 23, 30-33.

<sup>10</sup> E.g., Blatter WDT, at ¶ 32-35; Williams WDT, at 17-18.

<sup>11</sup> E.g., Blatter WDT, at ¶ 31; Williams WDT, at 13.

<sup>12</sup> E.g., Blatter WDT, at ¶ 2; Williams WDT, at 13-14.

<sup>13</sup> E.g., Williams WDT, at 14-15, 34-37.

<sup>14</sup> E.g., Blatter WDT, at ¶ 36-37.

<sup>15</sup> E.g., Williams WDT, at 23; Music Choice Exhibit 27 (presentation marketing Music Choice to [REDACTED] as a promotional platform).

<sup>16</sup> E.g., Music Choice Exhibits 26, 35, 36, 38.

Promotional events are consummated pursuant to written agreements setting forth specific performance obligations of each of the parties.<sup>17</sup> Details are negotiated.<sup>18</sup> My discussions with record labels confirmed that Sirius XM also actively seeks out opportunities to engage in promotions with popular artists, and that its promotions likewise occur pursuant to negotiated agreements with record labels and/or artists, although labels and artists sometimes do not agree about the value of such events. I further understand that the services typically pay statutory royalties for their use of recordings in connection with promotional events, a fact that perhaps satisfies the label's concerns.<sup>19</sup> The fact that the services and record companies are able to reach agreements separate from the statutory license concerning mutually-beneficial promotional events tells us nothing useful about either the absolute or relative promotional value of having a service merely play a recording outside the context of an agreed-upon promotional event.<sup>20</sup> The statutory license applies primarily to the high percentage of recordings made by artists that the services do not ask to participate in promotional events.

The unrepresentative nature of the anecdotes provided is important, because as I explained in my direct testimony, what would matter in a hypothetical negotiation between a record company and one of the services is catalog-level income, not sales of a specific recording or even an individual artist's sales.<sup>21</sup> There is likely to be great variation in the extent and direction of promotion and substitution effects on the massive pools of recordings the services use in a year. What would matter in a hypothetical negotiation, and should matter to the Judges for purposes of setting a statutory rate applicable to all usage by the services, is an average promotional effect for all relevant usage. Even if the services could show that their plays positively affected the commercial trajectory of some recordings, they do not provide any reason that such an effect should influence the statutory rate applicable to *all* sound recordings. Put simply, the statutory license is not for special cases; it is for the general case.

## B. The Services Fail to Address Relative Promotion

The Judges have stated plainly and repeatedly that the promotion question that matters in a rate proceeding is *relative promotion*; that is, whether the target service is, on the whole, more or less promotional than the chosen benchmark.<sup>22</sup> The services, however, focus on their own absolute (and alleged) promotional effects, largely ignoring substitution effects and not giving attention to relative promotional effects (other than Dr. Shapiro's assumption that the relative promotional effect between Sirius XM and streaming services is zero). This distinction between

<sup>17</sup> E.g., Music Choice Exhibit 41 ("Deal Memo" with [REDACTED]).

<sup>18</sup> E.g., Music Choice Exhibit 41 (email exchange concerning negotiation of agreement with [REDACTED]).

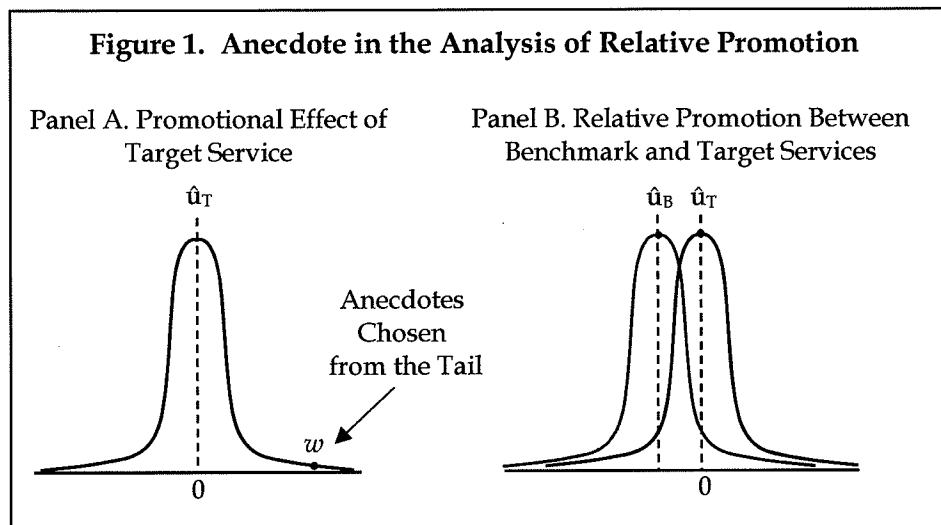
<sup>19</sup> For example, SoundExchange Exhibit 159 is an agreement between Sirius XM and [REDACTED].

<sup>20</sup> Dr. Shapiro and the Judges recognized this distinction in *Web IV*, and accordingly discounted the relevance of promotional events to statutory rate-setting. *Web IV*, 84 Fed. Reg. at 26,360 (Dr. Shapiro concluded that Pandora Presents events "did not call for any adjustment to the effective royalty rate he had calculated").

<sup>21</sup> Ford WDT, at 15-16.

<sup>22</sup> See, e.g., *SDARS II*, at 23066-67; *Web IV*, at 26322.

what is required and what is provided by the services' fact witnesses can be illustrated in a simple diagram.



Panel A of Figure 1 illustrates a hypothetical distribution of *net* promotional effects for the tracks played by a service. The promotional effects shown in the figure are net of any substitution effects. As illustrated, promotional effects can be positive or negative. If a service increases the amount of income that a label and artist mark from a given track, the net promotional effect is positive. Conversely, if a service decreases income (say, because it sufficiently or even overplays a recording such that consumers do not want to purchase that release), the net promotional effect would be negative. The net promotional effect would also be negative if a service helps sell a few more copies but significantly reduces label and artist income by substituting for the use of more profitable musical outlets.<sup>23</sup> For expositional purposes only, Figure 1 assumes that promotional effects are (1) normally distributed and (2) centered on zero. The average promotional effect of the target service is labeled  $\hat{u}_T$ .<sup>24</sup>

Panel B of Figure 1 illustrates the concept of *relative* promotion. In Panel B, I assume there are two services: a benchmark ( $\hat{u}_B$ ) and a target service ( $\hat{u}_T$ ). The net promotion distribution of the benchmark service illustrates the promotional effects of a large, random sample of the music played by the benchmark service. I assume, for illustration purposes alone, that the mean of promotional effects for the benchmark service is lower than that of the target service ( $\hat{u}_B < \hat{u}_T$ ).<sup>25</sup> Ignoring the presence of other music services, the necessary calculation for relative promotion is

<sup>23</sup> For instance, Dr. Shapiro provides evidence that users substitute Sirius XM for interactive streaming services. Shapiro WDT, at App. D, Table D-1.

<sup>24</sup> A distribution of this type might be estimated by calculating the promotional effects of large sample of randomly-selected tracks. As detailed in my direct testimony, average promotional effect should be measured in terms of income for the record labels and artists, or at least be a value that can be plausibly converted to income.

<sup>25</sup> Dr. Shapiro assumes that the promotional effects of Sirius XM and Pandora are equal. Shapiro WDT, at D-5. In *Web IV*, the Judges found no evidence that the promotional effect of non-interactive streaming (e.g., Pandora) and interactive streaming (e.g., the benchmarks used by Dr. Orszag) were different. *Web IV*, at 26,326-29. Thus, Dr. Shapiro's assumption suggests that the relative promotional effect between Sirius XM and Dr. Orszag's interactive benchmarks is zero.

the difference between the two means, or  $\hat{u}_T - \hat{u}_B$ . That is, the mere presence of a promotional effect does not justify a promotional discount. Rather, in a valid benchmarking analysis, any discount based on promotional effects would be calculated with reference to the *monetary value* of the difference between  $\hat{u}_T$  and  $\hat{u}_B$ .

Neither Mr. Blatter nor Mr. Williams speak to relative promotion. The chosen anecdotes in their testimonies represent a carefully selected, non-random sample of a small number of recordings and artists. Presumably, their examples intended to demonstrate a positive promotional effect and were chosen for this purpose. In statistical lingo, Mr. Blatter and Mr. Williams chose examples from the positive tail of the promotion distribution, such as the point labeled  $w$  in Panel A. (The direct licenses analyzed by Dr. Shapiro, covering only about 6% of Sirius XM's playlist,<sup>26</sup> may also be described as draws from the positive tail.)

Plainly, a few anecdotes from the positive tail of the distribution in Panel A say nothing about the average promotional effect across all songs played by the target services ( $\hat{u}_T$ ). Neither Mr. Blatter nor Mr. Williams provide any evidence about the average promotional effect of their services. But the statutory rate does not apply to some carefully selected list of tracks or artists. The statutory rate is not just for special cases, it is for all cases.<sup>27</sup> In short, their examples are directed to a question different than the one the Judges would have to answer if they were to adjust a benchmark rate based on a promotional effect.

### C. Relative Promotion is Not Readily Quantifiable

My direct testimony explained that a complete analysis of relative promotion requires estimating the differences in promotional effects and platform substitution across the full array of interdependent platforms and services. Attempting to quantify *net* relative promotion that takes all relevant factors into account would be a difficult, data-intensive task. One of the many reasons this is so is because in an environment of interdependent platforms and services and multi-faceted promotional strategies, it is exceptionally difficult to establish that any particular action actually causes any particular effect on paying consumption. As discussed later, there are some interesting exceptions, but the exceptions are rare and special events (*e.g.*, television appearances, the death of an artist, and so forth).

As I understand it, a successful promotional effort requires at least two key ingredients. First, the artist must make music people want to hear. Second, the artist needs to connect with an audience willing to spend money on his or her recordings. With regard to the latter, artists and record labels use a wide range of promotional activities to build an audience for an artist's

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<sup>26</sup> Shapiro WDT, at p. 35.

<sup>27</sup> As discussed in my direct testimony, the broad coverage of the statutory license implies that promotion matters only if it the service's use of music increases the income from sales for all the music covered by the statutory license. A few anecdotes of promotional effects may simply indicate that the mix of purchases has changed, perhaps to the benefit of certain artists or even labels but to the detriment of others. Yet, the statutory license covers all the music, so the mix of music purchased is unimportant. For a statutory license that covers all music, promotion matters only when the total quantity of purchases rises due to a service's activity. This mix-versus-total sales question has been raised even for terrestrial radio, and the evidence suggests that even terrestrial radio predominately alters the mix and not the overall level of sales.

recordings. In addition to seeking plays on terrestrial and satellite radio and Music Choice, labels promote music through interactive<sup>28</sup> and non-interactive streaming services, download stores, physical product retailers, special appearances (live and in the studios of radio stations and services), television shows and commercials, music videos, concert tours, interviews, news media, reviewers, dance club DJs, Twitter, Instagram, Facebook, YouTube, books, apparel, and even perfumes.<sup>29</sup> Country music sensation Eric Church even endorses his own line of furniture.<sup>30</sup> Social media is a relatively new promotional tool but an exceedingly important one, because it allows artists to communicate directly and continuously to their fans without mass media as an intermediary. Many of these activities continue on an ongoing basis between recording releases, while others happen more or less simultaneously around the time of a release. Although each of these platforms may contribute to the success of a given recording, records become hits (and therefore become significantly profitable for their creators) only when a mix of these varied opportunities expose as many consumers as possible to, and create demand for, a compelling artist and a great recording.<sup>31</sup>

So which of these factors *causes* paid consumption? Is it great recording? Or the artist's reputation based on previous recordings? Is it Sirius XM plays? Or terrestrial radio plays? Is it Spotify's playlists? Perhaps featured placement in the iTunes store? Is it an appearance by the artist on a television talk show? Or maybe a huge Twitter following? Is it touring (either on his or her own or as the opening act for an already successful artist)? The causal chain between exposure and artist and label income is multifaceted and nearly impossible to quantify. It is a difficult task even for industry experts after the fact; determining the *ex ante* success of any particular part of a promotional strategy is impossible.

There are a multitude of reasons for this difficulty, including that:

- Success is an accumulation of interest from multiple promotional activities;
- What works varies widely among genres of music, recordings and artists;
- Sales are inextricably tied to the quality of the music, and what makes a "great" recording cannot be quantified.

Any attempt to quantify the purported promotional effects of Sirius XM and the preexisting subscription services ("PSS") specifically faces additional barriers. Although both of these services track their total number of subscribers, they do not provide record labels with *any* data

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<sup>28</sup> I addressed the potential promotional impact of interactive services such as Apple and Spotify in my written direct testimony. The promotional value of such services has been the subject of recent media comment. Joe Coscarelli, Apple Music: Platform? Promoter? Both., New York Times (Dec. 22, 2016) (Apple Music emerging as "a one-stop shop for major artists – part platform and part promoter"), *available at* <https://www.nytimes.com/2016/12/22/arts/music/apple-music-platform-promoter-both.html?emc=eta1&r=0>.

<sup>29</sup> Record labels do not necessarily receive revenues from all these sources of artist's income, typically receiving income from musical recordings, in some cases touring, and perhaps some share of other revenues depending on the artist's contract.

<sup>30</sup> <https://ericchurch.com/highwaytohome>.

<sup>31</sup> No amount of radio play is likely to make Lou Reed's *Metal Music Machine* a hit. See J. Guterman and O. O'Donnell, *The Worst Rock'n'Roll Records of All Time* (1991) (rating this release the second worst album of all time, despite Lou Reed's otherwise successful career).



about how many people are listening at a given time or how many tune in to a given station. (Terrestrial radio stations and streaming services, by contrast, both provide much more of this type of information.) For this reason, when a Sirius XM or Music Choice channel adds a recording to its rotation, there is not currently any way to know how many people have actually heard it. This makes it impossible to link any effect of Sirius XM and Music Choice play directly to sales. Even for people steeped in the industry, my conversations with the record labels indicated that assessing the promotional effect of Sirius XM or Music Choice is largely a speculative endeavor.

In the absence of reliable data, record labels assess the impact of these services based on their experience and observations. Based on my conversations with music industry executives, there are instances in which Sirius XM seems to be an important part of the promotional mix;<sup>32</sup> but for most recordings, it is just one of many ways to help generate an audience. Certainly, both Sirius XM and Music Choice play music that does not sell well. Labels generally seem to view Sirius XM channels as comparable to other outlets to which they promote music, including interactive and non-interactive streaming services like Spotify and Apple, and terrestrial radio.<sup>33</sup> Although Sirius XM may be particularly helpful in providing early support to a record on occasion, there is nothing exceptionally promotional about this service relative to others. It is simply not the case that the labels rely uniquely on Sirius XM or Music Choice to break records. The services are helpful, and more helpful in some cases than others, but they are not exceptional in any general sense.<sup>34</sup>

The thank you notes and other acknowledgments cited in the services' testimony are not to the contrary. First, the anecdotes offered by Mr. Blatter and Mr. Williams reflect common courtesy and are commonplace among promotions staff. Successful promotions executives are passionate about the music they are promoting, and their job consists of building relationships with programmers to whom they pitch recordings week after week. Effusive gratitude is one of

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<sup>32</sup> For instance, I understand that Sirius XM may play a relatively larger role in supporting emerging artists and music in less popular genres (such as dance music and rock) because there are fewer outlets for audiences to access these genres. Not surprisingly, many of the examples cited in Mr. Blatter's testimony reflect these types of releases.

<sup>33</sup> Record labels certainly do not view Sirius XM and Music Choice as comparable to all of radio as a whole as Mr. Williams seems to say in one place, before going on to draw comparisons to individual radio stations. Williams WDT, at 12. Terrestrial radio as a whole is the medium with the greatest audience reach in the U.S., some 240 million people per month, and is closely followed by television at 226 million people per month. The Total Audience Report: Q1 2016, Nielsen (June 27, 2016), available at <http://www.nielsen.com/us/en/insights/reports/2016/the-total-audience-report-q1-2016.html>. While proponents of terrestrial radio often claim that it is highly promotional of record sales, evidence suggests that radio alters the mix of music purchased and not the total quantity of music purchases. Ford WDT, at 6-8.

<sup>34</sup> There is some reason to doubt the extent to which Music Choice is even particularly helpful with regard to labels' promotional efforts. Although the labels I spoke with appreciate Music Choice as an outlet for their recordings, I spoke to no one who said that Music Choice is a major consideration in their marketing plans. To the degree that plays on this service matter to labels, it is for reasons other than any discernible effect on sales (*e.g.*, because play on Music Choice increases total spin count for purposes of the charts).

the tools of their trade, and sometimes a thank you note is just a convenient opening for pivoting to their next pitch.<sup>35</sup>

Nonetheless, it is my understanding that record labels do truly appreciate the exposure provided by each of their partners, including not only Sirius XM and Music Choice, but also streaming services like Apple and Spotify, terrestrial radio stations and other outlets that play their music. When promotional staff sends a grateful email, I believe they are sincere, at least in most cases. However, such a statement does not imply that the success of a recording was purely the result of one service's spins.

Moreover, I understand that acknowledgements of the contributions of the services are sometimes responses to requests for such acknowledgements by the services. Multiple executives with whom I spoke described Sirius XM as being very "needy," which they explained means that Sirius XM likes to see acknowledgement of its plays in press releases, trade publications and other marketing arranged by labels, and sometimes complains if it does not receive such acknowledgement. In the interests of cultivating a relationship, the labels give Sirius XM the mentions it wants, and a number of the examples cited in Mr. Blatter's testimony appear to be responses to such requests. It is my understanding that Sirius XM is not necessary more promotional, just more demanding. Such acknowledgements do not tell us anything useful about the promotional value of Sirius XM relative to less "needy" services.

#### **D. The Judges Have Rightly Rejected Anecdotal Testimony About Promotion**

The services' testimony regarding promotion is nearly identical to the testimony they offered in prior proceedings, which the Judges have never found persuasive. Mr. Blatter's testimony is almost identical to his testimony in *SDARS I* and *SDARS II*. It consists primarily of a number of thank you notes from record labels, a handful of interview quotes, and a few bits of sales data for carefully selected recordings and time intervals. Mr. Williams' testimony on behalf of Music Choice, which is parallel in character, is likewise similar to his *SDARS II* testimony. As they have done before, both witnesses suggest that their anecdotes demonstrate a causal relationship between the services' spins of certain releases and record sales. And, as they have before, they fail to ask the Judges to apply any specific adjustment in the benchmarking exercise. Absent any proposal to modify rates, the testimony does not seem to serve anything more than an atmospheric purpose.

Perhaps recognizing this, in prior proceedings the Judges have consistently and correctly rejected anecdotal evidence relating to promotions and the possible promotional effects of plays. For instance, in their *SDARS II* determination, the Judges rejected Mr. Blatter's testimony:

Much of the evidence that Sirius XM presented to show the promotional effect of Sirius XM's service on phonorecord sales consists of testimony detailing record labels' efforts to get their artists airplay on Sirius XM and elsewhere. . . . Those facts alone, even if assumed to be true, would not provide the type of substantial

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<sup>35</sup> E.g., Sirius XM Dir. Exs. 9, 16, 17, 18. Music Choice recognizes this maneuver, noting that the thank you emails it receives are "often" accompanied by inquiries about other artists and releases. Williams WDT, at 20.

empirical evidence that might support a downward adjustment from the rates most strongly suggested by the evidence in the record.<sup>36</sup>

In his separate *SDARS II* opinion, Judge Roberts elaborated:

[T]here is no objective, quantifiable evidence that Sirius XM's promotional activities with respect to its music offerings, events, and surrounding programming produce a net positive impact on record company revenues. While these activities, viewed individually, may have promotional effect on record sales, there is insufficient evidence in the record as to the overall effect of Sirius XM's satellite radio service on all streams of record company revenues from sound recordings. Indeed, Sirius XM's witness Steven Blatter conceded that his examples of on-the-air activities showed only a correlation between airplay and record sales and nothing more.<sup>37</sup>

The similar evidence presented by Sirius XM's predecessors in *SDARS I* was not received any better:

[T]he *SDARS* assert that their service is promotional and imply that they should receive credit for this effect. But they present no persuasive evidence that would be useful for quantifying the magnitude of this asserted effect or for deriving a method for translating such magnitudes into a rate adjustment. The mere assertion that airplay is promotional without more is insufficient. Indeed, the quality of evidence presented by the services on this issue consisted largely of such assertions . . . , a handful of consumer testimonial e-mails or anecdotes recounting subjective opinions.<sup>38</sup>

Mr. Williams' testimony had no influence on the majority determination in *SDARS II*. Judge Roberts noted that he found it "anecdotal and weak," and Dr. Crawford's reliance on it "not sustainable."<sup>39</sup>

The Judges rejected similar evidence in *Web IV* as well:

The NAB and iHeart repeatedly point to evidence that record company promotional personnel thank music services for playing their artists' music to support the conclusion that such "spins" are promotional. The Judges do not find this argument persuasive. It is at least equally plausible that record company executives were merely displaying "common courtesy."<sup>40</sup>

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<sup>36</sup> *SDARS II*, 78 Fed. Reg. at 23,066 (referring to "the anecdotal nature of Sirius XM's promotional evidence").

<sup>37</sup> 78 Fed. Reg. at 23,092 (Roberts, J., dissenting).

<sup>38</sup> *SDARS I*, 73 Fed. Reg. 4080, 4095 (Jan. 24, 2008).

<sup>39</sup> 78 Fed. Reg. at 23,083 (Roberts, J., dissenting).

<sup>40</sup> *Web IV*, at n.41 (citations omitted).

Mr. Blatter and Mr. Williams neither acknowledge nor address the Judges' prior criticisms. Consequently, I see no reason or basis for the Judges to alter their position on this type of testimony.

## II. The Specific Anecdotes Provided Are Unreliable

Putting aside the Judges' consistent finding that anecdotal evidence of promotional effects is inadequate to support an adjustment of a benchmark rate, it would not be appropriate to rely on the services' testimony in an economic analysis, because to the extent it has been practicable for me to investigate the broader context, many of the anecdotes they provided overstate or misrepresent promotional effects, even with regard to the particular releases discussed.

### A. Expressions of Gratitude

Much of the testimony that Mr. Blatter, and to some extent Mr. Williams, provide points to statements of gratitude from record companies and artists for plays on the services. As discussed above, expressions of common courtesy – and even excitement – in interviews, press releases or emails between business acquaintances on the staff of a record company and a service, do not, as an economic or statistical matter, establish a difference in overall relative promotion that might warrant an adjustment to a benchmark rate. Record labels want their recordings to find an audience (and also want to get paid by royalty-paying services), so of course they encourage the services to play their recordings. It should not be surprising that as part of that process, record companies stroke the egos of the programmers to whom they pitch recordings, and express gratitude when their efforts at pitching recordings result in plays. I was assured that such expressions of gratitude are routine, and extend not only to Sirius XM and Music Choice but also to other outlets for recordings, including radio stations, station groups, and interactive and non-interactive Internet services.

Many of the services' specific examples misstate or leave out relevant facts. Examining just a few of the examples cited underscores the problems with relying on this aspect of the services' testimony in an economic analysis.

#### 1. Kid Ink / "Bad Ass"

Sirius XM points to a thank you email dated February 20, 2013 stating that Sirius XM's channel Shade 45 was "the 1st station to add" Kid Ink's single "Bad Ass."<sup>41</sup>

Kid Ink is a successful rap artist. His first album was released in 2012 on an independent label. That album debuted at #2 on Billboard's rap albums chart without the promotional heft of a major label, and sold 20,000 units in its first week.<sup>42</sup> Kid Ink announced that he had signed with RCA on January 3, 2013, the same day he premiered "Bad Ass" on radio station Power 106 in Los Angeles.<sup>43</sup> According to RCA, radio stations HOT97 (New York City), WJMN (Boston) and KKFR

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<sup>41</sup> Blatter WDT, at ¶ 22.

<sup>42</sup> Rob Markman, Kid Ink Inks Deal With RCA Records, MTV News (Jan. 4, 2013), *available at* <http://www.mtv.com/news/1699688/kid-ink-record-deal-rca-records/>.

<sup>43</sup> *Id.*

(Phoenix) had this track in rotation as of January 4, 2013. However, the track was not released for sale until January 22, 2013.<sup>44</sup> It is common for record companies to seek radio airplay for a recording before its release date to build up demand for the recording, but I heard from various executives that Sirius XM does not typically play a recording until its release date (or later).<sup>45</sup> Consistent with that policy, RCA informed me that Sirius XM's Shade 45 channel did not start playing "Bad Ass" until January 22, 2013, almost three weeks after it first was played on terrestrial radio. Clearly it would be incorrect to attribute the success of "Bad Ass" uniquely, or even primarily, to Sirius XM.<sup>46</sup>

## 2. Logan Mize / "Can't Get Away From a Good Time"

Mr. Blatter describes an April 12, 2015 interview with Logan Mize, a country artist, in which he expresses gratitude for Sirius XM's plays of his single "Can't Get Away From a Good Time."<sup>47</sup> That track was the debut single from his five-track EP "Pawn Shop Guitar."

Earlier in his career, Mr. Mize enjoyed some success with albums released by the independent label Big Yellow Dog Music, and opened for such popular artists as Lady Antebellum, the Band Perry and Leann Rimes.<sup>48</sup> He made television appearances, and his band was even shown in a "Fabric of Our Life" cotton commercial.<sup>49</sup> "Pawn Shop Guitar" was Mr. Mize's first project with Arista Nashville.

The single "Can't Get Away From a Good Time" was released on November 7, 2014.<sup>50</sup> Arista promoted it heavily, with e-newsletters, digital advertising, print advertising, social media, media visits, interviews (including the one cited by Sirius XM), promotion on the iTunes store, Spotify playlists, visits to Spotify and Google Music, radio introductions, consumer-facing events with local radio stations, a Walmart exclusive, and more. With all that, the lead-up to the EP release seemed promising. The recording was played by at least 167 radio stations, sometimes dozens of times. One reviewer said the recording was "burning it up."<sup>51</sup> Coinciding with the release of the EP on May 19, 2015, Country Music Television aired a premiere of a new music

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<sup>44</sup> U.S. Copyright Registration No. SR0000742551.

<sup>45</sup> It may be that Sirius XM finds sales information valuable in making its programming decisions, in that recordings that are selling, and continue to have a positive sales trend after Sirius XM starts playing them (even if it is not the cause of the positive sales trend), are likely to be relatively popular with its listeners.

<sup>46</sup> Sirius XM also failed to disclose that the sender of this email, who is known professionally as J Grand, has a close relationship with Sirius XM, in that he has hosted (and the RCA executives with whom I spoke thought still hosts) his own show on Shade 45. Marisa Pizarro, Joshua White, New York Times (Mar. 30, 2008), available at <http://www.nytimes.com/2008/03/30/fashion/weddings/30pizarro.html>.

<sup>47</sup> Blatter WDT, at ¶ 43.

<sup>48</sup> Country Artist Logan Mize Announced As Live Music Act for Union Station's Celebration of the Century, Union Station Kansas City (Sept. 3, 2014), available at <http://www.unionstation.org/news/country-artist-logan-mize-announced-live-music-act-union-station%E2%80%99s-celebration-century>.

<sup>49</sup> Logan Mize, CMT Artists, available at <http://www.cmt.com/artists/logan-mize/>.

<sup>50</sup> U.S. Copyright Reg. No. SR0000752445.

<sup>51</sup> Rebekah Bell, Logan Mize Making His Official Debut With 'Pawn Shop Guitar' EP, Taste of Country (May 18, 2015), available at <http://tasteofcountry.com/logan-mize-pawn-shop-guitar/>.

video for the single.<sup>52</sup> This multitude of promotional influences perhaps explains why the *AllAccess* article cited by Mr. Blatter attributes the success “*in part* to a boost from SiriusXM[.]”<sup>53</sup>

Unfortunately, despite Mr. Mize’s prior success, Arista’s wide-ranging promotional push, a recording that initially seemed to be well-received, and even Sirius XM’s plays, [REDACTED]

[REDACTED] Arista and Mr. Mize parted ways in 2016.

### 3. Old Dominion/“Shut Me Up”

Mr. Blatter also highlights an email dated July 30, 2014 from the manager of the band “Old Dominion” relating to “Shut Me Up,” the lead single from the EP “Old Dominion.” Specifically, the email expresses thanks for helping the single reach the “one million streams mark on Spotify.”<sup>54</sup>

Members of Old Dominion had enjoyed professional success as Nashville songwriters for years before this release. By 2007 they formed a band, and eventually developed a local following and did some touring.<sup>55</sup> The track “Shut Me Up” was released during the summer of 2014 by the independent label ReeSmack Records.<sup>56</sup> The band seems to have formed a relationship with Sirius XM at a very early point in their career as recording artists. For example, the band did a live performance at Sirius XM’s performance space in Nashville shortly after the release of “Shut Me Up.”<sup>57</sup> However, Billboard has also credited Atlanta radio station WUBL as another early supporter of the band, and the band observed, “there’s a lot of people out there, like a lot of people out there that wouldn’t know our music if it wasn’t for Spotify.”<sup>58</sup> When the band’s EP began to get some traction in the marketplace, the band was signed to the RCA Nashville label in early 2015.<sup>59</sup>

<sup>52</sup> Eric T. Parker, Arista Nashville’s Logan Mize to Release 5-Song EP, Music Row (May 11, 2015), available at <http://www.musicrow.com/2015/05/arista-nashvilles-logan-mize-to-release-5-song-ep/>.

<sup>53</sup> Blatter WDT, at ¶ 43 (emphasis added).

<sup>54</sup> Blatter WDT, at ¶ 25.

<sup>55</sup> Old Dominion Biography, iTunes, <https://itunes.apple.com/us/artist/old-dominion/id495761008>; Marissa R. Moss, 10 New Artists You Need to Know: Fall 2014, Rolling Stone (Oct. 10, 2014), available at <http://www.rollingstone.com/music/lists/new-country-artists-2014-20141010/old-dominion-20141010>.

<sup>56</sup> Eric T. Parker, Old Dominion Preps Debut EP, Produced by Shane McAnally, Music Row (Aug. 28, 2014), available at <http://www.musicrow.com/2014/08/old-dominion-preps-debut-ep-produced-by-shane-mcanally/>.

<sup>57</sup> <https://twitter.com/sxmthehighway/status/491574074821185537> (July 22, 2014).

<sup>58</sup> Tomorrow’s Hits: Shakey Graves, Leihoku & Old Dominion, Billboard (Nov. 7, 2014), available at <http://www.billboard.com/articles/columns/chart-beat/6311898/tomorrows-hits-shakey-graves-leihoku-old-dominion>; Billy Dukes, Old Dominion Added to Kenny Chesney’s the Big Revival Tour, Taste of Country (Dec. 17, 2014), available at <http://tasteofcountry.com/old-dominion-kenny-chesney-big-revival-tour/?trackback=tsmclip>.

<sup>59</sup> Rebekah Bell, Old Dominion Sign With RCA Nashville, Taste of Country (Feb. 26, 2015), available at <http://tasteofcountry.com/old-dominion-rca-nashville/>.

While the single “Shut Me Up” and the EP “Old Dominion” were a success for the band in that they helped get the band a contract with a major label and the opportunity to play stadium shows as a featured act on Kenny Chesney’s the Big Revival Tour,<sup>60</sup> it is evident that this particular email is nothing more than a polite thank you note, typical of those commonly sent to outlets that support a record. From a financial perspective, one million streams on Spotify brings in only a few thousand dollars. Recording an EP to achieve that level of income is not considered a commercial success.

[REDACTED]

The relationship between this band and Sirius XM also is in no way typical of its use of recordings under the statutory license, making this example ill-suited to an economic analysis of rates under the statutory license. Sirius XM did not merely play this band’s recordings occasionally, it developed a genuine relationship with the band from an early date. This was probably good business for Sirius XM as well as the band. Special promotions such as a live performance by a popular local band help Sirius XM build its brand. But this example does not suggest that Sirius XM overall has a positive and exceptional promotional effect on the recordings it plays.

#### 4. Chris Brown / “Royalty”

Music Choice identifies some expressions of gratitude it reportedly received in connection with a pre-release promotion it conducted for Chris Brown’s album “Royalty.”<sup>61</sup>

Most notably, David Del Beccaro, Music Choice’s CEO, states that “[t]he head of urban music for Chris Brown’s label specifically told us that Music Choice is responsible for more urban music sales for Sony than any other outlet.”<sup>62</sup> I specifically asked executives from Mr. Brown’s label RCA about Music Choice’s role as to their urban music sales, and [REDACTED] More generally, I asked about Music Choice in all my label calls. I was told consistently that [REDACTED]

[REDACTED]<sup>63</sup>

<sup>60</sup> Billy Dukes, Old Dominion Added to Kenny Chesney’s the Big Revival Tour, Taste of Country (Dec. 17, 2014), available at <http://tasteofcountry.com/old-dominion-kenny-chesney-big-revival-tour/>.

<sup>61</sup> Del Beccaro WDT, at 41-42; Williams WDT, at 19-20, 34-36.

<sup>62</sup> Del Beccaro WDT, at 42.

<sup>63</sup> Music Choice’s anecdote about a Foo Fighters’ recording does not prove the contrary. See Del Beccaro WDT, at 43; Williams WDT, at 29. Music Choice’s witnesses recall receiving a call asking why plays of this recording had declined and asking Music Choice to put it back into rotation. Part of the work of a radio promotions department is to monitor spins on a daily basis. There is nothing out of the ordinary about a label’s promotions staff communicating with radio stations and services about any changes, particularly if the label is trying to eke out a few additional spins to move up in chart position. Music Choice spins are counted by Nielsen and affect the charts, providing a motive for staff to monitor

Nor is there any reason to think that Music Choice was uniquely responsible for pre-release sales of the album "Royalty." Brown was a successful artist long before Music Choice conducted its promotion, and the promotion does not seem to have materially affected pre-release sales. Both "Royalty" and Mr. Brown's previous album "X" had nearly identical pre-orders (approximately [REDACTED] each), indicating an established audience base for Brown. This consistency offers no indication that Music Choice's promotion is somehow responsible for "Royalty's" success.

## B. Promotional Events

Both Sirius XM and Music Choice devote a great deal of attention to special promotional events such as in-studio performances, interviews, and pop-up channels. As described above, this evidence is irrelevant for purposes of this proceeding, because such promotional events are entirely distinct from use of recordings under the statutory license. It is all well and good that services, labels and artists find such special arrangements mutually beneficial, but that tells us nothing about the promotional effects of mere play, in either absolute or relative terms, of either these particular artists or the entire playlists of the services. The dubious quality of these anecdotes for purposes of economic analysis of a statutory rate is illustrated by a few examples.<sup>64</sup>

### 1. Adele / "25"

Sirius XM touts appearances in its studio as giving artists "a unique opportunity to connect with fans."<sup>65</sup> The examples Sirius XM provides are all questionable, in that they involve well-known artists whose popularity cannot be attributed to any one source (and certainly not to Sirius XM). One of those examples is the artist Adele, who agreed to be interviewed by Sirius XM about her album "25" in connection with its release in November 2015.<sup>66</sup>

Adele is a global superstar. Her debut album "19" won Grammy Awards in 2009 for Best New Artist and Best Female Pop Vocal Performance<sup>67</sup> and is certified 3x Multi-Platinum.<sup>68</sup> Her second album "21" was even more successful, winning six Grammy Awards in 2012, including

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the service. But, in this case, the Music Choice witnesses fail to disclose that the issue was broader than just the Foo Fighters. [REDACTED]

[REDACTED] It is no surprise that such a change would be noticeable and result in follow-up.

<sup>64</sup> In addition to his discussion of specific promotions, Mr. Williams notes that some record companies "service" Music Choice by giving them promotional copies of recordings. Williams WDT, at 21-22. However, Mr. Williams explains that such copies are "usually delivered via a password protected website." Of course, the marginal cost of allowing Music Choice to download a copy of a recording (along with every radio station) is approximately zero, meaning that it should not be of consequence to any economic analysis of Music Choice's promotional effects.

<sup>65</sup> Blatter WDT, at ¶ 31.

<sup>66</sup> See also Blatter WDT, at ¶ 63 (mentioning an Adele appearance).

<sup>67</sup> 2009 Grammy Award Winners, Billboard (Feb. 9, 2009).

<sup>68</sup> [https://www.riaa.com/gold-platinum/?tab\\_active=default-award&ar=ADELE&ti=19](https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=ADELE&ti=19).



Album of the Year.<sup>69</sup> It set records for its run among the albums at the top of the charts, and sold more albums worldwide in a two-year period than any album since Michael Jackson's "Thriller," in 1983-1984.<sup>70</sup> It is certified 14x Multi-Platinum.<sup>71</sup> She subsequently wrote and recorded the theme song for the James Bond film "Skyfall," which received an Academy Award<sup>72</sup> and a Golden Globe Award.<sup>73</sup> That single is certified Platinum.<sup>74</sup> "25" was her third studio album. It became the global top-selling album for 2015<sup>75</sup> and is certified 10x Multi-Platinum.<sup>76</sup> Adele just won five Grammy Awards for this album, again including Album of the Year.<sup>77</sup> Among many other accolades, Time magazine named Adele one of the most influential people in the world in 2012 and 2016.<sup>78</sup>

Mr. Blatter's suggestion that Sirius XM's interview gave Adele an opportunity to connect with her fans that she would not have otherwise had, or that Sirius XM was somehow responsible for the success of Adele's "25" is not credible. [REDACTED]

[REDACTED] The single "Hello" had already been released and was a runaway hit.<sup>79</sup> For example, "Hello" set records for most video views in the first 24 hours on Vevo, achieving 100 million YouTube views within five days, and being the first recording to be downloaded a million times in its first week.<sup>80</sup> Sirius XM, like every other outlet for music, was eager for access to Adele in connection with what was sure to be a blockbuster release.

Fortune magazine praised the "[a]mazing" and "incredibly savvy" marketing of the album.<sup>81</sup> Among many other things, numerous events surrounded the album's release, including a star-

<sup>69</sup> David Greenwald, Grammys 2012: Adele Makes a Clean Sweep on Somber Night, *Billboard* (Feb. 12, 2012), available at <http://www.billboard.com/articles/events/grammys/506185/grammys-2012-adele-makes-a-clean-sweep-on-somber-night>.

<sup>70</sup> Lisa Robinson, Cover Story: Adele, Queen of Hearts, *Vanity Fair* (Dec. 2016), available at <http://www.vanityfair.com/culture/2016/10/adele-cover-story?mbid=adele>.

<sup>71</sup> [https://www.riaa.com/gold-platinum/?tab\\_active=default-award&ar=ADELE&ti=21](https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=ADELE&ti=21).

<sup>72</sup> <https://www.oscars.org/oscars/ceremonies/2013>.

<sup>73</sup> Golden Globes 2013: Complete List of Winners, *Hollywood Reporter* (Jan. 13, 2013).

<sup>74</sup> [https://www.riaa.com/gold-platinum/?tab\\_active=default-award&ar=ADELE&ti=SKYFALL](https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=ADELE&ti=SKYFALL).

<sup>75</sup> International Federation of the Phonographic Industry, *Global Music Report*, at 7 (2016), available at <http://www.ifpi.org/downloads/GMR2016.pdf>.

<sup>76</sup> [https://www.riaa.com/gold-platinum/?tab\\_active=default-award&ar=ADELE&ti=25](https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=ADELE&ti=25).

<sup>77</sup> 59th Annual Grammy Awards Winners & Nominees, <https://www.grammy.com/nominees>.

<sup>78</sup> Jennifer Lawrence, Adele, *Time* (Apr. 21, 2016), available at <http://time.com/collection-post/4298223/adele-2016-time-100/>; Pink, Adele, *Time* (Apr. 18, 2012), available at [http://content.time.com/time/specials/packages/article/0,28804,2111975\\_2111976\\_2111950,00.html](http://content.time.com/time/specials/packages/article/0,28804,2111975_2111976_2111950,00.html).

<sup>79</sup> In connection with the release of "Hello," Adele did an interview with Apple Music as well as Sirius XM. Daniel Kreps, Adele Talks '25,' 'Hello' Origins and 'Darkness' in New Interviews, *Rolling Stone* (Oct. 23, 2015), available at <http://www.rollingstone.com/music/news/adele-talks-25-hello-origins-and-darkness-in-new-interviews-20151023>.

<sup>80</sup> Chris Morris, The Amazing Marketing Machine Behind Adele, *Fortune* (Nov. 7, 2015), available at <http://fortune.com/2015/11/07/adele-hello-marketing-machine/>.

<sup>81</sup> *Id.*

studded concert at Radio City Music Hall, which was telecast on the NBC television network;<sup>82</sup> an appearance on *The Tonight Show Starring Jimmy Fallon*;<sup>83</sup> an appearance on *Saturday Night Live*;<sup>84</sup> and “an intimate show for fans” from Joe’s Pub broadcast nationally on iHeartRadio’s *Hit Nation* on the day of release.<sup>85</sup> Columbia Records worked with its global partners for the album on other promotional events, including a BBC television special (later aired in the U.S. on BBC America)<sup>86</sup> and an appearance by Adele on the U.K. *X-Factor* finale.<sup>87</sup>

It should be clear that if Sirius XM’s interview had any effect at all on the commercial success of “25,” it was just one among a very large number of contributors to that success, and the extent of its contribution (if any) would be impossible to quantify.<sup>88</sup> It should also be clear that being one of very few audio services with access to a hugely successful artist like Adele was more of a unique opportunity for Sirius XM than it was for Adele.<sup>89</sup> Sirius XM continues to promote the interview in order to leverage Adele’s popularity in order to attract and retain subscribers. None of this, of course, tells us anything about the overall promotional effects of mere plays of

<sup>82</sup> Adelle Platon, *Adele Makes Triumphant Comeback at NBC’s Radio City Special: Live Review*, *Billboard* (Dec. 8, 2015), available at <http://www.billboard.com/articles/review/6792586/adele-25-nbc-radio-city-concert-review>.

<sup>83</sup> Lis R. France, *Adele Kills It on ‘The Tonight Show’ with Jimmy Fallon*, *CNN* (Nov. 25, 2015) available at <http://www.cnn.com/2015/11/25/entertainment/adele-jimmy-fallon-tonight-show-feat/>; Jon Blistein, *Watch Adele Croon New Song, Cackle on ‘Jimmy Fallon,’* *Rolling Stone* (Nov. 24, 2015), available at <http://www.rollingstone.com/tv/news/watch-adele-croon-new-song-cackle-on-jimmy-fallon-20151124>.

<sup>84</sup> Mitchell Peters, *Watch Adele Beautifully Sing ‘Hello’ and ‘When We Were Young’ on ‘SNL,’* *Billboard* (Nov. 22, 2015) available at <http://www.billboard.com/articles/columns/pop-shop/6770292/watch-adele-beautifully-sing-hello-and-when-we-were-young-on-snl-saturday-night-live>; Daniel Kreps, *Watch Adele Perform ‘When We Were Young,’ Save Thanksgiving on ‘SNL,* *Rolling Stone* (Nov. 22, 2015), available at <http://www.rollingstone.com/tv/news/watch-adele-perform-when-we-were-young-save-thanksgiving-on-snl-20151122>.

<sup>85</sup> Nicole Mastrogiannis, *Adele Returns to Joe’s Pub for Intimate iHeartRadio Album Premiere*, *iHeartRadio* (Nov. 20, 2015), available at <https://www.iheart.com/news/adele-returns-to-joes-pub-for-14144798/>.

<sup>86</sup> Erin Strecker, *BBC America Will Air ‘Adele: Live in London’ Special*, *Billboard* (Jan. 28, 2016) available at <http://www.billboard.com/articles/columns/pop/6859174/adele-live-in-london-special-bbc-america>; <http://www.bbc.co.uk/programmes/articles/2d2gP1DTqDZSVP8hGl7ZX4z/exclusive-adele-at-the-bbc-a-first-look-when-adele-met-graham-norton-featuring-hello-live>.

<sup>87</sup> Erica Gonzales, *Watch Adele Perform “Hello” On The ‘X Factor’ Finale*, *Harper’s Bazaar* (Dec. 14, 2015), available at <http://www.harpersbazaar.com/culture/art-books-music/a13332/watch-adele-perform-hello-at-the-x-factor-finale/>.

<sup>88</sup> *Adele Talks 25 on SiriusXM*, *Sirius XM Press Release* (Nov. 16, 2015), available at <http://investor.siriusxm.com/investor-overview/press-releases/press-release-details/2015/Adele-Talks-25-on-SiriusXM/default.aspx>; Caitlin Carter, *Adele celebrates new album, 25, with intimate listener Q&A on The Spectrum*, *Sirius XM Blog* (Nov. 16, 2015), <http://blog.siriusxm.com/2015/11/16/adele-celebrates-new-album-25-with-intimate-listener-qa-on-the-spectrum/>.

<sup>89</sup> [REDACTED], and she is not included among the artists who made visits to Music Choice during the period 2013-2014. Music Choice Ex. MC 34.

recordings on Sirius XM relative to any other service.<sup>90</sup> The statutory license is not for special cases; it is for the general case.

## 2. Kelly Clarkson / “Give Me One Reason”

Mr. Blatter similarly refers to a March 2015 live performance by Kelly Clarkson.<sup>91</sup> Kelly Clarkson rose to fame just about the time that Sirius XM’s predecessors were commencing to offer their services, by winning the first season of “American Idol” in 2002. Subsequently, she has gone on to a very successful career as a recording artist, which I need not detail here. Her seventh studio album, “Piece by Piece,” was released March 3, 2015.<sup>92</sup> Among other things, the release of “Piece by Piece” was celebrated with an album release party the night before at the iHeartRadio Theater in New York City, which was webcast and broadcast live on all iHeartRadio adult contemporary and contemporary hit radio stations across the country.<sup>93</sup> Ms. Clarkson performed the lead single “Heartbeat Song” on various television shows, including The Graham Norton Show,<sup>94</sup> The Tonight Show Starring Jimmy Fallon,<sup>95</sup> and Good Morning America.<sup>96</sup> A couple weeks later, on March 18, 2015, she made it to Sirius XM’s studio for an interview and cover performance of the song “Give Me One Reason.”<sup>97</sup> This song was not on Ms. Clarkson’s album and *not available for sale*. From the perspective of her label RCA, this appearance was about general awareness of the artist. As an economic matter, it says nothing about determining a statutory rate for the hundreds of thousands of commercially-released recordings that are played on the service.

## 3. Billy Joel / “The Billy Joel Channel”

Mr. Blatter describes a pop-up channel featuring the recordings of the artist Billy Joel that Sirius XM offered in April-June 2014, mid-January to mid-February 2016, and October 2016.<sup>98</sup> He asserts that the channel was “successful at driving sales for Joel’s concerts,” and does not even try to claim an effect on sales of Mr. Joel’s recordings.

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<sup>90</sup> For example, I do not expect that Adele’s interview sold any records by the band Bad Company, plays from which are also subject to the statutory license.

<sup>91</sup> Blatter WDT, at ¶ 31.

<sup>92</sup> U.S. Copyright Reg. No SR0000765820.

<sup>93</sup> WATCH: Kelly Clarkson’s iHeartRadio Album Release Party, iHeartRadio (Feb. 26, 2015), *available at* <https://web.archive.org/web/20150306130050/http://news.iheart.com/articles/iheartradio-live-485840/watch-kelly-clarksons-iheartradio-album-release-13293864>.

<sup>94</sup> The Graham Norton Show, BBC, *available at* <https://web.archive.org/web/20150306124505/http://www.bbc.co.uk/programmes/b053gqtk>

<sup>95</sup> VIDEO: Kelly Clarkson Performs ‘Heartbeat Song,’ on TONIGHT SHOW, Broadway World (Mar. 3, 2015), *available at* <http://www.broadwayworld.com/bwwtv/article/VIDEO-Kelly-Clarkson-Performs-Heartbeat-Song-on-TONIGHT-SHOW-20150303>.

<sup>96</sup> Bradley Stern, Kelly Clarkson Performs “Heartbeat Song” And “Since U Been Gone” On ‘Good Morning America’: Watch, Idolator (Mar. 3, 2015), *available at* <http://www.idolator.com/7583188/kelly-clarkson-performs-heartbeat-song-since-u-been-gone-good-morning-america-watch>.

<sup>97</sup> Sagine Morency, Kelly Clarkson Gives Us a Reason to Stay Here with this Tracy Chapman Cover, Sirius XM Blog (Mar. 18, 2015), *available at* <http://blog.siriusxm.com/2015/03/18/kelly-clarkson-gives-us-a-reason-to-stay-here-with-this-tracy-chapman-cover/>.

<sup>98</sup> Blatter WDT, at ¶ 33.

Mr. Joel is, of course, another global superstar with a successful career stretching back decades before the predecessors of Sirius XM launched their services. There is considerable reason for skepticism about Sirius XM's claimed effect on ticket sales of Mr. Joel's concerts. As just one example, Mr. Joel famously launched a residency at Madison Square Garden in January 2014 (three months before the Sirius XM channel launched the first time). He has been performing to sell-out crowds at Madison Square Garden every month since, irrespective of whether Sirius XM was offering its channel at the time.<sup>99</sup>

#### 4. Five Finger Death Punch / "Got Your Six"

Music Choice highlights a promotion it conducted in September 2015 with the indie label Prospect Park to "premiere" the album "Got Your Six" by the metal band Five Finger Death Punch.<sup>100</sup>

I put the term premiere in quotation marks because this was not a world premiere, it was a Music Choice premiere. The after-action analysis that Music Choice provided to Prospect Park

[REDACTED]

[REDACTED].<sup>101</sup>

Whatever contribution Music Choice's premiere might have made to the album's commercial trajectory, it is not a contribution relevant to valuing usage under the statutory license. As Mr. Williams' testimony makes clear, this promotion involved extensive voluntary cooperation between the label, band and Music Choice. As part of that cooperation, Music Choice provided "on-channel and off-channel social media marketing support," [REDACTED] [REDACTED] ran a contest with an album-branded Twitter hashtag, provided special screen displays with information about retail availability of the album, and encouraged social media promotion of the album by the band's fans who are Music Choice subscribers.<sup>102</sup> If Music Choice did all those things for every recording it played, in the absence of an agreement with the label, the analysis of its promotional effects might be quite different. Because it does not, and the specific things it undertook to do here tell us nothing about the value of plays on the service in the ordinary case. The statutory rate is a backstop rate applying to all the music a service plays; it requires no special negotiations or considerations.

Music Choice also received benefits from this promotion, which are acknowledged in its own documents. Among the things it says worked well is that [REDACTED]

[REDACTED] To secure these benefits in the future, it expresses its [REDACTED]

<sup>99</sup> Billy Joel Sets Record-Breaking 39th Consecutive MSG Show March 3, 2017 (Dec. 8, 2016), available at <https://www.billyjoel.com/news/billy-joel-sets-record-breaking-39th-consecutive-msg-show-march-3-2017/>; Billy Joel at Madison Square Garden 37th Show Added Jan, 11, 2017 (Nov. 10, 2016), available at <https://www.billyjoel.com/news/billy-joel-madison-square-garden-37th-show-january-11-2017/>.

<sup>100</sup> Williams WDT, at 13-14.

<sup>101</sup> Music Choice Exhibit MC 19.

<sup>102</sup> Williams WDT, at 13-14; Music Choice Exhibit MC 19.

[REDACTED]<sup>103</sup> In fact among the batch of thank you emails accompanying Mr. Williams' testimony is [REDACTED].<sup>104</sup>

### C. Sales Data

Mr. Blatter also includes sales data, both in the form of graphs and scattered references throughout his testimony, that purport to show Sirius XM's effect on sales of new releases. These data do not purport to speak to the substantial number of catalog recordings Sirius XM uses, and there are significant reasons to question this evidence even as to new releases.

#### 1. Scale

First, it is important to put the sales shown by Sirius XM into perspective. Each of Mr. Blatter's graphs is drawn on its own scale, and they generally show a proportionally large spike to a level of sales that nonetheless remains low in absolute terms. Sales would need to go higher than shown for the project to be a financial success for the label. A successful recording requires a promotional toolbox in which Sirius XM is but one wrench. For example, Mr. Blatter provides a graph purporting to show a spike in sales when Sirius XM started playing the recording "S.O.B." by Nathaniel Rateliff & The Night Sweats. But this graph shows a limited time period, which does not capture the entire sales trajectory of this recording. As Mr. Barros testifies, the week *after* the last one shown on the graph, the band performed on the Tonight Show Starring Jimmy Fallon, and sales soared by an order of magnitude.<sup>105</sup>

This phenomenon is demonstrated by Ben Rector's recording "Brand New." Mr. Blatter talks about "Brand New" as a recording for which Sirius XM received an expression of gratitude because its channel The Pulse was "[t]he first station in America" to air it.<sup>106</sup> I had the opportunity to talk with the sender of that email to learn more about this recording.

Ben Rector is a successful artist who draws good crowds when he tours and currently has 155,000 followers on Instagram,<sup>107</sup> 117,000 likes on Facebook,<sup>108</sup> and 110,000 followers on Twitter.<sup>109</sup> "Brand New" is a track from his sixth album (also named "Brand New"). It was released on August 28, 2015 by the independent label Aptly Named Recordings, which is Mr. Rector's own label.<sup>110</sup> It is distributed, and was promoted to radio, by Caroline/Capitol Records.

<sup>103</sup> Music Choice Exhibit MC 19.

<sup>104</sup> Music Choice Exhibit MC 24 ([REDACTED]).

<sup>105</sup> Barros, WRT, at 27.

<sup>106</sup> Blatter WDT, at ¶ 8.

<sup>107</sup> [https://www.instagram.com/ben\\_rector/?hl=en](https://www.instagram.com/ben_rector/?hl=en).

<sup>108</sup> [https://www.facebook.com/pg/benrector/likes/?ref=page\\_internal](https://www.facebook.com/pg/benrector/likes/?ref=page_internal).

<sup>109</sup> [https://twitter.com/benrector?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/benrector?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor).

<sup>110</sup> [http://www.benrectormusic.com/news/07-17-15/new-album-brand-new-available-august-28;](http://www.benrectormusic.com/news/07-17-15/new-album-brand-new-available-august-28)  
<http://www.benrectormusic.com/bio>.

The Pulse was early to play the recording, but measurable (though small) audiences for radio play were indicated at the same time. The Pulse started playing the recording on September 2, 2015, a few days after the album's official release, probably through the efforts of Mr. Rector's manager. The strategy of the label was to set up the single throughout the fall, with the official "impact date" (the coordinated date targeted for radio play and other promotional efforts) on January 11, 2016. In the interim, while Mr. Rector was actively touring,<sup>111</sup> he made visits to radio stations in the cities in which he was performing, along with Capitol's field staff, to introduce himself and the album to the stations. Capitol is genuinely grateful for the early support of the recording by Sirius XM, which it views as an important promotional partner. But a narrow focus on sales in early September 2015, or even during the period through early January 2016, would miss the real story of this recording's success, which I have illustrated in Figure 2 below.

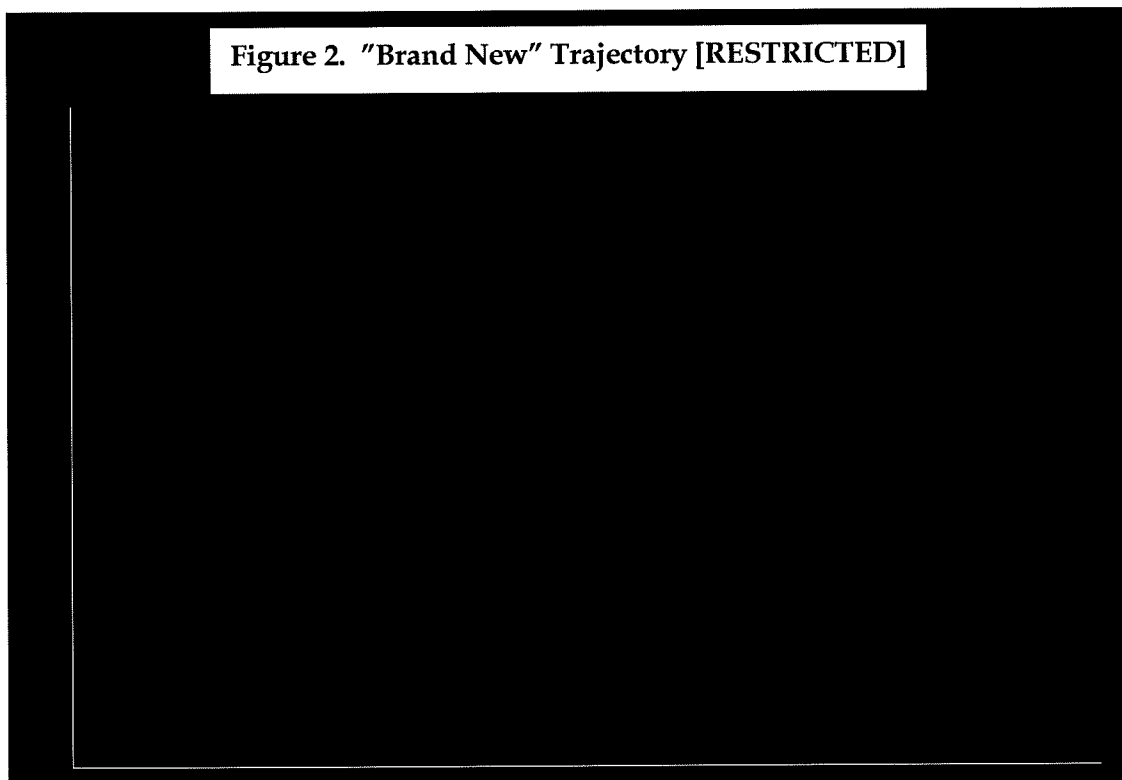


Figure 2 shows paid consumption of the recording in the form of track equivalents including video streams, audio streams, and track sales on a *weekly* basis from before the official release date through early February 2017, as well as the audience reached by the terrestrial radio stations playing the recording each week.<sup>112</sup> (Radio audience numbers appeared the week of September

<sup>111</sup> <http://www.setlist.fm/setlists/ben-rector-7bd20ec8.html?page=2>.

<sup>112</sup> Track equivalents are shown in units per week, and the radio audience in thousands of people per week. Video and audio streams convert to tracks at the industry-standard ratio of 1:150. RIAA Accepts Streams for Gold and Platinum Certifications, *Billboard* (Feb. 1, 2016), available at <http://www.billboard.com/articles/business/6859551/riaa-streaming-gold-platinum-certification-methodology>. The data is weekly data, so the date indicators do not necessarily exactly align with the data.

3, 2015). It was not possible to include The Pulse's reach in this audience measurement, because no audience measurement statistics for Sirius XM are available.

As the data shows, there were pre-orders for the record prior to its official release,<sup>113</sup> suggesting that there was demand for the recording by Mr. Rector's fans and that promotional influences were already having an effect. There was a spike in sales associated with the release date, which was soon followed by Sirius XM and some radio play a few days later. Sirius XM's plays were coincident with the album's formal release and various promotional events,<sup>114</sup> so it is impossible to decompose the effects of the release and other promotional influences from Sirius XM's activity (a coincidence discussed below). Consumption of the track did not really start to take off in a sustained way until the impact date and when Mr. Rector appeared on the Today Show on January 26, 2016<sup>115</sup> [REDACTED]. From there, sales and streaming continued to build steadily at the same time the radio audience hearing the recording grew.

[REDACTED] with consumption falling as radio stations and the public moved on. There is a notable spike in sales in late November 2016, [REDACTED]. Mr. Rector performed in the nationally-telecast Macy's Thanksgiving Day Parade on November 24, 2016, which produced spikes in sales for several artists who participated.<sup>117</sup> The consumption trajectory [REDACTED]

[REDACTED].<sup>118</sup>

As I discussed in my direct testimony and above, labels and artists use many tactics as part of a promotional strategy. Figure 2 and the description above make it clear that for any given record, many factors can have an effect on sales. Focusing on sales during the very early period when The Pulse was the only (or almost the only) station playing the track, and ignoring Mr. Rector's

<sup>113</sup> <https://twitter.com/benrector/status/627184774356938752>;  
<https://twitter.com/benrector/status/629709752461860864>.

<sup>114</sup> Mr. Rector appeared on Good Day New York on September 1 (<https://twitter.com/benrector/status/638738799963557888>); participated in a Periscope live stream from Billboard's offices the same day (<https://twitter.com/benrector/status/638812919099191296>); released a mixtape on Pandora on September 3 (<https://twitter.com/benrector/status/639452991557357568>); and performed a concert live streamed on Yahoo that night (<https://twitter.com/benrector/status/639596274589769732>); <https://twitter.com/benrector/status/639812925952135168>).

<sup>115</sup> <http://www.today.com/video/ben-rector-performs-brand-new-on-today-609107011548>.

<sup>116</sup> [REDACTED].

<sup>117</sup> Kevin Rutherford, Ben Rector, LunchMoney Lewis & More Earn Sales Gains After Macy's Thanksgiving Day Parade, Billboard (Nov. 29, 2016), available at <http://www.billboard.com/articles/columns/chart-beat/7595792/ben-rector-lunchmoney-lewis-sales-gains-thanksgiving-macys>.

<sup>118</sup> [REDACTED].

existing reputation, touring and social media, misses entirely the success this recording ultimately achieved and the diversity of factors that may have influenced sales.<sup>119</sup>

## 2. Correlation or Causation?

To the extent that Mr. Blatter can show a rise in sales following Sirius XM play of a new release in some cases, this correlation is not at all surprising. I understand that as a matter of practice, Sirius XM generally will not play recordings until they become available for sale. And one would not expect Sirius XM to start playing a (relatively) new release after its sales had peaked and were declining. Sirius XM, like terrestrial radio stations, is motivated to play exciting new releases, not stale ones. Thus, one would expect to see Sirius XM's plays of new releases occur during a period of rising sales almost all the time. Mr. Blatter does very little to try to establish that this entirely predictable correlation is associated with a causal relationship between plays on its service and sales.

As explained above, this is very difficult to do, absent very pronounced effects that can be associated precisely with very specific causes, such as in the case of "Brand New." Mr. Blatter tries to get at this issue by identifying a few instances where Sirius XM (purportedly) played a recording for a few days before it was picked up by terrestrial radio. Even in those cases, however, one should be cautious about attributing to Sirius XM the natural trajectory of a recording destined for success, regardless of Sirius XM's support. For instance, Mr. Blatter mentions John Newman's "Love Me Again."<sup>120</sup> This recording may have been played on Sirius XM for a time before "any major radio outlet" picked it up. Sirius XM started playing this recording in August 2013.<sup>121</sup> Before then, the recording had debuted at #1 on the U.K. singles chart, and the accompanying video had gained millions of YouTube views.<sup>122</sup> While I'm sure Mr. Newman's label genuinely appreciated Sirius XM's early support for the recording in the U.S., it seems likely that the recording would have done well in the U.S. even without Sirius XM.

It is also important to remember that even if there may be a period where Sirius XM played a recording before terrestrial radio stations (as in the case of "Brand New"), there would almost always be other promotional activities going on at that time. For example, Mr. Blatter provides a graph purporting to show a spike in sales when Sirius XM started playing the recording "S.O.B." by Nathaniel Rateliff & The Night Sweats. Mr. Barros explains that at the time Sirius XM started playing the recording, the band had a substantial fan base; the track was available for promotional

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<sup>119</sup> There are many sources of effective promotion, and they vary by artist and by track. Some promotional activities are more desirable than others. For instance, U.S. sales of George Michael's recordings increased over 2600% upon his death on Christmas Day 2016. Nielsen Music: Year End Report (U.S. 2016), at 9.

<sup>120</sup> Blatter WDT, at ¶ 38.

<sup>121</sup> Sirius XM Ex. 26.

<sup>122</sup> Jason Lipshutz, John Newman's Solo Breakout: Budding U.K. Star Talks 'Love Me Again' & Debut Album, *Billboard* (July 12, 2013), available at <http://www.billboard.com/articles/columns/pop-shop/1573048/john-newmans-solo-breakout-budding-uk-star-talks-love-me-again>; Brand Barstein, John Newman Scores First Number 1 with Love Me Again, *Official Charts Company* (July 7, 2013), available at [http://www.officialcharts.com/chart-news/john-newman-scores-first-number-1-with-love-me-again\\_3188/](http://www.officialcharts.com/chart-news/john-newman-scores-first-number-1-with-love-me-again_3188/).



Internet streaming through some outlets; the band was touring; and the release was getting positive coverage from the press and other reviewers.<sup>123</sup> In a number of Mr. Blatter's graphs – including the ones for “Break Up With Him,”<sup>124</sup> “Chillin It,”<sup>125</sup> and “Hide Away”<sup>126</sup> – it is plain that promotional activities of some sort were affecting sales before Sirius XM began playing the track. Apart from radio, Mr. Blatter does not address what touring, advertising, appearances, interviews, playlisting, online promotions, social media and the like were occurring at the time Sirius XM started playing a recording, but it has to be assumed that some of them were happening. It would not be appropriate to assume that Sirius XM is the sole cause of any increase in sales when there are other potential causes.

I understand from my conversations with record labels that there are some instances in which Sirius XM is perceived as an important promotional platform – most commonly for high quality releases in genres that are underserved by terrestrial radio, by artists that are less well known, and on records that are early in their release cycle. But for every success story, there are multiple instances in which Sirius XM plays a recording that never gains traction. If it were true that play on Sirius XM was all that it took to break a record, we would expect to see not only a more predictable pattern across the industry, but also many more hits than there are. Instead, as Sirius XM and other streaming services have grown, record sales industrywide have trended downward. Accordingly, I continue to believe that platform substitution for the statutory services likely dwarfs the overall economic effects of promotion of individual recordings. Besides, given the decline in sales of permanent copies, any promotional effect is certainly much smaller today than in the past, suggesting that statutory rates should rise.

### III. The Services' Economic Testimony Does Not Refute My Position

The testimony of the Services' economic experts Dr. Carl Shapiro (Sirius XM) and Dr. Gregory Crawford (Music Choice) does not undermine my testimony. Rather, with regard to the treatment of purported promotional effects, their testimony is generally consistent with mine.<sup>127</sup>

#### A. Neither of the Services' Economic Experts Relies on Anecdotes of Promotion in Calculating A Statutory Royalty Rate

Neither Dr. Shapiro nor Dr. Crawford relies on the services' anecdotes about promotion. Both economists acknowledge that there is no quantitative evidence to support a promotional adjustment to the services' rate proposals. Dr. Shapiro's testimony barely mentions promotion. He discusses this issue primarily in the context of his *Web IV* benchmark.<sup>128</sup> There, he notes Mr. Blatter's testimony passing, but ultimately assumes that Sirius XM and Pandora are equally

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<sup>123</sup> Barros WRT, at 24-27.

<sup>124</sup> Blatter WDT, at 22.

<sup>125</sup> Blatter WDT, at 24.

<sup>126</sup> Blatter WDT, at 28.

<sup>127</sup> My testimony does not endeavor to critique other aspects of Dr. Shapiro's or Dr. Crawford's testimony, nor does my discussion of their treatment of promotional effects intend to suggest agreement with their economic analyses or conclusions more broadly. I understand that other witnesses for SoundExchange will provide more complete analysis of their testimonies.

<sup>128</sup> Shapiro WDT, at 50, 55-56.

promotional.<sup>129</sup> In the context of his direct license benchmark, Dr. Shapiro asserts that direct licensors receive “significant promotional benefits,” but only in the context of his much larger discussion of the hypothesis that the direct license rates reflect competition among record labels.<sup>130</sup>

Dr. Crawford’s testimony is, by contrast, replete with references to the alleged promotional effects of Music Choice.<sup>131</sup> However, Dr. Crawford also acknowledges repeatedly that he cannot quantify such effects and does not take them into account in his analysis.<sup>132</sup> Referring to the “qualitative evidence” presented by Mr. Williams, Dr. Crawford concludes that “[q]uantifying these [promotional] benefits is a difficult empirical challenge and I was unable to do so given the data at my disposal.”<sup>133</sup>

As I argued in my written direct testimony, any purported promotional effect does not warrant an adjustment to the statutory rate.<sup>134</sup> The Services’ failure to rely on Mr. Blatter and Mr. Williams’ testimony – or to otherwise calculate or request an adjustment on this basis – comports with my position that anecdotal evidence of promotion should not alter the statutory rate.

### **B. Dr. Shapiro’s Theoretical Model Comports with Significant Aspects of My Testimony**

In my direct testimony, I provided a theoretical bargaining framework, which illustrates how a license fee is determined in a hypothetical market setting. The simplest version of this bargain involves two parties: a music service and a record label. These parties divide the income of the music service less any promotional effects and other adjustments. In my theoretical framework, the Nash Equilibrium license fee ( $P$ ) is calculated as  $P^* = \frac{1}{2}(A - E)$ , where  $A$  is the amount of the service’s income and  $E$  is the incremental income from the interdependency across platforms.<sup>135</sup> Importantly, this expression shows that any promotion or substitution across platforms ( $E$ ) is internalized in the bargain between the music service and the label.<sup>136</sup>

At a theoretical level, Dr. Shapiro agrees with me about the role of promotion and substitution in calculating a license fee. While our arguments differ, the economic analysis in Appendix D of his written direct testimony offers the same theoretical predictions as my modeling approach – promotion and substitution effects are part of the labels’ opportunity cost. Also, Dr. Shapiro makes no adjustments for promotional effects because he states he has no evidence with which to do so.<sup>137</sup> Dr. Shapiro’s admitted lack of evidence to support a promotional adjustment counters

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<sup>129</sup> *Id.* at 56, D-5 to D-6.

<sup>130</sup> *Id.* at 40.

<sup>131</sup> Crawford WDT, at ¶¶ 18, 82, 86, 96-104, 106, 113, 176, 192-194, 209, 215-219, 221.

<sup>132</sup> *Id.* at ¶¶ 18, 113, 176, 215-216, 219.

<sup>133</sup> *Id.* at ¶ 18 (“I am unable to quantify [the net promotional effect] and therefore conservatively assume that it is zero.”). Dr. Crawford’s analysis suffers from numerous other flaws, including his focus on purported promotional effects without regard for platform substitution.

<sup>134</sup> Ford WDT, at 4, 11-12.

<sup>135</sup> Ford WDT, at 6-7.

<sup>136</sup> *Id.* at 7.

<sup>137</sup> Shapiro WDT, at Appendix D; *see also id.* at 56 (acknowledging that he has no evidence about promotion). Dr. Shapiro presents a different type of theoretical model of promotion/substitution than I

any suggestion in Mr. Blatter's testimony that such an adjustment may be necessary.<sup>138</sup> Instead, Dr. Shapiro's analysis – like mine – focuses largely on platform substitution. As I argued in my written direct testimony, this issue has become increasingly important in the digital age, whereas promotion of physical copies and even download sales has declined in importance.<sup>139</sup>

Given a lack of evidence, Dr. Shapiro simply assumes that any promotional effect of Sirius XM is equal to the promotional effect of Pandora.<sup>140</sup> This assumption is significant when coupled with the Judges' determination in *Web IV* that there is no discernable difference in the promotional effects of interactive and non-interactive services.<sup>141</sup> If Sirius XM is equally promotional as Pandora, and Pandora is equally promotional as interactive streaming services which function as benchmarks here, there seems to be no basis for the Judges to make promotional adjustments to the rate with respect to the benchmark services. Platform substitution, however, remains "on the table," so to speak. The details of accounting for such substitution is beyond the scope of my testimony but is covered in the testimonies of Dr. Willig and Dr. Orszag.

### C. Promotional Motivations for Entering into Direct Licenses Are Irrelevant to the Statutory Rate

One place where Dr. Shapiro mentions promotion is in the context of his reliance on the agreed-upon royalty rates in directly negotiated licenses between Sirius XM and record labels/artists. Dr. Shapiro asserts that the direct licenses in his benchmark confer significant promotional benefits on the artists and labels that are parties to these agreements.<sup>142</sup> As discussed in the testimony of Dr. Thomas Lys, there is reason to doubt that promotional benefits are a primary consideration in economically-significant labels' agreeing to a discounted royalty rate in a direct license with Sirius XM.<sup>143</sup> But even assuming that Sirius XM's direct license benchmark may reflect a promotional effect, such an effect is not indicative of value across the full range of statutory usage.

As I explained in my written direct testimony,<sup>144</sup> direct licenses are by definition special deals that seek to avoid, or occur outside of, the statutory license. There are likely to be specific – non-representative – reasons that artists and labels choose to make such deals. For instance, artists that are emerging or who perform in underrepresented genres (or their labels) may

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do; his Appendix D focuses on the *opportunity cost* a record label bears when its music is played on one service instead of another. *Id.* at Appendix D. But in calculating this opportunity cost, Dr. Shapiro's approach "captures the various promotion and substitution effects arising in this industry." *Id.* at 11. In other words, in his model as in mine, promotion and substitution effects are "baked in" to the market rate.

<sup>138</sup> *Id.* at 56.

<sup>139</sup> Ford WDT, at 13-14.

<sup>140</sup> Shapiro WDT, at D-6.

<sup>141</sup> *Web IV*, at 26,329.

<sup>142</sup> Shapiro WDT, at 40 (arguing that entering into a "direct license relationship has led not only to increased plays on Sirius XM but also additional plays and sales on other media through the promotional effect of Sirius XM").

<sup>143</sup> Lys WDT, at Part II.C.

<sup>144</sup> Ford WDT, at 16-18.

perceive a higher promotional benefit than others, and thereby have reason to negotiate different terms than others.<sup>145</sup> Defections from the statutory rate may reflect many other special circumstances, including the presence of promotional considerations not common to the vast majority of the content subject to the statutory license.<sup>146</sup> By contrast, the statutory rate should reflect the appropriate *average* promotional effect among property that is subject to that rate. Injecting an adjustment based on the terms of contracts made to *supplant* the statutory mechanism is improper.<sup>147</sup> Dr. Shapiro does not address this problem, nor does anything in the Services' direct case alter my conclusion. Direct license deals are the exception, not the rule, and at least so far as their promotional effects are concerned, they are not an appropriate measure of the value of all usage of recordings subject to the statutory license.

#### D. Changes in the Music Industry and in Sirius XM's Performance Warrant a Rate Increase

Finally, I disagree with Dr. Shapiro's contention that nothing has changed since the last proceeding that should prompt a change to the royalty rate.<sup>148</sup> There have in fact been significant changes in the music marketplace over the last five years that would result in a different hypothetical negotiation between a record company and a music service than would have been the case five years ago.<sup>149</sup> In my simple Nash bargaining model, the benefits to all the parties are divided evenly. That is, the label and the music service divide the income of the music service less any additional income created by the music service's use of the music. Consequently, if the relevant incomes of the parties changed, then statutory rate should change to reflect the new circumstances.

According to Dr. Lys, since the last SDARS proceeding, Sirius XM has become considerably more profitable.<sup>150</sup> During the same period, record sales have fallen substantially.<sup>151</sup> Consequently, the value of any promotional effect for permanent copies has declined sharply and

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<sup>145</sup> As Dr. Shapiro acknowledges, direct license deals are relatively rare: Only 6.4% of the tracks played by Sirius XM are subject to a direct licensing deal, meaning 93.6% of what Sirius XM plays is not. Shapiro WDT, at 35. That the great majority of artists and labels choose not to engage in extra-statutory contracting suggests (at least) two things. First, it is unreasonable to use the direct licenses as a benchmark, since the actions of so few say little about the market price for the many. Second, the evidence suggests the statutory rate is too low, since those believing a rate lower than the statutory rate is advantageous are few.

<sup>146</sup> It is not at all surprising that direct licenses involving such benefits would impact the agreed upon rate.

<sup>147</sup> Ford WDT, at 18.

<sup>148</sup> See Shapiro WDT, at 57-59. Dr. Shapiro takes this position in connection with his evaluation of the factors set forth in 17 U.S.C. § 801(b).

<sup>149</sup> These changes are of particular relevance to the second of the Section 801(b)(1) objectives, which requires the Judges to consider whether the royalty rate will afford copyright owners a "fair return" on their creative work and copyright users a "fair income under existing economic conditions." 17 U.S.C. § 801(b)(1)(B).

<sup>150</sup> Lys WDT, at 12-20; *see also* Shapiro WDT, at 29-30 (noting the growth of Sirius XM). As Sirius XM's income rises, the royalty should rise as well.

<sup>151</sup> Ford WDT, at 12-13.

continues to do so.<sup>152</sup> Streaming services, on the other hand, are growing rapidly.<sup>153</sup> Mid-tier and interactive services pay royalties at a higher rate, and the services at issue here appear to substitute for them to a significant extent.<sup>154</sup> As I discussed in my written direct testimony, all three of these developments weigh in favor of a higher statutory rate.

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<sup>152</sup> Promotional effects, to the extent they exist, must decrease as permanent copy sales decline.

<sup>153</sup> Shapiro WDT, at 28-29.

<sup>154</sup> Willig WDT, at ¶ 39-43; Willig WRT, at ¶ 76.

## Conclusion

All parties agree that there is no quantitative evidence to support a promotional adjustment in this proceeding. The services never request that the Judges apply a promotional discount of any particular size or suggest how one might calculate a discount that could be applied in the benchmarking context. Accordingly, there should be no downward adjustment based on purported promotional effects.

APPENDIX A

Record company executives with whom I spoke to inform the economic analysis in my rebuttal testimony (excluding litigation counsel).

Atlantic Records

[REDACTED]

RED Distribution and The Orchard

[REDACTED]

Republic

[REDACTED]

Capitol Records

[REDACTED]

Roadrunner Records

[REDACTED]

Columbia Records

[REDACTED]

Sony Music Entertainment

[REDACTED]

RCA

[REDACTED]

Sony Music Nashville

[REDACTED]

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 2/17/17

  
\_\_\_\_\_  
George Ford