

**PUBLIC APPENDIX – MATERIAL UNDER SEAL IN SEPARATE
SUPPLEMENT**

Oral Argument Not Yet Scheduled

In the United States Court of Appeals
for the District of Columbia Circuit

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Copyright Royalty Board

Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179

INTERCOLLEGIATE BROADCAST SYSTEM, *et al.*,
Appellants,

v.

COPYRIGHT ROYALTY BOARD,
Appellee,

SOUNDEXCHANGE, INC.,
Intervenor,

NATIONAL ASSOCIATION OF BROADCASTERS,
Intervenor.

ON APPEAL OF AN ORDER OF THE
COPYRIGHT ROYALTY BOARD

JOINT APPENDIX VOLUME II

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Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN
SOUND RECORDINGS AND EPHEMERAL
RECORDINGS

Docket No. 2005-1 CRB DTRA

REBUTTAL TESTIMONY OF

BARRIE KESSLER

Chief Operating Officer, SoundExchange, Inc.

September 2006

REBUTTAL TESTIMONY OF BARRIE KESSLER

I am the Chief Operating Officer of SoundExchange. I previously provided a written direct statement in this proceeding. My qualifications and background are provided with that statement.

OVERVIEW

I am providing this rebuttal testimony in order to address a few points raised during my cross-examination and during the testimony of various webcaster witnesses and Mr. Ronald Gertz of Royalty Logic, Inc. ("RLI") and Music Reports, Inc. ("MRI"). I would like to emphasize the following critical points:

- The number of companies, including terrestrial broadcasters, streaming music under the statutory license and paying royalties to SoundExchange continues to grow.
- The problems that would be caused by a system of multiple Designated Agents administering a single statutory license are enormous, and the purported benefits of "competition" that RLI advances are non-existent. Moreover, numerous practical problems would arise in a multi-agent system, which would delay and reduce royalty distributions to copyright owners and recording artists.
- SoundExchange's continuing experience with administering the statutory license has reinforced the critical importance of comprehensive reporting and standardized format and delivery specifications as well as modifications to the terms of the statutory license that will ensure accurate and timely payment.

DISCUSSION

I. GROWTH IN THE WEBCASTING MARKET

I am aware that some of the webcaster witnesses have claimed that there are few new entrants into the webcasting market. Based on receipts paid to SoundExchange, that does not appear to reflect reality.

The webcasting marketplace is growing rapidly. More and more companies are starting to stream under the statutory license and the amount of listenership reported by these services continues to increase. Since 2004, the total number of webcasters paying royalties has grown from 430 to 788, an increase of 83%. Within this group of new webcasters are large numbers of terrestrial radio stations simulcasting their over-the-air transmissions. From 2004 to 2005, the royalties paid (which is a useful proxy for measuring webcaster listenership as most commercial webcasters pay on a per performance or aggregate tuning hour basis) increased more than 40%. Through receipts for June of 2006, royalties to SoundExchange were running at approximately 27% more than in 2005.¹

We have seen growth in all categories of webcasting. As shown in SX Exhibit 022 RR (Receipt and Enforcement Effectiveness Tracking Spreadsheet), the number of nonsubscription webcasters paying SoundExchange has grown from 114 in 2004 to 400, as of September 8, 2006.² Much of this growth has been in the number of simulcasters paying SoundExchange, which grew from 81 in 2004 to 294 as of 2006. This growth, however, understates the increase in the number of simulcasters, as some major broadcast radio conglomerates pay once for all of

¹ Under the Copyright Royalty and Distribution Reform Act of 2004 ("CRDRA"), the statutory royalty rates in effect in 2004 were pushed forward through December 31, 2005, and those rates must be paid on an ongoing basis, subject to retroactive adjustment, until new rates are established for the years 2006-2010.

² This does not include webcasters paying under the Small Webcaster Settlement Act. Nor does it include webcasters that violate the law by failing to pay at all.

their stations (and thus are counted by SoundExchange as a single webcaster). Moreover, this growth is not limited to simulcasters. The number of Internet-only webcasters has also grown, with one company catapulting into the top five services in terms of royalties paid even though it was making no transmissions under the statutory license approximately one year ago. At the same time, the number of subscription services has nearly doubled since 2004 and total receipts from subscription services now exceed more than 20% of the royalties paid to SoundExchange.

The growth in the number of services paying royalties and the increased amount of total royalties paid to SoundExchange suggests to me that the current statutory royalty rates are not a barrier to entry into the webcasting marketplace.

II. THE MISNOMER OF "COMPETITION"

As the Librarian of Congress has recognized, a multiple Designated Agent system is less efficient than a single agent system. I am aware that Ronald Gertz, the President of MRI/RLI, testified that the increased inefficiency of a multiple Designated Agent system is offset by the benefits from "competition" among multiple Designated Agents administering the same license. The purported "competition" that Mr. Gertz identifies, however, is both illusory and downright harmful to the efficient administration of the statutory license and the interests of record companies and performers.

Mr. Gertz suggested that multiple Designated Agents could compete based on several factors: 1) royalty rates to be charged; 2) interpretations of the statute; 3) distribution policies; and 4) costs. None of these types of "competition" is real in the context of administering a statutory license. *See, e.g.*, Testimony of Ronald Gertz, Vol. 18, June 14, 2006 ("Gertz Test.") at 48, 101, 51, and 315.

First, it makes no sense to say that Designated Agents can compete on the rate for the statutory license; that rate will be set by this Board. Certainly, individual copyright owners can choose to license directly on rates and terms different from those set in this proceeding, and copyright owners may act collectively and enter into direct licenses for something below the rates established by the Copyright Royalty Board. Such direct licenses could make trade-offs of different kinds (e.g., trading higher upfront payments for lower per performance payments, replacing money with in-kind marketing considerations, etc.). These are the kinds of agreements that ASCAP and BMI enter into on behalf of their members.

But that has nothing to do with administering a statutory license on a single set of rates and terms set by the Board. By definition, a Designated Agent cannot "compete" on rates enshrined in regulation by the Board. So when Mr. Gertz discusses competing based on price or claims that a lower rate would benefit copyright owners and performers, *see e.g.* Gertz Test. at 50, 201, and 315, he is really describing direct licensing, not administering the statutory license.³

Second, the suggestion that Designated Agents can compete with each other based on their interpretation of the statute makes no sense whatsoever. Mr. Gertz suggests that different Designated Agents would take different positions on the amount of interactivity that the statute permits. *See* Gertz Test. at 102. That, however, is an issue of law – not something on which there can be marketplace competition. To the extent that a small number of copyright owners represented by RLI want to license additional functionality beyond the statutory license, they are free to do so on a voluntary basis, but that again has nothing to do with being a Designated Agent.⁴

³ It is worth noting that RLI's direct license with DiMA does not, in fact, compete on rates. Rather, it is effectively a sham agreement that simply adopts whatever rates this Board adopts.

⁴ Mr. Gertz also suggests that artists want their licensing and license administration (for statutory and non-statutory licenses) done all in one place and that it is a burden for them to receive monies from

Third, competition on distribution policies is a recipe for disaster. All royalties must be allocated in a non-discriminatory manner without regard to whether a copyright owner or performer is represented by a particular Designated Agent. For example, one Designated Agent could not promise Diana Ross 75% of the money generated for the performance of a sound recording of Diana Ross and The Supremes unless all of the Designated Agents and the individual members of The Supremes agreed to that royalty allocation. Otherwise, a dispute might arise between Designated Agents as to the proper allocation of royalties.

I am extremely skeptical of Mr. Gertz's proposal that any disputes among multiple Designated Agents could be resolved by the CRB. *See Gertz Test.* at 95-96. The Board would have two primary options for resolving such conflicts: 1) it could attempt to promulgate an enormously detailed set of regulations that would envision every possible contingency arising under the statutory license – something which my knowledge of the statutory license suggests is impossible, or 2) it could establish procedures for resolving the disputes among multiple Designated Agents as they arise – and then likely be besieged by disputes among multiple Designated Agents. Neither of these options is viable or realistic.

These sorts of issues about how much can or should be distributed to performers in a group occur in thousands of different contexts each year, and SoundExchange works with the representatives of performers on its Board to resolve them fairly, seeking input from the artist community. The creation of multiple Designated Agents for the express purpose of “competing” on such issues will only result in a never-ending series of disputes about the statutory license,

SoundExchange as well as from other sources for non-statutory licenses. *See e.g. Gertz Test.* at 95, 107. That again does not justify creating a system of multiple Designated Agents. Most artists do not typically control licensing; licensing more often runs with the copyright owner. RLI's proposed “fix” – to have multiple Designated Agents for statutory licenses – has nothing to do with this issue. For the artists that RLI represents who do not control licensing, RLI will have no role in licensing and administering royalties for non-statutory licenses.

which will cause delays in distributing royalties and will increase costs of administering the license.

For similar reasons, RLI's suggestion that it will provide "advances" – clearly designed to tantalize artists and record companies who do not fully understand how the statutory license operates – makes no sense. *See Gertz Test.* at 112. If an advance is paid to an artist and it turns out that the artist's sound recordings are not played as often as RLI anticipated, there will necessarily be a shortfall in the funds to be paid to other artists and record companies. That shortfall cannot be made up from statutory royalties; the pot of money available for each distribution period is static. Thus, advances in this context are simply taking risks with other people's money – risks that are certain, in some instances, to result in a lack of money to be paid to others who are owed royalties.

Fourth, there can be little dispute that a multiple agent system will create greater overall costs (as a percentage of total receipts) because copyright owners and performers will have to pay for multiple, duplicative systems for license administration, and for resolving the endless number of disputes that will arise between multiple agents. It is clear from RLI's conduct in this and prior proceedings that RLI's notion of competing on costs amounts to nothing more than shifting costs to SoundExchange – i.e., letting one Designated Agent (SoundExchange) do all of the work of establishing royalty rates, enforcing the payment of royalties, auditing services, and collecting royalties – in order to claim greater efficiency. That is not the sort of competition that helps anyone, except possibly RLI. Indeed, RLI was absent during much of the live hearings in this case, did not cross-examine a single licensee witness, and introduced virtually no meaningful evidence as to the rates that would be paid in a free market between a willing buyer and a willing seller. RLI was content to sit on the sidelines while SoundExchange incurred the costs of

litigating this proceeding, and now it wants to reap the benefits of whatever rate SoundExchange's efforts achieve.

In sum, a multiple Designated Agent system will be less efficient and the "competition" that RLI claims would occur under such a system has nothing to do with administration of the statutory license. In any event, RLI's conduct in this proceeding and prior proceedings – offering no constructive solutions and working hand-in-glove with the webcasters while claiming to represent copyright owners and performers – merely confirms what has been true for years: that RLI has no interest in advancing or fighting for the interests of copyright owners and performers.

III. CHANGES TO THE TERMS OF THE STATUTORY LICENSE ARE ESSENTIAL, ESPECIALLY CHANGES THAT ENSURE PROMPT PAYMENT, ADEQUATE REPORTING, AND EFFECTIVE VERIFICATION.

In my written direct testimony, I made a number of suggestions concerning the terms governing the statutory license, based on SoundExchange's experience over the last several years. I want to reiterate a few of them.

First, increasing the consequences of failing to make payments and submit statements of accounts promptly is essential. Whatever rates of interest and penalties the Board chooses for late payments, it should increase those that exist in the current regulations. Those regulations simply have not been effective in promoting prompt payment or submission of statements of account. The regulations adopted by the Board should make clear that the failure to make timely payments and/or to provide statements of account will result in meaningful penalties.

Second, adequate reporting is essential to fulfilling the mandate of the statute. I have previously discussed the importance of census reporting in my written direct testimony. I am aware that a number of services have claimed that they have difficulty in providing reporting on

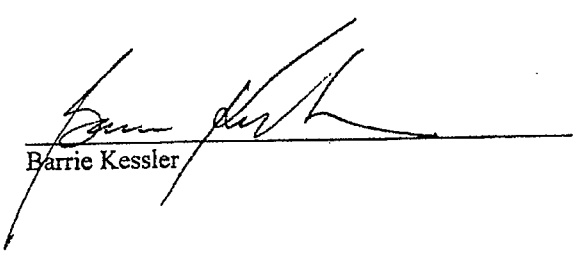
the performances that they undertake (despite the fact that the statute requires them to identify to each listener the artist, title, and album of each sound recording as it is streamed).

SoundExchange is, as it has always been, willing to work with those services to address any concerns. SoundExchange has in the past offered to develop technology to assist small services, and it has been actively working on a device that, when connected to a webcaster's servers, will be able to monitor their transmissions and provide complete reporting – functionality that is the norm for commercial services that stream under the statutory license and voluntary licenses. We remain ready to work with non-commercial services on ensuring that they too provide copyright owners with reasonable notice of use of sound recordings under the statutory license, but we firmly believe that commercial and non-commercial licensees – and not copyright owners and performers – should bear the costs for providing reports of use. The royalty recipients should not have their income reduced by having to pay the cost of monitoring transmissions made under the privilege of the statutory license.

Third, SoundExchange's recent experiences with the auditing of webcasters has demonstrated the need for more stringent and effective audit/verification provisions. SoundExchange has recently undertaken audits of several of the largest webcasting services, including those in this proceeding. Without exception, SoundExchange has met with delays, resistance, and recalcitrance by webcasters. Webcasters have refused to answer even the most basic questions needed to conduct an audit and/or have delayed the process of commencing field work by months. Prior audits with respect to other licensees have shown very significant underpayments, and we would not be surprised if we discover such underpayments in the webcasting marketplace as well.

For the statutory licensing system to function, there must be strong audit/verification controls, which ensure that licensees comply with the statutory license in the first instance and respond completely and in a reasonable timeframe to audit requests. The current regulations have not resulted in such compliance. If an audit discloses an underpayment by 5% or more, or by \$5,000 or more, then the cost of the audit should shift to the licensee. Moreover, to the extent that the Board adopts a definition of revenue payment metric for services, it will be even more important for the Board to establish detailed reporting requirements (to ensure proper calculation of payments based on revenues) and strong audit controls. Only through such requirements can copyright owners and performers be certain that they are receiving a percentage of the correct amount of revenues.

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


Barrie Kessler

Date: 9/29/06

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN
SOUND RECORDINGS AND EPHEMERAL
RECORDINGS

Docket No. 2005-1 CRB DTRA

REBUTTAL TESTIMONY OF

JAMES H. GRIFFIN

Chief Executive Officer
OneHouse, LLC

September 2006

I previously testified in this matter and offer four key points for re-emphasis and further consideration in light of testimony, new developments and additional thinking on the matters at issue.

First, commercial webcasters, simulcasters, and non-commercial webcasters are all converging in the digital music space by streaming music, using those streams to cement connections with their audiences, and monetizing those audiences by--among other things--selling advertisements, underwriting, and sponsorships. This digital convergence is propelling a collision of money and media that is accelerating webcasting as measured by the actions of the players, not just their words, and by the numbers of stations that stream, not their mere commitments or hyperbole. Traditional webcasters like Yahoo! and AOL are growing their audiences; broadcast/simulcasters like ClearChannel are entering the market in droves; and non-commercial broadcasters like NPR are aggressively positioning themselves to exploit the revenue opportunities that webcasting offers.

Convergence undercuts the attempts of broadcast/simulcasters and non-commercial webcasters to claim that they are the poor cousins to the AOLs and Yahoo!s of the world, because they all now compete for the same audience and pursue advertising revenues in essentially the same way. Real revenues are flowing to webcasters, broadcaster/simulcasters and non-commercial webcasters alike, and there is no reason their license fees should be set at different levels. Their digital playing field is effectively leveling, and so should their rates.

Second, webcasts are now untethered from wired networks, and are progressing faster and further than previously expected towards true wireless portability. A number of key factors are driving this push toward portability, including the development of Wi-Fi, WiMax and cellular networks and the increasing number of devices available to consumers that receive

wireless webcasts. Webcast rates should reflect the unprecedented demand driven by a growing audience hungry for digital media on portable devices and the real advertising revenues that accompany this burgeoning crowd.

Third, tracking webcasts is relatively straightforward, can be performed remotely and is good business for every webcaster. The technology is not difficult, and there are services already available that perform the reporting.

Fourth, streamripping software and services exist and are simple to use. The software allows users to record songs, including the identifying information, and save them on their hard drives, on their portable devices, and on CDs. Users can even set the software so that it captures the beginning of a song if they hit "record" in the middle of the song.

I. Digital Convergence Stimulates Webcasting

Since the last rate-setting proceeding, there has been huge growth in the webcasting market audience, and webcasters are now increasingly successful at selling access to that audience to their advertisers and sponsors. The growth of webcasting is not limited to the Internet-only webcasters. Broadcast/simulcasters and non-commercial stations are now diving into the audience of Internet surfers as well. They are pursuing the same audiences and the same advertising dollars with the same zeal and the same methods as their portal brethren.

A. Overview

By now, it is a familiar refrain: The rates are too high; the reporting obligations too burdensome; the technology just isn't there. Webcasters and their representatives would have you believe they are losing money on every listener. They claim that their outlook is bleak because they lose money as their audience grows.

I participated as a witness in the Webcaster I CARP, and I can tell you that the webcasters sang this same song the last time a royalty rate for webcasting was set. They all

business, and it's growing fast. The business is so profitable that AOL and other service providers are now moving from charging the audience for access to the network to simply charging the network's sponsors for access to the audience. So says AOL itself, which recently advertised for a new Senior Manager of Entertainment Business Development:

"Join the Audience Business, the fastest growing business unit at AOL, which will generate \$1.5 billion in revenue and return double-digit OIBDA growth in 2006, as a Sr. Manager, Entertainment Business Development in the Strategy & Business Development organization. As Sr. Manager, you will be part of the business development team for AOL's entertainment channels, including AOL Music . . ."⁹

AOL's help-wanted advertisement makes clear what they would rather not admit at a rate-setting hearing: The audience business is generating record revenues and profit growth.

B. Broadcaster/simulcasters

Broadcasters would have you believe that they do not want their listeners to stream and that streaming is a tiny, unimportant part of their operation. Nothing could be further from the truth. They promote their web sites on the air, hoping that such promotions result in people listening to their stations at work from their computers. They now buy television airtime (an expensive proposition) to persuade listeners to stream during the work day. SoundExchange Exhibit 217 RP contains two advertisements that show both Clear Channel and Bonneville advertising in a way that is specifically designed to persuade people to stream from their computers. In both ads, people in cubicles hit buttons on their computer keyboards, and the name of the radio station in question appears on the computer screen and music begins playing. The commercials end with the announcer saying that the station "makes you feel good at work" in one ad, and "Washington's number one at-work station" in the other.

⁹ See SX Ex. 232 RP.

As Evan Harrison, head of Clear Channel's online efforts, has said, "[i]f you're not letting your A/C [Adult/Contemporary] listeners listen at work, or your teen listeners listen in their bedrooms, you're just not in the game." SX Ex. 221 RP. Broadcasters know that webcasting is both a key to unlocking additional revenue and a defensive move to prevent the loss of audience—and the resulting loss of revenues—from their over-the-air broadcasts, and broadcasters are jumping into webcasting with both feet. They know that getting people to stream brings people to their websites and earns them advertising revenues. They know that getting people to listen to their websites when the listeners cannot receive an over-the-air broadcast keeps them from losing audience to other services, like AOL, Yahoo!, and satellite radio, that can reach listeners where over-the-air broadcasts cannot. And they know that, unlike with their over-the-air signal, they can stream multiple channels from their websites to draw in wider audiences and to promote other services, like HD radio, which they hope will help them compete with these other services.

Indeed, webcasting is empowering in ways that have eluded traditional radio broadcasters for years. For example, AM and FM radio signals have trouble penetrating the walls of buildings that house workplaces, depriving broadcasters of access to the listeners they can reach only at drive time. Webcasting solves this problem. Just last month, CBS Radio's chief financial officer publicly confirmed the value of reaching listeners at work:

For example, many speakers saw opportunities ripe for the taking in the world of digitally-delivered radio. CBS Radio CFO Walter Berger noted that delivering programming to office workers at their PCs via the Internet offered the opportunity for "incredible value creation."¹⁰

Jacobs Media, a consultant to many large radio conglomerates, expanded on the potential to reach these otherwise tough to reach places:

¹⁰ SX Ex. 205 RP.

Clearly, there's an expense associated with streaming... But these results underscore the notion that offering an Internet stream is... giving consumers a chance to listen in environments where radio usage was difficult, if not impossible. Weighing the costs of streaming versus other marketing and contesting activities is a no-brainer. No other promotional line item provides the same level of listening increases as streaming. It is a superb investment in the present and the future....¹¹

Webcasting also allows broadcasters to reach an entire set of listeners outside the bounds of their over-the-air signal. The broadcasters hope that these listeners will use the stations' websites as their "local stations." They know, too, that these listeners will be counted, providing valuable sales metrics, and that they can be sold "results-oriented" advertising – based on clicks, calls and sales.

Furthermore, broadcasters are not limited to streaming only their over-the-air AM and FM broadcasts. They can stream multiple channels with different content. For example, broadcasters are simulcasting their over-the-air HD broadcasts. They get two benefits from so doing. First, because most people do not have HD radios, simulcasting the streams serves as a way to entice listeners to sample the HD offerings and to stimulate them to purchase HD radio receivers. Basically, broadcasters are using the Internet to bait the HD hook. Second, the variety in content allows them to attract more listeners to their websites. By doing so, the broadcasters are able both to compete for the audiences of other services, like Yahoo! or satellite radio, and to prevent those services from stealing the broadcasters' over-the-air audiences. Frequently, the broadcasters receive so much value from these two benefits that they choose not to sell advertising or charge subscription fees on the HD simulcasts as their competitors do for their streams.

¹¹ Fred Jacobs, *2006 Technology Web Poll*, Jacobs Media, 2006, available at <http://www.jacobsmedia.com/061406-tech-streaming.htm> (last visited Sept. 22, 2006).

Broadcasters' online efforts extend beyond streaming as well. For example, Clear Channel's websites now mimic portals like AOL and Yahoo! with on-demand and video content as well as noninteractive streaming webcasts. But as explained by Evan Harrison of Clear Channel, "the no. 1 activity on the Web sites is listening to live streams."¹² That is what draws and keeps users and reaps Clear Channel advertising profits.

Indeed, broadcasters are now changing their over-the-air station format to sound more like webcasters. In the last couple of years, more and more broadcasters have switched to "Jack" and other similar formats that have less DJ banter and sound more like webcasts. They tout these formats as playing more music and being "like an i-Pod on shuffle." Radio broadcasters are competing directly against webcasters and against the purchased music that more and more people are listening to on portable devices.

The biggest American broadcaster by far is Clear Channel, and no broadcast company has more eagerly embraced webcasting. The results are in, and it's good news:

CLEAR CHANNEL RADIO'S ONLINE MUSIC and radio division has been the company's fastest-growing source of revenue in 2005 and 2006, a Clear Channel spokeswoman said Friday, after Evan Harrison – the executive vice president who was poached from AOL in 2005 to head the division – detailed Clear Channel's efforts in 2005 and program for 2006.

Together, digital tech vehicles – including cell phones, in-vehicle navigation, online streaming, and download subscriptions – account for about 5 percent of Clear Channel Radio's total revenue, or about \$40.5 million in first quarter 2006, and Harrison's division is the fastest-growing part. ...

In terms of format, Harrison said, streaming broadcasts increased 421 percent between April 2005 and May 2006, bringing it suddenly to near-parity with AOL Radio – Harrison's former employer. Most remarkably, perhaps, Harrison said on-demand plays have risen 1,319

¹² Katy Bachman, *Clear Channel Expands Online*, Media Wire, Aug. 29, 2006, available at http://www.radioandrecords.com/radiomonitor/news/business/digital/article_display.jsp?vnu_content_id=1003054329 (last visit Sept. 22, 2006).

percent in the first 5 months of 2006 – rising from 100,000 in the first week of January to 1.9 million in the last week of May/first week of June.

To enable these features and drive traffic to Clear Channel properties, Harrison led a broad relaunch of most of the company's local station Web sites, revamping over 950 out of a total 1,171 with 50 basic site "templates" designed in-house by Clear Channel online music and radio. Of these, so far over 800 have added streaming capabilities, with more planned in the near future.¹³

Number two is not standing still while Clear Channel steals the show. Infinity Broadcasting, which had no streaming webcasts less than two years ago, has rebranded itself as CBS RADIO and has now made a "major commitment" to streaming. SX Ex. 224 RP (CBS Radio press release). CBS Radio explains on-line that it is "now streaming over 70 of its best music, talk, sports and news radio stations live on-line. By extending its programming assets onto the web, CBS RADIO is meeting the demands of the increasing on-line listening community and providing advertisers with an exciting new vehicle to reach consumers."¹⁴ The company's top executive explained the turnaround for financial analysts in July:

CBS Radio Chairman and CEO Joel Hollander, in a one-on-one interview with BearStearns's Miller, noted that, during the Mel Karmazin era, "We should've maybe invested more in streaming, HD, and Arbitron. That's more important than Less is More." Currently, he argued, "CBS is taking more chances in programming and new initiatives than any other company." Hollander observed that "Fifteen months ago, none of our stations were streaming" and that web-based initiatives for his company are already approaching \$10 million in new revenues.¹⁵

Bonneville is a smaller broadcaster than Clear Channel or CBS, but is seeing similar results:

¹³ SX Ex. 226 RP (*Clear Channel's Sales Soar - Online*).

¹⁴ Radiomat, powered by CBS Radio, available at <http://www.radiomat.com> (last visited, Sept. 22, 2006).

¹⁵ SX Ex. 205 RP.

Bonneville President and CEO Bruce Reese shared the data point that 2% of his division's current revenues are web-based and the opinion that the web offers the "biggest opportunities." He suggested that bringing in 15% of revenues from Internet-based initiatives was a realistic goal.¹⁶

Similarly, Robert Shiflet, Internet director for ABC Radio, recently summarized ABC's experience with webcasting:

"Some are making money, some are almost covering cost, others still have a way to go," he says of the company's 27 stations that stream. "But I firmly believe next year will be a profitable year for virtually all of our stations for streaming." In fact, Web stream advertising sales are on the rise for ABC. "In the Dallas/Fort Worth market alone, we are currently 150% ahead of last year – and we still have two months to go in the fiscal year," Shiflet says.

Most companies Radio & Records talked to are selling streamed ads both as part of terrestrial/stream packages and as stand-alones. Shiflet says the packages ABC sells attract new business. "A great deal of the Internet-only packages are smaller businesses that might not be able to afford an effective on-air campaign," he says. Lower-cost Internet programs allow them to team with their station of choice.¹⁷

Streaming has such potential as a money maker that broadcasters are now changing identities, from radio broadcasters who happen to have Internet sites, to content delivery companies that provide music over the Internet, mobile platforms, analog radio signals, and HD radio signals. Radio industry observers have encouraged this change:

Both Ramsey and Pallad, on the other hand, argued that the best opportunities for radio were in the digital-Internet-Wi-Fi space. Ramsey went even further, urging broadcasters to think of themselves as "dotcoms with sticks" rather than "sticks that stream."¹⁸

And companies like Clear Channel are clearly listening. The CEO of Clear Channel, John Hogan explained, that "[a]nyone who thinks radio is only tall towers in big fields is thinking much too narrowly Any radio company that defines itself by a single delivery method is

¹⁶ *Id.*

¹⁷ SX Ex. 227 RP (Ken Tucker, *Monetizing Web Streams*, Radio and Records, Aug. 18, 2006).

¹⁸ SX Ex. 205 RP.

doomed.”¹⁹ Digital streaming is the new benchmark for broadcast relevance. “Channel We” is becoming “Channel Me,” and broadcasters with webcasts are rebranding themselves as digital media narrowcasters, fully capable of delivering video and graphics and interacting with the audience.

To this end, along with all of its other streaming efforts, Clear Channel has introduced a mobile subscription service just as RealNetworks and Sirius, among others, have. With this service, called Z100 Mobile, Clear Channel is now simulcasting one of its largest stations to subscribers’ cell phones and plans to stream a total of 100 stations to phones within the next year:

CLEAR CHANNEL RADIO’S FLAGSHIP STATION in New York, Z100, today will launch a new mobile radio service for cell phones. The service will allow users to receive streams of radio shows on their mobile phones, and also listen to tracks on demand. The subscription service, available to Cingular cell phone users across the country for \$2.99 a month, is the first step in a planned rollout of streaming and on-demand programming from about 100 stations nationwide over the next year. It’s not yet clear when the service will be available to mobile users who are customers of companies other than Cingular. ... [Clear Channel Radio executive vice president Jeff] Littlejohn said it’s hard to predict how many listeners the new service has, because no other radio station has introduced streaming and on-demand service on such a large scale. However, Littlejohn observed that “Cingular, the carrier we’re initially launching with, has 50 million subscribers, and Z100 is the most-listened to station in the country with an audience of about 2.5 million. If we got even one percent of that it would be quite a large number.”²⁰

For only an additional 99 cents per month, subscribers can receive unlimited streaming of Z100 programming. SX Ex. 220 RP (*Radio and Internet Newsletter*, Sept. 7, 2006). Clear Channel is currently negotiating to expand the service to other cellular carriers as well. *Id.*

Nothing exemplifies the convergence between traditional webcasters and broadcast/simulcasters more than the similarity in the way they sell advertising. Clear Channel,

¹⁹ *Radio and Internet Newsletter*, Apr. 14, 2005, available at <http://www.kurthanson.com/archive/news/041405/index.asp> (last visited, Sept. 22, 2006).

²⁰ Erik Sass, *Clear Channel Bows Mobile Service*, *Online Media Daily*, Sept. 6, 2006, available at http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=47729 (last visited Sept. 25, 2006).

for example, sells advertising through the Ronning Lipsett Radio firm, just like AOL, Yahoo!, MSN, and Live365. Other broadcasters are selling advertising together through the efforts of Net Radio Sales and Webcast Metrics, which combine the "small webcasters" – some of which individually reach almost 1 million different listeners per month – with major broadcast conglomerates such as Cox, CBS Radio, ABC Radio and Bonneville.

As the broadcasters rapidly move into the webcasting market, grow their audiences, and sell advertising alongside non-broadcaster webcasters, any argument that they are a different breed of cat requiring special treatment and a lower rate simply evaporates. The broadcasters' aggressive move into webcasting has made them the direct competitors of the portals – AOL, Yahoo!, and others. Clear Channel is now the third largest webcaster, surpassing Microsoft, and has Yahoo! in its sights. Indeed, Clear Channel's Evan Harrison considers Yahoo!'s music audience of 20 million "ours for the taking." SX Ex. 221 RP (*RAIN*, Sept. 27, 2005). And if Yahoo!'s music audience is Clear Channel's for the taking, why should Clear Channel pay a lower royalty for its use of sound recordings?

C. Non-Commercial Webcasters

Noncommercial webcasters are also acting increasingly like their commercial brethren. Even if it's called "underwriting" or "sponsorships," National Public Radio and other noncommercial webcasters are selling the same thing that AOL, Yahoo!, Clear Channel, and others are selling – access to an audience that sponsors hope will buy their products. Large noncommercial webcasters compete directly with large media companies, like Yahoo!, and they are creating portal-like websites that stream multiple channels of different content to garner the largest possible audience.

Revenues at NPR are not left to chance or the kindness of strangers. There is a team devoted to gleaning fully the revenues from webcasting, and NPR has been advertising to hire

radio stations around the country and their partner websites.”²⁸ This portal-like “supersite” will only enhance NPR’s ability to sell underwriting and sponsorships.

A number of individual NPR stations also use the Internet and webcasting as the medium and means to offer multiple channels of different types of content. These so-called side channels permit listeners to focus on what they want most: Music, or news, or world content – a variety of transmissions that are not possible over a one-signal transmitter. Casting a wider net, for these NPR stations, brings a more prosperous catch.

Examples of this strategy are legion. KCRW in Santa Monica, California, for example, broadcasts one signal but streams three: It’s over-the-air content plus a pure music channel and another devoted to news. WAMU has streamed BluegrassCountry.org since June 2001. WKSU, an NPR station associated with Kent State University in Ohio, has two all-music side channels, Folkalley.com, which has been streaming since September 2003, and WKSU 3 Classical. KPLU streams “Jazz24–World Class Jazz” along with its simulcast.

WXPB presents the most direct blurring of the line between commercial and noncommercial webcasters, and between broadcasters and webcasters. Y100 was an over-the-air commercial station in the Philadelphia market. When it went off the air, WXPB, an NPR station, elected to take the programming from Y100 and turn it into an Internet-only side channel, which now operates side-by-side with WXPB’s simulcast. SX Ex. 204 RP.

D. Conclusion

These are just a few of the developments in webcasting that lead to one conclusion – it is impossible to segregate Internet-only webcasters from simulcasters and non-commercial stations from commercial stations. They are all competing with each other for the same listeners in the

²⁸ *Id.*

same ways and raising money in essentially the same fashion. They all recognize that the future (and the present) is in offering many channels of music programming that users can access over the Internet and over wireless networks of different kinds. And they all are aggressively investing in that future, recognizing that there are enormous sums of money to be made.

II. Webcasts Are Now Portable

Where webcasting was at one time derisively called “musicals for cubicles,” webcasts are now untethered from the computers to which they were once targeted.

Two years ago, Corey Deitz, a key observer of radio and webcasting, writing for The New York Times’ about.com, predicted that “The key for users will be the given ability to walk away from their personal computer – and household – and still access their favorite Internet stations. The technology is already here; it just needs natural evolution to become more embedded and more affordable.”²⁹ What Deitz imagined in 2004 is now reality in 2006, with trends pointing to lower prices and more ubiquitous adoption between now and 2010. It’s no wonder: Music is uniquely mobile. When on the move, we need our eyes for safety and choose our ears for recreation.

The participants in this proceeding recognize the growing importance of mobile music. Last month, August 2006, attorney David D. Oxenford of Davis Wright Tremaine LLP updated his widely distributed guide to webcasting, entitled “Internet Radio – The Basics of Music Royalty Obligations,” with the following conclusion about the impact of royalties as yet unknown and the market for webcasting:

Yet, even with these royalty obligations, the use of music on-line continues to expand. Increasingly, consumers are looking to the

²⁹ Corey Deitz, *The Future of Internet Radio is Bright*, May 6, 2004, available at <http://radio.about.com/cs/latestradionews/a/aa050604a.htm> (last visited Sept. 22, 2006) (“*The Future Of Internet Radio Is Bright*”).

proceeding), Shoutcast, and XM Online. The software even allows listeners to track what is playing on many different channels at once, and using the HyperScan feature, a listener can ask the device to find particular artists. SelectRadio also advertises a feature "coming soon" that will allow users to press a button while any song is playing and keep a permanent digital copy of that song . . . from the beginning (the whole song, not just a portion). So, streamripping is coming to wireless devices.

B. Conclusion

Receiving webcasts via wireless networks is already easy. How do I know? Because I regularly listen to webcasting in this way, and I have even tried to see how easy it is to receive such webcasts by driving the five-state length of Routes 95 and 66 from New York City to my home in The Plains, Virginia. I am able to listen to webcasts the entire way over a combination of cellular and Wi-Fi networks.

Furthermore, I've tested these same devices on foot, in city parks, on city streets, and in buildings. They are reliable and convenient, empowering one mobile device to do what once took two, three or more gadgets to accomplish -- not to mention having to lug around their numerous power charging apparatuses.

And my experience is not unusual. Clear Channel announced on the 6th of September 2006 that they will be offering hundreds of radio stations such as its New York affiliate Z100 through cellphones offered by Cingular and expect to reach a large audience. SX Ex. 220 RP. They were not the first, nor will they be the only webcasts targeting mobile devices. RadioIo, a "small" webcaster in this proceeding, promotes streaming its service to wireless devices, SX Ex. 225 RP, and KFOG, a Susquehanna station, touts streaming to mobile devices.⁶¹

⁶¹ <http://www.kfog.com/betamobile.asp>.

In the next five years, it will be commonplace, making webcasting even more valuable as it is able to reach consumers anywhere at any time. That increased value needs to be accounted for in the license terms set by the CRB.

III. Tracking Delivery Is Trivial and Important

This third major point will involve less elaboration, but not less importance: Webcasters can easily and cheaply track the delivery of their streams to listeners. Furthermore, it is critical that they do so for the success and well-being of many lesser-known and independent artists, including many who will and should someday be better known.

A. Tracking Webcasts Is Easy

Can we efficaciously track the delivery of webcasts? The answer is yes. Without exception, it is possible to track the transmission, delivery and reception of webcasts, and with near or totally complete granularity. By granularity, I mean that the webcaster can tell exactly how many listeners heard each song.

Indeed, I will go a step farther: If you choose not to track, it is because you actively made a choice not to do so and actually are ignoring data that your Internet server collects automatically. Tracking this information is a relatively straightforward technical task. When the machines that deliver Internet streams receive requests to add listeners, data about that connection and all subsequent digital transmissions are produced as a matter of course, recording the time and destination and origin of requests and data fulfillments. Computer servers can easily track (and as a matter of course do track) each stream (of music or anything else), and it is not at all difficult to track the number of streams at any one time, e.g., the number of listeners to any particular sound recording, which provides the number of performances. Thus, the servers know when a new stream begins, how many streams there are, and which songs are transmitted on each stream. And, they know that information for every stream that they deliver.

Even if a webcaster did not want to use its own servers to track its streams, it could simply pay someone a modest fee to do so. There are numerous services that will perform tracking, and at a relatively low price. LoudCity, for example, provides an end-to-end service for webcasters that includes all of the tracking of music usage and reporting to SoundExchange, all for prices starting at \$19.05 per month. SX Ex. 223 RP. Live365 offers a similar service to provide reporting to SoundExchange and other performing rights organizations. The tracking need not be performed on the webcaster's premises, and can be used by, say, a university to track the webcasting performed by student organizations (the example that arose during cross-examination in my initial testimony in this matter).

As Robert Shiflet, the Internet director for ABC Radio, recently stated when discussing advertising spots—which after all are just another part of the stream: “The beauty of electronics is we can verify exactly how many people heard a spot – [or] at least how many people were tuned in and presumably listening—and the specific time that spot played each day.” SX Ex. 227 RP. Obviously, if they can pinpoint how many streams carried an advertising spot, they can also track how many streams carried a song.

Indeed, in order to sell advertising, webcasters *must* keep track of how many listeners are listening to each individual commercial (or underwriting) spot. Webcasters even go so far as to regularly promote their ability to precisely measure the number of listeners as a reason why advertisers should be attracted to webcasting:

Arbitron measurement of Internet listening is in the early stages, so radio stations are using other data to convince advertisers that buying their Web stream is a solid strategy.

ABC stations have access to Webcast Metrics, a program that passively tracks exact listener data from all listening sources and converts it to standard broadcast audience metrics. “The beauty of electronics is we can verify exactly how many people heard a spot—[or] at least how

many people were tuned in and presumably listening—and the specific time that spot played each day,” Shiflet says.

“The metrics we use, if asked, are ‘sessions’ and ‘unique users,’” Clear Channel’s (Tom) English says. “We also have the ability to provide weekly/monthly TSL and cume numbers,” utilizing third-party providers Webside Story, Akamia and Arbitron for analytics, he says.

Bender says his stations have a similar measure. “We’ve got server reporting on all the streams and are able to give advertisers numbers that are analogous to the on-air metrics.”⁶²

The irony is rich: One of webcasting’s advantages over broadcasting is the availability of statistical metrics that can be used to analyze the audience and convince sponsors of the value of supporting the station. If webcasters can – and they do – measure the precise number of people listening to an advertising spot, it is trivial for them to use the same technology to identify the precise number of people listening to a sound recording by matching their streaming data with their playlists in the same way that they match the data with the ad spots. It is certainly remarkable that some seek to alleviate as a burden that which is clearly good business and a compelling advantage for webcasters, especially so when this information is so very important to the artists played by these stations.

B. Tracking Is Important

Why is this so very important to non-mainstream artists?

Because they tend to be better represented in the playlists of precisely those smaller and independent webcasters who most often claim the record-keeping requirements are burdensome. Without complete reporting from all webcasters, the reports submitted by some webcasters will provide an incomplete allocation picture to the detriment of precisely those artists who most need the resources, exposure, and statistical recognition to achieve success, or at the very least fair statutory compensation.

⁶² SX Ex. 227 RP.

IV. Streamripping Software and Services Exist, and They Are Simple to Use

Turning push (streaming) into pull (a recorded song) is easy, and getting easier. Without assistance, it would be a technical task met relatively simply by most teen-agers with more time than money, but their experience has led to products and services that put this task within the reach of many with less time and more money.

As I discussed in my direct testimony and at the hearing, there are dozens of software products and services that offer the functionality of an "Audio Tivo" – a smart recording device that can record webcasts and create from them discrete, individually usable songs with artist name and song title attached.

This month I tested a software package I'd not previously used: WebRadio Recorder by Magix. The software installs with a tutorial that graphically demonstrates the ease with which it records webcasts, breaks them into songs, enables you to adjust the beginning and end if an announcer's voice is present, and then burns them to a compact disc or DVD.

Like SelectRadio, a service I've previously mentioned, WebRadio Recorder includes a function that pre-buffers songs such that it will begin recording minutes (you configure the software for however many minutes you prefer) BEFORE you hit the record button. In other words, the software is constantly recording (so-called "buffering") the music. You set the exact amount of music that is kept. For example, if you set the software to record the last minute, it will constantly keep the last minute of music in memory, but it essentially re-writes over previous minutes. When you hit record, it stops re-writing, and keeps all the music until you hit stop. The WebRadio Recorder documentation demonstrates how, "so you don't miss out on the beginnings of music titles in progress," you can "start a recording in the middle and have, after the recording is complete, the entire program from beginning to end." SX Ex. 217 RP (02_permanent.wmv).

SX Exhibit 203 RP



Corporate Underwriting Kit

WAMU 88.5 FM
AMERICAN
UNIVERSITY
RADIO

4000 Brandywine Street, NW
Washington, D.C. 20016-8082

www.wamu.org

MONDAY - FRIDAY

12am	With Good Reason - in-depth interviews with leading Virginia scholars (Monday only)
12am	The World Today - Live international news from the BBC with Max Pierson (Tuesday - Saturday)
12:30am	Soundprint - Documentary series (Monday only)
12:30am	Newslink - International news from Deutsche Welle (Tuesday - Saturday)
1am	Selected Shorts - Classic and new short fiction read by actors and entertainers (Monday only)
1am	The World Today - (Tuesday - Saturday)
2am	Metro Connection* - (Rebroadcast of previous Friday program) (Monday only)
2am	News & Notes with Ed Gordon - News, talk, and provocative discussions (Tuesday - Saturday)
3am	Fresh Air with Terry Gross - Award-winning weekday magazine of contemporary arts and issues (Tuesday - Saturday)
3am	Talk of the Nation - Science Fridays with Ira Flatow 2nd hour - News and discussion on the latest in science (Monday only)
4am	BBC Programming including Outlook and Off the Shelf
5am	Morning Edition - NPR's morning news magazine with hosts Steve Inskeep and Renee Montagne
10am	The Diane Rehm Show* - Information, conversation, and call-in. Friday edition includes the "News Roundup"
Noon	The Kojo Nnamdi Show* - Local public affairs news magazine. Friday edition includes "The DC Politics Hour"
1pm	Metro Connection* - Weekly community news and features hosted by David Furst (Friday only)
2pm	Talk of the Nation - National call-in program with host Neal Conan
3pm	The World - International news beyond the headlines from BBC correspondents across the world with Lisa Mullins and Tony Kahn.
4pm	All Things Considered - NPR's afternoon news magazine with hosts Robert Siegel and Michele Norris
6pm	Marketplace - Business news magazine with Kai Ryssdal
6:30pm	All Things Considered - (Rebroadcast)
8:04pm	Stardate - A daily 2-1/2 minute guide to the universe
8pm	The Kojo Nnamdi Show* - (Rebroadcast)
9pm	The Diane Rehm Show* - (Rebroadcast)
10pm	To the Point - A look at the day's news and events with veteran journalist Warren Olney
11pm	As It Happens - Public affairs program from the Canadian Broadcasting Corporation

SATURDAY

12am	The World Today - Live international news from the BBC with Max Pierson
12:30 am	Newslink - International news from Deutsche Welle
1am	The World Today - Continued
2am	News & Notes with Ed Gordon - News, talk, and provocative discussions
3am	Fresh Air with Terry Gross - Award-winning magazine of contemporary arts and issues
4am	BBC Programming including Outlook, Talking Point, The Ticket and Off the Shelf
5am	Metro Connection* - (Rebroadcast)
6am	The Parent's Journal - Help with life's toughest job with host Bobbie Conner
7am	Latino USA - News and culture from the Latino perspective, with host Maria Hinojosa
7:30am	Soundprint - Documentary series
8am	Car Talk - Irreverent talk show about much more than car maintenance with hosts Tom & Ray Magliozzi
9am	Weekend Edition - NPR's weekend morning news magazine with host Scott Simon
11am	Wait, Wait... Don't Tell Me - News quiz show with host Peter Segal
Noon	What's Ya Know? - Comedy/quiz/interview show with host Michael Feldman
2pm	Metro Connection* - (Rebroadcast)
3pm	This American Life - Documentary-like stories of everyday life with host Ira Glass
4pm	Studio 360 - A look at arts and culture with host Keri Anderson
5pm	On The Media - Compelling radio that examines the impact of media on our lives
6pm	All Things Considered - NPR's afternoon news magazine
7pm	Hot Jazz Saturday Night* - Jazz, swing, and big band recordings from the 20s, '30s, and '40s with host Rob Bamberger
10pm	American Routes - Americana music program with host Nick Spitzer



Program Schedule

WAMU 88.5 FM
AMERICAN
UNIVERSITY
RADIO

SUNDAY

12am	Bluegrass Overnight* - Hosted by Lee Michael Demsey, Gary Henderson, Lisa Kay Howard, Tom "Cat" Reeder, and Bob Webster
6am	Stained Glass Bluegrass* - Traditional bluegrass gospel favorites with Red Shipley
10am	The Ray Davis Show* - Traditional Bluegrass
1pm	The Dick Spottswood Show* - An eclectic mix of ethnic roots music
3pm	The Eddie Stubbs Show* - Traditional country and honky tonk music from the 40's, 50's and 60's
5pm	The Thistle and Shamrock - Celtic music with Fiona Ritchie
6pm	All Things Considered - NPR's afternoon news magazine
7pm	The Big Broadcast* - Vintage broadcasts from the Golden Age of radio with host Ed Walker
11pm	The Infinite Mind - Neurological and medical information with Dr. Fred Goodwin

* Produced by WAMU



The Public Radio Audience

Prime Demographic:

More than 82% of WAMU's audience is between the ages of 25 and 64.

WAMU reaches more than 206,000 Washingtonians with a postgraduate degree. WAMU listeners are 150% more likely than the average adult in Washington to have a postgraduate degree.

More than 416,000 of WAMU listeners attended an arts venue in the last year: theatre, dance, the symphony, live musical performances, art galleries and museums.

More than 155,000 WAMU listeners work for the federal, state and local governments or are members of the armed forces.

More than 145,000 WAMU listeners are involved in the key purchasing decisions for products and services for their companies.

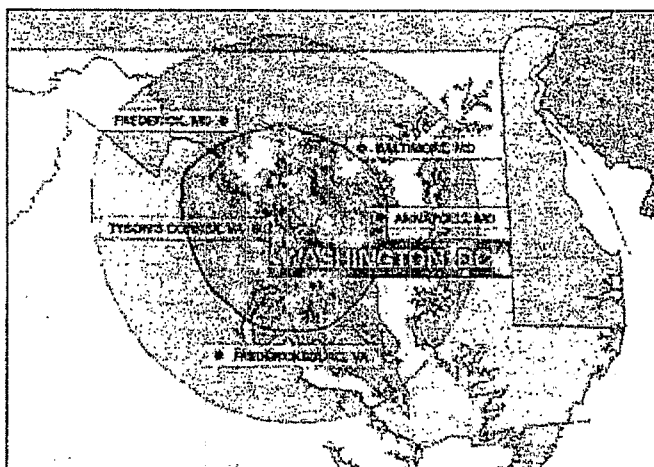
More than 120,000 WAMU listeners are IT professionals involved in the field of computers/mathematics and are involved in all key purchasing decisions for hardware, software and IT systems.

More than 101,000 WAMU listeners hold the following senior level positions in their company: chairman of the board, CEO, president, vice president, treasurer, comptroller, general manager, board member/director, owner/partner or manager.

More than 285,000 WAMU listeners live in households with incomes of \$100,000+.

WAMU reaches more than 95,000 professionals each week with individual incomes of \$100,000+.

Source: September 2005 - February 2006 Scarborough, Washington Metro Survey Area, 18+.



Selected Audience Ratings on WAMU

WAMU Listeners in the Total Survey Area

Daypart	Time (Weekdays)	AQH	CUME
AM Drive	5:00 - 10:00am	40,700	338,800
Mid-day	10:00am - 3:00pm	32,200	241,100
PM Drive	3:00 - 8:00pm	27,500	311,400
Weekly			
M - Su	6am - Midnight		571,800

Source: Arbitron, Spring 2006; audience 12+

AQH: (Average Quarter Hour) The average number of persons listening to a particular station for at least five minutes during a 15-minute period.

CUME: The total number of *different* persons who tune to a radio station during the course of a daypart for at least five minutes.



Testimonials from our Clients

“ Our underwriting of WAMU has been very successful for us – and a perfect example of doing well by doing good. The audience is ideal – we reach senior professionals and decision makers. We have achieved a greater level of recognition that helps all of our outreach efforts. Not only do we hear directly from prospects, but our clients have even called to thank us for supporting public radio! We are proud to do so. ”

– Leo Mullen, CEO
NavigationArts

“ WAMU-FM's audience has proved an ideal match for Cultural Tourism DC. The station's listeners, like the individuals we seek to reach, are engaged in their community, intellectually curious, and physically active. We would be hard pressed to find a better way to reach our target audience in Washington, DC. ”

– Kathryn S. Smith, Director
Cultural Tourism DC

“ Booz Allen Hamilton takes great pride in providing outstanding service to our clients. We're proud to sponsor WAMU, an organization that shares the values of excellence and community service. ”

– Booz Allen Hamilton

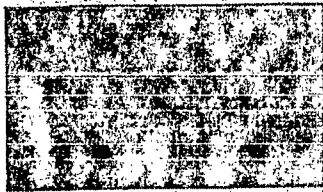
“ We have found that underwriting on WAMU has consistently delivered results and added value. No greater example is when we hear feedback from Members of Congress or senior staff about how they heard our latest message and want to learn more. ”

– Kent Dellinger, Manager, Government Relations
Honda North America, Inc.

“ Partnering with WAMU helped IBA's campaign messages hit the mark. Paired with other targeted advertising and marketing, we saw a dramatic increase in web site traffic and heard clients remark that they'd heard the spot on air. Thanks WAMU, for helping us make a positive impact! ”

– Lauren Foote
IBA Communications

SX Exhibit 221 RP



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News from the NAB Radio execs ignore WiFi, etc., at annual NAB Radio Show

BY KURT HANSON

Part 2 of a two-part story (Part 1 is [here](#)): Group heads speaking at the NAB Radio Show last week focused on terrestrial radio's hoped-for transition from 60- to 30-second spots and the question of whether HD Radio side channels should be used as line extensions or flankers.

However, the question of the potential effect on AM, FM, and satellite radio of the ongoing national rollout of wireless broadband Internet access (e.g., WiFi and WiMax) was essentially not addressed at all.



"If you're not [streaming], you're just not in the game" — Clear Channel's Harrison

In a panel called "Brand Extensions: You Can't Just Phone It In" moderated by Clear Channel's New York-based programming executive Tom Poleman, Clear Channel EVP Evan Harrison discussed their success with streaming in New York.

He noted that two main things attract Clear Channel listeners to station websites: contests and streaming. When A/C station WLTW/New York City resumed streaming this year, "the size of our audience database went up 30% in a month, and listening at work shot up significantly.

"If you're not letting your A/C listeners listen at work, or your teen listeners listen in their bedrooms, you're just not in the game," Harrison said

He went on, "Why should Yahoo! have a music audience of 20 million?," Harrison asked. "That's ours for the taking." He pointed out that MTV was ideally positioned for that position a few years ago and "MTV could've owned it if they had made different decisions."



"Radio has two problems: Perception and reality"

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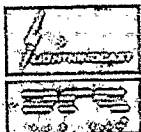
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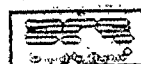
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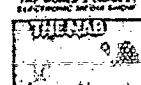
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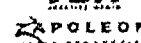
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Billboard Magazine's Scott McKenzie moderated a panel called "Future of Radio," with panelists Jon Coleman of Coleman Research, John Parikh of Joint Communications, and Bill Figenshu of FigMedia1.

Figenshu, former group head for Viacom's radio group, more recently a SVP at Infinity and a Regional President for Citadel, and now a consultant, observed, "We only have two problems: Perception and reality." He pointed out that when he hears someone at a cocktail party saying, "You guys are too homogenous," he knows he's met someone who reads the newspapers.



Although, he said, "to read the papers you'd think satellite had more listeners than we do," he

acknowledged, "We do have a problem. We really don't like change and we're used to having 100% distribution."

"I'm concerned when I walk into Circuit City or Best Buy and I ask to see the HD radios — and I know they carry the Kenwood model — and the sales guy takes me to the Sirius display and tells me, "This is it! This is digital."

"Every single one of the successful cable channels were launched by newcomers"

Researcher Jon Coleman noted, "We have one great asset: Great, known radio/audio brand names." On his cell phone (which must be Sprint), Coleman said, "there are six services, and I've never heard of five of them." Coleman said he signed up for the Sirius version, but noted that if there had been some kind of "Raleigh Radio Market" brand, that's what he would have signed up for instead.

Figenshu noted, "We can put an 'HD band' on the air, but auto manufacturers are only going to give us two years. The world is not going to beat a path to Circuit City for 'Lite FM HD2.'" He added that brand extension generally doesn't work.

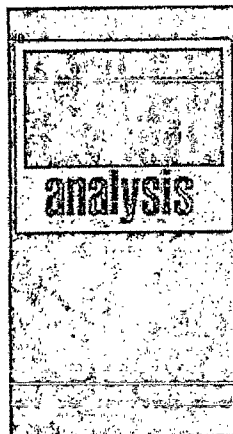


"CBS and NBC and ABC all knew it was good to put news on a cable channel," Figenshu said, "but they had to protect the mothership. Every single one of the successful cable channels were launched by newcomers."

"The Internet is your potential"

Consultant and futurist John Parikh noted, "Here's the good news: You have tons of cume and you can send them to your websites." He recommended that stations make their websites "the new creative initiative of radio."

Parikh also observed that radio has PDs who know how to program. "The Internet is your potential," he advised.



The NAB Radio Show was an odd combination of (A) speakers on panels in small meeting rooms telling how they are making money from websites and from streaming and (B) simultaneously, group executives on the stages in the big rooms were saying they weren't doing it and didn't believe it could be done.

It was also an event that thought the big issues facing the industry were stock price



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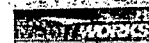
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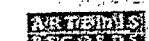
NTR revenue
opportunities



Performance
Rights



Record
labels



recovery and spot lengths of :60s vs :30s. (And, okay, yes, young people aren't listening any more to the medium, but HD Radio is coming — although it wasn't made clear how the latter might affect the former.)

But as I wrote in RAIN last week, the 10-ton elephant in the room that no one was discussing was WiFi — a new delivery mechanism for audio-based entertainment and information that is in the process of leapfrogging past AM, FM (including HD Radio), and satellite radio transmissions.

WiFi will, I and other observers believe, have a bigger impact on the radio industry than cable had on broadcast television. It has the potential of being a seismic shift in the radio landscape.

And yet the WiFi issue — dangers, opportunities, whatever — was not the subject of a single panel (out of dozens that were held (e.g., "Great Presentations = Great Sales!"), nor was it even a word that came out of anyone's mouth (moderator or panelist) at the big sessions.

(By the way, it was also amusing to watch how the radio industry is reacting to the fact that, after 20+ years of complaining that Arbitron diaries were inaccurate, it's now been revealed that the diaries were inaccurate in their favor.) — KH

Jackson urges execs to prepare for Internet radio, new tech

From R&R: "Delivering the keynote address at the NAB Radio Show's Radio Luncheon [Friday], the American Idol judge and former A&R exec warned the radio



THE NAB
RADIO SHOW

already 21 million iPods out there,...

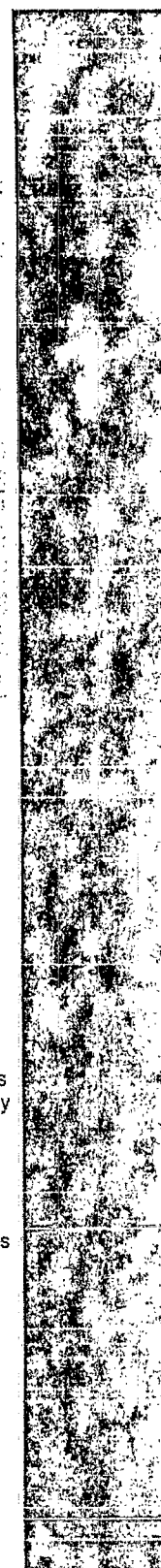
"He also urged radio to take more chances on new music and praised the opportunity HD Radio will afford the industry to launch creative new formats and give increased exposure to new artists. 'Seize the moment,' he said. 'In the end, it always comes down to the product. The public is waiting. Don't let them leave you behind.'"

Read the full article at R&R.

industry that failing to embrace change gives competitors an opening to steal away listeners.

"It's not like it was 20 years ago, when radio was the only game in town," he said.

"Look at what American Idol did to the record labels. This little TV show did an end-around on them. What is radio going to do when Internet radio hits critical mass? Plus, there are



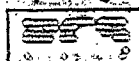
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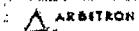


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RIAA takes aim at XM, Sirius for portable satellite radio players

From Red Herring: "Unafraid to fight on multiple fronts, the music industry has now reportedly added the two largest U.S. satellite radio companies, XM Satellite Radio and Sirius Satellite Radio, to its growing list of musical outlets it believes are not paying the piper.

"The bone of contention is the portable products that both satellite outlets have said would allow users to download songs they hear on the air.



"There were clear signals last week that the two-part harmony between the music industry and the satellite radio companies was fading when Warner Music Group CEO Edgar Bronfman Jr. said he believes the satellite radio outlets should pay more in rights fees when their contract ends later this year...



"In July, Washington, D.C.-based XM announced a portable MP3 player jointly with Samsung. The player,

when docked to a home or car system, allows users to download songs they hear on XM and store them for playing on their MP3 devices.

"Last month New York City-based Sirius announced a similar device that it said would become the first wearable MP3 satellite radio. The device allows users to capture and store up to 50 hours of Sirius content, which of course includes music...

"The RIAA reportedly sees the downloading of songs from satellite radio playlists as a clear violation of the industry's agreement with XM and Sirius and expects to be paid for the use of its content...



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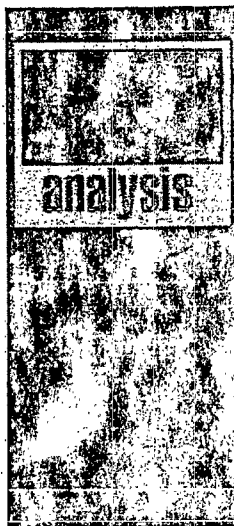
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"The music industry seems embattled lately over the downloading of its content. Lastweek Apple CEO Steve Jobs called the industry 'greedy' for requesting variable pricing on Apple's iTunes music library. Currently all songs are priced at \$0.99.

Read the rest of this story at Red
Herring

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THE BUSINESS OF TECHNOLOGY



This is absolutely astonishing to me. I had assumed that the satellite providers and the RIAA had agreed that this functionality was acceptable.

After all, it's crystal-clear in Sec. 405 (a)(2)(C)(iv) of the DMCA that a statutory license is available only if "the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology."

In other words, digital broadcasters can't encourage recipients to record their programming... which is exactly what these new devices do. — KH

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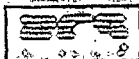
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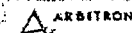


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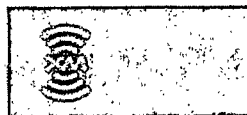
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"The bone of contention is the portable products that both satellite outlets have said would allow users to download songs they hear on the air.



"There were clear signals last week that the two-part harmony between the music industry and the satellite radio companies was fading when Warner Music Group CEO Edgar Bronfman Jr. said he believes the satellite radio outlets should pay more in rights fees when their contract ends later this year...

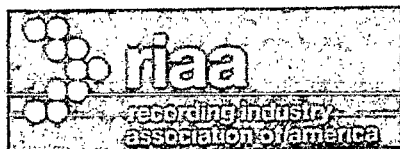


"In July, Washington, D.C.-based XM announced a portable MP3 player jointly with Samsung. The player,

when docked to a home or car system, allows users to download songs they hear on XM and store them for playing on their MP3 devices.

"Last month New York City-based Sirius announced a similar device that it said would become the first wearable MP3 satellite radio. The device allows users to capture and store up to 50 hours of Sirius content, which of course includes music...

"The RIAA reportedly sees the downloading of songs from satellite radio playlists as a clear violation of the industry's agreement with XM and Sirius and expects to be paid for the use of its content...



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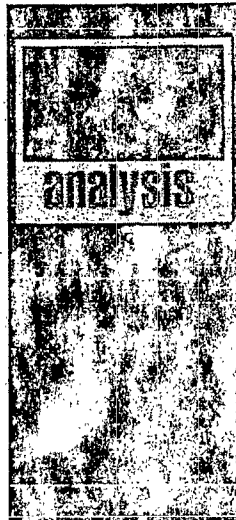
Web design and maintenance

"The music industry seems embattled lately over the downloading of its content. Lastweek Apple CEO Steve Jobs called the industry 'greedy' for requesting variable pricing on Apple's iTunes music library. Currently all songs are priced at \$0.99.

Read the rest of this story at Red Herring

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This is absolutely astonishing to me. I had assumed that the satellite providers and the RIAA had agreed that this functionality was acceptable.

After all, it's crystal-clear in Sec. 405 (a)(2)(C)(iv) of the DMCA that a statutory license is available only if "the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology."

In other words, digital broadcasters can't encourage recipients to record their programming... which is exactly what these new devices do. — KH

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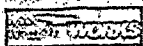
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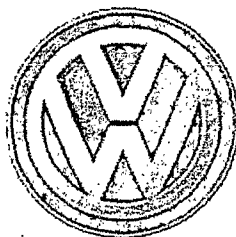
In-dash USB integrates MP3 players with stereo in new VW

From CNN: "With digital music players becoming more ubiquitous, Volkswagen AG is offering a stereo component that lets motorists plug in all manner of portable digital players -- not just iPods -- and manage their tunes and podcasts on a dashboard display.

"Although the in-dash CD player has yet to go the way of the eight-track, digital devices with USB connections -- be they fancy iPods or simple keychain drives -- seem now to be portable music's future.



"Volkswagen, Europe's biggest automaker, is thus making the USB connection an option on its Golf, Golf Plus and Touran models in December and on remaining models next year.



"Just plug your device into a built-in console in the center armrest. The option comes in two varieties, one for the iPod, another for other USB-based players. Up to six of the player's folders will be displayed on the car stereo system, and the radio buttons can be used to scan, search or shuffle your mix. The setup will cost \$240."

Read the full story at [CNN](#).

This story was previewed last week through RAIN express. Click [here](#) to read the RAIN story about Chevrolet's step by step instructions for hooking up your iPod through an Aux Input.

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October 27-30	<u>Collegiate Broadcasters, Inc. Fall Conference</u> : New Orleans
October 29	<u>Intercollegiate Broadcasting Fall Coast-to-Coast</u> : Chicago
November 5	<u>Intercollegiate Broadcasting Fall Coast-to-Coast</u> : Boston
November 12	<u>Intercollegiate Broadcasting Fall Coast-to-Coast</u> : Los Angeles
November 15-17	<u>Streaming Media West</u> : San Jose

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Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of)
)
)

RATE SETTING FOR)
DIGITAL PERFORMANCE RIGHT)
IN SOUND RECORDINGS AND)
EPHEMERAL RECORDINGS)

Docket No. 2000-9
CARP DTRA 1 & 2

REPORT OF THE COPYRIGHT ARBITRATION ROYALTY PANEL

February 20, 2002

Eric E. Van Loon
Chairperson

Jeffrey S. Gulin
Arbitrator

Curtis E. von Kann
Arbitrator

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Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS

**Docket No. 2000-9
CARP DTRA 1 & 2**

Pursuant to 37 C.F.R. § 251.53, the undersigned members of the Copyright Arbitration Royalty Panel hereby submit the Panel's Report to the Librarian of Congress.

This is a rate adjustment proceeding convened under 27 C.F.R. § 251 *et seq.*, pursuant to which this Copyright Arbitration Royalty Panel (“CARP” or “the Panel”) has been empanelled to set compulsory license fees for eligible¹ nonsubscription digital audio

JA 522

transmissions of sound recordings as provided for in § 114 of the Digital Millennium Copyright Act ("DMCA"), as well as for the making of ephemeral copies to facilitate such transmissions, as provided for in § 112 of the DMCA. This CARP is setting fees for two license periods: (a) October 28, 1998 - December 31, 2000, and (b) January 1, 2001 - December 31, 2002.

The subject matter underlying this proceeding -- access to music -- spans from ancient antiquity to state-of-the-art technology. Humankind's affinity for music extends from ancient campfires to today's capacity to transmit music across vast distances and hear it played with remarkable fidelity. The Panel is cognizant that the decision it renders today could significantly affect citizen access to music for years to come.

B. PARTIES TO THE PROCEEDING

The current² parties to this proceeding are: (i) the "Webcasters," namely, BET.com, Comedy Central, Echo Networks, Inc. ("Echo"), Listen.com, Live365.com, MTVi Group, LLC ("MTVi"), Myplay, Inc. ("MyPlay"), NetRadio Corp. ("NetRadio"), Radio Active Media Partners, Inc. ("RadioAMP"), RadioWave.com, Inc. ("RadioWave"), Spinner Networks Inc. ("Spinner.com"), and XACT Radio Network LLC ("XACT"); (ii) the FCC-licensed radio Broadcasters, namely, Susquehanna Radio

9 (hereinafter, orders of both the Copyright Office and the Panel respecting this docket shall be cited as "Order of" followed by the date of the order and page number).

² At the outset of the proceeding, Webcaster parties also included Coolink Broadcast Network, Everstream, Inc., Incanta, Inc., Launch Media, Inc., MusicMatch, Inc., Univision Online, and Westwind Media.com, Inc., which have since withdrawn or been dismissed from the proceeding. National Public Radio ("NPR") reached a private settlement with RIAA. Because RIAA, AFTRA, AFM, and AFIM propose the same rates and take similar positions on most issues, they are sometimes referred to collectively as "RIAA" or "Copyright Owners and Performers" for convenience. Similarly, Webcasters, Broadcasters, and the Business Establishment Services are sometimes referred to collectively as "the Services."

Corporation, Clear Channel Communications Inc., Entercom Communication Corporation, Infinity Broadcasting Corporation, and National Religious Broadcasters Music License Committee (collectively "the Broadcasters"); (iii) the Business Establishment Services, namely, DMX/AEI Music Inc. (also referred to as "Background Music Services"); (iv) American Federation of Television and Radio Artists ("AFTRA"); (v) American Federation of Musicians of the United States and Canada ("AFM"); (vi) Association For Independent Music ("AFIM"); and (vii) Recording Industry Association of America ("RIAA").

The Webcasters are internet services that each employ a technology known as "streaming,"³ but comprise a range of different business models and music programming. *See e.g.*, Written Direct Testimony⁴ of Zittrain at 2; Tr. 6917-33 (Mills); Tr. 4025-29 (Lyons); Tr. 4554-77 (Porteus); Tr. 7277-97 (Roy); Tr. 8151-90 (Jeffrey).

The Broadcasters are commercial AM or FM radio stations that are licensed by the Federal Communications Commission ("FCC").

³ The Webcasters' activity, sending music or other audio programming over the Internet to the listener's computer, is known as "streaming" because the webcaster "streams" packets of digitized transmissions in a time-dependent, location-dependent manner. *See* Griffin W.D.T. 4-8. To the listener, it seems like traditional radio, but unlike radio signals that are "broadcast," the streams are transmitted to individual recipients. The recipient's computer receives the streamed packets, reassembles them, and plays them back via common software programs known as "players." *See id.* Unlike "downloads," which may be permanently stored in the recipient's computer, the digits of streamed music are designed to be used once and then discarded. *See id.*

⁴ Hereinafter, references to written direct testimony shall be cited as "W.D.T" preceded by the last name of the witness and followed by the page number. References to written rebuttal testimony shall be cited as "W.R.T" preceded by the last name of the witness and followed by the page number. References to the transcript record shall be cited as "Tr." followed by the page number and the last name of the witness. References to proposed findings of fact and conclusions of law shall be cited as "PFFCL" preceded by the name of the party that submitted same and followed by the paragraph number. References to reply proposed findings of fact and conclusions of law shall be cited as "RPFFCL" preceded by the party and followed by the paragraph number.

The Business Establishment Services, DMX/AEI Music,⁵ deliver sound recordings to business establishments for the enjoyment of the establishments' customers. *See* Knittel W.D.T. 4

RIAA is a trade association representing record companies, including the five "majors" and numerous "independent" labels. Its SoundExchange division has been designated by RIAA member copyright owners (who account for about 90% of all sound recordings legitimately distributed in the United States) as the non-exclusive agent to collect and to distribute Section 112 and 114 royalties. *See* Rosen W.D.T. 4; Tr. 438-39 (Rosen).

AFTRA, the American Federation of Television and Radio Artists, is a national labor organization representing performers and newsmen. *See* Tr. 2830 (Himelfarb).

AFM, the American Federation of Musicians, is a labor organization representing professional musicians. *See* Bradley W.D.T. 1.

AFIM, the Association For Independent Music, is a trade association representing independent record companies, wholesalers, distributors and retailers. *See* Tr. 2830 (Himelfarb).

C. THE STATUTORY BACKGROUND

1. Music Copyright Law in General

Section 102 of the Copyright Act of 1976 identifies various categories of works that are eligible for copyright protection. *See* 17 U.S.C. § 102. These include "musical works" and "sound recordings." *Id.* at Section 102(2) and 102(7). The term "musical

⁵ DMX/AEI Music is the successor company resulting from a merger between AEI Music Network, Inc. ("AEI") and DMX Music, Inc. ("DMX").

work” refers to the notes and lyrics of a song, while a “sound recording” results from “the fixation of a series of musical, spoken, or other sounds.” *Id.* at Section 101. Thus, for example, the compact disc (“CD”) entitled *Whitney Houston’s Greatest Hits* contains Whitney Houston’s rendition of *I Will Always Love You* and the CD entitled *Jolene* contains Dolly Parton’s rendition of *I Will Always Love You*. Sherman W.D.T. 3-4. Each of the two renditions constitute distinct sound recordings and both the sound recordings and the single underlying musical work are “fixed” in the two CDs. *See id.* There are separate copyrights in each sound recording of *I Will Always Love You* and these copyrights are separate from the copyright in the underlying musical work. *See id.*

The copyright owner receives a bundle of exclusive rights including “performance” rights and “reproduction and distribution” rights. *See* 17 U.S.C. §106. Copyright owners of musical works are granted the exclusive right “to perform the copyrighted work publicly.” *Id.* at 106(4). So, for example, the copyright owner has the exclusive right to authorize, or license, a radio broadcaster to publicly perform the musical work – to play a CD containing the copyrighted musical work such as *I Will Always Love You* over the radio. *See* Sherman W.D.T. 6-7. However, the Section 106(4) performance right does not extend to sound recordings. Accordingly, the broadcaster that publicly performs (broadcasts) *I Will Always Love You* must be licensed by the copyright owner⁶ of the musical work, but need *not* be licensed by the copyright owner of the sound

⁶ Songwriters who create musical works generally assign an interest in their copyrights to musical publishers who typically pay the songwriter an advance and a share of royalties that they collect for licensing the musical work. *See* Sherman W.D.T. 11-12. Songwriters and publishers typically bifurcate the administration of their rights. Performance rights in musical works are administered in the United States by three performing rights societies (“PROs”) – the American Society of Composers, Authors and Publishers (“ASCAP”); Broadcast Music, Inc. (“BMI”); and SESAC, Inc. *See id.* at 13. The PROs typically enter into licensing agreements on behalf of their member songwriters and publishers with thousands of businesses that perform musical works. The PROs

recording.⁷ *See id.* Sections 106(1) and 106(3) grant copyright owners exclusive rights “to reproduce the copyrighted work in copies or phonorecords” and to “distribute copies or phonorecords of the copyrighted work to the public by sale ...” 17 U.S.C. §106(1), (3). Musical works may be reproduced and distributed within the meaning of Sections 106(1), (3) in three principal ways: (a) mechanical reproductions -- the recording of a musical work on a CD, cassette, computer file or other phonorecord;⁸ (b) synchronizations -- the recording of a musical work on a soundtrack of a motion picture or other audiovisual work;⁹ and (c) print -- the printing of a musical work on sheet music or in books. *See* Sherman W.D.T. 9.

2. The DPRA

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (“DPRA”), which added a new Section 106(6) to the Copyright Act. That provision grants copyright owners of *sound recordings* the exclusive right “to *perform* the copyrighted work publicly by means of a digital audio transmission.” *See* 17 U.S.C. § 106(6) (emphasis added). This grants record companies and artists a new right: the

generally grant “blanket licenses” that permit the licensee to perform any musical works within their repertoires for a set license fee, as well as more limited licenses for specific purposes. *See id.* Publishers typically handle the licensing of reproduction and distribution rights in musical works through The Harry Fox Agency.

⁷ Record companies normally handle the licensing of the copyright rights in their sound recordings. But, as previously mentioned, a division of RIAA known as SoundExchange acts on behalf of many record companies, including all of the majors, to license performance and reproduction rights that are subject to the statutory licenses in Section 112 and 114. *See* Sherman W.D.T. 14.

⁸ The rights to authorize the recording and distribution of the phonorecord to the public are commonly referred to as “mechanical rights.” *See id.*

⁹ The rights to authorize these reproductions and distributions are commonly referred to as “sync rights.” *See id.*

right to receive royalties when sound recordings are transmitted ("performed") over the internet. However, Congress limited this new Section 106(6) digital performance right through certain exemptions that it set forth in an amended Section 114 of the Copyright Act including, among others, exemptions for (a) nonsubscription broadcast transmissions; (b) retransmission of broadcast radio stations within 150 miles of their transmitters; and (c) transmissions to business establishments. *See* 17 U.S.C. § 114 (d)(1).

Congress also amended Section 114 to create a new compulsory license for certain subscription digital audio services, which transmit sound recordings to cable television and Direct Broadcast Satellite subscribers on a non-interactive basis. *See* 17 U.S.C. § 114(d)(2). The compulsory license permits the services, upon compliance with certain statutory conditions, to make those transmissions without obtaining consent from, or having to negotiate license fees with, copyright owners of the recordings. *Id.* Congress established procedures to facilitate voluntary negotiation of rates and terms for the subscription services compulsory license. This included a provision authorizing copyright owners and services to designate common agents on a nonexclusive basis to negotiate licenses – as well as to pay, to collect, and to distribute royalties – and a provision granting antitrust immunity for such actions. *See* RIAA Exhibit 113 DP (setting forth Sections 114 and 801 of the Copyright Act as enacted in the DPRA); Sherman W.D.T. 23-24.

Absent agreement, the Copyright Office must convene a CARP to recommend royalty rates and terms for adoption by the Librarian of Congress. Congress directed the CARP to set a royalty rate for the subscription services' compulsory license that achieves the policy objectives in Section 801(b)(1) of the Copyright Act. *Id.*

Under the DPRA, copyright owners must allocate one-half of the compulsory licensing royalties that they receive from the subscription services compulsory license to recording artists. Forty-five percent of the royalties must be allocated to featured artists; 2½ percent of the royalties must be distributed by AFM to non-featured musicians; and 2½ percent of the royalties must be distributed by AFTRA to non-featured vocalists. *See* 17 U.S.C. § 114(g).

3. The DMCA

After passage of the DPRA, a dispute arose concerning the proper treatment of webcasters who stream sound recordings on a nonsubscription basis. The webcasters argued that they were exempt under the DPRA from the Section 106(6) digital performance right. The recording industry, on the other hand, took the position that the DPRA did not exempt webcasters and that webcasters were required to obtain the consent of copyright owners of the sound recordings that they transmit over the internet. *See* Sherman W.D.T. 24; Tr. 321 (Sherman).

Congress resolved that dispute in 1998 with the passage of the DMCA. It made clear in the DMCA that webcasting is subject to the Section 106(6) digital performance right and that webcasters who transmit sound recordings on an *interactive* basis, as defined in Section 114(j), must obtain the consent of, and negotiate fees with, individual owners of those recordings. However, webcasting would be eligible for compulsory licensing when done on a *non-interactive* basis. Accordingly, Congress created a new compulsory license in Sections 114(d)(2) & (f)(2) for "eligible nonsubscription transmissions," which include non-interactive transmissions of sound recordings by webcasters. 17 U.S.C. § 114(d)(2). To qualify for that compulsory license, the webcaster

must comply with several conditions in addition to those that the DPRA applied to subscription services. As with the subscription services royalties, webcaster royalties are allocated on a 50-50 basis to copyright owners and to performers. *See generally* Sherman W.D.T. 24-28; RIAA Exhibit 114 DP at 79-91 (DMCA Conference Report); *Bonneville International Corp. et al v. Peters*, 153 F. Supp. 2d 763, 768-69 (E.D.Pa.2001), appeal pending.

Congress adopted the DPRA voluntary negotiation and CARP procedures for the DMCA webcaster performance license. *See* 117 U.S.C. § 114(e),(f). However, it changed the statutory standard by which a CARP must set rates and terms for the webcaster compulsory license. Congress provided that the CARP must adopt rates and terms for the webcaster performance license that “most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 114(f)(2)(B).

Congress also recognized that webcasters who avail themselves of the Section 114 license may need to make one or more temporary or “ephemeral” copies of a sound recording in order to facilitate the transmission of that recording. Accordingly, Congress created a new compulsory license in Section 112(e) for such copies and extended that compulsory license to services that transmit sound recordings to certain business establishments under the Section 114(d)(1)(C)(iv) exemption created by the DPRA. *See generally* Sherman W.D.T. 24-28; RIAA Exhibit 114 DP at 89-91 (DMCA Conference Report).

Again, Congress adopted the DPRA voluntary negotiation and CARP procedures for the Section 112 ephemeral license. 17 U.S.C. 112(e)(2),(3). And Congress again

directed the CARP to set rates and terms for this license that meet the willing buyer/willing seller standard applicable to the Section 114 webcaster performance license. 17 U.S.C. § 112(e)(4).

II. THE PROCEEDINGS

A. PRE-HEARING PROCEEDINGS

Pursuant to Section 114(f)(4)(B)(i), on September 20, 1999, the Copyright Office directed eligible nonsubscription services, that wish to rely upon the Section 114 compulsory license, to file appropriate notices with the Copyright Office by October 15, 1999 or, if they had not yet launched, prior to their first transmission. *See* 64 Fed. Reg. 50758 (September 20, 1999). As of early 2001, initial notices were filed for nearly 2,300 web sites, of which 1557 were filed by AM/FM broadcast radio stations. *See* RIAA Exhibit 126 DP; Marks W.D.T. 4.

Pursuant to the six-month voluntary negotiation provision of the DMCA, on November 27, 1998, the Librarian initiated a voluntary negotiation period covering the timeframe October 28, 1998 through December 31, 2000. *See* 63 Fed. Reg. 65555 (November 27, 1998). On January 13, 2000, the Librarian initiated a second six-month period for the parties to negotiate voluntary rates and terms covering January 1, 2001 through December 31, 2002. *See* 65 Fed. Reg. 2194 (January 13, 2000). RIAA, designated by virtually all of its members and several non-member record labels as their nonexclusive, common negotiating agent (*see* Tr. 321-22 (Sherman); Sherman W.D.T. 23-24), reached agreements with 26 webcasters during and subsequent to these two formal negotiation periods. However, apparently because an industry-wide agreement had not been reached, RIAA petitioned the Copyright Office on July 23, 1999 to

commence the CARP process for the period October 28, 1998 through December 31, 2000. On August 28, 2000 RIAA filed a second petition covering the period January 1, 2001 through December 31, 2002.

In response to RIAA's petitions, the Copyright Office directed interested parties to file notice of their intent to participate in the 1998-2000 CARP proceeding and the 2001-02 proceeding. *See* 64 Fed. Reg. 52107 (Sept. 27, 1999); 65 Fed. Reg. 55302 (Sept. 13, 2000); 65 Fed. Reg. 77393 (Dec. 11, 2000). RIAA, AFIM, AFM, AFTRA, about 43 webcasters, and 82 broadcasters filed notices of intent to participate. NPR filed notices to participate on its own behalf and on behalf of non-commercial public radio stations qualified for funding from the Corporation for Public Broadcasting. AEI and DMX (prior to their merger) also filed separate notices of intent to participate.

B. THE DIRECT CASES

On April 11, 2001, RIAA filed its direct case. AFM, AFTRA and AFIM also submitted direct cases and supported RIAA's proposed rates. Twenty-five Webcasters and Broadcasters submitted direct cases. NPR submitted a separate direct case and a separate rate proposal covering public radio stations. AEI and DMX submitted direct cases and a Section 112 rate proposal for organizations that transmit sound recordings to business establishments.

The Panel conducted 31 days of hearings on the direct cases, commencing July 30, 2001 and ending September 14, 2001. A total of 49 witnesses testified.

RIAA presented the following witnesses during the direct case hearings: Cary Sherman, Executive Vice President and General Counsel, RIAA; Hilary Rosen, President and Chief Executive Officer, RIAA; Linda McLaughlin, Vice President, National

Economic Research Associates, Inc. ("NERA"); David Altschul, Vice Chairman and General Counsel of Warner Bros. Records; Paul Katz, Senior Vice President of Business Affairs for Zomba Music Publishing and Zomba Recording Corporation; Charles Ciongoli, Senior Vice President of Finance, Universal Music Group; James Griffin, Chief Executive Officer, Cherry Lane Digital, LLC; Ron Wilcox, Senior Vice President, Business Affairs and Administration, Sony Music, U.S. and Executive Vice President, Business Affairs and New Technology, Sony Music Entertainment Inc.; Paul Vidich, Executive Vice President, Strategic Planning and Business Development, Warner Music Group.; LaVerne Evans, Senior Vice President and General Counsel, Legal and Business Affairs, BMG Entertainment; Anthony Pipitone, President, Warner Special Products, Inc.; Lawrence Kenswil, President, Universal eLabs, Universal Music Group; Dr. Thomas Nagle, Chairman, Strategic Pricing Group, Inc.; Jay Samit, Senior Vice President, New Media, EMI Recorded Music; Steven Wildman, Professor of Economics and Telecommunications studies at Michigan State University; Robert Yerman, Director of Intellectual Property Practice for LECG, LLC; and Steven Marks, Senior Vice President, Business and Legal Affairs, RIAA.

The following witnesses testified on behalf of AFTRA during the direct case hearings: Greg Hessinger, National Executive Director of AFTRA; Jennifer Warnes, recording artist; and AFM presented testimony from Harold Bradley, recording artist; Kevin Dorsey, background vocalist and arranger. AFIM presented testimony from Gary Himelfarb, Founder, RAS Records.

Webcasters and Broadcasters presented the following witnesses during the direct case hearings: Professor William Fisher, Harvard Law School; Joe Lyons, Director of

New Business Development, Comedy Central; Michael Wise, Chief Financial Officer, NetRadio; David Pakman, President of Business Development and Public Policy, My Play; Brad Porteus, Vice President of MTVi Radio and General Manager of Internet Radio Operations for MTVi.; Rob Reid, Chairman, Listen.com; Quincy McCoy, Vice President of Radio and Music Programming, MTVi SonicNet; Fred McIntyre, Executive Director, Business Development, AOL Music, Spinner.com; Dan Halyburton, Senior VP, General Manager, Group Operations, Susquehanna Radio Corporation; Professor Michael Mazis, Kogod School of Business, American University; Michael Fine, Consultant; James P. Donahoe, Senior Vice President, Clear Channel Broadcasting; Professor Jonathan Zittrain, Harvard Law School; Paul Kempton, Founder and Senior Partner, Media Matrix Partnership; Adam Jaffe, Professor of Economics, Brandeis University and Chair of the Department of Economics and the Chair of the University Intellectual Property Policy Committee; Scott Mills, COO and Executive Vice President, BET Interactive LLC; David Juris, President and CEO, XACT Radio; Tuhin Roy, Executive Vice President of Strategic Development, Echo Networks, Inc.; Charles Moore, Vice President of Business Development, RadioActive Media Partners; Stephen Fisher, Executive Vice President and Chief Financial Officer, Entercom Communications Corp.; Dan Mason, President, Infinity Radio; Nathan Pearson, President and CEO, Radiowave.com; John Jeffrey, Executive Vice President of Corporate Strategy and General Counsel, Live365 Inc.; and Joe Davis, Senior Vice President for Operations, Salem Communications.

Webcasters and Broadcasters submitted, but subsequently withdrew written direct testimony from the following witnesses: David Bean, Vice President of Programming,

Music Match, Inc.; Robert Ohlweiler, Senior Vice President of Business Development, Music Match, Inc.; Diego Ruiz, Vice President and General Manager, Univision Online, Inc.; Clifton Gardiner, President of Westwind Division, Radio One Networks, Inc.; Michael Peterson, Senior Vice President, Coolink Broadcast Network; Steven McHale, Co-Founder, President and Chief Executive Officer, Everstream, Inc.; Eric Snell, Chief Financial Officer, Incanta, Inc.; Robert D. Roback, President, Co-Founder, and Director, Launch Media, Inc.; and David Goldberg, Chief Executive Officer, Launch Media, Inc. *See* June 25, 2001 Order (Music Choice, Incanta and Everstream); Aug. 3, 2001 Order (Music Match); Aug. 29, 2001 Order (Univision Online and Westwind); Sept. 14 Order (Coolink); Tr. 13242-43 (Launch). Webcasters also had submitted written testimony from Alanis Morissette, a recording artist. By agreement of the parties, the Panel received that written testimony into evidence without Ms. Morissette presenting oral testimony at the direct case hearings. *See* Tr. 9862.

The following witnesses testified on behalf of the Business Establishment Services: Barry Knittel, President of AEI Music Markets Worldwide, and Doug Talley, Chief Technical Officer, AEI/DMX. DMX had submitted written testimony from Lon Troxel, its President and Chief Executive Officer, but that testimony was withdrawn. *See* Tr. 6571.

The following witnesses testified on behalf of NPR during the direct case hearings: Kenneth Stern, Executive Vice President, NPR, and Dr. Jane Murdoch, Vice President of Charles River Associates.

C. THE REBUTTAL CASES

The parties filed written rebuttal cases on October 4, 2001. The Panel conducted ten days of rebuttal hearings, commencing October 15, 2001 and ending October 25, 2001. A total of 26 witnesses testified.

The following rebuttal witnesses testified on behalf of RIAA during the rebuttal hearings: Barrie Kessler, Executive Director, Internal Operations and Data Management, Sound Exchange; Michael Williams, Executive Vice President of Finance and Operations, RIAA; James McDermott, Senior Vice President, New Technology and Electronic Music Distribution, Sony Music, U.S.; Lawrence Kenswil, President, Universal eLabs, Universal Music Group; Dr. Thomas Nagle, Chairman, Strategic Pricing Group, Inc.; Professor Richard Seltzer, Howard University; Dr. George Schink, Director LECG, LLC; Steven Marks, Senior Vice President, Business and Legal Affairs, RIAA; and Professor Steven Wildman, Michigan State University. RIAA had submitted written rebuttal testimony from Deane Marcus, Senior Vice President, Strategic Planning & Business Development, Warner Music Group; Carmine Coppola, Vice President and Chief Financial Officer, Sony Music International; and Prescott Price, Senior Vice President, Finance, EMI Group. By agreement of the parties, the Panel received that written testimony into evidence without those witnesses testifying at the rebuttal hearings. RIAA also submitted written testimony from Mark Ansorge, Vice President and Associate Counsel, Warner Music Group, Inc., but that testimony was subsequently withdrawn. *See* Tr. 13234.

AFTRA and AFM submitted written rebuttal testimony from Greg Hessinger, National Executive Director of AFTRA.

The following witnesses testified during rebuttal on behalf of the Webcasters and Broadcasters: Cindy Charles, MTVi; Charles Moore, Vice President of Business Development, RadioActive Media Partners, Inc.; Ronald Gertz, President and CEO, Music Reports, Inc.; Michael Fine, Consultant; Professor William Fisher, Harvard Law School; Professor Michael Mazis, Kogod School of Business, American University; David Fagin, recording artist; Professor Jonathan Zittrain, Harvard Law School; and Professor Adam Jaffe, Brandeis University.

NPR submitted written rebuttal testimony from Dr. Jane Murdoch, Vice-President, Charles River Associates. By agreement of the parties, the Panel received that written testimony into evidence without Dr. Murdoch's testifying at the rebuttal hearings. *See* Tr. 12393.

Shortly before the conclusion of the direct case evidentiary hearings, the Panel invited each of the 26 webcasters who had entered into voluntary agreements with RIAA to testify during the rebuttal hearings. Seven of the 26 RIAA licensees subsequently testified during the rebuttal hearings: Bruce Bechtold, President and CEO, Cybertainment; David Mandelbrot, Vice President and General Manager, Entertainment Division, Yahoo!, Inc.; Wolfgang Spegg, President and CEO, musicmusicmusic; Scott Purcell, Founder and CEO, OnAir Streaming Networks, Inc.; John Heilbronn, President, Cablemusic Networks, Inc.; Matthew Hackett, Founder and CEO, Kickradio.com; Jim Junkala, President and COO, Multicast Technologies; and Randy Freedman, Counsel, Multicast Technologies.

Lists of exhibits offered during the direct case and the rebuttal case hearings are attached hereto as Appendix C and Appendix D, respectively.

Hearings in this proceeding were interrupted twice by tragic external events. On the morning of September 11, 2001, the Library of Congress building in which the hearing was being conducted was evacuated abruptly by Capital Police; fortunately, the hearing was able to be resumed the following morning. Subsequently, on October 17, 2001, the rebuttal hearing was again interrupted due to fear of anthrax contamination, and the proceedings had to be relocated for eight days. The Panel wishes to express its appreciation and admiration for, and commend the thoughtfulness of, counsel for the parties and the legal staff of U.S. Copyright Office, whose conduct reflected the highest degree of consideration and professionalism throughout these difficult periods.

D. THE SUSPENSION OF PROCEEDINGS

On November 8, 2001, the parties jointly moved the Copyright Office to suspend the CARP proceedings for the period November 9, 2001 through December 2, 2001. The purpose of the suspension was to permit the parties to engage in settlement negotiations. By Order dated November 9, 2001, the Copyright Office granted the motion and set February 20, 2002 as the deadline for the submission of the final CARP Report. The negotiations resulted in a confidential settlement agreement between NPR (National Public Radio) and RIAA. The parties also reached an accord respecting all non-rate terms, excepting one contested issue relating to the designation of an agent to receive and distribute royalties in the circumstance where a copyright owner has not made a designation. Pursuant to joint request of the parties, on December 20, 2001, the Panel issued an order to reopen the record for the limited purpose of admitting into evidence the agreed-upon terms.

E. POST-HEARING SUBMISSIONS AND ARGUMENTS

Following resumption of the proceedings, the parties submitted Proposed Findings of Fact and Conclusions of Law, Replies thereto, and various other memoranda, pursuant to schedules established by the Panel. On December 20, 2001 and January 11, 2002, the Panel heard two days of oral arguments presented by counsel for the parties.

F. THE ENORMITY OF THE RECORD

This proceeding has spawned one of the most voluminous records in CARP history. It includes a written transcript approaching 15,000 pages, many thousands of pages of exhibits, and over 1000 pages of post-hearing submissions by extraordinarily able counsel. In these pages, the parties have raised literally hundreds of contentions relating to statutory construction, economic theory, technology, particulars of their respective industries, and a host of other subjects. Addressing all of these individual contentions, and the evidence supporting or contradicting each, would generate a final report of hundreds, perhaps thousands of pages. Such an endeavor is not required, nor is it practicable within the time constraints imposed under 37 C.F.R. § 251.53(a).

Accordingly, in this Report the Panel attempts to articulate only the principal grounds upon which our determinations are based. Of course, in arriving at these determinations, the Panel has carefully considered all of the parties' evidence and arguments. To the extent this Report comports with a particular proposed finding of a party, we accept that proposed finding. To the extent it does not, we reject that proposed finding.

III. THE STATUTORY CRITERIA FOR SETTING RATES AND TERMS

A. SECTION 114(f)(2)

1. The Statutory Language

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

In establishing rates and terms for transmissions by eligible nonsubscription services ..., the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including –

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

The statute further directs the Panel to set “a minimum fee for each type of service” and grants the Panel discretion to consider the rates and terms for “comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements” negotiated under the voluntary negotiation provisions of the statute. 17 U.S.C. § 114(f)(2)(B).

2. The Relationship of the Statutory Factors to the “Willing Buyer/Willing Seller” Standard

The meaning of the “willing buyer/willing seller” standard was the subject of considerable testimony and argument. Indeed, prior to the hearing, dispute arose regarding the appropriate relationship between the statutory factors identified in § 114

(f)(2)(B)(i) and (ii), and the willing buyer/willing seller standard enunciated in the statute.

In response to the written direct testimony of Services' witness William Fisher, RIAA filed a motion for declaratory ruling seeking clarification of the statutory standard. In an order issued on July 16, 2001, the Librarian ruled as follows:

The statutory standard set forth in section 114(f)(2)(B) requires the Panel to determine the rates that a willing seller and a willing buyer would agree upon through voluntary negotiations in the marketplace. The Panel must use the "willing seller/willing buyer" standard to set rates for all non-interactive, nonsubscription transmissions made under the section 114 license, including those within 150 miles of the broadcaster's transmitter.

In making its determination, the arbitrators should consider the two factors listed in section 114(f)(2)(B)(i) and (ii), but they should not limit their deliberations to these factors alone. Neither factor defines the standard for setting the rates. See, H.R. Rep. No. 105-796, 105th Cong., 2d Sess. 86 (1998) ("The test applicable to establishing rates and terms is what a willing buyer and willing seller would have arrived at in marketplace negotiations. In making that determination, the copyright arbitration royalty panel shall consider economic, competitive and programming information presented by the parties including, but not limited to, the factors set forth in clauses (i) and (ii)."). To the extent that a party's testimony is relevant to the analysis of what a willing buyer/willing seller would accept in the marketplace, it should be considered.

Order of July 16, 2001 at 5.

For further guidance in setting royalty rates that reflect the "willing buyer/willing seller" standard, the Librarian referred the Panel to his decision in the satellite rate adjustment proceeding. *See id.* In construing parallel language of 17 U.S.C. §119(c)(3)(D), the Librarian declared that "economic, competitive and programming information" must be considered by the Panel "if it were relevant to determining fair market value" but the weight to be accorded each factor depended upon its relative

significance to a determination of fair market value. 62 FR 55742, 55746-47 (October 28, 1997).

Accordingly, the willing buyer/willing seller standard is the *only* standard to be applied. The two factors enumerated in the statute do *not* constitute additional standards or policy considerations. Nor are these factors to be used *after* determining the willing buyer/willing seller rate as bases to adjust that determination upward or downward. The statutory factors are merely factors to be considered, along with any other relevant factors, in *determining* rates under the willing buyer/willing seller standard.

3. The Nature of "The Marketplace"

The parties agree that the directive to set rates and terms that "would have been negotiated" in the marketplace between a willing buyer and a willing seller reflects Congressional intent for the Panel to attempt to replicate rates and terms that "would have been negotiated" in a *hypothetical* marketplace. *See e.g.*, RIAA PFFCL ¶¶ 77-82, Webcasters PFFCL ¶¶ 17-26. The parties further agree that the "buyers" in this hypothetical marketplace are the Services (and other similar services) and that this marketplace is one in which no compulsory license exists. *See id. See also* Noncommercial Education Broadcasting Rate Adjustment Proceeding 63 FR 49823, 49835 (September 18, 1998) ("It is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect fair market value.") But they bitterly dispute the identities of the "sellers" in this hypothetical marketplace.

RIAA asserts that a single collective of sound recording copyright owners (such as RIAA), offering a blanket license for sale, must be the appropriate seller in the

hypothetical marketplace we seek to replicate. *See* RIAA PFFCL ¶ 94. Consequently, RIAA argues that the 26 voluntary agreements it recently negotiated with various webcaster licensees, pursuant to Section 114(f)(2)(A), would serve as perfect benchmarks. *See* RIAA PFFCL (Introduction at 1).

The Services' perception of the sellers, in the hypothetical marketplace envisaged by Congress, is starkly different. They assert that RIAA's vision "would eviscerate the protections sought by the Justice Department and implemented by Congress to prevent the exercise of market power [by the RIAA or the record companies]." Webcasters PFFCL ¶ 26. By contrast, the Services seem to envision a theoretical world of perfect competition. Accordingly, they press the notion of a theoretical "competitive market" where the sellers consist of a "non-trivial number" of collectives (essentially, multiple RIAAs) in competition with each other, with each offering a blanket license consisting of all copyrighted sound recordings.¹⁰ Tr. 11667-69 (Fisher); Tr. 6431, 6659, 6603-05, 12704 (Jaffe). *See also* Webcasters PFFCL ¶¶ 20-26.

The Panel rejects the Services' view. We recognize that an antitrust exemption was required to enable RIAA to act as a non-exclusive, common agent in negotiating agreements under the statutory license at issue here. In the absence of a compulsory license, even if the designation of the single common agent were non-exclusive, extraordinary market power would be concentrated in that single entity. However, in the hypothetical marketplace, where no compulsory license would exist, RIAA would *not* enjoy such an exemption and services would necessarily negotiate directly with the *record companies*. Indeed, numerous internet services, which were not eligible for

¹⁰ In support of this theory, the Services cite *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990).

statutory licenses, and at least one that was eligible [REDACTED], did reach agreements with individual record companies.¹¹ See e.g., RIAA PFFCL ¶¶ 167-69, Appendix A. See also [REDACTED] xx.

Moreover, we see no Copyright Office or Copyright Royalty Tribunal precedent for the Services' "competitive market" construct in the compulsory license context. Perhaps upon a showing that the record companies themselves, or even the majors, could exert oligopolistic power, we would be tempted to import the *ASCAP v. Showtime* (see n.10 *supra*) concept of multiple licensing collectives, each selling the same product. However, no record evidence supports this proposition.¹² Finally, it is difficult to imagine the practicality of competing licensing collectives each offering full blanket licenses, and the Services could offer no example of such circumstances existing in the real world. See Tr. 6612 (Jaffe).

Neither, however, can the Panel fully adopt the RIAA stance. We recognize that the hypothetical marketplace we seek to replicate would operate more efficiently, with lower transactional costs, if a single collective designated by the services could negotiate with a single collective designated by the record companies. Even if such designations were non-exclusive, Congress clearly perceived antitrust concerns with such an arrangement. Congress authorized antitrust exemptions respecting such negotiations *only* within the context of the compulsory licenses. See 17 U.S.C. § 114(e). See also Webcasters PFFCL ¶ 21, n.7, 8. Consequently, the record companies could *not* designate

¹¹ Of course, the existence of a single negotiated agreement between one DMCA compliant service and one record company does not establish that non-exclusivity alone would provide adequate protection from RIAA market power. See discussion of "non-exclusivity" *infra*.

¹² Indeed, contrary record evidence was adduced. See Tr. 8978-83 (Murdoch) (sound recording marketplace is a competitive marketplace).

a single negotiation agent for non-statutory licenses, whether non-exclusive or not. RIAA's reliance upon the DPRA Senate Report (see RIAA RPFCL ¶ 19, n.30) is misplaced. The Report does state that non-exclusivity "should help" prevent RIAA from demanding supra-competitive rates but, again, only in the context of the compulsory license where RIAA can not withhold use of the copyrighted works. *Id.* Accordingly, in the hypothetical marketplace, where no compulsory license would exist to provide true protection, we do not perceive the hypothetical seller to be RIAA. The appropriate sellers would be the individual record companies.

Thus, the Panel perceives the Section 114(f)(2) hypothetical marketplace as one where the buyers are DMCA-eligible (also referred to as "DMCA-compliant") services, the sellers are record companies, and the product being sold consists of blanket licenses for each record company's repertory of sound recordings.

4. The Appropriate Willing Buyer/Willing Seller Rate

As noted, the statute directs us to "establish rates and terms that *most clearly* represent the rates and terms that would have been negotiated in the marketplace." 17 U.S.C. § 114(f)(2)(B) (emphasis added). In the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors. Moreover, these parties would be negotiating rates for newly created property rights with no established pricing history.

One would, therefore, expect negotiations between diverse buyers and sellers to generate not a uniform rate, but a range of negotiated rates reflecting the particular circumstance of each negotiation. *See, e.g.,* Tr. 2618-20 (Nagle). Congress surely

understood this when formulating the willing buyer/willing seller standard. Accordingly, the Panel construes the statutory reference to rates that "most clearly represent the rates...that would have been negotiated in the marketplace" as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree.

B. SECTION 112(e)

The criteria for setting rates and terms for the Section 112 ephemeral licenses are enunciated under 17 U.S.C. § 112(e)(4), which provides in pertinent part:

The copyright arbitration royalty panel shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive, and programming information presented by the parties, including –

(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and

(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

As does Section 114, this section further directs the Panel to set "a minimum fee for each type of service." 17 U.S.C. § 112(e)(4). Although Section 112 does not explicitly grant the Panel discretion to consider the rates and terms for comparable types of services, it does explicitly grant discretion to "consider the rates and terms under voluntary license agreements" negotiated under the provisions of the statute. 17 U.S.C. § 112(e)(4).

Accordingly, while the language of the two sections varies in minor respects, the Panel interprets the criteria for setting rates and terms as essentially identical. *See* Order of July 16, 2001 at 5.

IV. RATE PROPOSALS OF THE PARTIES FOR WEBCASTING SERVICES

A. RIAA RATE PROPOSALS

The RIAA approach is simple and straightforward. It offers as a benchmark the agreements reached between the RIAA and 26 separate webcasters which, RIAA alleges, represent a broad range of webcaster business models and comparable circumstances. *See* RIAA PFFCL (Introduction at 7-9). RIAA asserts that these agreements, negotiated during the statutorily prescribed period for voluntary negotiations, *see* 63 Fed. Reg. 65555 (November 27, 1998), 65 Fed. Reg. 2194 (January 13, 2000), "involve the same buyer, the same seller, the same right, the same copyrighted works, the same time period and the same medium as those in the marketplace that the CARP must replicate."¹³ RIAA PFFCL (Introduction at 8) (emphasis in original). RIAA further asserts that the rates and terms established by these 26 agreements are corroborated by substantial evidence of record including, *inter alia*, the following:

(i) Approximately 115 agreements between individual record companies and similar services;¹⁴

(ii) An analysis of intellectual property values under the criteria set forth in the *Georgia Pacific* patent infringement case; and

¹³ With the exception of the "same seller," the Panel concurs with this litany. As discussed *supra*, in the hypothetical marketplace, we view the seller as not a single monopolistic collective, but rather the individual record companies. However, this distinction is rather minor because the RIAA conducted its negotiations under circumstances where it could not exert monopolistic power. The 26 agreements were all negotiated in "the shadow" of the compulsory license. Hence, RIAA could not deny use of the copyrighted work to any service that simply filed the appropriate notice pursuant to Section 114(f)(4)(B)(i). *See* 64 Fed. Reg. 50758 (September 20, 1999).

¹⁴ Excepting one agreement with [REDACTED] these agreements involved licenses for different rights granted to non-DMCA compliant services. *See* RIAA PFFCL ¶¶ 167-69, Appendix A. *See also* [REDACTED]

(iii) An "economic value" estimation.

See Id. at 9.

Based upon these agreements, RIAA proposes the following rates for DMCA compliant webcasting services:

(a) For basic "business to consumer" (B2C) webcasting services, either 0.4¢ for each transmission of a sound recording to a single listener, or 15% of the service's gross revenues;

(b) For "business to business" (B2B) webcasting services, where transmissions are made as part of a service that is syndicated to third-party web sites, 0.5¢ for each transmission of a sound recording to a single listener; and

(c) For "listener-influenced" webcasting services,¹⁵ where the transmissions are partly influenced by the listener, 0.6¢ for each transmission of a sound recording to a single listener. *See* RIAA PFFCL (Appendix C) for a more detailed description of proposed rates and qualifications.

RIAA further proposes a minimum fee, subject to certain qualifications, of \$5,000 per webcasting service and a Section 112(e)(1) ephemeral license fee of 10% of each service's performance royalty payable under (a), (b), or (c) *supra*. *See id.* at 3-4.

B. WEBCASTER RATE PROPOSALS

Unlike the RIAA proposals, which are grounded in actual marketplace agreements, the Webcasters proposals are derived from a theoretical economic model.

¹⁵ It should be noted that RIAA believes that such services are not DMCA-compliant and, accordingly, not eligible for the Section 114(f)(2) statutory license. *See* RIAA PFFCL (Appendix C, n.1). RIAA sets forth this proposal only in the event the Panel determines to set a royalty for such services.

The Webcasters' model is fundamentally premised upon the notion that, in the hypothetical marketplace we seek to replicate, copyright owners¹⁶ would license their sound recording digital performance rights and ephemeral reproduction rights to webcasters at a rate no higher than the rates at which music publishers (through the PROs) have licensed their musical work analog performance rights to over-the-air radio broadcasters. See Webcasters PFFCL ¶¶ 276-78; Jaffe W.D.T. 16-19. Accordingly, Webcasters calculated their proposed per-performance and per-hour sound recording performance fee by extrapolation from the aggregate fees paid to ASCAP, BMI, and SESAC by over-the-air radio stations holding blanket performance licenses. Specifically, Webcasters utilized year 2000 data from 872 radio stations (those stations for which their expert was able to obtain relevant data), which they claim constitutes "a significant portion" of the total fees paid to the PROs in 2000. Webcasters PFFCL ¶ 276. See also Jaffe W.D.T. 25-32. By combining this fee data with data on the Arbitron "ratings" or listening audience of these stations, Webcasters converted the over-the-air music stations' fees paid to the PROs into an average fee paid by an over-the-air broadcaster per "listening hour." See Jaffe W.D.T. (Appendix B).

Based upon data from Broadcast Data Systems, Webcasters also calculated a fee per listener song by dividing the "listener hour" fee by the average number of songs played per hour by music-intensive format stations. This calculation produced a fee per song and fee per listener hour for the performance of musical works by the over-the-air radio stations of 0.02¢ per song and 0.22¢ per hour, respectively. See Jaffe W.R.T. 29-30,

¹⁶ As discussed *supra*, Webcasters believe the copyright owners would be selling their rights through multiple, competing collectives, but the Panel rejects this view. We find that the Section 114 and Section 112 copyright sellers would be the record companies.

Figure 3. However, because, on average, webcasters play 15 songs per hour, compared to the 11 per hour played on over-the-air radio, the per-hour rate was adjusted to 0.3¢ per hour. *See* Webcaster PFFCL ¶ 277. We note, however, that the 0.3¢ figure is not derived by simply multiplying 0.2¢ by 15, as Webcasters suggest. *See id.* Rather, we presume, Professor Jaffe formulated a mathematical proportion and performed the following calculation: $11X = (15)(.22)$; therefore, $X = 0.3¢$.

Webcasters assert that the 0.02¢ per song and 0.3¢ per hour benchmarks should be adjusted downward for a variety of factors, but offer quantification for only one factor – difference in promotional value. *See* Jaffe W.D.T. 34-43, Tr. 6517-34 (Jaffe).

Webcasters note that radio play unquestionably promotes the sale of record albums. However, sound recording copyright owners receive a greater benefit from the sale of phonorecords than do copyright owners of the underlying musical works. *See* Jaffe W.D.T. 37-38; Tr. 6525 (Jaffe). As discussed *supra*, musical works copyright owners receive payment for each sale of a phonorecord via licensing of their “mechanical” rights. However, the amount of remuneration is set by statute. *See* Jaffe W.D.T. 44-45; Tr. 6526 (Jaffe). By contrast, the profits that sound recording owners command from sales of their phonorecords are under no legal restraints. *See* Jaffe W.D.T. 46-47. If, as Webcasters assume, the value of the sound recording digital performance right is worth no more than the musical work analog performance right, Webcasters argue that the *total* remuneration received by each of the copyright owners derived from performances should be equal. *See* Jaffe W.D.T. 45-46. Webcasters accordingly argue that, if royalties paid to musical works copyright owners are to be used as a benchmark for royalties that should be paid to sound recording copyright owners, an adjustment is required to account for the greater

promotional benefits received by the sound recording owners relative to the musical work owners.¹⁷ See Jaffe W.D.T. 44-47.

To determine the appropriate adjustment, Webcasters assumed that 27% of all record album sales were directly attributable to record play on the radio.¹⁸ See Jaffe W.D.T. 44. Webcasters then calculated the promotional value discount that reflects the difference in the total remuneration derived by sound recording owners and musical work owners from the sale of record albums promoted by over-the-air radio. See *id.* at 47; Webcasters PFFCL ¶ 293, n.124. This calculation implied that a sound recording royalty for over-the-air radio performances should be 52% of the estimated musical works royalty. See *id.* However, to be “conservative,” Webcasters applied a discount of only 30% -- *i.e.*, they propose a Section 114(f)(2) royalty fee for sound recording digital performances that is 70% of the musical works analog performance benchmark royalty that they estimated. See Jaffe W.D.T. 48; Webcasters PFFCL ¶ 295; Tr. 6534 (Jaffe). Applying this discount to Webcasters per-performance benchmark of 0.02¢ and their per hour benchmark of 0.3¢, yields a proposed per-performance fee of .014¢ and a per-hour fee of 0.21¢.

¹⁷ This, of course, assumes that these collateral benefits were, and would be, considered by the relevant parties in the negotiation of appropriate royalties for the respective rights. No persuasive evidence supporting this proposition was adduced.

¹⁸ This assumption is also suspect. The Soundscan survey, upon which Webcasters rely, reflected only that 27% of the respondents identified “heard on radio” as what most influenced them to purchase record albums. See Jaffe W.D.T. ¶ 14. This does not necessarily imply that record sales increased 27% *solely due* to radio play.

In their PFFCL, Webcasters, for the first time in this proceeding,¹⁹ propose an alternative royalty metric – a percentage-of-revenue fee structure, provided that each webcasting service could elect which fee structure to utilize. See Webcasters PFFCL ¶¶ 275, 283, 296. Webcasters propose a fee of 3% of a webcaster's gross revenues,²⁰ which they assert "is taken straight from the ASCAP/BMI/SESAC broadcast radio licenses." Webcasters PFFCL ¶ 283. Webcasters assert that "the PROs collectively receive approximately 3 percent of broadcast radio music station revenues directly attributable to over-the air radio." *Id.* With respect to this percentage of revenue fee structure, Webcasters apply *no* downward adjustment because "it is an alternative to be elected at the Webcaster's option." *Id.* at 296.

With respect to "business to business" syndicators and to "listener-influenced" webcasting services, Webcasters propose the same rates as proposed for basic webcasting services. See *id.* at 297-305. They argue *inter alia* that "[r]egardless of the type of service, the nature of the public performance is the same; and the value of the performance does not change merely because of the technology of the webcaster or the fact that the sound recording is heard when it is accessed at a third-party web site [syndicated] rather than the originating webcaster's site." *Id.* at 297.

Webcasters propose *no additional* royalty fees for the making of ephemeral copies under Section 112(e) because "[s]uch copies have no economic value separate or

¹⁹ This proposal is surprising because heretofore Webcasters repeatedly asserted that a percentage of revenue metric is inappropriate. See e.g., Jaffe W.D.T. 22; Tr. 4317-18 (determining the relevant revenues associated with Section 114 webcasting would "create[] enormous potential measurement problems.") Moreover, this proposal is untimely. See Order of November 3, 2001 (to which no party objected).

²⁰ Webcasters set forth their definition of "gross revenues" at Webcasters RPPFCL ¶¶ 64-65.

distinct from the value of the public performances they effectuate.” *Id.* at 354.

Respecting minimum fees, Webcasters assert that the only justification for imposing a minimum fee is to protect against a situation in which the licensee’s performances are such that it costs the license administrator more to administer the license than it would receive in royalties. *See* Jaffe W.R.T. 31; Tr. 12387 (Jaffe). This is particularly true under the per-performance fee structure, which presumably provides the appropriate level of compensation for each use of the copyrighted work. *Id.* Moreover, Webcasters assert that the appropriate calibration for the minimum fee is the incremental costs to the license administrator of adding another license to the system regardless of how many performances they make. *See* Jaffe W.R.T. 32; Tr. 12388 (Jaffe). Accordingly, based upon the minimum fees allegedly charged by the PROs, Webcasters propose a minimum fee of \$250 per annum. *See* Webcasters RPFCL ¶ 163.

**V. THE PANEL’S DETERMINATION OF ROYALTY RATES
FOR WEBCASTER AND BROADCASTER SERVICES**

**A. APPLICATION OF THE SECTION 114(f)(2) AND
SECTION 112(e) STATUTORY FACTORS**

1. Section 114

Section 114(f)(2) directs the Panel to base its decision on information presented by the parties, including:

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. §114(f)(2)(B)

As we previously noted, these two factors do *not* represent additional criteria. They are merely factors to consider, along with any other relevant factors, in setting rates under the willing buyer/willing seller standard. *See* Order of July 16, 2001 at 5. The weight to be accorded each factor, if any, depends upon its relative significance to a determination of fair market value. *See id* citing Satellite Rate Adjustment Proceeding 62 FR 55742, 55746 (October 28, 1997).

As to the first factor (impact on sales), we cannot conclude with any confidence whether any webcasting service causes a *net* substitution or *net* promotion of the sales of phonorecords, or in any way significantly affects the copyright owners' revenue streams. The evidence adduced by RIAA on this issue, consisting entirely of anecdotes and unsupported opinion testimony, is unconvincing. (*See generally* RIAA PFFCL ¶¶ 124-39, 436-53.) Indeed, RIAA did not attempt to offer any *empirical* evidence to support its "concerns" that webcasting causes a net substitution of phonorecord sales. *Id.*

Webcasters also failed to present any compelling evidence. In addition to a plethora of similarly unsupported opinion evidence (*see e.g.*, Webcasters PFFCL ¶¶ 311, 315-19, 322), they produced some unpersuasive empirical evidence (*see generally* RIAA PFFCL ¶¶ 454-85) to support their claim that webcasting actually causes a net promotion of phonorecord sales.

For example, the Soundata survey presented by Mr. Fine evinced a net promotional effect of radio broadcasts, but said little about the net promotional effect of the internet -- and nothing about any net promotional effect of webcasting. *See* Fine W.D.T. 6-8. The study conducted by Professor Mazis suggested that the impact was, at

best, *minimally* promotional. Over 80% of the respondents who listened to radio retransmissions indicated that listening did not affect their overall music purchases and another 9% were not sure; similarly, over 70% of the respondents who listened to internet-only streaming reported that listening did not affect their overall music purchases and another 5% were not sure. See RIAA Exhibit 102 RP (Tables 29 & 52); Tr. 5555-56 (Mazis). Moreover, the extremely low response rate raises additional questions about the survey. The 47% adult response rate and the 19% teen response rate²¹ fall below generally accepted standards. See Tr. 12027-30 (Seltzer). Indeed, Dr. Seltzer's critique of the Fine and Mazis studies, while not flawless itself, nevertheless substantially undermines the reliability of the conclusions offered by these two witnesses.

After weighing the credibility of the various conflicting witnesses and assessing the strength of the proffered empirical evidence, the Panel concludes that, for the time period this CARP is addressing, the *net* impact of internet webcasting on record sales is indeterminate. In any event, as explained earlier (*see* discussion in Section III.A.2, *supra*), to the extent those factors influence rates that willing buyers and willing sellers would agree to, they will be reflected in the agreements that result from those negotiations.²²

²¹ In fact, of the 757 teen respondents, 347 were directed to answer questions about webcasting. See Mazis W.D.T. 5-6; Mazis W.R.T. 2; RIAA Exhibit 102 RP (Tables 3, 40 & 63). Accordingly, the results presented by Professor Mazis reflect less than 9% of the 4000 teen panel members who were invited to participate in the survey.

²² By contrast, it would be necessary to adjust theoretical models, such as the Jaffe formulation, that borrowed data from another marketplace. With a theoretical model, these factors would not already have been accounted for by the negotiating parties. In addition, the setting of prospective statutory rates could be affected by record evidence that clearly established that parties to agreements had misperceived relevant economic realities at the time of their negotiation. For example, if comparable marketplace agreements (used to set a rate for one period) were negotiated on the mutual assumption that webcasting caused a net decline in record sales, but the hearing record proved conclusively that it actually caused a net increase in sales, then the Panel's

Regarding the second factor (the relative creative, technological, and financial contributions of copyright owners and transmitters), we also find no persuasive evidence militating in favor of either copyright owners or services. *See generally* RIAA PFFCL ¶¶ 486-98; Webcasters PFFCL ¶¶ 333-52. Clearly, the streaming industry has made meaningful contributions and incurred significant costs and risks in connection with the services it offers to the public. Similarly, copyright owners have made meaningful contributions and incurred significant costs and risks in connection with the creation of their copyrighted recordings.

Again, we would expect these considerations to be fully reflected in any agreements *actually negotiated* between webcasters and copyright owners in the relevant marketplace. Accordingly, if such agreements exist, absent unusual circumstances, no rate adjustment would be required to determine willing buyer/willing seller rates. Relative contributions, costs, and risks would already be subsumed within the negotiated rates.

2. Section 112

Section 112(e) similarly directs the Panel to base its decision in part on information presented by the parties regarding these same two factors, specifically:

- i. whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
- ii. the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative

rate-setting for subsequent periods should reflect the reduction in royalty rates which this newly-established conclusion would naturally bring about in marketplace pricing.

creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. §112(e)(4).

Again, we find no persuasive evidence militating in favor of either copyright owners or streaming services.²³ And again, if agreements actually negotiated between webcasters and copyright owners in the relevant Section 114 marketplace can be observed, these considerations should already be subsumed in the rates negotiated by the parties.

B. PER-PERFORMANCE IS THE PREFERRED ROYALTY METRIC

At the outset of its analysis, the Panel must consider two foundational questions. The first relates to the type of metric to be adopted for the royalty rate. The second is whether rate determinations are best derived from theoretical economic analyses or from any of the licensing agreements in the record before us. We address each of these matters in turn.

Regarding the choice of a metric, we note that initially RIAA proposed a percentage-of-revenue option, but by the conclusion of the proceeding, it urged that only a per-performance model be adopted. *See* RIAA Comments Concerning Definitions of Gross Revenues and Performance at 2 (Jan. 18, 2002). A similar evolution in perspective on this issue occurred over the course of RIAA negotiations with the 26 licenses. Initially, RIAA negotiated two percentage-of-revenue agreements with licensees. RIAA

²³ A considerable amount of the hearing record consists of detailed testimony and exhibits concerning the economics of the recording, music publishing, broadcasting, and webcasting industries; how various streaming services operate; and the technology of the internet. While valuable as general background information, the Panel does not find that this evidence materially aids our determination of what royalty rates willing buyers and willing sellers would actually agree to for the licenses at issue.

Exs. [REDACTED] Soon, however, RIAA determined that per-performance licenses were more advantageous (*see* Tr. 9203 (Marks)), and it began to offer licenses on a per-performance basis. Thereafter, it reached per-performance agreements with a number of licensees. *See, e.g.*, RIAA Exs. [REDACTED].

From the evidence of record, the Panel concludes that three factors militate in favor of the per-performance approach. First, in reality, revenue merely serves as “a proxy” for what is truly being licensed. *Jaffe W.D.T. 22*. By contrast, a per-performance metric “is directly tied to the nature of the right being licensed.” *Id.* The more intensively an individual service uses the rights being licensed, the more that service shall pay, and in direct proportion to the usage. *See id.* at 21. And unlike a per-hour fee structure, per-performance models appropriately capture partial performances resulting from a “skip song” feature. *See RIAA RPFCL ¶ 189*.

Second, percentage-of-revenue models are difficult to utilize because identifying the relevant webcaster revenues can be complex, particularly where the webcaster offers features unrelated to music. A given percentage rate can produce widely variant royalties depending upon the revenue base against which it is applied. *See Marks W.D.T. 7; Jaffe W.D.T. 22; Tr. 9138-39, 9201-03 (Marks); Tr. 4317-18 (Jaffe)*.

Third, because many webcasters are currently generating very little revenue, use of a percentage-of-revenue royalty for the statutory licenses at question could result in a situation in which copyright owners are forced to allow extensive use of their property with little or no compensation. This potentiality was something Congress specifically cautioned against in enacting DMCA. *See DMCA Conference Report 85-86*.

For these reasons, the Panel concludes that, where feasible to utilize, a performance fee metric is highly preferable to a percentage-of-revenue structure or to a per-hour fee structure, if such a rate can be reliably derived from the evidence of record.

C. A THEORETICAL ECONOMIC MODEL VERSUS NEGOTIATED AGREEMENTS

The second foundational issue relates to the type of evidence that can most reliably be used for deriving the royalty rates we must determine in this proceeding. On this issue, the two sides present starkly different viewpoints. RIAA argues that the best available evidence of the rate which willing buyers and willing sellers would agree to can be found in the 26 agreements it actually negotiated with licensees for the rights in question. The Services, on the other hand, contend that these agreements are fatally tainted in numerous respects and that willing buyer/willing seller rates are best derived from the thoughtful, theoretical model developed and explicated by Dr. Adam Jaffe, a distinguished economist. In essence, the parties ask us to choose between theory and practice, with each side pointing out numerous alleged flaws in the opposing party's presentation.

1. The Shortcomings of the Theoretical Model

Preliminarily, we recognize that rate-setting based upon theoretical market projections is a difficult endeavor. *See e.g., National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998). This is true in part because it is virtually impossible for a theoretician to identify all of the factors that might influence the structure of a market and the manner in which these factors will interact to establish rates. The complexity of real world markets makes predicting market rates highly susceptible to

error. *See* Wildman W.D.T. 15. Real world participants in an actual marketplace discover relevant market-influencing factors as they negotiate deals, and these factors are reflected in the ultimate agreements reached. *See id.* Actual agreements contain embedded information that cannot be captured fully in the projections and estimates of theoretical analysts. *See* Tr. 3369-71 (Wildman). Factors that the analyst suspects might influence hypothetical negotiations should be subsumed and reflected in actual negotiated agreements, but the theorist's capacity for perfect projection is subject to the inherent limits of human fallibility. *See id.*

Moreover, theoretical models are necessarily based upon a series of logical assumptions and analogies. Each assumption or analogy inevitably involves some degree of uncertainty or inexactitude. The cumulative impact of a string of such assumptions may produce a model which differs substantially from real world experience. In this case, for example, the analysis offered by Professor Jaffe relies upon at least a dozen assumptions, as enumerated below:

- (1) that different technologies (analog vs. digital) are analogous;
- (2) that different sellers (PROs vs. record companies) are analogous;
- (3) that different buyers (established over-the-air broadcasters vs. internet entrepreneurs) are analogous;
- (4) that different copyrights (musical works vs. sound recordings) are analogous;
- (5) that different delivery systems (over-the-air, where cost/listener remains constant vs. internet, where broadband cost/listener increases) are analogous;
- (6) that different cost structures (individual song writers vs. integrated creative/production/marketing corporate entities) are analogous;
- (7) that different demand structures (a finite universe of performing artists vs. the mass record-buying public) can be analogized;

- (8) that infant and mature industries behave similarly;
- (9) that different royalty metrics (percentage-of-revenue vs. per-performance) can be accurately converted from one to another;
- (10) that "listener hours" can be accurately converted into "listener songs;"
- (11) that an end-product number (a dollar volume amount) from one market can form the basis for a backward calculation to a different metric in a different market; and
- (12) that a promotional impact in one industry (radio broadcasting) can be reliably quantified and then used as a rate reduction adjustment for a different industry (webcasting).

The Panel is uncomfortable with many of these assumptions and the cumulative effect casts significant doubt on the reliability of the ultimate conclusions. The Panel finds that this theoretical construct suffers serious deficiencies. Two examples are addressed below.

2. The Model is Based upon a Different Market

As discussed above, the webcasters' rate model is premised upon the fundamental assumption that in the Section 114(f)(2) hypothetical marketplace, copyright owners would license their internet sound recording performance rights to webcasters at a rate no higher than the rates at which music publishers (through the PROs) have licensed their musical work analog performance rights to over-the-air radio broadcasters. *See* Section IV.B. *supra*. Accordingly, Professor Jaffe calculated proposed performance fees by extrapolation from a large sample of aggregate fees paid to ASCAP, BMI, and SESAC by over-the-air radio stations holding blanket performance licenses.

This analysis by necessity engrafts concepts and presumptions from one marketplace onto another. Dr. Jaffe's model is thus based upon different buyers and different sellers, selling different rights from those at issue in this proceeding.

The Panel agrees with RIAA that the market for the performance of musical works is distinct from the market for the performance of sound recordings. Musical works and sound recordings do not compete in the same market, and they have different cost and demand characteristics. *See generally* RIAA PFFCL ¶¶ 523-35. Moreover, the Panel rejects Dr. Jaffe's premise that the value of performance rights in sound recordings are *necessarily* no greater than in musical works because costs are "sunk." *See id* at ¶ 552-67. This view assumes (erroneously, in our view) that sound recording owners have a static perspective and do not consider the costs of developing new sound recordings when negotiating fees. *See Schink W.R.T.* 6-7; Tr. 13576-78, 13584-89 (Schink).

As to the precise relative value of performance rights in sound recordings *vis-à-vis* musical works, we render no opinion. However, in determining the prices to which willing buyers and willing sellers would agree, the "true" relative value -- even if that could be precisely ascertained -- is less important than the parties' perception of that relative value. Thus, Professor Jaffe's theoretical calculations are far less powerful evidence in this regard than, for example, David Madelbrot's repeated testimony that one of the factors which led Yahoo! to sign the RIAA agreement was Yahoo!'s belief that the sound recording royalty rates in that agreement were "[redacted]" of what Yahoo! paid to the PROs for musical works royalties. Tr. 11250, 11270, 11287-89 (Mandelbrot).

In addition, many of the webcasters' arguments in support of Professor Jaffe's conclusions have significant limitations. *See generally* RIAA PFFCL ¶¶ 578-89 ("master

use” and “synch” rights), 590-93 (statutory allocation), 610-21 (international evidence). And Webcasters can take no comfort in the prior Subscription Services Rate Proceeding, in which the Register simply found that neither side had produced compelling evidence of relative value. *See* 63 Fed. Reg. 25394, 25404 (1998). *See also* Order of July 18, 2001 at 2.

3. The Conversion from Percentage of Revenues

Regarding this issue, the Panel again agrees with RIAA that converting a rate from the metric in which it was negotiated into another metric to be used as a benchmark is usually a risky undertaking. *See* RIAA PFFCL ¶¶ 597-600; *cf. ASCAP v. Showtime*, 912 F.2d 563 at 579 (magistrate’s opinion). Indeed, the listener-hour conversions calculated by Professor Jaffe bear little resemblance to the blanket license fees *actually paid* by some individual radio stations. *See e.g.*, RIAA PFFCL 602-04. For example, during the year 2000, one specific station which was analyzed actually paid four times the amount of fees to the PROs that Professor Jaffe’s conversion calculation had predicted. Moreover, even if the conversion were mathematically correct, real world considerations may drive marketplace players to utilize one metric and strongly resist another. *See* Schink W.R.T. 6-7; Tr. 13541-53, 13650-69, 13676-78 (Schink).

Given the uncertainty inherent in any theoretical model and our numerous significant concerns regarding the limitations of this specific webcaster analysis, the Panel next examines whether the record before us affords better evidence.

D. COMPARABLE AGREEMENTS ARE THE BEST BENCHMARK

The Panel believes that the quest to derive rates which would have been negotiated in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances. This belief is buttressed by two factors.

The first is statutory. Both Sections 114 and 112 explicitly invite the Panel to consider the rates and terms negotiated under voluntary license agreements. *See* 17 U.S.C. §§ 114(f)(2)(B), 112(e)(4). Section 114 further invites the Panel to consider other agreements negotiated by comparable digital audio transmission services under comparable circumstances. *See* 17 U.S.C. § 114(f)(2)(B). Second, because as noted above, it is extraordinarily difficult to predict marketplace results from purely theoretical premises, it is clearly safer to rely upon the outcomes of actual negotiations than upon academic predictions of rates those negotiations might produce. *See* Tr. 3369-71 (Wildman).

Indeed, as Professor Jaffe himself testified, comparable marketplace agreements, if available, provide the best evidence of the prices to which willing buyers and willing sellers actually agree. Tr. 6618 (Jaffe) ("If you had available agreements that you believe represent reasonable rates for users that are comparable to the users being licensed by the proceeding, I think that would have been the best thing to do."). *Accord*, Tr. 13675 (Schink) (The best evidence for determining fair market rates is agreements actually negotiated in the marketplace). The Panel's next task, therefore, is to consider whether any of the agreements before us constitute such comparable agreements.

E. THE [REDACTED] LICENSE AGREEMENT

We concluded above that the Section 114(f)(2) hypothetical marketplace is one where the buyers are DMCA-compliant services, the sellers are record companies, and the product being sold consists of blanket licenses for each record company's repertory of sound recordings. Accordingly, the most reliable benchmark rate would be established through license agreements negotiated between these same parties for the rights described. Unfortunately, the record contains only one agreement that appears to meet all three of these parameters, namely, the agreement between [REDACTED] [REDACTED]. See [REDACTED]. [REDACTED] testified that [REDACTED] was a fully DMCA-compliant service.²⁴ See Tr. [REDACTED]; [REDACTED]. The agreement provided for a royalty rate of [REDACTED] per performance²⁵ with [REDACTED]. Regrettably, while directly on point, this agreement can be accorded little weight because it was never implemented, and

²⁴ Curiously, the license agreement requires compliance with Section 114(d)(2)(C)(i) (the performance complement requirements) but it is silent as to compliance with Section 114(d)(2)(A) (the non-interactivity requirement).

²⁵ The agreement is silent respecting any ephemeral royalties under Section 112(e). See RIAA Exhibit [REDACTED]. This could be interpreted to mean either that (1) the [REDACTED] per performance fee included the making of ephemeral copies incident to the transmissions or (2) an unspecified additional fee could be due under Section 112(e). The agreement specifies that the Licensee is not granted [REDACTED]

[REDACTED] *Id.* at 3. It further provides that the agreement [REDACTED] and provides examples, none of which relate to making ephemeral copies. Although it is difficult to imagine that the parties intended additional, but unspecified, fees to be paid (or that the making of ephemeral copies would be unnecessary), in light of this unambiguous language, we cannot assume that the intended rate for making ephemeral copies was zero. See generally discussion of ephemeral royalties in Section V.N. *infra*.

[redacted] therefore never paid any royalties under it. Rather, [redacted] outsourced its streaming to a third party, which apparently deemed the agreed rate too high and elected instead to avail itself of the compulsory license rate set in this proceeding. *See* RIAA's Reply of October 24, 2001 to the Order of October 2, 2001. On balance, since no royalties were ever paid pursuant to its provisions, we conclude that this agreement is of virtually no use as a rate benchmark. *See* discussion in Section V.G.2. *infra*.

**F. THE 26 RIAA LICENSE AGREEMENTS CONSTITUTE
THE NEXT CLOSEST APPROXIMATION
OF THE HYPOTHETICAL MARKETPLACE**

The 26 agreements between RIAA and various services were the product of a marketplace with many characteristics similar to the hypothetical marketplace the Panel is directed to analyze. Although the seller in these negotiations was different (RIAA, rather than record companies), the buyers were the same, and the rights for sale were identical. Of course, the marketplace differed since the agreements were negotiated within the context of a compulsory license, while the hypothetical marketplace is one where no compulsory license would exist. *See* Section III.A.3. *supra*. However, the very fact that RIAA, a single designated negotiating agent of the record companies with potential to yield monopolistic power, negotiated the agreements under the shadow of the compulsory license, renders the agreements more, rather than less, comparable. Stated otherwise, because the agreements were negotiated with DMCA-compliant services in the context of a protective compulsory license, the distinction between *RIAA* as seller, in contrast to the *record companies* as sellers, becomes much less significant. So long as buyers could avail themselves of the compulsory license, RIAA was deprived of a

intended to be used in the CARP. *See e.g.*, RIAA RPFCL ¶ 120. This explanation lacks credibility. RIAA meticulously crafted confidentiality clauses for each and every license agreement. These clauses prohibit any licensee from discussing the terms and conditions of the agreement with other parties. *See* RIAA Exs. 60 DR- 84 DR. But it simultaneously reserved its own right to use each agreement however it wished at the CARP proceeding. *See id.* These clauses belie the notion that RIAA's primary²⁹ concern was to establish precedents for other potential licensees.

As we have noted, in the statutory marketplace, one would expect to find some buyers - for various reasons - that are willing to pay higher rates for a product than most other buyers pay. But, if a seller is in a position to *temporarily* sacrifice volume, it can afford to negotiate deals only with those buyers willing to pay above-market rates. By engaging in this conduct, the Panel finds, RIAA created a virtually uniform precedent with rates above those that most buyers would be willing to pay.³⁰

Moreover, RIAA devoted extraordinary efforts and incurred substantial transactional costs to negotiate successfully a relatively small number (26 agreements out of hundreds of services) of license agreements with mostly minor services -- services that promised very little actual payment of royalties. *See* discussion *infra* Section V.G.2; RIAA Exhibit 126 DP; Marks W.D.T. 4. Such sacrificial conduct makes economic sense

²⁹ We do not find that establishment of a high CARP benchmark was RIAA's *only* motivation. We do not doubt that RIAA sought to "sign up" as many licensees as it could - particularly "major players" like "AOL, Viacom and Yahoo!" (*see* Tr. 558-60 (Rosen)) - in hope of avoiding an expensive and risky CARP proceeding. RIAA hoped that if a major player fell in line, all others would follow. *See id.* *See also* Tr. 13876-77 (Marks).

³⁰ By contrast, the [REDACTED] license, involving the only DMCA-compliant service that negotiated with an individual record company, produced a royalty rate significantly less than the "sweet spot" RIAA rate. *See* Section V.E., *supra*.

only if calculated to set a high benchmark to be later imposed upon the much larger constellation of services.

In fact, RIAA reached agreement with only 26 of the 60 services with which it had "meaningful discussions." RIAA PFFCL ¶ 189. And RIAA offered virtually no evidence to explain why the majority of these services did not conclude an agreement. In the absence of alternative explanations, the Panel infers that this majority of buyers was simply unwilling to agree to the rates RIAA was seeking. Indeed, had RIAA *not* pursued this negotiating strategy, we would have expected to see a much broader range of negotiated rates. The tight range of rates among the 25 non-Yahoo! agreements suggests a take-it-or-leave-it approach. RIAA decided to deviate significantly from its 0.4¢ precedential rate on only one occasion – to successfully negotiate the deal with Yahoo. *See* n.26 *supra*.

Because RIAA was apparently able to close deals at its "sweet spot" with only a minority of licensees, the Panel finds that these non-Yahoo! agreements do not establish a reliable benchmark. Rather, they establish, at best, the high end of the rate range that some services (with special circumstances) might pay. Before addressing the Yahoo! agreement, however, we shall set forth additional bases for determining that the 0.4 ¢ rate (as represented by the 25 non-Yahoo! agreements) is not a useful benchmark.

2. Licensees That Paid Little or No Royalties Or Quickly Ceased Operating

Although RIAA has urged the Panel to adopt the rates represented in the 26 voluntary agreements it negotiated with licensees, one of RIAA's lead economic experts, Dr. Thomas T. Nagle, enunciated principles that would result in the Panel rejecting nearly all of these agreements. Dr. Nagle testified that the Panel should accord no weight to

agreements with licensees which are unable to endure in the marketplace. *See* Tr. 2642-48 (Nagle). Dr. Nagle rested his overall analysis on the fundamental assumption that the current webcasting industry consists of a large number of marginal or insignificant entities (*see, e.g.*, Tr. 13393 (Nagle); Nagle W.D.T. 5) and that a dramatic "shake out" must and will occur. *See id.* This, in his view, is both inevitable and desirable because it will bring about market consolidation, which will result in the emergence of a far smaller number of viable webcaster companies. These, in turn, will be able to prosper and endure (operate at a "sustainable scale at this future point of viability" (Nagle W.D.T. 6)) and, not incidentally, be able to afford significantly higher royalty payments to copyright owners. RIAA Ex. 108 DP (Nagle analysis) at 15. The actions of the marginal economic entities which are fated to disappear in this process, in Dr. Nagle's view, are economically inconsequential and offer virtually no probative value as benchmarks for setting future royalty rates. Tr. 2642-48, 13393 (Nagle).

This testimony is significant because the majority of RIAA's 26 licensees fall into the category of smaller entities which are unlikely to endure. A number of them never launched their services, and another group, after launching, have already ceased operation. All but a handful of the 26 licensees either (1) paid zero royalties; (2) paid no royalties beyond the prescribed minimum (due to low revenues or because they streamed so few transmissions); or (3) quickly went out of business. These licensees include Cyberaxis; Multicast Technologies, Inc.; Cornerbrand.com; Beem-Me-Up Broadcasting; Spacial Audio Solutions; Cybertainment Sys. Corp.; Kickradio.com;³¹ NRJ Media Corp.;

³¹ The [REDACTED] agreement does not specify a "minimum." *See* RIAA Exhibit [REDACTED]. It requires a [REDACTED] advance, which was paid. However, the service has not yet launched, and the fee formula appears illusory. *See id.* *See also* Webcasters PFFCL ¶¶ 216-17, n.102.

JamRadio.com; MoodLogic, Inc.; She Sings Media, LLC; GaliMusica; OnAir.com;³² Soundbreak.com; Spike Internet Radio, Inc;³³ Visual Dynamics, LLC; eNashville; Fansedge, Inc.; The Buzz Bin.com; and SLAM Media, Inc. *See* RIAA Exhibit 15 RR, 80 DR, 70 DR, 70A DR; 84 DR, 82 DR, 69 DR, 73 DR, 63 DR, 63A DR, 64 DR, 064A DR, 77 DR, 79 DR, 68 DR, 66 DR, 74 DR, 76 DR, 65 DR, 67 DR, 72 DR, 81 DR, 71 DR. Another licensee has paid *de minimis* royalties of less than [REDACTED] over two license terms.³⁴ *See* Tr. 9918-31 (Marks); RIAA Exhibit 15 DR, [REDACTED].

Apart from Dr. Nagle's opinion, several factors support the conclusion that agreements involving non-functioning or minimally-functioning services (under which few or no royalties have been paid) should carry significantly less weight as benchmarks than licensing agreements involving vibrant businesses that have paid significant royalties. First, smaller, economically marginal licensees that expected to earn little revenue, or to stream few transmissions, would care little, when negotiating their agreements, about the fee formula -- other than the minimum fee required. Second, services that quickly terminated their businesses tend to exhibit little business acumen or experience. *See e.g.*, Tr. 13390-92 (Nagle). In this new marketplace, agreements with licensees of these sorts should be accorded significantly less weight. *Cf. ASCAP v. Showtime*, 912 F.2d 563 at 567, 579. Indeed, a strict application of Dr. Nagle's opinion

³² Additionally, the Panel has concerns that OnAir.com perceived an RIAA license to be considerably more advantageous than a statutory license for its particular circumstances. *See* Webcasters PFFCL ¶ 209.

³³ Operators of Spike Internet Radio also appear to have been under time constraints that could have precluded negotiation of individual licenses with the record companies. *See* Webcasters PFFCL ¶¶ 253-54. *See also* Section V.G.3. *infra*.

that any agreement with a service that is not "economically viable" should be accorded no weight as a potential benchmark (*see* Tr. 2642-48, 13390-93 (Nagle)) would eliminate all but three or "potentially four" of the 26 agreements from *any* consideration.

The Panel renders no findings with regard to the inevitability of an industry "shake out" or any inherent characteristics of smaller services. However, the Panel does find that certain actions of a clear majority of the 26 licensees appear to demonstrate a significant lack of understanding with respect to important aspects of the DMCA. One clear example, described more fully in Section V.N.3. below, is the failure of a majority of the 26 to negotiate the right to make the ephemeral copies of sound recordings necessary to the successful operation of their services. This demonstrated lack of business acumen tends to further erode Panel confidence in the weight to be accorded these agreements as benchmarks.

3. Licensees that Could Not Wait for the Statutory License

As explained previously, *so long as* prospective licensees could avail themselves of the compulsory license, RIAA would be deprived of any significant potential to exercise monopolist power. *See* Section V.F. *supra*. However, if due to special circumstances, some licensees required immediate RIAA licenses, these licensees would no longer be shielded from the potential monopoly power of RIAA. And negotiating DMCA-compliant, voluntary licenses directly with the record companies may have been

³⁴ It also appears that the extremely unsophisticated operator of this service, [REDACTED], may have believed that an RIAA license agreement was *required* even under the statutory license. *See* RIAA Exhibit [REDACTED] at RIAA N1750.

unattractive.³⁵ Under such circumstances, the resulting rates must be deemed to constitute above-market rates. In addition to Spike Internet Radio (*see* n.33, *supra*), both musicmusicmusic ("MMM") and Websound fall into this category.

MMM was the very first license which RIAA negotiated at its predetermined "sweet spot." *See* Section V.G.1., *supra*. MMM had at least three reasons to need an immediate license: (1) to diffuse negative publicity stemming from a Canadian cease-and-desist order, (2) to generate positive press promotion by becoming the first RIAA licensee, and (3) to allay concerns of foreign investors respecting an upcoming initial public offering in Germany. Thus, MMM was extraordinarily eager to secure a voluntary license from RIAA. (*See* Webcasters PFFCL ¶¶ 150-53; RIAA Exhibit 128 DR.) Furthermore, MMM clearly perceived an RIAA license to be more valuable than a statutory license. (*See* Webcasters PFFCL ¶¶ 155-61.) In fact, Mr. Spegg of MMM candidly acknowledged that, because of these factors, [REDACTED]

[REDACTED]³⁶ *See* Tr. 12929-33 (Spegg). Except as to the precise definition of the revenue base, MMM docilely accepted RIAA's proposed [REDACTED] of revenue fee model virtually without substantive negotiation. *See id.*

³⁵ For example, time may not have permitted such negotiations. Or, services might have found the prospect of negotiating a DMCA-compliant license with multiple record companies (that all had access to confidential RIAA records) quite unattractive. Indeed, only one service did conclude a DMCA compliant voluntary license. *See* Section V.E. *supra*.

³⁶ We assume this reasoning also applied to the renewal license (*see* RIAA Exhibit 60A DR). We also note that in the renewal agreement, MMM successfully negotiated a type of mutual MFN clause whereby [REDACTED] *See id.*

This further renders the agreement less useful as a benchmark. It would be circular reasoning for the Panel to rely upon an agreement to establish a marketplace rate [REDACTED]

The Panel also finds that Websound felt a similar sense of urgency. Websound appeared to have been under two time pressures: (1) to resolve uncertainty regarding whether the service would qualify for the statutory license (*see* RIAA Exhibit 136 DR at N9422), and (2) to secure confirmation of its license status for its customers. *See id* at N9421-23, N9720, N9751, N9772-73. *See also* Tr. 10122-26 (Marks). It is also significant that Websound is a very minor player in this market. Despite acceding to one of the highest royalty rates, it has paid less than [REDACTED] since the agreement was executed in September 2000 – less than [REDACTED] of the fees paid by Yahoo! over a similar period. *See* RIAA Exhibit 15 RR.

For these reasons, the Panel concludes that the MMM and Websound agreements reflect buyers at the high end of the rate range and are, as such, of little use as benchmarks for the average marketplace rate.

Putting aside licensees which either (1) paid no royalties beyond the prescribed minimum, (2) quickly ceased operating, or (3) could not wait for the statutory license, only three of RIAA's 26 licensees remain: MusicMatch; Lomasoft; and Yahoo!. Each of these three merit individual discussion.

4. MusicMatch License Agreement

Because the negotiation of the MusicMatch agreement was closely associated with the settlement of infringement litigation initiated by RIAA, it cannot be reasonably characterized as the product of marketplace negotiations between a typical willing buyer and a typical willing seller. Indeed, in order to end RIAA's litigation against it, MusicMatch eventually accepted license fees and terms less favorable than those it had rejected prior to the litigation. *See* Webcasters PFFCL ¶¶ 137, 140-44; RIAA exhibit 115

DR; RIAA Exhibit 152 DR. The Panel also notes that this agreement contains a type of MFN clause [REDACTED]³⁷ This provision further erodes the usefulness of this agreement as a benchmark for what willing buyers and willing sellers would agree to in a hypothetical marketplace where no statutory license (and therefore no CARP proceeding) existed. *See* n.37, *supra*. Accordingly, the Panel finds that this agreement reflects rates above those that willing buyers and sellers would normally negotiate and, in any event, its MFN clause renders it of little use as a benchmark.

5. Lomasoft License Agreement

The Lomasoft agreement, RIAA's second license, was negotiated shortly after the MMM license described previously. *See* Marks W.D.T. (Attachment B). With minor exceptions, it contained the same percentage of revenue fee model as the first license.³⁸ *See id.* The record indicates that Lomasoft is another small service, whose two operators had no prior music licensing experience. *See* Tr. 13109-13, 13119 (Heilbronn). Moreover, since concluding its license agreement with RIAA in August 1999, Lomasoft paid total royalties of approximately [REDACTED] (about [REDACTED] of Yahoo! payments). *See* RIAA Ex.15 RR.

The probative value of the Lomasoft license is also diminished because it has expired and not been renewed. *See* Tr. 13105, 13114 (Heilbronn). Apparently realizing that he initially overpaid, Mr. Heilbronn never seriously discussed renewal of the license.

³⁷ [Deleted due to correction of footnote 36.]

³⁸ RIAA informed Lomasoft that [REDACTED] (emphasis added). RIAA Exhibit 129 DR at RIAA N8552.

He testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Tr. 13115.

Evidently, Lomasoft deemed negotiations with RIAA a futile mismatch. We do not doubt this to be the case. Lomasoft negotiated a license agreement that does not even grant it the right to make multiple ephemeral copies (see RIAA Exhibit 61 DR at §§ 2.2, 2.5), although it appears that the company requires such copies. Cf. Tr. 14972-74. Indeed, Lomasoft believes that the *performance* license *did* grant it the right to make ephemeral copies at no additional charge (see Tr. 13106-07 (Heilbronn)), even though the agreement clearly excludes such rights. See RIAA Exhibit 061 DR at §§ 2.2, 2.5. This record reflects grossly mismatched negotiating parties.³⁹

³⁹ In addition to Lomasoft, a clear majority of the original 26 RIAA agreements did *not* grant the right to make ephemeral copies, including original licenses for Radiofreeworld, NRJ Media, JamRadio, Visual Dynamics, OnAir.com, eNashville, GaliMusica, Spacial Audio Solutions, Multicast Technologies, SLAM Media, Fansedge, Cybertainment, Beem-Me-Up, and Cornerband. We recognize the possibility that some of these services may have erroneously perceived that they could operate their services without this right. Cf. Tr. 14970-71 (Garrett). But interestingly, of these licensees that ultimately renewed their licenses, each renewal contained the grant of rights to make ephemeral copies (for a specified fee). See RIAA Exhibits [REDACTED]; Tr. 14969 (Garrett) [REDACTED]. Because the record does not reflect that any of these licensees changed the manner in which they delivered their services from the first license to the second, we must assume that they required an ephemeral license all along. Moreover, RIAA's own expert witness testified that the process of "ripping" CDs to a server entails copying. See W.D.T. of Griffin 6. See also Tr. 8651 (Talley) (ephemeral [buffer] copies are produced whenever a CD is played). Thus, these licensee's lack of sophistication further enhanced RIAA's ability to secure above-market rates that it could later offer as benchmarks.

Given this totality of circumstances, we have little confidence that the Lomasoft agreement reflects a representative rate that willing buyers and willing sellers would normally negotiate.

6. Weight To Be Given the 25 Non-Yahoo! Agreements

For the reasons cited previously, and for many additional ones not addressed here,⁴⁰ the Services assert that none of the RIAA license agreements are entitled to any weight whatever in establishing the statutory royalty rates. *See* Webcasters PFFCL ¶ 65. Conversely, RIAA does not concede a single problem with regard to any of these license agreements and continues to offer them all as record support for its rate proposals. RIAA argues that all of these licensees, as well as the circumstances surrounding the negotiation of the license agreements, are representative of the real world marketplace. *See generally* RIAA PFFCL ¶¶ 271-314. For example, RIAA asserts that many webcasters are subject to time constraints, require prompt licensing for certainty or other reasons (*see id.* at 299-301), or desire positive publicity. *See id.* at 309. While the Panel agrees that the non-Yahoo! licensees are not unique, RIAA has certainly not shown that they are representative of the majority of webcasters. Doubtless, some licensees do share individual circumstances that would induce them to pay higher rates than services that do not share such circumstances. *See, e.g.,* Tr. 2614-18, 2762 (Nagle) ("soda on the beach" example). But such licensees merely establish the upper bounds of the expected rate range, not the rates to which more representative buyers would willingly agree.

⁴⁰ *See generally* Webcasters PFFCL ¶¶ 65-272. These additional arguments generally entail allegations that (1) the licensees were not comparable types of services; (2) the licenses were negotiated under non-comparable circumstances; or (3) the licenses negotiated reflect RIAA's unconstrained monopoly power.

As to those licensees that paid little or no royalties, RIAA notes that some of the Services that are party to this proceeding are of comparable size or have ceased operations. *See id.* at 288-91. This entirely misses the point. If those Services had reached agreements with RIAA, and then paid no royalties beyond the recited minimum, or quickly went out of business, the Panel would accord those agreements very little weight either. For the reasons previously cited, it is difficult to imagine how one could rely on such agreements with any confidence.

In sum, the Panel concludes that the 25 non-Yahoo! license agreements (as well as the [REDACTED] agreement) are unreliable benchmarks. They are entitled to very little weight for the purpose of determining the rate that willing buyers and willing sellers would normally negotiate in the relevant marketplace. The RIAA agreement with Yahoo!, however, is marketplace evidence of an entirely different character.

7. The Yahoo! License Agreement

Initially the Panel notes that Yahoo! alone accounts for over [REDACTED] of all royalties paid to RIAA under the 26 relevant voluntary licenses. *See* RIAA Exhibit 15 RR. And because it pays substantially lower rates than other licensees, the [REDACTED] payment percentage suggests that Yahoo! transmissions account for far more than [REDACTED] of all DMCA-compliant performances for which sellers have received payments. On this basis alone, barring special circumstances, the Yahoo! rates should be accorded significant weight.

There is another compelling reason for according the Yahoo! agreement great weight. Of all the parties with whom RIAA negotiated license agreements, Yahoo! is the only one with resources, sophistication, and market power comparable to that of RIAA.

Yahoo! is one of the world's leading internet companies. See Marks W.D.T. 27-28; Tr. 11384 (Mandelbrot); Panel Rebuttal Hearing Exhibit 1 at 1, 3, and 7. For the calendar year (2000) in which its license agreement with RIAA was executed, Yahoo! had net revenues of [REDACTED] and net income of [REDACTED]. Panel Rebuttal Hearing Exhibit 1 at 3. Thus, the Yahoo!-RIAA negotiation was the only one to reflect a truly arms-length bargaining process on a level playing field between two major players of comparable skill, size, and economic power.

(a) Description of the Yahoo! Streaming Service

In the audio streaming portion of its service, Yahoo! operates as an "aggregator" that serves as a portal for AM/FM radio stations and other webcaster sites. See Panel Rebuttal Hearing Exhibit 1 at 3. At the time the Yahoo! license agreement was negotiated, about [REDACTED] of its streaming performances were radio retransmissions⁴¹ ("RR"), in which, pursuant to a business arrangement with an AM or FM radio station, Yahoo! transmitted that station's broadcast signal over the internet. At that time, internet-only ("IO") performances - - transmission of programming not simultaneously broadcast over-the-air by any radio station - - constituted the remaining [REDACTED] of Yahoo!'s transmissions. This approximate ratio was expected to continue for the next [REDACTED]. See Panel Rebuttal Hearing Exhibit 1 at 5.

(b) The Yahoo! Terms

The pertinent terms of the Yahoo!/RIAA license agreement follow:

⁴¹ Retransmission is defined in 17 U.S.C. §114(j)(12) to mean a further, simultaneous transmission of an initial transmission.

again, this was explicitly referenced during the negotiations. RIAA Ex. 137 DR at N0946. Indeed, that projection proved fairly accurate throughout the period up to the time of the hearing herein. *See* Tr. 11279, 11333, 11345 (Mandelbrot). The *total* performance fees paid by Yahoo! through August 2001, yielded an effective rate of [REDACTED]. *See* Webcasters PFFCL ¶ 108 n.52; Panel Rebuttal Hearing Exhibit 1 at 7.

(c) The Yahoo! Negotiation

Both the Services and RIAA agree that RIAA was highly motivated to reach an agreement with Yahoo! *See* RIAA PFFCL ¶ 123; Webcasters PFFCL ¶ 114. RIAA hoped that the news of an agreement with a “major player” would spur other webcasters to sign agreements and obviate the need for a CARP proceeding. *See id.* *See also* n.29, *supra*. However, RIAA was also keenly aware that any agreement with rates below its prior established benchmarks might be used against it at the CARP proceeding. *See e.g.*, RIAA Exhibit 137 DR at N11732. Accordingly, RIAA undertook two actions to protect itself against this risk. First, it insisted upon the non-cooperation clause that [REDACTED]
[REDACTED] *See* RIAA Exhibit 75 DR at § 3.7.3. Second, RIAA demanded the “whereas” clause which recited that approximately [REDACTED] of Yahoo!’s radio retransmissions are within a 150-mile radius of the originating radio station. *See id.* (introductory clauses). The significance of this clause is explained later in this section.

Naturally, Yahoo!’s primary concern, as characterized by its negotiator, was to negotiate a license agreement under which it would pay [REDACTED] regardless of whether its fees were expressed as a blended rate or as differentiated rates for RR and IO performances. Tr. 11299, 11255-57 (Mandelbrot). But, because [REDACTED] of its

Indeed, both parties were willing to, and did, artificially raise the IO rate in exchange for artificially lowering the RR rate. *See id.* at 11256-57; 11281. This arrangement met the needs of both Yahoo! and RIAA. Yahoo! was pleased to achieve the lowest possible overall rate, while RIAA was pleased to raise the IO rate, so as to protect its .04¢ benchmark to the maximum extent possible. *See id.*; Panel Rebuttal Hearing Exhibit 1 at 4; Tr. 11279-81, 11395-96 (Mandelbrot). *See also* Tr. 10237-38 (Marks); RIAA 137 DR at N14540 (Marks e-mail to negotiating committee member stating that this strategy [REDACTED]).

The Panel concludes that RIAA was less concerned about the lower RR rate for two reasons. First, since RIAA had not previously negotiated a license agreement with

⁴² Clearly, RIAA was concerned about protecting its IO benchmark of 0.4¢ to the maximum extent possible. Early in the negotiations when a blended rate of [REDACTED] was on the table, RIAA expressed concerns that a stated blended rate [REDACTED] RIAA 137 DR at N11732. Notwithstanding, RIAA ultimately agreed to an effective (but *unrecited*) blended rate of [REDACTED]. See Section V.G.7.b., *supra*; see also Tr. 11395-96 (Mandelbrot) (“Q And was there discussion about why it was that the language was such that you not only couldn’t participate, that you couldn’t quote cooperate with any party opposing licenser and the CARP? A [REDACTED]”).

any webcaster that retransmitted radio signals,⁴³ it had no RR benchmark to protect. Second, and more importantly, RIAA clearly intended to rely upon the "whereas" clause which recited that approximately [REDACTED] of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station. *See id.* at 11409-12. Some context is required to appreciate the significance of this clause.

At the time of the Yahoo! negotiations, radio broadcasters were claiming in pending litigation that their retransmissions of their own radio signals over the internet were exempt from the copyright laws. And even if not all of their retransmissions were exempt, they argued, at least their own retransmissions to listeners *within 150 miles* of their radio stations were exempt under Section 114(d)(1)(B)(i).⁴⁴ *See* Tr. 9304-05, 10203, 10210, 10232-34, 14146-50 (Marks); Marks W.D.T. 15-16.

Naturally wishing to exploit the alleged "uncertainty" respecting these claims, Yahoo! negotiators cited them as one basis, among many, for a lower RR rate. *See id.*, Tr. 11307-08 (Mandelbrot). Understandably, they were also willing to agree to a "whereas" clause that implied that the low RR rate was somehow related to this alleged legal uncertainty respecting the 150-mile provision. In short, it cost Yahoo! nothing to accede to RIAA's insistence upon this clause. Both Yahoo! and RIAA, however, understood the obvious -- that *no uncertainty* existed as to whether any *Yahoo! retransmissions* were

⁴³ Subsequent to Yahoo, RIAA concluded an agreement with Cyberaxis, a small service that retransmitted a single radio station signal. *See* RIAA Exhibit 80 DR at § 1.7. This small operation [REDACTED]. *See id.*, RIAA Exhibit 15 RR.

⁴⁴ These claims were subsequently rejected by the Librarian (*see* Order of July 16, 2001 at 5) and a federal district court. *See Bonneville Int'l, et al. v. Peters*, 153 F. Supp. 2d 763 (E.D. Pa. 2001), appeal pending. The Panel expresses no view concerning the merits of these claims. We have simply proceeded, in accordance with the Librarian's Order, to determine willing buyer/willing

exempt. *See* Tr. 11308-10; 11380-87 (Mandelbrot); 10181-83, 11380, 13853-55 (Marks). If an exemption could possibly apply to anyone, it would apply to *broadcasters* – not to third party transmitters such as Yahoo!. The only rational argument available to Yahoo! was that it would be at a competitive disadvantage should either of the alleged exemptions ultimately be validated. *See id.* Mr. Mandelbrot testified that Yahoo! understood that this argument was extremely weak and had no significant impact on the rates ultimately negotiated. *See id.* The Panel finds Mr. Mandelbrot's assertion credible and agrees that this argument did not significantly affect the negotiated rates. However, RIAA was conveniently left with the "whereas" clause, which enabled RIAA to argue before this Panel that the [] RR rate reflects a "real" rate of [] that had been discounted⁴⁵ to account for the alleged "legal uncertainty" at the time of the negotiation. *See e.g.*, RIAA PFFCL ¶¶ 122, 128.

(d) Other Factors Affecting the Yahoo! Rates

As described above, the Panel has concluded that Yahoo!'s [] IO performance rate was elevated above the IO rate that the parties *would have* agreed upon, but for their agreement to lower the RR rate. Two other significant factors support an IO rate lower than [] – the MFN clause and Yahoo!'s assessment of the cost of arbitrating the CARP proceeding.

The MFN entitled Yahoo! to []

[]

seller rates for various types of streaming, including broadcasters, based on the evidence before us.

⁴⁵ The alleged discount ostensibly reflects that Yahoo! paid only for those transmissions that were not "exempt," thereby reducing the otherwise [] rate to the [] RR rate.

Unlike the musicmusicmusic MFN clause that is [REDACTED], the Yahoo! MFN [REDACTED]. However, because the clause provides for the possibility of reduced royalties at some future time, it does add some indeterminate amount of value for Yahoo!.

Another significant factor relates to arbitration costs. RIAA and Yahoo! both understood that if Yahoo! had chosen to participate in this CARP proceeding, it would have been expected, as a "major player," to shoulder a significant portion of the arbitration costs. See Tr. 10142-45 (Marks); 111248-49, 11269-76 (Mandelbrot). Yahoo! estimated that these costs, along with lost "opportunity costs,"⁴⁶ could approach [REDACTED]. See *id.* at 11274-76. Naturally, Yahoo! was willing to accept inflated royalty rates if it could realize an even greater savings in arbitration costs. Of course, because RIAA was also motivated to save arbitration costs (that it would bear almost exclusively), it too was arguably willing to accept a somewhat *lower* rate if it believed settlement with Yahoo! would spur an industry-wide settlement and thereby avoid the necessity of RIAA incurring any arbitration costs.⁴⁷ On balance, however, we think the issue of arbitration costs militates in favor of Yahoo!. If Yahoo! reached agreement with RIAA, it definitively avoided arbitration costs. In contrast, if RIAA reached agreement with Yahoo!, the existence of many other unsigned licensees meant that RIAA still faced a

⁴⁶ Referring to costs associated with Yahoo! managers directing time and resources toward the CARP arbitration, rather than to developing new aspects of the business. See Tr. 11248-49, 11271-76 (Mandelbrot).

⁴⁷ RIAA President Hillary Rosen testified that there were really only three big players on the internet (namely, AOL, Viacom, and Yahoo!) and that RIAA's hope was that an agreement with Yahoo! would prompt the other two to follow. Tr. 559 (Rosen). Of course, it is quite unlikely that AOL and Viacom, who are as sophisticated as Yahoo! would agree to rates higher than Yahoo!'s. Thus, RIAA's goal of an "industry wide solution" really reflected a willingness to accept rates in the Yahoo! range if those could be established across the board.

substantial prospect of having to arbitrate, as indeed has happened. For this reason, we believe the concern about arbitration costs also implies somewhat *inflated* rates.

Other considerations arguably imply even further inflated rates for both RR and IO. *See* Webcasters PFFCL ¶¶ 121-27. For example, Webcasters argue that the Yahoo! agreement eliminated certain legal ambiguities for Yahoo! and provided other benefits that the statutory license does not afford. *See id.* at ¶ 126. However, it is unclear that the agreement actually resolves the legal ambiguities cited by the Webcasters. *See e.g.*, Tr. 11377-78 (Mandelbrot) (conceding that the agreement provides no more rights than permitted by the DMCA). The other alleged benefits are of minor consequence.⁴⁸

(e) Impact of the Yahoo! Agreement

We began our discussion of the Yahoo!/RIAA agreement by noting its economic significance. First, Yahoo! accounts for both the vast majority (approximately [REDACTED]) of DMCA-compliant royalties paid and an even larger percentage of the number of performances transmitted. Second, this agreement also represents the results of a level playing field negotiation. Sophisticated business people with the legal and financial resources to press their interests forcefully sat on both sides of the negotiating table that produced this agreement. Indeed, the Yahoo! license agreement appears to be the sole

⁴⁸ RIAA argues that the Yahoo! rates actually reflect below-market rates based upon two factors. First, RIAA asserts that it "gambled that agreeing to a below-market rate with Yahoo would avoid the uncertainty and costs associated with a CARP proceeding." RIAA PFFCL ¶¶ 120-24. We already addressed these issues (settlement with Yahoo! obviously did not guarantee avoidance of CARP proceeding). *See* Section V.G.7. c and d, *supra*. Second, RIAA claims that it acceded to below-market rates in return for a large lump sum payment. *See* RIAA PFFCL ¶ 127. While there is obviously some value in receiving an advance payment, that value is substantially outweighed by the other factors at play. These other factors include (1) the total payments that would be due under the agreement (dependent upon the agreed rates) and (2) precedential value for the CARP proceeding. Moreover, in the voluminous record materials related to this

agreement where the rate was *not* the result of an essentially take-it-or-leave-it negotiating process. Third, the terms of this agreement provide, after the initial period, for different rates for different types of transmissions, a consideration which Section 114 (f)(2)(B) specifically directs us to employ in our rate-setting. Thus, the elements of this agreement, its economic significance, and the matching strengths of the parties who negotiated it, all support its use as the most reliable benchmark for what a willing buyer and a willing seller would agree to in the marketplace.

However, before reaching a final conclusion that the Yahoo! agreement constitutes the most representative benchmark available to us, the Panel must address one final argument. RIAA contends that three forms of corroborating evidence demonstrate that the 0.4¢ rate specified in most of the 25 non-Yahoo! agreements constitutes the most appropriate benchmark. We address this claim below.

H. RIAA'S "CORROBORATING EVIDENCE"

RIAA asserts that its proposed benchmark rates -- a performance royalty of 0.4¢ per performance plus an additional 10% ephemeral copy royalty -- are corroborated by three forms of record evidence, namely (1) 115 individual record company agreements, (2) an analysis of the standards enunciated in the *Georgia Pacific* case, and (3) an expert Economic Value Estimation. The Panel concludes that RIAA's argument is not persuasive and addresses briefly the principal deficiencies in each type of "corroborating evidence."

negotiation, the lump sum payment plays a minor role in the many evaluations exchanged both between the parties and within the RIAA Negotiating Committee.

1. The 115 Record Company Agreements

For reasons similar to those enunciated in our critique of the Webcasters' benchmark, the Panel rejects these agreements as useful benchmarks for the Section 114 rights at issue here. While the licensees in these agreements (digital music users) are similar to Section 114(f)(2) buyers, except for the [REDACTED] agreement previously discussed, the record company agreements cover different rights not subject to the Section 114(f)(2) statutory license. By contrast, the 26 RIAA agreements license the precise rights at issue here. Moreover, to the extent the Panel were inclined to utilize these record company agreements, the effect would likely be to undermine, not corroborate, RIAA's proposals in that many of the agreements reflect rates below those which RIAA is proposing. For example, license agreements for [REDACTED] recite rates ranging from [REDACTED]. See e.g., RIAA Exs. 90 DR - 95 DR. Yet, RIAA proposes 0.5¢ for webcasting syndication services and 0.6¢ for listener influenced webcasting services (neither are on-demand). See Section IV.A., *supra*.

2. The Georgia Pacific Analysis

RIAA expert, Dr. Robert Yerman, testified about certain criteria enunciated in the case of *Georgia Pacific v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), for the purpose of determining appropriate damages in patent infringement cases. After applying these criteria to the 26 RIAA agreements, he concluded that they generally support the rates proposed by RIAA. See Yerman W.D.T. 1, 5-6. The Panel agrees with Dr. Yerman's general conclusion that the 26 RIAA agreements are *potentially* compelling rate benchmarks. See Sections V.D. and V.F., *supra*. However, Dr. Yerman's

conclusions are significantly undermined by two important factors. First, they were based solely upon a review of the text of the 26 agreements. He did not review any of the circumstances surrounding the negotiation of those agreements, as the Panel has done. *See e.g.*, Tr. 3727-29 (Yerman). Consequently, his analysis sheds no light on the weight to be accorded each agreement and really adds little to the notion (which we have already accepted) that comparable agreements are the best *potential* benchmarks.⁴⁹

Another limitation on Dr. Yerman's analysis, as explicated by Webcasters' expert witness Prof. William Fisher (Fisher W.R.T. ¶13; Tr. 11606-07 (Fisher)), is that the *Georgia Pacific* case articulates standards for determining remedies for prior infringement. This context introduces an extraneous element, characterized as having "a punitive cast to it" (*id.* at 11606), which is not present in the non-infringement marketplace that the Panel is directed to replicate, and which undermines its usefulness for our purposes. Accordingly, the *Georgia Pacific* analysis does not, in any sense, undermine our previous reasoning.

3. The Economic Value Estimation

As described previously, RIAA witness, Dr. Thomas Nagle, conducted a pricing strategy analysis designed to predict the royalty rates that hypothetical webcasters would be willing to pay. He concluded that the rates proposed by RIAA are consistent with the rates he would recommend based upon this analysis. *See* Tr. 2531-32. The analysis seeks to ascertain the price that a theoretically viable webcaster would have been able to

⁴⁹ These comments apply equally to the testimony of Dr. Wildman. *See* W.D.T. (Wildman) 1, 3-5, 15-19.

afford and still remain viable at some point in the future beyond the statutory license period. See RIAA PFFCL ¶¶ 411-23.

As previously noted, Dr. Nagle contends that most webcasting services are not economically viable and will not survive. See *e.g.*, Tr. 13393 (Nagle); Nagle W.D.T. 5. Thus, he asserts, the current economic value of the statutory licenses must be estimated for webcasters that will operate at a "sustainable scale at this future point of viability." Nagle W.D.T. 6. That current value is determined by the price that such webcasters could afford to pay after first paying their other expenses, and retaining sufficient profit to earn "a reasonable return (which he places at 20 -30%) on their investment." RIAA Exhibit 108 DP (Dr. Nagle's analysis) at 15 - 16.⁵⁰ In essence, Dr. Nagle posits that record companies could extract every last penny from webcasters beyond the amount they needed to pay other expenses and derive such a return.

Dr. Nagle's analysis necessarily relies upon a myriad of highly questionable assumptions that appear inconsistent with foreseeable market conditions.⁵¹ For example, Dr. Nagle assumes that the future viable webcaster will sell audio ads at \$30 CPM, selling about 60% of its inventory by 2005 (his projected date of viability). See Tr. 2569-73. These figures appear overly optimistic. See *e.g.*, Tr. [REDACTED] audio ads are currently in the range of \$5 to \$15 with sales of less than 10% of inventory). Moreover, Dr. Nagle's estimate of projected unique listeners at the future date of viability is not based upon any reliable projection. He merely calculates the number of unique

⁵⁰ We view this allowance as quite arbitrary. If the webcasting industry represents the type of risk to investors that Dr. Nagle appears to suggest, a 20-30% return on investment may be inadequate.

⁵¹ We recognize that some of these projections are partly based upon business plans of a few webcasting services. However, we do not regard these projections, which are intended for investors and appear to be constantly revised downward, as particularly reliable.

listeners he believes *are required* for profitability without regard to the likelihood of attracting that number of listeners. *See* Tr. 2570 (Nagle).

We conclude that Dr. Nagle's analysis does not support any particular rate level. Moreover, Dr. Nagle's analysis firmly supports use of the Yahoo! agreement as a reliable benchmark, as contrasted with the other 25 licensees, many of which have already failed the test of marketplace endurance. *See* Section V.G.2., *supra*. Accordingly, we now proceed to a determination of specific royalty rates.

I. DETERMINATION OF SECTION 114(D)(2) WEBCASTING RATES.

The Panel previously concluded that the 26 RIAA license agreements *potentially* constitute the best approximation of the hypothetical marketplace we attempt to replicate. However, the 25 non-Yahoo! agreements merit extremely little weight as benchmarks for the rates that willing buyers and willing sellers would normally negotiate in the relevant marketplace. Only the Yahoo! agreement reflects a reliable approximation of such rates in the marketplace we attempt to replicate.

As previously noted, the "bottom line" combined rate was of paramount importance to Yahoo!, but both parties also benefited from the artificially wide disparity between the RR and the IO rates. Significantly, the Yahoo! agreement also establishes that, in the actual marketplace, willing buyers and willing sellers negotiate RR rates considerably lower than IO rates. This seems eminently understandable.

The dramatically different RR and IO marketplace rates contained in the Yahoo agreement reflect essentially undisputed testimony that traditional over-the-air radio play

has a tremendous promotional impact on phonorecord sales. Indeed, record companies have spent many millions of dollars over many decades to promote over-the-air play of their releases. *See, e.g.*, Tr. 530-33 (Rosen), 937-52 (Altschul), 1150-53 (Ciongoli), 1783-85 (Wilcox), 2412 (Kenswil), 5717 (Fine), 5886 (Donahoe), 7657 (S. Fisher). Also, endorsements from familiar, trusted radio station DJs are a key element in promoting sales. McDermott W.R.T. 4; Tr. 7709-10 (S. Fisher). To the extent that internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional impact is any less. Tr. 5894-95, 6002 (Donahoe); *see also* Tr. 12861 (McDermott). This factor was likely considered by RIAA and Yahoo!, and is evidently reflected in the resulting difference between RR and IO negotiated rates. Apparently, RIAA concerns about displacement of CD sales from internet performances do not apply equally to retransmissions of radio broadcasts. *See, e.g.*, Tr. 1112-15 (Katz); *see also* Jaffe W.R.T. 41-42.

In any event, the Panel's task is now clear. If the Yahoo!/RIAA agreement is to be used as a benchmark for determining the hypothetical marketplace rates, we must adjust downward the IO rate to offset the inflationary factors previously identified in Section V(G)(7)(c) and (d), and we must adjust upward the RR rate.

1. The Internet-Only Webcasting Rate

The Panel's analysis implies a willing buyer/willing seller marketplace rate somewhere between ☐ (the artificially high IO-only rate) and the effective or blended

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Of course, the agreement worthy of the most weight is the

Yahoo! license. In sum, we find insufficient record evidence to support a separate rate for syndicator services and conclude accordingly that such performances shall be at a rate of 0.14¢ per performance.

2. "Listener-Influenced" Services

RIAA maintains that so called "listener-influenced" services are ineligible for the Section 114 statutory license and urges the Panel *not* to set a royalty rate for such services. RIAA PFFCL ¶ 226. However, if the Panel feels compelled to do so, RIAA submits that the rate should be set at 0.6¢ per-performance. RIAA PFFCL ¶ 227.

RIAA defines listener-influenced services (also referred to as "personalized services") as "those that allow their listeners some control over the programming they receive through the rating of artists, albums or songs, as well as providing listeners with a skip forward to the next song." RIAA PFFCL ¶ 286. Although the listener will not know which song will be coming next, by supplying ratings and using the skip feature, the listener has more control over the songs heard than a listener of a basic genre-based webcasting service. *See id.* Because RIAA deems most listener-influenced services as ineligible for the Section 114 statutory license (*see* notes 1 and 15, *supra*), and because RIAA is not permitted to negotiate as a common agent for non-statutory Section 114

licenses, it does not rely upon the 26 agreements as benchmarks for setting rates for such services. Rather, it relies upon several agreements between record companies and non-DMCA-compliant services.

The Panel's sentiments respecting services that offer listener influence are similar to those expressed respecting syndicators. While RIAA may believe that listener-influenced services displace demand for sales of their phonorecords (*see e.g.*, Tr. 1508-12 (Griffin)), there is no empirical evidence before us to confirm this belief. And RIAA's reliance upon agreements with non-DMCA compliant license agreements is unavailing. By definition, these license agreements grant rights beyond those conferred by the relevant statutory license. One would expect a rate premium for such additional rights. We also note that RIAA has reached agreements with several licensees that offer listener influence at rates consistent with its predominant rate (without premium). *See e.g.*, RIAA Exhibit [REDACTED] Tr. 9354-57 (Marks), [REDACTED].

Finally, the Panel cannot imagine how one would meaningfully draw the line between those services eligible for the basic webcasting rate and those that would be subject to a separate rate for listener-influenced services. Indeed, neither side has adequately described such a line of demarcation. We conclude that so long as a service complies with, and is deemed eligible for the statutory license, it should not pay a separate rate based upon listener influence.⁵⁹

⁵⁹ Of course, we do not interpret the Librarian's Order of July 16, 2001 as compelling us to set a separate rate for listener-influenced services if we conclude, as we have, that the record does not support one.

K. ROYALTY RATES FOR COMMERCIAL BROADCASTERS

1. Introduction

Commercial broadcasters are FCC-licensed radio stations. Some currently operate, and others contemplate operating, services which simultaneously stream (retransmit) their over-the-air broadcasts via the internet. These streamed retransmissions are known as "simulcasts." *See, e.g.,* Proposed Definitions of RIAA, February 12, 2002 at 16. Some broadcast stations also offer "archived" programming, "side channel" programming, and "substituted" programming. *See* Section K.5. *infra*. The Panel must determine what rates to set for these various transmissions.

2. Procedural History

As previously noted, this proceeding was suspended for the period November 9, 2001 through December 2, 2001, to allow the parties an opportunity to pursue additional settlement negotiations. *See* Section II.D., *supra*. The negotiations resulted in a confidential settlement agreement between NPR and RIAA, and an accord respecting the great majority of the non-rate terms. *See id.* Commercial Broadcasters also reached a *tentative* settlement with RIAA. However, the settlement was contingent upon the agreed rates remaining confidential until after the Panel rendered its Report respecting non-broadcasters. *See* Request to Withdraw Issues from CARP, December 14, 2001. This contingency presented special challenges because, unlike the NPR/RIAA private agreement, which settled all matters among a finite class of services, the broadcaster/RIAA agreement affected only the signatories. *See* Order of December 20, 2001. The Panel remained obligated to set rates and terms for non-signatory broadcasters. Despite multiple, creative attempts by the Copyright Office and the parties

to fashion a mutually acceptable procedure that preserved the required confidentiality, no agreement could be concluded. Accordingly, the Librarian directed the Panel to determine rates and terms for Commercial Broadcasters. *See* Order of January 7, 2002.

3. Positions of the Parties

RIAA urges the Panel to adopt the very same rate for commercial broadcaster streamers as the rate it proposes for B2C IO webcasting. *See* RIAA PFFCL (Broadcasters) ¶ 1. RIAA maintains that no record evidence leads to a different result, and that the Services' fee model should be rejected for all of the reasons previously discussed. *See id* ¶¶ 1-11.

Broadcasters note that broadcasters represent more than 1500 of the 2300 entities which filed Notices of Intent to use the statutory license. *See* Broadcasters PFFCL ¶ 33; Marks W.D.T. n.2. They argue that the fact that RIAA was able to negotiate agreements with only 26 webcasters, but with none of the 1500 broadcasters, demonstrates that broadcasters and webcasters represent different groups of "willing buyers," which would negotiate different rates in the marketplace. *See* Broadcasters PFFCL ¶¶ 27, 33; Tr. 7660-61 (S. Fisher).

4. Determination of Commercial Broadcaster Rates

With respect to webcasters, we previously stated that if we can observe agreements that willing buyers and willing sellers *actually negotiated* in the relevant marketplace, we would generally expect their negotiated rates to already reflect the parties' joint perceptions of the various factors identified in Sections 114(f)(2)(B) and 112(e)(4). In that event, no further rate adjustment would generally be required to

determine a willing buyer/willing seller rate. Although no party has adduced a single digital sound recording performance license agreement with any radio broadcaster, the Yahoo!/RIAA agreement entails retransmissions of the same types of radio stations signals, albeit by a third party -- Yahoo!. The Panel has already determined that the typical willing buyer/willing seller rate for that RR rate is 0.07¢ per performance. The Panel must now decide whether the record suggests a different rate for retransmission of an identical radio signal by the *station itself* -- rather than by a third party. We find the record (and consideration of the statutory factors) utterly devoid of evidence implying a *higher* rate and *insufficient* to warrant a lower rate.

Regarding the displacement of record sales, Section V.I. above discusses the extensive record evidence regarding the promotional effect of radio airplay. Some record evidence also suggests that record companies are less fearful of simulcasts by *both* broadcasters and third parties -- as contrasted with conventional multi-genre webcasting. See e.g. Tr. 1112-15 (Katz) (these streaming activities constitute the "safer end" of the spectrum warranting a lower rate). This implies a lower rate than the webcaster performance rate, for *both* broadcasters and third party retransmitters. However, we find no record evidence suggesting a different rate *as between* broadcasters and third party retransmitters.

Though not explicitly argued by any party, several other rational arguments could be advanced in favor of a *lower* rate for broadcasters *vis-à-vis* those third-party retransmitters which also aggregate stations (such as Yahoo!). First, third-party aggregators like Yahoo! aggregate hundreds of radio stations on their portal sites. This arguably provides the listener with a more satisfying listener experience than derived

from a traditional broadcast radio dial. One might then contend that third-party aggregators derive more value from the sound recordings than do broadcasters that merely retransmit their own signals. Second, aggregators might arguably pay more to buy access to new, wider audiences than broadcasters would pay to stream to people who were already their listeners. And third, aggregators who have to pay a performance royalty to stream to all of their listeners might arguably pay more than broadcasters who have never paid any performance royalty during decades of broadcasting experience. In the final analysis, however, there is no record basis to quantify any possible difference in value due to these factors. Stated differently, the Panel does not and cannot know whether these arguments would impact the rate negotiated by a willing buyer and willing seller, or to what degree.

RIAA continues to press its contention that the Yahoo! RR rate is an inappropriate benchmark because it reflected alleged legal uncertainties surrounding the retransmission of broadcast signals. *See* RIAA PFFCL (Broadcasters) ¶ 14. We have already addressed this issue and confidently concluded that these alleged “exemptions” were “red herrings” that did not affect the negotiated rates. *See* Section V.G.7.c. and text accompanying n.44 *supra*. If at some future date, broadcasters were to prevail on their 150-mile exemption claim, we assume the courts would fashion a method of appropriately reducing the royalty to exclude listeners within that area. Contrary to RIAA’s claim (*see* RIAA PFFCL (Broadcasters) ¶ 18), such reduction would *not* constitute a “double counting of the 150-mile exemption” because we have made the factual finding that the alleged exemption was *not* factored into the Yahoo! RR rate. *Id.*

In sum, the Panel finds no reason to set a different rate for broadcasters (that simulcast their own signals) than for third parties that retransmit the same signals on behalf of the broadcasters. Accordingly, we determine the willing buyer/willing seller commercial broadcaster rate also to be 0.07¢ per performance.

5. Archived Programming, Side Channels, and Substituted Programming

A broadcaster's steaming activity may involve making available to listeners previously-aired ("archived") radio programming, internet-only programming on their web sites ("side channels"), and/or "substituted programming" that is streamed whenever a broadcaster lacks authorization to stream a portion of the over-the-air programming.⁶⁰ Cf. Tr. 8556-67 (Davis); 5467-68 (Halyburton); RIAA Exhibit 140 DP-X.

The record is devoid of direct evidence of the willing buyer/willing seller rate for archived radio retransmissions. But the Panel must resolve *which* rate, of those we have already determined, should apply to these retransmissions – the 0.07¢ RR (and commercial broadcaster) rate, the 0.14¢ IO rate, or some other rate.

As part of their contingent settlement agreement discussed above, Broadcasters and RIAA evidently resolved all issues respecting archived programming, side channels, and substituted programming. See Proposed Terms filed on December 20, 2001, at ¶ 1(e) (setting forth definitions that would apply to the settlement). Broadcasters assert that, although the settlement has not been effectuated, the jointly submitted, proposed terms remain binding on all parties. See Broadcasters PFFCL ¶ 1, n.1. And these agreed terms contain a definition of AM/FM streaming that includes transmissions of certain archived

⁶⁰ For example, a professional sports franchise might conceivably license a radio station the rights to broadcast an event over-the-air, but withhold the rights to simulcast the event over the Internet.

programming, side channel programming, and substituted programming. *See id.*; Proposed Terms of December 20, 2001, at ¶ 1(e). Accordingly, Broadcasters implicitly claim that these transmissions should be encompassed within the royalty rate set for commercial simulcast transmissions. *See id.* RIAA vehemently disagrees and contends that that definition was rendered moot when the settlement agreement was discarded. *See* Copyright Owners Submission Explaining Proposed Terms of February 1, 2002, at 2-4. The Panel fully agrees with RIAA. The definition of AM/FM streaming is so inextricably linked to the contingent settlement, it has lost all value for purposes of rate-setting. *See also* Section VII.C.1., *infra*.

In accordance with our previously articulated reasoning, the best benchmark for determining royalty rates for the transmission of archived programming, side channel programming, and substituted programming, is the Yahoo!/RIAA license agreement. That agreement provides compelling record evidence of two willing buyer/willing seller rates: (1) a rate for internet retransmissions of AM/FM broadcasts (RR rate); and (2) a rate for all other internet transmissions. The former is significantly lower than the latter. This apparently reflects marketplace assessment of the various promotion and substitution effects, along with myriad other factors.

The Yahoo!/RIAA license agreement defines a radio retransmission performance as [REDACTED] RIAA Ex. 75 DR at §1.16. The term "retransmission" is not further defined. Therefore, in the absence of contrary record evidence, the Panel adopts the definition of that term as set forth in 17 U.S.C. §114, namely "a further transmission of an initial transmission ... if it is *simultaneous* with the initial transmission." 17 U.S.C. § 114(j)(12) (emphasis added).

Accordingly, absent contrary evidence, the Panel concludes that the Yahoo! RR rate applies only to *simulcast* transmissions and does not include archived transmissions, side channel transmissions, or transmissions containing substituted programming. Consistent with this approach, the Panel declines to include these transmissions within the 0.07¢ RR rate adopted for commercial broadcaster retransmissions. As RIAA correctly maintains, archived transmissions, side channel transmissions, and transmissions containing substituted programming, are essentially webcasting. *See* RIAA PFFCL (Broadcasters) ¶¶ 21-25; Proposed Definitions of RIAA of February 12, 2002 at 19. The Panel finds no record evidence warranting a separate rate for these transmissions and, therefore, adopts the 0.14¢ IO rate.

Indeed, the Panel determines that the 0.07¢ performance rate applies only to simulcast transmissions. *All* other transmissions are subject to the 0.14¢ performance rate.

**L. ROYALTY RATES FOR NON-CPB AFFILIATED,
NON-COMMERCIAL BROADCASTERS**

At the outset of this Report, we noted that NPR has reached a private settlement with RIAA respecting webcasting by public broadcasters represented by NPR. *See* n.2, *supra*. However, NPR represents only itself, its member radio stations, and non-member radio stations which are eligible to receive federal funding from the Corporation for Public Broadcasting ("CPB"). *See* Murdoch/Woodbury W.D.T. 2. NPR does *not* represent the universe of non-commercial radio stations that are non-CPB affiliated.

Accordingly, the Panel must decide whether the existing record warrants a separate rate for webcasting by these non-commercial radio stations.⁶¹

Applying the same commercial broadcaster rate to non-commercial entities affronts common sense. A predecessor panel observed that, while commercial broadcasters can pass along some portion of their costs to their advertisers, “[n]o comparable mechanism exists for Public [non-commercial] Broadcasters.” RIAA Exhibit 220 DP-X at 24 (CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823). Unlike commercial broadcasters, “programming costs are not automatically accommodated through market forces. Contributions from government, business, and viewers remain voluntary.” *Id.* “For these reasons, commercial rates almost certainly overstate fair market value to Public Broadcasters.” *Id.* That panel concluded that “commercial license rates can *not* appropriately be used as a benchmark to determine Public Broadcasters’ rates.” *Id.* at 29 (emphasis in original).

Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations (“non-CPB broadcasters”) presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. *See* Tr. 9009-13. The record tells little about those non-

⁶¹ Non-commercial radio stations are those that meet the definition of public broadcasting entities found at 37 C.F.R. § 253.2.

CPB broadcasters that are represented by the NRBMLC,⁶² and virtually nothing about those that are not.⁶³

NRBMLC struggles mightily to quantify a proposed rate founded in record evidence. It urges the Panel to base non-commercial broadcaster rates upon the flat fees currently paid to the PROs for their over-the-air musical works performance rights, as set forth in 37 C.F.R. §§ 253.5(c), 253.6(c). *See* NRBMLC PFFCL ¶¶ 20-24. Putting aside our hesitancy to utilize over-the-air musical works performance rates as a proxy for webcasting sound recording performance rates, those fees were settled pursuant to joint proposals that are not part of this record. We do know, however, that those rate proposals were

made on a nonprejudicial and nonprecedential basis. Therefore, the Librarian recognizes that the joint proposals do not reflect any assessment by any of the parties of the absolute or relative value of the right of the performance of music in the ASCAP, BMI or SESAC repertory by college radio stations [and] community radio stations.

62 Fed. Reg. 63502, 63504 (December 1, 1997). *See also* RIAA Exhibit 220 DP-X at 21-22 (CARP Report adopted by Library, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823) (Panel concluded that voluntary agreements containing "no-precedent clauses" are highly suspect as rate benchmarks, requiring an examination of the "totality of circumstances"). Absent a rigorous examination of the

⁶² A party to this proceeding, the National Religious Broadcasters Music License Committee ("NRBMLC"), apparently represents a certain subset of the non-CPB broadcasters (although the record does not reflect the size of that subset), as well as many commercial broadcasters. In that capacity, they filed Proposed Findings of Fact and Conclusions of Law ("NRBMLC PFFCL") concerning this issue. *See* NRBMLC PFFCL ¶ 1.

⁶³ The only witness presented by NRBMLC was Joe D. Davis, Senior Vice President for Salem Communications -- a very profitable commercial company traded on the NASDAQ exchange that owns 85 radio stations, a network, a media company, and an internet company. *See* Tr. 8540-44,

agreements that led to adoption of the rates set forth in Part 253, *supra*, this Panel must decline to adopt those rates as a benchmark.

NRBMLC attempts to bolster its proposal by citing the testimony of Dr. Murdoch, who testified on behalf of NPR. At the request of the Panel, Dr. Murdoch reluctantly⁶⁴ attempted to establish the ratio of fees currently paid by NPR to the PROs, as compared to the fees that NPR stations *would* pay the PROs if they were commercial radio stations. *See* Murdoch W.R.T. 6-10. Dr. Murdoch concluded that *if* the Panel insisted upon using "a commercial fee rate expressed on a *revenue* basis ... as a starting point for setting [NPR] website fees, it would be appropriate...to reduce the commercial fee rate by 90% to determine the fee rates to be paid by [NPR] webcasters." *Id* at 9 (emphasis added). Again putting aside the Panel's serious concerns about (1) using over-the-air musical works performance rates as a proxy for webcasting sound recording performance rates, and (2) using NPR as a proxy for non-CPB Broadcasters, Dr. Murdoch candidly conceded other problems that render her strained conclusion "fraught" with problems. *See id* at 9-10. For example, she explains that, should the Panel set commercial rates on a percentage of revenue basis (which we have not), identifying a public radio station's revenue attributable to music webcasting would be "exceedingly difficult." *Id.* at 9. And

8574-84. Davis works with Salem's radio stations -- not the internet company -- and his testimony about non-commercial stations was primarily anecdotal. *See* Tr. 8542, 8554-55.

⁶⁴ Citing the Noncommercial Education Broadcasting Rate Adjustment Proceeding CARP, Dr. Murdoch opined that "the complexities of deriving fees for public broadcasters from benchmark fees for commercial broadcasters are not trivial, and are best avoided in situations where a public broadcasting benchmark exists.... Nonetheless, in response to the Panel's specific request, we have identified the nature of the adjustments that the Panel would need to recognize to derive a fee for public radio webcasters from a commercial webcaster benchmark." Murdoch W.R.T. 7.

if the Panel adopted a per-performance fee metric for commercial broadcasters (as we have),

the adjustment to arrive at a [per-performance rate]...for public radio websites is less clear due to the limitations of information available to us. A problem in identifying the correct adjustment factor arises because the discount rate that we were able to calculate compounds a music use adjustment factor and a noncommercial adjustment factor. The per-[performance] ... rate requires the adjustment for the noncommercial nature of public radio websites but does not require the adjustment for public radio's less-intensive music use. The Panel would find it necessary to deconstruct the 90 percent discount factor we have identified.

Id. at 10. Moreover, it appears that the revenue figure used in Dr. Murdoch's calculations was improperly inflated by the inclusion of revenue from non-CPB broadcasters and by revenue of NPR itself (which is not a radio station entity). *See* RIAA RPFCL (re non-CPB broadcasters) ¶ 17. *See also* RIAA PFFCL (re Broadcasters) ¶ 42. In sum, the Panel must reject both approaches advanced by NRBMLC.

RIAA's methodology also suffers infirmities. Absent record evidence supporting a particular rate for non-CPB broadcasters, RIAA "borrowed a ratio" from the Noncommercial Education Broadcasting Rate Adjustment Proceeding CARP Report, *supra*. *See* RIAA PFFCL ¶¶ 237. RIAA maintains that the panel awarded ASCAP and BMI approximately one-third of the sum they had requested as a royalty fee for the Section 118 public broadcasting compulsory license, and ASCAP and BMI had based their request on royalties paid by commercial broadcasters. Based upon this ratio, RIAA is "willing to offer" non-CPB broadcasters a two-thirds discount from the commercial broadcaster rate.⁶⁵ *See* RIAA PFFCL (re Broadcasters) ¶ 44. Otherwise, RIAA contends,

⁶⁵ The RIAA offer is silent as to NRBMLC's request for the fee to include (1) substituted programming (where the station lacks the rights to transmit certain over-the-air programming via the internet), (2) previously aired archived programming, and (3) up to two side channels

the record reflects that non-CPB broadcasters "should pay the same royalty rates that apply to ... commercial broadcasters." *Id.* Given the state of the record, the Panel reluctantly would have to agree. Absent record evidence to support a differentiated rate, should the Panel decline RIAA's offer, non-CPB broadcasters would be subject to the commercial rate.

Accordingly, rather than subject the non-CPB broadcasters to the commercial rate, the Panel hereby accepts RIAA's invitation⁶⁶ to set a rate for non-CPB broadcasters at a rate which is one-third of the commercial broadcaster⁶⁷ rate of 0.07¢ per-performance. Rounded to the nearest hundredth of a cent, the derived rate equals 0.02¢ per-performance.

In accordance with the Panel's findings respecting the commercial broadcasters, we determine that this rate of 0.02¢ should not apply to archived radio broadcast programming *subsequently* transmitted via the internet. Nor should it apply to transmissions of substituted programming. The 0.02¢ rate applies only to simulcasts -- retransmissions under 17 U.S.C. § 114(j)(12). However, consistent with RIAA's one-

consistent with and in furtherance of the educational purpose of the station. *See* NRBMLC PFFCL ¶ 40; RIAA PFFCL (re Broadcasters) ¶¶ 44-52.

⁶⁶ We assume that in a willing buyer/willing seller negotiation, the negotiated rate would be no higher than the rate "offered" herein by RIAA.

⁶⁷ Curiously, one week prior to the deadline for submission of this Report, RIAA asserted that their offer was not intended to be interpreted as one-third of the rate determined by the Panel for commercial broadcasters, but rather "one-third of the rate adopted for Webcasters." Proposed Definitions of February 12, 2002 at 14, n.6. This claim defies logic. Both the Panel and the Services plainly understood the offer as referring to the commercial broadcaster rate. *See id.* Indeed, we invite RIAA to review its initial offer: "Copyright Owners are willing to accept a rate for Noncommercial Broadcasters that is no less than one-third of the rate paid for commercial *broadcasters*." Reply of Copyright Owners and Performers to Non-CPB Entities (December 18, 2001) at 3 (emphasis added). The Panel declines to modify its position based upon RIAA's eleventh hour assertion.

third offer, and its implicit recognition that non-commercial broadcasters should not be subject to commercial rates, transmissions of archived programming and substituted programming shall be subject to a rate of one-third the commercial IQ rate of 0.14¢. Again rounded to the nearest hundredth of a cent, the derived rate equals 0.05¢ per performance.

Respecting side channel transmissions, these obviously do not qualify for the simulcast rate. In accordance with our reasoning, these transmissions would also be subject to the 0.05¢ per performance rate (one-third of the commercial IQ rate of 0.14¢). However, the Panel accepts as appropriate the limitations proposed by NRBMLC. *See* n.65 *supra*. These limitations were proposed by NRBMLC (*see* NRBMLC PFFCL ¶ 40) apparently in recognition that allowing unlimited side channels could permit non-CPB broadcasters to essentially become commercial webcasters.

In summary, the Panel determines the performance royalty rate for non-CPB broadcaster retransmissions (simulcasts) to be 0.02¢ per performance. The rate for transmissions of archived programming substituted programming, and transmissions of one or two side channels of programming, consistent with the educational mission of the station, shall also be 0.05¢ per performance. The rate for transmissions on any side channels beyond the two shall be the same as the commercial non-simulcast rate, i.e., 0.14¢ per-performance.

M. THE MINIMUM FEE FOR WEBCASTING SERVICES

Both Sections 114(f)(2)(B) and 112(e)(4) direct us to set a minimum fee for each type of service. Because the Panel is setting a Section 114 rate (and concomitantly a Section 112 rate) that is based upon the number of performances that a service transmits,

rather than a percentage of revenues generated by the service, the issue of minimum fees is of lesser significance. *See Marks W.D.T. 17-18.* RIAA was rightfully concerned that a start-up service with little revenues could transmit a large volume of performances, but pay very little in royalty fees, if fees were based upon a percent-of-revenue model. *See id.*

The Panel concurs with the Services that one purpose of the minimum fee is to protect against a situation in which the licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties. *Cf. Jaffe W.R.T. 31; Tr. 12387 (Jaffe).* Another arguable purpose is to capture the intrinsic value of a service's access to the full blanket license, irrespective of whether the service actually transmits any performances. *See RIAA RPFCL ¶ 249.* Whichever the purpose of the minimum fee requirement, the Panel believes that the lowest fee negotiated by RIAA under the per-performance fee model would necessarily cover the perceived administrative costs and the value for access to the blanket license. This belief is premised upon one fundamental assumption -- that a sophisticated and experienced negotiator, such as RIAA, would not negotiate a minimum fee that would expose it to a loss. We are quite comfortable with this assumption. Accordingly, we adopt the minimum fee prescribed in the [REDACTED] license agreement of \$500 per annum,⁶⁸ which covers both the Section 114 license and the Section 112 license. *See [REDACTED].* Our reliance upon the minimum fee prescribed in the [REDACTED] license agreement is in no way inconsistent with our prior decision to accord virtually no weight to that agreement with respect to the per performance fee. As previously explained, [REDACTED] is one of a large number of licensees that never

⁶⁸ This minimum fee appears to be generally comparable to the combined minimum fees set by other collection agencies such as the PROs. *See Webcasters PPFCL ¶¶ 363-64.*

paid royalties pursuant to the performance rate structure. It merely paid pursuant to the minimum fee requirements.

Accordingly, we apply this minimum fee to all webcasting services. Each statutory licensee is required to pay a minimum license fee of \$500, payable as a non-refundable advance against future royalty fees in that year, due upon the first monthly payment of each year. And in accordance with the [REDACTED] license agreement, the minimum fee shall *not* be prorated based upon the date paid, but shall be due in full for any calendar year in which a service holds a statutory license.

N. SECTION 112(e) EPHEMERAL RECORDING RATES FOR WEBCASTING SERVICES

1. The Nature of Ephemeral Copies

Ephemeral copies of digital recordings, as addressed in §112 of the Copyright Act, refer to temporary copies of sound recordings made to enable or facilitate the digital transmission of such recordings. These may include, for example, multiple copies made to sit on multiple hard drives or servers, or copies configured differently to facilitate streaming at different bitrates and "codecs." Zittrain W.D.T. 2-6, 12; Tr. 4588 (Porteus); Porteus W.D.T. 12; Pearson W.D.T. 9-10; Wise W.D.T. 9; Juris W.D.T. 7; Roy W.D.T. 8; Moore W.D.T. 5; Tr. 6555-56 (Jaffe). Webcasters and broadcasters may use a single ephemeral copy in the streaming process without charge. 17 U.S.C. §112(a)(1). The creation or use of multiple ephemeral copies, however, is subject to a statutory license. One part of this Panel's responsibility is to set a royalty rate for the use of multiple ephemeral copies by webcasters and broadcasters. §112(e)(4). The royalty rate for the

use of ephemeral copies by Business Establishment services is determined in Section VI of this Report.

The record establishes that ephemeral copies are integral to most digital performance streaming, but the testimony is contradictory regarding whether ephemeral copies have independent value apart from, or because of, their use in the streaming process.

2. The Value Of Ephemeral Copies

(a) The Services' View

As throughout this proceeding, the Panel is offered two contrasting views regarding what the appropriate analysis should be. The Services urge the Panel to adopt economic analysis reasoning, primarily by Professor Jaffe, while the Copyright Owners and Performers urge that the appropriate guidance is to be found in the 26 agreements negotiated between RIAA and its licensees.

Services witnesses argue that, because the only purpose of ephemeral copies is to facilitate licensed public performances, they have no economic value separate or distinct from the value of the performances they effectuate. Jaffe W.D.T. 52-54; Tr. 6556 (Jaffe). Because the payment of the performance royalty has already compensated the copyright owner for the full value of the public performance, according to this logic, paying any additional amount for the ephemeral right would constitute an inappropriate double payment. Tr. 3904 (Fisher). Arguing by analogy, ephemeral copies should be seen as similar to car keys, which are used to start and operate an automobile. See Jaffe W.D.T. 54. Although they are necessary for operation (except possibly for "hot wire" specialists), their "value" is included in the overall purchase price paid for the car.

Similarly, appropriate royalty payments for performance rights include payment for incidental ephemeral rights. Designating any separate value for an ephemeral right is thus arbitrary, and any amount so set should be subtracted from the royalty rate for the performance right in order to keep the combined cost of the two rights the same. Jaffe W.D.T. 52-54; Tr. 6556 (Jaffe). Again by analogy, if a \$10 price tag were to be attached to car keys, the price of the automobile should be reduced by \$10 to keep the total price constant. Jaffe W.D.T. 54; see also Tr. 6556-57, 12700-01 (Jaffe); Services RPFCL ¶27.

(b) The Copyright Office View

Advocates of the "car keys" analogy urge the Panel to follow the August 2001 Report of the U.S. Copyright Office, issued during the pendency of this proceeding, which characterized §112(e)'s imposition of a separate ephemeral rate as an "aberration." This Report states: "we [see] no justification for...the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license." Jaffe W.R.T. Ex. 6, U.S. Copyright Office, DMCA Section 104 Report at 114 fn. 434 (August 2001). The Copyright Office also advocated this view in 1998. *Id.*

(c) The Congressional View

Although the Copyright Office did urge this policy position in 1998, both the text and the legislative history of §112 indicate that Congress declined to adopt it. 17 U.S.C. §112(e); DMCA Conf. Rpt. 89-91; DMCA Section-by-Section Analysis 52-53, 61-62. Whatever the Panel's private views regarding the merits of this policy debate (and the Panel affords great weight to the views of the Copyright Office professionals who have developed considerable expertise in these matters), this policy determination must be

made by the Congress, not by the Panel. Unless and until Congress amends the current statute, the Panel's duty is clear: the Panel's responsibility is to follow the current Congressional mandate set forth in § 112(e)(4) and determine a separate rate for ephemeral copies.

(d) Evidence from the Marketplace

The record also establishes another reason to guide Panel analysis to this conclusion. In mandating a separate ephemeral compulsory license in §112(e)(4), Congress established the willing buyer/willing seller measure as the standard to be followed, and the Copyright Office has affirmed that "willing buyer/willing seller" is the standard this Panel must apply in determining an ephemeral royalty rate. July 16, 2001 Order at 5. It would be one thing if record evidence established that buyers of privately-negotiated licenses had refused to pay any separate ephemeral royalty or, if they had, had insisted that their performance royalty be reduced by the amount of their ephemeral royalty. However, as discussed below, record evidence before the Panel establishes the contrary: separate ephemeral rates, above and beyond the performance royalty were, in fact, often agreed to in the 26 RIAA statutory licensing agreements. Thus, whatever the merits of the theoretical economic analysis, actual actors in the marketplace have demonstrated behavior which matches the standard that Congress and the Copyright Office have indicated must be applied. For this reason, we turn next to an examination of the 26 agreements as they pertain to ephemeral royalty rates.

3. Four Measures from the 26 Agreements

In Section V.G. above, we explained why we have concluded that 25 of RIAA's 26 license agreements are entitled to little weight in determining the predominant

performance royalty which willing buyers and willing sellers would agree to in the hypothetical marketplace we must replicate. The same infirmities greatly limit the usefulness of these agreements in determining ephemeral royalty rates. Nevertheless, the Panel considers it appropriate to look at these 26 agreements in order to see if they reveal a clear and consistent pattern. Regrettably, examination of the RIAA's initial 26 license agreements reveals an inconsistent, rather than a consistent, pattern.

Overall, the 26 agreements fall into four categories. Two set ephemeral rates as a percentage of gross revenue. One provides for a flat dollar amount payment. The largest single group indicating any rate (eight in number) provides for an ephemeral rate as a percentage of the performance rate amount. And a fourth group (of fifteen) is silent regarding ephemeral copies and provides no express ephemeral rate.

Percentage of Overall Revenue. Two of the initial 26 negotiated agreements [REDACTED] calculated ephemeral rates based on overall revenue ([REDACTED] in the first and [REDACTED] for a combined performance/ephemeral rate in the second). See RIAA Exs. [REDACTED]. Compared to the other 24 agreements, these two are the least probative because their percentage-of-overall-revenue basis was used only twice and is not now urged by any party as a formula for the webcasting ephemeral rate to be set by this Panel.

Flat fee. This second type of ephemeral rate agreement (with Yahoo!) resulted in the largest ephemeral royalty amount paid under any of the 26 agreements and was related to the largest number of performances. The Yahoo! agreement is calculated on the basis of a flat fee, with a payment of [REDACTED] for the initial time period (through 12-31-00) and an additional [REDACTED] for each 12-month renewal. See RIAA Ex. 75 DR at

§§ 3.1, 3.4. The total [redacted] ephemeral royalty amount paid, when divided by Yahoo!'s total non-ephemeral performance royalty payment of [redacted] million, Panel Rebuttal Hearing Ex. 1 (Mandelbrot W.R.T. 7), results in an effective royalty rate of 8.8% paid under this agreement. As the agreement which represents both the ephemeral royalty for the largest number of performances and the largest ephemeral amount paid, this Yahoo! ephemeral rate, like its per performance rate, is entitled to considerable weight.

Percentage of Performance Royalty Amount. The third category of ephemeral royalty rates is found in eight agreements, which provide for express ephemeral rates of, or calculable to be, 10%. The first of these ([redacted]) occurred in August 2000, contemporaneously with the Yahoo! agreement; the remainder occurred over the next eight months. The three which can be *calculated* to be 10% are [redacted]
[redacted]
[redacted] and [redacted]. See also RIAA Exs. [redacted]

Absence of Indication. Having concluded that the soundest basis for determining what willing buyers would pay willing sellers for an ephemeral rate would be to look at the 26 actual marketplace agreements, the Panel is faced with the anomaly that the majority (fifteen) of these 26 do not state any ephemeral royalty rate.⁶⁹ Based upon a careful examination of the agreements themselves, as discussed previously in Section V. G., the Panel concludes that the reason for this silence is that these agreements do not, in

⁶⁹ Clearly, the RIAA characterization that "Nearly all of the RIAA license agreements include the 10% surcharge for the making of ephemeral recordings under the Section 112(e) compulsory license," RIAA PFFCL ¶245, is decidedly wide of the mark.

fact, convey ephemeral rights to the licensees. Unlike the Yahoo! agreement and others which are typically labeled "WEBCASTING PERFORMANCE AND EPHEMERAL LICENSE AGREEMENT" (emphasis added), the fifteen silent agreements are labeled only "WEBCASTER PERFORMANCE LICENSE." See, e.g., RIAA Exs. 60 DR-73 DR. Similarly, while the Yahoo! agreement and others grant an express ephemeral license (see, e.g., RIAA Ex. 75 at §2.1.2), the fifteen silent agreements lack this provision. What all 26 do have in common, however, is an express provision which states that [REDACTED]

[REDACTED] See, e.g., RIAA Ex. 75 DR at §2.2.3). Thus, both types of agreements are clear, internally consistent, and unambiguous on their face. The ones labeled as granting ephemeral licenses do so expressly, while the ones labeled simply as performance licenses are limited to that right. Because these fifteen do not provide any ephemeral royalty rate, they provide the Panel no guidance on what the ephemeral royalty rate should be.

However, because they do constitute a significant portion of the marketplace evidence, the Panel sought to analyze how they came about. Four different reasons could explain the unexpected state of affairs. First, at least some of the licensees may have believed that their agreements included ephemeral rights. For example, Mr. Heilbronn of Lomasoft, although he did not negotiate the agreement himself, was not a lawyer, and did not head his company at the time, testified to his understanding that his [REDACTED] royalty rate [REDACTED] Tr. 13106-07 (Heilbronn). The Panel believes that he was mistaken.

A second possible explanation is that these services could have been sufficiently small to enable them to operate using only the single free statutory ephemeral copy. Tr. 9769-80 (Marks); Tr. 14970 (Garrett). While some evidence indicates that some of these were smaller, single-channel, or never-launched webcasters, the record does not establish any specificity and suggests, at best, various contradictory inferences. Tr. 14974-88 (Garrett).

A third possible explanation is that ephemeral rates are generally so much smaller than performance rates that they were treated almost as an afterthought, possibly on the order of a sales tax, and accordingly were simply not addressed in some negotiations. For example, the record reveals that in the Yahoo! case, after eleven months of extensive negotiation, multiple term sheets, and near closure on many issues -- and six days before Mr. Marks reported to the RIAA Negotiating Committee that "we have a deal" (RIAA Ex. 137 DR at N14561 (6/29/00)) -- the ephemeral rate was still "to be agreed upon." *Id.* at N11828 (Term Sheet, 6/23/00). In the negotiation, in the last six days, an ephemeral rate agreement was reached (*id.* at N14561), although it may not have been in other negotiations.

A fourth possible explanation is that initially RIAA did not press the issue so long as it received what it regarded as a "satisfactory" performance royalty rate. In each of the first fifteen agreements, RIAA negotiated either 15% of revenue or about 0.4¢ per performance. *See* RIAA Exs. 60 DR-73 DR. While negotiating the [REDACTED] and Yahoo!), as it became clear that any agreement reached with Yahoo! would be closer to one-half the previous amounts, lead negotiator Marks asked the Negotiating Committee [REDACTED]

RIAA Ex. 137 DR at N14548 (3/29/00). In the context of a non-
"satisfactory" rate, the Committee was clear that

RIAA Ex. 137 DR at N14557 (3/31/00); and at
N14555 (3/28/00). In virtually all the agreements thereafter, they did.

4. The Panel's Ephemeral Royalty Determination

In setting an ephemeral royalty rate, the Panel thus has before it the following:
two agreements founded on a basis not now advocated by any party, fifteen agreements
which did not provide a rate, the largest single agreement at an effective rate of 8.8%, and
eight other agreements at a 10% rate (express or calculable). The Panel concludes that the
rate most representative of that negotiated in the marketplace between willing buyers and
willing sellers, as represented by these 26 agreements, lies within the range between 8.8%
and 10% of the performance royalty amount. For all of the reasons discussed in Section
V. G. above, the Panel places significant weight on the Yahoo! rate of 8.8% and does not
afford great weight to the other 25 agreements. Indeed, even at face value, as explained
here, they do not represent evidence which establishes RIAA's proposed rate.
Accordingly granting very modest effect to the agreements which have ephemeral rates
around 10%, the Panel rounds the 8.8% Yahoo! rate up to 9%. It determines,
accordingly, that the §112(e) royalty rate for whatever number of ephemeral copies are
necessary for the sole purpose of facilitating performances under §114(f) shall be set at
9% of the amount of performance royalties paid by a licensee.

O. OTHER ISSUES

1. Same Rates for Both License Periods

As previously noted, the purpose of this proceeding is to set rates and terms for two time periods: (1) October 28, 1998 (the effective date of the DMCA) through December 31, 2000; and (2) January 1, 2001 through December 31, 2002. *See* Order of December 4, 2000 at 5. However, the rates and terms proposed by all parties are the same for both periods.⁷⁰ The Panel agrees that, based upon the record before us, there is no warrant to set different rates, nor any inflation adjustments.

2. Long Song Surcharge

RIAA proposes a "long song surcharge" for all performances of songs over five minutes in duration. *See* RIAA PFFCL ¶ 210. RIAA asserts that this "provision is in all of the relevant RIAA license agreements with B2C webcasters." *Id.* To the contrary, this provision is [REDACTED]

[REDACTED]

[REDACTED]. Accordingly, we decline to impose this provision.

3. Partial Performances

Webcasters urge the Panel to exclude from payment *partial* performances of a sound recording that do not reach a threshold duration of thirty seconds. *See*

Webcasters' Supplemental Submission of January 18, 2002 at ¶¶ 13-14. Webcasters note

⁷⁰ Within the context of its rate proposal, Webcasters did propose a modest inflation adjustment. *See* Services' Proposed Rates and Terms (November 6, 2001) ¶¶ 2(a)(3) and 2(e). However, the record does not support this adjustment. In any event, the Panel readily acknowledges that its rate determinations are not so precisely calculated as to render an inflation adjustment meaningful or necessary. In this regard, we felt quite comfortable rounding our rate determinations to the nearest hundredth of a cent. This rounding likely subsumes any minor inflation adjustments.

that truncated performances can occur as a result of "technology glitches or user activation of song-skip functions." *Id.* at ¶ 15. This is true, however the record does not support payment exemptions.

Recognizing the potential for technological glitches that cause occasional streaming failures, three of the 26 RIAA agreements provide exemptions for performances under 10 seconds in duration (two of the three apply only in the introductory periods). *See* RIAA Exhibits [REDACTED] at § 1.6 [REDACTED] at § 3.1.1 [REDACTED] at § 1.6 [REDACTED]. Indeed, streaming failures are also accommodated in the benchmark Yahoo! agreement which provides:

[REDACTED]

RIAA Exhibit 75 DR at § 3.2.1 (emphasis added).

However, the Panel has already partially accounted for this provision in our calculation of the per-performance rates. In our calculations, we used the [REDACTED] blended rate as an end point to determine the final IO and RR rates. The [REDACTED] blended rate constitutes the precise per-performance rate negotiated by the parties for the first [REDACTED] performances. These [REDACTED] performances included the "free" [REDACTED] performances. Accordingly, this provision has been partially accounted for because it was part of our calculations to find each mid-point, or arithmetic mean, that constitutes the final IO and RR rates. And only a "partial" accounting is appropriate because RIAA

agreed to this accommodation in the initial period *only* – as it did in two of the other three agreements that made accommodations for technological glitches.

Respecting Webcasters' second argument, we find no justification for excluding short performances merely because the listener elected to skip a sound recording. The functionality of certain services that allow listeners to skip unwanted performances provides a benefit to webcasters.⁷¹ Although the record does not support a higher performance rate for services that provide this functionality,⁷² neither does the record support penalizing the copyright owners for this benefit to webcasters – a benefit that allows webcasters to offer a more satisfying experience to their listeners. None of the 26 agreements provides an exemption for skipped songs and no exemption is warranted.

Finally, we find that tracking and reporting partial performances would not significantly burden the services. *See* Tr. 13789 (Marks) ("Every webcaster that we've done a deal with has agreed to do so [report actual performances], generally speaking, and they do it in different ways."). *See also* Tr. 11800, 11817 (Kessler) (currently available software allows the generation of a performance report that "truly is the push of a button").

Accordingly, the Panel declines to exempt partial performances from payment obligations established herein. *See, however*, Panel discussion below regarding "incidental performances" and the definition of a "performance."

⁷¹ *See e.g.*, Tr. 7412 (Roy) ("... consumers really like this functionality. They like to be able to skip songs they don't like. That's one of the things they don't like about terrestrial radio. And they tend to stay on the services longer....")

⁷² *See* our Section V.J.2., *supra*.

4. Incidental Performances

Webcasters also argue that "incidental performances" should be exempted from payment. *See* Webcasters' Supplemental Submission of January 18, 2002 at ¶¶ 13, 17. The Panel agrees. The benchmark Yahoo! agreement explicitly excludes [REDACTED] from [REDACTED]. *See* RIAA Exhibit 75 DR at §§ 1.3, 1.10. We accordingly adopt this provision which excludes transmissions or retransmissions that make no more than incidental use of sound recordings, including but not limited to, certain performances of brief musical transitions, brief performances during news, talk and sports programming, commercial jingles, and certain background music. *See id.*

5. Performances of Sound Recordings Already Licensed

All parties agree that performances of sound recordings by webcasters that have already secured a license for that performance should be exempt from payment under the statutory licenses. *See* Webcasters' Supplemental Submission of January 18, 2002 at ¶ 19; RIAA's Comments of January 18, 2002 at 8-9. The Panel agrees.

6. Definition of a Performance

Consistent with the Panel's determinations above, and the applicable provisions of the Yahoo! agreement, we define a "performance" as:

Each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (*e.g.* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

- (1) A performance of a sound recording that does not require a license (*e.g.*, the sound recording is not copyrighted);
- (2) A performance of a sound recording for which the service has previously obtained a license from the copyright owner of such sound recording; and

(3) An *incidental* performance that *both* (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events *and* (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

See RIAA Exhibit 75 DR at §§ 1.3, 1.10; Webcasters' Supplemental Submission of January 18, 2002 at ¶ 19; RIAA's Comments of January 18, 2002 at 8-9.

7. Calculating Number of Performances

As previously explained, the per-performance fee metric is preferred because, among other reasons, it provides a fee structure directly tied to the intensity of sound recording usage. See Section V.B., *supra*. However, as RIAA apparently concedes (*cf.* RIAA PFFCL, Appendix C at ¶ 4), some services may not currently possess the proper software, or technical expertise, to track or calculate accurately their performances of sound recordings. Accordingly, as RIAA proposes (*see id.*), statutory licensees should be permitted to make a reasonable estimate of the number of their performances until such time as they can reasonably be expected to acquire the software and expertise.⁷³

⁷³ RIAA proposes to permit estimation of performances prior to January 1, 2000 only. See RIAA PFFCL, Appendix C at ¶ 4. However, we view this deadline (which precedes by almost five months the expected date of the Librarian's decision in this matter) as inequitable and unworkable. The Panel believes services should be accorded more reasonable notice to acquire the requisite software and technical expertise to begin accurately tracking performances. And although the record does not support any particular timeframe, we view 30 days as reasonable. *Cf. Recording Industry of America v. Library of Congress*, 176 F.3d 528, 536 (1999) (there are "some circumstances in which the Librarian's Decision must, for want of concrete data, be based principally on sound judgment ... [so long as the matter in dispute has been] properly raised before the arbitration panel so that the parties have a fair opportunity to address it, and so that the Librarian has the benefit of the parties' views before reaching a judgment"). In the instant proceeding, the matter was raised during the hearing, and again in the RIAA PFFCL. The Services have had ample opportunity to respond.

Accordingly, the Panel accepts RIAA's proposal and permits estimation of the total number of performances by a service as follows:

For the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the licensee's total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of retransmissions of AM and FM radio stations reasonably classified as news, business, talk or sports stations, and 12 performances per hour in the case of all other AM and FM radio stations).

8. Discount for Promotion and Security

In response to inquiries from the Panel during the hearing, RIAA proposes that a performance rate discount of 25% be allowed to any service that includes certain promotional and security features not otherwise required by Sections 114 and 112. *See* RIAA PFFCL ¶¶ 240-43. These include a "buy button" or other link to retail web sites that offer sales of CDs, certain promotional announcements, listener surveys, and limitations on the streaming technology used. *See id.* Some of these considerations are consistent with those offered in many of the RIAA licensees. *See* RIAA Exhibits 60 DR through 84 DR.

The Panel would encourage RIAA and webcasters relying upon the statutory licenses to consider voluntary agreements that would effectuate such discounts. In the final analysis, however, the Panel concludes that it should not mandate these discounts because they entail matters beyond the statutory license and, arguably, beyond the Panel's authority. Moreover, the Panel is aware of no record evidence to support any particular discount rate.

VI. ROYALTY RATES FOR BUSINESS ESTABLISHMENT SERVICES

A. NATURE OF THE SERVICE

In addition to webcasters and broadcasters, the record before us shows that certain organizations offer an entirely different type of music service, namely, the compilation and delivery of background and foreground music to be played in business establishments for the listening enjoyment of customers of those establishments. Pursuant to the "Business Establishment Exemption" found in 17 U.S.C. § 114(d)(1)(C)(iv), organizations which make digital transmissions in the course of such services are exempt from any performance royalty so long as they comply with the requirements of the DMCA. However, pursuant to § 17 U.S.C. § 112(e), those organizations are required to pay a royalty for the right to make multiple ephemeral copies in the operation of such services. RIAA's petition to set the royalty rate for such ephemeral copies has been assigned to this CARP panel for determination.

Unlike webcasting, Business Establishment (also called "background") music service is a form of business which has been in operation for decades. AEI Music Network, Inc. ("AEI") began distributing original artist recordings for use in business establishments in 1971. *See* Knittel W.D.T. 4. Other companies, including DMX Music, Inc. ("DMX"), Muzak, Inc. ("Muzak"), PlayNetwork, Inc., and Radio Programming and Management, Inc., have also offered background music services to business establishments for years. *See, e.g.,* RIAA Exhibits [REDACTED]. More recently, Music Choice and musicmusicmusic have sought to offer these services, (*see* RIAA Exhibit 60-A DR; Tr. 14,746), and other entities have expressed interest in entering the business as well. Tr. 2259 (Pipitone). In response to the Librarian's invitation, three companies--AEI, DMX, and Music Choice--filed notices of intent to

participate in this CARP proceeding. Music Choice subsequently withdrew its notice, but AEI and DMX both filed direct cases in April 2001. In May 2001, these latter companies merged to become DMX/AEI Music ("DMX/AEI"), and that merged entity has continued as an active party in the proceedings.

Again unlike webcasting, the Business Establishment music business has large numbers of paying customers and substantial revenues. DMX/AEI provides music to about [REDACTED] businesses and generates revenues of over [REDACTED] per year from this service. *See* Knittel W.D.T. 4; Tr. 8492 (Knittel). As one would expect from a successful business such as this, there have been technological advances over time in the way in which such companies deliver their product.

Originally, AEI and DMX prepared musical programs on tapes and CDs to be played "on-premises" in specialized equipment at their clients' establishments. Later, this on-premise service was improved. AEI and DMX provided their customers with a proprietary hard disk based device which could play music programs that were placed on an internal hard drive. *See* Knittel W.D.T. 8-9. In 1999, DMX and AEI established "digital repositories" of numerous sound recordings, which could be utilized in all the different models of their services. Tr. 8409, 8413, 8416-17 (Knittel); Talley W.D.T. 3-4.

DMX/AEI and RIAA agree that the "on-premises" services are not subject to the § 112(e) license at issue. Thus, the rates set in this proceeding do not apply to those services. Instead, DMX, AEI, and other background music services have obtained from copyright owners voluntary licensing agreements to utilize sound recordings in the operation of those services.

Most recently, certain of the background music organizations have developed a so-called "broadcast model" of their service.⁷⁴ The model employed by DMX/AEI is described in detail in the written and oral testimony of Barry Knittel and Douglas Talley of DMX/AEI. In essence, the model involves digital transmission of musical programs to customers over cable and/or satellite facilities. In the course of operating this service, literally millions of ephemeral recordings are made at various stages of the process, including composing the digital repository, programming, quality control, "client computers," and transmissions. Tr. 8632-8639, 8658-59 (Talley). In particular, "cache" ephemerals are made when content is temporarily stored on a client server for transmission to a cable affiliate or satellite. *Id.* And "buffer" ephemerals, which are ubiquitous in the use of digital technology, are made at numerous stages throughout the operation of the service. *Id.*

The parties agree that it is only this "broadcast" model of background music service which is encompassed in the present proceeding and for which this Panel must set a royalty rate. *See* Tr. 9567 (Berz); 9576, 9581-82 (Garrett).

⁷⁴ For example, Muzak, the nation's largest background music service with annual revenues of approximately \$87 million, operates a broadcast model of its service. *In re Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recordings*, No. 96-5 CARP DSTR (Library of Congress November 12, 1997), Report of the Copyright Arbitration Royalty Panel ¶¶ 68-69. Musicmusicmusic is also licensed to operate a broadcast service. *See* RIAA Exhibit 60-A DR.

B. RATE PROPOSALS OF THE PARTIES

1. DMX/AEI's Rate Proposal

DMX/AEI proposes that the Panel set a royalty of \$10,000 per year per company for the making of buffer and cache copies to facilitate the digital transmission of sound recordings in broadcast services, prorated for the period between October 28, 1998 and December 31, 1998. *See* DMX/AEI PFFCL ¶44.

While recognizing that, "as a theoretical matter the potential scope of ephemeral recording rights available to the background music industry may be broader," DMX/AEI asserts that the Panel should set a royalty only for the use of cache and buffer ephemerals, since its existing voluntary licenses allegedly give it the right to use its digital repository in operation of the broadcast service, as well as the on-premises services. DMX/AEI PFFCL ¶ 10.

DMX/AEI argues that the Panel would be entirely justified in setting this royalty rate at zero. *See* DMX/AEI PFFCL ¶¶ 42-44. It contends that, in exempting DMCA-compliant background music services from any performance royalty, Congress concluded that operation of such services would likely have a positive effect on the revenue of copyright owners, and envisioned only a modest ephemeral royalty if there were evidence of any significant "leakage" (ephemeral copies being used to generate records for sale), which there is not. DMX/AEI PFFCL ¶¶ 46-50. It points out that the Copyright Office has criticized the §112(e) statutory license as an "aberration" which should be repealed in favor of an ephemeral recording exemption which would exempt buffer copies from any royalty obligation. DMX/AEI PFFCL ¶¶ 51-53. Finally, DMX/AEI argues that, because they have no "independent economic value" other than facilitating performances, its

ephemeral copies should have a royalty, at most, which is consistent with those set in RIAA license agreements for webcasters. Its fee proposal of \$10,000 per company (i.e., \$20,000 for the merged DMX/AEI) is allegedly quite compatible with the Yahoo! agreement, which sets a royalty of \$50,000 per year for a much broader range of ephemeral rights than DMX/AEI will require. *See* DMX/AEI PFFCL ¶¶ 54-56.

2. RIAA's Rate Proposal

RIAA proposes that the Section 112(e) ephemeral license for broadcast background music service be set at 10% of the gross revenue from such service, with a minimum fee of \$50,000 per year. *See* RIAA PFFCL ¶ 627. RIAA denies that DMX/AEI's existing licenses permit use of its non-DMCA-compliant digital repository in the broadcast service. Thus, asserts RIAA, DMX/AEI will likely be required to utilize in this service a DMCA-complaint database, which will entail creation of ephemeral recordings beyond the cache and buffer copies for which DMX/AEI wants the Panel to set a royalty. *See* RIAA Reply to DMX/AEI PFFCL ¶¶ 8 - 12.

Moreover, RIAA argues, even if DMX/AEI were to prevail in its contention that its presently licensed database can also be utilized in its broadcast service, the Panel should not tailor the royalty to the individual circumstances of one company. Rather, it should establish a blanket royalty which would permit any applicant, including those which may not have separately licensed databases, to utilize ephemeral recordings throughout the operation of their service, regardless of the particular technology they choose to employ. *Id.*

Further, RIAA contends, Congress was certainly aware that, notwithstanding the absence of a performance royalty, background music companies have for years paid

substantial royalties to make the sound recording reproductions necessary to operate their on-premises services, and there is no reason to believe that Congress intended to disturb this "traditional stream of revenue" by creation of the § 112(e) license. *Id.*

RIAA notes that the Copyright Office's comment about the aberrational nature of the ephemeral license was made in connection with webcasting, not background music, and, in any event, Congress has not accepted the Copyright Office's view on this matter. *Id.* at 11-12.

Finally, RIAA asserts that the appropriate benchmarks for a royalty for the background services are not recent licensee agreements from the very different world of webcasting, but rather agreements which have been utilized for years to license sound recording use by background services. *Id.* at 13-20.

C. WHAT IS THE ROYALTY FOR?

A threshold dispute that the Panel needs to resolve in order to set a royalty in this area is the question of what we are setting a royalty for. As noted above, DMX/AEI argues that we should only set the royalty for the use of cache and buffer copies because, it asserts, its existing licenses already give it the right to use its non-DMCA complaint database in the broadcast service. RIAA disputes that the existing licenses give DMX/AEI this right and argues that we should set the royalty for all ephemeral recordings utilized in a broadcast service, which will likely involve -- at least for some applicants - - ephemerals in DMCA-complaint databases, as well as cache and buffer ephemerals. Resolution of this threshold matter is complicated by the fact that the dispute about the reach of DMX/AEI's existing licenses is a matter for determination by the courts, not this Panel, and no court has yet addressed the issue.

On reflection, we have concluded that the exact reach of DMX/AEI's existing licenses is irrelevant to our task. The background music license agreements introduced into evidence show that royalty rates have not been based on [REDACTED]

[REDACTED]. Thus, for example, Knittel Rebuttal Exhibit 22, [REDACTED]

[REDACTED]. Moreover, the royalty rates in DMX and AEI licenses were essentially the same before and after November 1999, when they introduced the new "digital repository" database.⁷⁵

Some background music services may choose to operate broadcast services with DMCA-compliant databases, as musicmusicmusic has done. See RIAA Exhibit 60-A ¶ 2.1(c)(i). Others may conclude that a permanent, non-DMCA-complaint database involves substantial cost savings and thus elect to obtain voluntary licenses for that database. Still others may wish to operate without a database at all, as DMX and AEI did before 1999. See Tr. 14,789. Choices about which technology to use involve cost-and-benefit tradeoffs about which neither side presented detailed evidence.

However that choice is made, though, no broadcast service can operate without making millions of ephemeral recordings at many different stages of the process. Thus, after Mr. Talley of DMX explained that he uses the term "ephemeral copies" to include "cache and buffer copies" and nothing more, Tr. 8656, he was asked at what stages ephemeral copies are made in the DMX/AEI broadcast model. He answered, "Every

⁷⁵ Compare pre-1999 and post-1999 royalty rates in the respective license agreements and renewals provided as RIAA Exs. 09 DR, 10 DR, 11 DR, 12 DR, and 13 DR.

stage from the transmission to the reception. There are many, many, many places where this happens, where ephemeral copies are made." *Id.*

Over the next ten pages of transcript, Mr. Talley described the "many places" in the broadcast model at which ephemeral copies are made, including, but far from limited to, the digital repository, Tr. 8656-66, after which this colloquy occurred:

Q: Okay. I guess as you said in your broadcast model there are a lot of different ephemeral copies that are made, correct?

A: Yes.

Q: And if you can't make those ephemeral copies, you can't use this broadcast model, can you?

A: That's correct.

Tr. 8667

This testimony effectively refutes, in our view, DMX/AEI's contention that its ephemeral copies have "little or no independent economic value." DMX/AEI Reply to RIAA PFFCL ¶ 6. Without such ephemerals, no broadcast service could be operated, and no revenue could be generated.

We agree with RIAA that, in creating the § 112(e) statutory license, with rates for each type of service "binding on all copyright owners ... and transmitting organizations," 17 U.S.C. § 112(e)(4), Congress intended to create blanket licenses which would afford each licensee all the rights necessary to operate such a service, in this case, the right to make any and all ephemeral copies utilized in a broadcast background music service. We do not believe it appropriate to subdivide this package of rights into multiple mini-licenses for the making of different kinds of ephemeral copies at numerous different stages of the process. Nor does the evidence of the parties permit us to assign separate

value and separate royalties to each such sub-license, as DMX/AEI counsel have acknowledged. *See* Tr. 14,762 (Rich).

Accordingly, the Panel concludes that the royalty we must set is for all ephemeral copies which may be utilized in the operation of a broadcast service, and the royalty rate is not dependent on whether or not a particular licensee's model includes a DMCA-complaint database.

D. DETERMINING THE ROYALTY RATE

1. The Views of Congress and the Copyright Office

We do not find persuasive DMX/AEI's argument that Congress envisioned the §112(e) royalty as a *de minimis* payment to guard only against the risk of leakage. Nothing in the statute says so, nor does the legislative history compel that conclusion. Rather, Congress plainly made fair market rate the talisman for this CARP, and we must assume that Congress knew that for years copyright owners have been collecting millions of dollars in royalties from background music companies for use of their sound recordings in those services.⁷⁶

Nor do we think the Copyright Office report cited by DMX/AEI mandates that we set a zero or *de minimis* royalty. DMX/AEI PFFCL ¶ 51. First, the section of the report quoted by DMX/AEI deals with webcasting, not background music. Second, while the views of the Copyright Office on any matter are entitled to great respect, as stated previously, Congress has yet to accept the Office's view on this point. We are bound to apply the Copyright Law as presently enacted.

⁷⁶ Mr. Knittel testified that [REDACTED] pays over [REDACTED] per year in royalties and fees to copyright owners. Knittel W.D.T. 14.

2. The Statutory Factors

As we explained in Section III above, we believe the statutory command for setting rates under § 112(e) is essentially the same as for setting rates under § 114(f)(2), *i.e.*, the determinative question is what price a willing buyer and willing seller would agree to in the marketplace for the license in question. While the economic, competitive, and programming factors described in the statute are relevant, and we have considered them, the net effect of such factors is best gauged by looking at the prices actually negotiated by willing buyers and willing sellers, if such agreements are available.

Thus, with respect to § 112(e)(4)(A), we agree with DMX/AEI that use of sound recordings in background music services has significant promotional value. DMX/AEI PFFCL ¶¶ 32-35. This is true whether the music is delivered via the on-premise model or a broadcast service. This factor has led some small labels and individual artists on occasion to license the use of their sound recordings for little or no royalty payment in hopes of achieving wider public familiarity with their works. *See* Tr. 8380 (Knittel). However, notwithstanding the promotional potential, the major record labels, which hold the vast majority of sound recording copyrights, have insisted on significant royalty payments in exchange for use of their complete repertoires, and background music companies have agreed to those payments, as discussed below.

Indeed, background music companies would have little economic incentive to incur the capital costs of establishing a new, broadcast service unless they had concluded that such a service would be more profitable than their existing, successful on-premises services. Given that conclusion, such companies would naturally seek to move as many customers as possible from on-premises to broadcast contracts. In fact, most DMX

customers now receive their music through the broadcast service. Talley W.D.T. 3. If the royalty rate for broadcast service is substantially lower than for on-premises service, as DMX/AEI propose, then the shift in customers (and thus revenue) from on-premises to broadcast service will substantially reduce the copyright owners' "traditional stream of revenue" from broadcast music companies, a factor which Congress instructed us, via Section 112(e)(4)(A), to consider in setting the royalty rate.

Similarly, as regards §112(e)(4)(B), background music companies plainly have played a major role with respect to the creative and technology contributions, capital investment, cost, and risk relative to their services (*see, e.g.* evidence cited at DMX/AEI PFFCL ¶¶ 36-41), and copyright owners have played a major role with respect to such factors relative to the copyrighted works. (*See, e.g.*, evidence cited at RIAA PFFCL ¶¶ 488-89, 493-97.) The weight to be given by willing buyers and willing sellers to such respective factors is, again, best demonstrated by the agreements they have actually reached.

3. Agreements From Which Marketplace?

DMX/AEI contends that, if we are to derive a royalty from marketplace agreements, we should look to the ephemeral royalty rates reflected in RIAA's agreements with certain webcasting licensees, particularly Yahoo!. However, in the webcasting market, the principal royalty is plainly the § 114(f) performance royalty; the ephemeral royalty is an ancillary royalty which produces only a modest increase in the licensee's overall royalty obligation. With respect to background music companies which are exempt from the § 114(f) royalty obligation, § 112(e) is the only royalty which licensees must pay in order to make use of all sound recordings in the operation of a digital broadcast service.

Moreover, webcasting is an entirely different kind of business than background music. It has different customers, different economics, and different delivery methods.

Webcasting, as noted above, is a new business which has yet to prove profitable on a large scale, whereas the background music business is well established and generates very substantial revenues.

Thus, we believe the appropriate license agreements to use as benchmarks are those by which copyright owners have for years granted background music companies the right to use all of their sound recordings in the operation of their on-premises service. We reject DMX/AEI's contention that these agreements are irrelevant because they involve the licensing of reproduction and distribution rights, rather than the right to make ephemeral copies. It is apparent to us that these licensing agreements (introduced by both RIAA and DMX/AEI) were effectively intended to permit the licensees to utilize sound recordings in operating the background music services in question. The Section 112(e) license here will have the same effect for broadcast services that make digital transmissions of sound recordings.

4. Royalties Evidenced By the Pertinent Agreements

The parties have introduced nearly three dozen license agreements between copyright owners and background music services. No party has contended, nor introduced evidence to show, that these are anything other than what they appear to be, namely, agreements between willing buyers and willing sellers, and we treat them as such. The critical question is what royalties do these agreements establish?

Barry Knittel, formerly President of AEI Music Markets -- Worldwide and now DMX/AEI's Senior Vice President of Business Affairs Worldwide, testified that AEI has

approximately [] license agreements for North America, which fall into various categories. *See* Tr. 8379-80 (Knittel).

First are licensing agreements which are "strictly promotional" and in which the licensees do not expect a royalty. *See* Tr. 8380 (Knittel). These agreements are usually with individuals who are trying to get their songs played. *See* Tr. 8390 (Knittel). AEI has "very few" of these agreements. *Id.*

Second are agreements in which AEI pays a royalty of [] every time a sound recording is used within one of its programs. *See* Tr. 8380.

Third are "marketing fund license agreements" in which the licensors "share in our profits from music programming and receive certain distributions of royalties from that and other promotional benefits." Tr. 8380. Under such an agreement, the label receives part of the royalty in cash and the balance is placed in an account to be used by AEI for promotion of the label's products in whatever way the label directs. *Id.* at 8384-85. AEI has such agreements with [] *Id.*

Fourth are agreements in which [] receive a percentage of AEI's proceeds in cash rather than have those funds retained by AEI in a promotional account. *See* Tr. 8468-69.

The Panel finds that the third and fourth form of agreement (whose principal difference is whether the royalty is received entirely in cash or partly in the form of promotional services requested by the licensor) comprise the predominant royalty arrangement between AEI and the major labels who license the vast majority of copyrighted sound recordings. *See also* Wilcox W.D.T. 12; Pipitone W.D.T. 3; Tr. 2266 (Pipitone). Similar agreements exist between major labels and other background music

services, including [REDACTED], Muzak ([REDACTED]), Play Network Inc. ([REDACTED]), and Radio Programming and Management, Inc. ([REDACTED]).

It is true, as DMX/AEI asserts, that these agreements convey to the licensees some benefits beyond the use of the sound recordings. But they also convey to the licensor benefits beyond the royalty payment. It is clear, however, that "by far the most important rights" conveyed to licensees by these agreements are the rights to copy and distribute (i.e., to use) sound recordings in their background music service (Tr. 8475-76 (Knittel)), and it is thus reasonable to infer that the royalty obligation in these agreements was assumed in exchange for those "far most important" rights.

The royalty obligation in these agreements is generally [REDACTED] of gross proceeds derived by the background music company from the licensed service. See, RIAA Exhibits 9 DR, 10 DR, 11 DR, 12 DR, 13 DR, 14 DR, 26 DR, 27 DR, 28 DR, 60-A DR, 66 DR-X, Knittel Rebuttal Ex. 22; Knittel W.D.T. 14-15. Two agreements (RIAA Exhibits [REDACTED]) set the percentage for satellite service at [REDACTED] and for on-premises service at [REDACTED]; these agreements were negotiated at a time when it was uncertain whether satellite service was subject to a royalty obligation. See Pipitone W.D.T. 3-4; Tr. 2268-70 (Pipitone); Marks W.D.T. 31. One of these agreements (RIAA Exhibit 14 DR) has subsequently expired, and the rate for on-premises service has gone back to [REDACTED] (RIAA Exhibit 10 DR). Other subsequent agreements (RIAA Exhibit 60-A DR, Knittel Rebuttal Exhibit 22) have set a uniform percentage rate for satellite and on-premises services.

In a few agreements (e.g., [REDACTED] Knittel Rebuttal Exhibit 22), there are certain deductions from "gross proceeds" before the royalty percentage is applied. In most of these agreements in evidence (RIAA Exs. [REDACTED] [REDACTED]), however, there are no deductions from gross proceeds, and in some (e.g., RIAA Exs. [REDACTED]), the licensee is obligated to pay [REDACTED] per recording used in a program, in addition to the stated percentage of gross proceeds.

From the evidence before us, the Panel finds that, among major labels and a variety of background music companies, willing buyers and willing sellers have generally agreed to blanket licenses to use sound recordings in such services in exchange for royalty payments of approximately [REDACTED] of the gross proceeds of such services. As discussed in Section VI.C. above, there is no evidence that the royalty rate depends on what technology is used to deliver the music. Royalty rates for on-premises services were 10-15% of gross proceeds before 1999, when DMX and AEI did not utilize digital repositories, and 10-15% of gross proceeds after 1999, when they did. *See* note 75 *supra*. Nor is there any persuasive evidence that willing buyers and willing sellers place a significantly different value on a broadcast service which uses a DMCA-compliant database from one which does not. *See, e.g.,* RIAA Exhibit 60-A DR ([REDACTED] royalty for broadcast service with DMCA-compliant database) and Knittel Rebuttal Exhibit 22 (royalty of [REDACTED] for broadcast service without DMCA-compliant database).⁷⁷

⁷⁷ The [REDACTED] per program feature is impossible to convert directly into a percent of revenue, but plainly means that the total royalty obligation is greater than [REDACTED] of gross proceeds.

In view of this evidence, the Panel concludes that, in exchange for a blanket license to utilize all copyright owners' sound recordings in a broadcast service under Section 112(e), background music companies and copyright owners would agree to a royalty of at least 10% of gross proceeds. RIAA has proposed that royalty, which lies at the low end of the [REDACTED] range described above, partly to give some consideration to the contention of DMX/AEI that its existing voluntary licenses already provide some of the rights (i.e., the digital repository) it needs to operate such a service. Tr. 14658 (Garrett).

One subsidiary question which must be answered in setting such a rate is how to define "gross proceeds." RIAA has proposed an expansive definition drawn from the [REDACTED]. We reject this proposal for two reasons. First, we believe that this licensee, [REDACTED], was particularly motivated to accommodate RIAA. Second, the definition in question is found in only one of the other background music license agreements before us. In contrast, [REDACTED] agreements before us (RIAA DR Exhibits [REDACTED]) provides, in substantially uniform language, a simpler and less sweeping definition of gross proceeds.⁷⁸ This definition, which appears in more of the

⁷⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

agreements before us than does any other, has apparently been utilized by [REDACTED] with most of the background music services (AEI, DMX, Muzak, Play Network, Inc. and Radio Programming and Management, Inc.) over a number of years. Thus the record shows that this simple definition has won broad marketplace acceptance. While not detailed, its widespread use suggests that the parties have developed workable understandings for applying it in actual practice. We adopt this definition, as rephrased to fit the Section 112(e) license.⁷⁹

Section 112(e) requires that the Panel also set a minimum fee for this kind of service. However, the evidence before us is too varied to draw the conclusion that willing buyers and willing sellers consistently agree to minimum fees on the order of \$50,000 per year, as requested by RIAA. While several of the agreements (RIAA Exhibits [REDACTED]) have minimums of that size or larger, one has a much smaller minimum ([REDACTED]) and several (RIAA Exs. [REDACTED]) have no minimum payment at all. We conclude that the minimum fee of \$500, which we have set to cover the administrative costs of dealing with the webcasting and broadcasting licensees, should apply to the Business Establishment licensees as well.

Accordingly, the Panel determines as follows:

⁷⁹ Because any one label can only demand royalty payments from the background services for use of its own recordings, a formula must be developed to calculate what portion of total proceeds resulted from use of that label's records. The definition we adopt does so differently for classical recordings and other titles, presumably because the playing time of classical recordings varies widely, whereas that of most other recordings is relatively uniform in length. For the blanket license under 17 U.S.C. § 112 (e), there is no need to distinguish the copyrighted recordings of one label from that of another, but there is a need to distinguish the portion of the background company's programs which utilize copyrighted recordings from the portions which utilize non-copyrighted recordings. The definition we select is easily adapted to that purpose.

1. The Section 112(e) royalty rate for the making of unlimited numbers of ephemeral recordings by background music organizations in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. § 114 (d)(1)(C)(iv) shall be a sum equal to ten percent (10%) of the licensee's gross proceeds derived from the use of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings shall be made on the basis of:

- (i) for classical programs, the proportion that the playing time of copyrighted classical titles bears to the total playing time of classical titles; or
- (ii) for all other programs, the proportion that the number of copyrighted titles bears to the total number of titles.

2. The minimum fee for each licensee shall be \$500 per year.

VII. TERMS FOR SECTION 114(f) AND 112(e) LICENSES

A. THE GOVERNING STANDARD

17 U.S.C. §§ 114(f) and 112(e) require that, in addition to determining royalty rates for the statutory licenses created by those sections, the Panel is also required to establish *terms* for such licenses. Section 114(f) explicitly provides that the Panel's determination of such terms is governed by the same standard which controls its rate determinations, i.e.,

In establishing rates *and terms* for transmissions by eligible non-subscription services and new subscription services, the copyright arbitration royalty panel shall establish rates *and terms* that most clearly represent the rates *and terms* that would have been negotiated in the marketplace between a willing buyer and willing seller.

17 U.S.C. § 114(f)(2)(B) (emphasis added).

While the language of Section 112(e) is less explicit in defining the standard applicable to the Panel's determination of terms under that section, the Librarian has previously ruled that "the standard for setting royalty fees for the Section 112 license is identical to the standard used to set rates for the section 114 license" (Order of July 16, 2001 at 5), and there is no reason to conclude that this identity of standards would not apply to the setting of Section 112 terms as well.

Thus, it is evident that the Panel is bound to adopt those terms which the record shows would have been agreed to by willing buyers and willing sellers in the marketplace. The question of whether such terms represent the optimum alternative from the standpoint of administrative convenience and workability is not part of the governing standard for the Panel, nor is it a matter on which we have either record evidence or institutional expertise. Accordingly, while the Panel would not readily adopt terms which are obviously unworkable, and has not done so here, we must defer to the expertise of the Librarian the final evaluation of the administrative feasibility of terms which willing buyers and willing sellers would agree to in marketplace negotiations.

**B. THE RECORD CONCERNING WILLING BUYER/
WILLING SELLER AGREEMENT**

During the suspension of proceedings described in Section II.D. *supra*, the parties reached a contingent settlement concerning commercial broadcaster rates and an agreement concerning virtually all terms for webcasters, broadcasters and background music services. While the parties agreed that their rate settlement could not be presented to the Panel until certain conditions were met, there was no such restriction concerning the agreement on terms. Accordingly, on December 20, 2001, the Panel issued an order granting the joint motion of the parties to reopen the record for the purpose of receiving the agreed terms.

Subsequently, complications developed which prevented the Panel from receiving the parties' settlement concerning broadcaster rates. However, the parties continued to maintain general agreement regarding nearly all terms. In a hearing on January 11, 2002, the Panel solicited clarification and supporting authority for certain of the proposed terms.

On February 1, 2002, the Services and the Copyright Owners and Performers filed separate submissions tendering their respective proposals concerning terms. In each case, the actual terms proposed were virtually identical in all respects except for two matters addressed below. In each submission, the proposed term was followed by one or more explanatory comments. Again, in the vast majority of instances, the comments from each side were substantially identical.

The Panel has concluded that the nearly identical February 1, 2002 submissions of the parties, which reflect extensive negotiations between all the parties to this case -- including RIAA, AFIM, AFTRA, AFM, DMX/AEI, NRBMLC, five large broadcaster

groups, and a dozen webcasting services -- meet the standard of clearly representing the terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. Extensive evidence in support of many of the terms was provided in the written and oral testimony of a number of witnesses, including Barrie Kessler, Executive Director of Internal Operations and Data Management for SoundExchange; Michael Williams, RIAA's Executive Vice President of Finance and Operations; Steven Marks, RIAA's Senior Vice President for Business and Legal Affairs; and Ronald Gertz, President and CEO of Music Reports, Inc. Moreover, we do not see any provisions in these terms which are plainly unworkable, although, as noted, we defer to the Librarian's greater expertise on this matter.⁸⁰ Accordingly, the Panel adopts those terms which reflect agreement among the parties.⁸¹

B. DISPUTED TERMS

There are two respects in which the parties did not reach agreement concerning terms. The Panel must therefore determine how willing buyers and willing sellers would have resolved those matters in their marketplace negotiations.

⁸⁰ There are some provisions in the terms which cannot be fully settled until the Librarian makes his final determination with respect to the royalty rates at issue and also issues a final order under 17 U.S.C. §§ 114(f)(4)(A) and 112(e)(7)(A) establishing applicable notice and record-keeping requirements for the services involved in this proceeding. Those instances are noted in the Panel's determination of terms set forth in Appendix B hereto.

⁸¹ One term on which all parties agreed was the provision in Paragraph 3(f) that requires Designated Agents to pay directly to performers their share of royalties. All parties seem to recognize, and the Panel concurs, that this is the most efficient, economical, and reliable way to assure that performers receive the royalties to which they are entitled under the statute. The Copyright Office has raised the question of whether, regardless of its desirability, the statute permits such direct payments. The memorandum submitted by AFM and AFTRA makes a strong argument that it does. In the absence of contrary authority, we accept the AFM/AFTRA position and commend it to the Copyright Office for favorable consideration.

1. Definitions of Certain Terms

The Services ask that the Panel include in the terms we adopt the definitions, contained in the parties' joint submission of December 20, 2001, of four terms: "Affiliated," "AM/FM Streaming," "Broadcaster," "Non-Public." Copyright Owners and Performers oppose the adoption of such definitions, noting that they were developed to explain the broadcaster rates settlement which has not been effectuated.

The Panel has concluded that these disputed definitions plainly relate to a broad settlement of broadcaster issues which went well beyond this Panel's jurisdiction, for example, by extending beyond 2002. Because that settlement could not be realized, and has never been presented to the Panel, we do not know the rate structure to which the definitions in question relate. Based on the evidence of record, the Panel has determined to adopt rates as set forth above, which are not tied to the particular definitions the Services ask us to adopt. Accordingly, there is no need to include such definitions in the terms we establish.

However, the Panel has concluded that, in view of the rate structure it has determined to adopt, it should also adopt definitions of some terms that were not included in the parties' February 1, 2002 submissions. Accordingly, on February 6, 2002, the Panel solicited the parties' definitions of certain additional terms, has carefully considered the parties responses to this order, and has adopted what it deems the most appropriate definitions for those additional terms.

2. Agent for Copyright Owners Who Do Not Designate an Agent

The terms agreed to by all the parties permit copyright owners to designate either

SoundExchange or Royalty Logic Inc. (RLI) as their Designated Agent for the distribution of royalties to the copyright owners who designate them, and the performers entitled to receive royalties from the performance of recordings owned by such copyright owners. The parties, however, are in disagreement concerning who should be the agent for copyright owners who fail to designate an agent, and the performers entitled to receive royalties from the performance of such copyright owners' recordings. The Services propose RLI. Copyright Owners and performers propose SoundExchange.

While there are respectable arguments for either designation, the Panel has concluded that willing buyers and willing sellers would ultimately have agreed upon SoundExchange as the distribution agent for copyright owners who fail to designate one. While the Services would like to see some competition among designated agents, they do not have a vital stake in the matter. Once licensees have paid to the Receiving Agent (whom the Services have agreed should be SoundExchange) the royalties and fees for which they are liable, the distribution of such funds is not a matter in which they have a direct interest.

Copyright owners and performers, on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates. AFM and AFTRA, in particular, have expressed a strong preference for SoundExchange because of its non-profit status, its experience with royalty payment, and a recent purported reorganization of SoundExchange which allegedly gives artists substantial control over its operations. Submission of AFM and AFTRA Regarding Proposed Terms and Eligible Non-Subscription Transmissions And The Making of Ephemeral Reproductions at 15-18.

The Panel believes that, in any marketplace negotiation between willing buyers (i.e., licensees) and willing sellers (i.e., licensors) concerning the process for distributing licensor payments, the licensees, having no direct stake in that aspect, would ultimately have to accede to the strong preference of licensors concerning who should distribute royalties to copyright owners who have not designated a particular agent. Accordingly, we reflect such an agreement, or concession, in the terms we adopt here. The Panel also believes that, as a matter of public policy, when choosing between a for-profit and a not-for-profit entity to serve parties who have not indicated a preference for either one, it is generally more appropriate to select the not-for-profit organization, rather than one whose distributions would be reduced by some degree of profit margin in addition to the administrative cost of collecting and distributing such royalties.

C. THE FORMAT OF APPENDIX B

Set forth in Appendix B hereto are the terms which the Panel has adopted for the Section 114 and 112 statutory licenses in question. The terms themselves appear in regular type. Explanatory comments appear after each term in italics. Comments preceded by a bullet (•) were submitted by all parties. Comments preceded by an asterisk (*) were either written by the Panel or adopted by the Panel from the submission of one side or the other.

VIII. DETERMINATION AND ASSESSMENT OF COSTS

In accordance with the findings and conclusions set forth above, the Panel determines that the compulsory license rates and terms for the digital audio transmission of sound recordings by eligible nonsubscription services pursuant to 17 U.S.C. § 114(f) and the making of ephemeral recordings by transmitting organizations pursuant to 17 U.S.C. § 112(e) for the period October 28, 1998 through December 31, 2002 should be as set forth in Appendix B hereto.

Pursuant to 37 CFR § 251.54(a)(1) and (b), the costs of the arbitrators shall be borne by the parties hereto in accordance with their agreement, namely, one-half by the Copyright Owners and Performers and one-half by the Services.

IX. CERTIFICATION BY THE CHAIRPERSON

Pursuant to 37 CFR § 251.53(b), on this 20th day of February, 2002, the Panel Chairperson hereby certifies the Panel's determinations contained herein.

DATED: FEBRUARY 20, 2002

Eric E. Van Loon
Chairperson

Jeffrey S. Gulin
Arbitrator

Curtis E. von Kann
Arbitrator

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
)

DIGITAL PERFORMANCE RIGHT IN)
SOUND RECORDINGS AND EPHEMERAL)
RECORDINGS)
)

Docket No. 2005-1 CRB DTRA

REVISED RATE PROPOSAL FOR SOUNDEXCHANGE, INC.

Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, hereby proposes the following rates for (1) the digital audio transmission of sound recordings by eligible nonsubscription transmission services and new subscription services operating under the statutory licenses set forth in 17 U.S.C. § 114(d)(2), and (2) the making of ephemeral phonorecords necessary to facilitate transmissions by eligible nonsubscription transmission services and new subscription services, 17 U.S.C. § 112(e), during the period January 1, 2006 through December 31, 2010. Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange reserves the right to alter or amend its rate proposal prior to submission of findings and conclusions if warranted by the record.

I. ROYALTY RATES FOR MUSIC SERVICES

A) Eligible Nonsubscription Transmission Services

Each transmitting entity providing an eligible nonsubscription transmission service ("transmitting entity" or "Licensee") shall pay a monthly fee (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies) for its eligible nonsubscription transmission service equal to:

1) Monthly Fee. For each month, the Licensee shall calculate and report Gross Revenues and the number of performances of copyrighted sound recordings. The monthly fee shall equal the greater of a) or b) below:

a) *Revenue Share:* 30% of Gross Revenues;

or

b) *Usage Amount:* The applicable Per Play Rate multiplied by the number of performances of copyrighted sound recordings in the month (i.e., each instance where a webcaster transmits any portion of a single copyrighted sound recording to a single listener (i.e., a receiving device)) multiplied by the Adjustment Factor.

2) The Per Play Rate. The Per Play Rate during each year of the license shall equal:

Year	Per Play Amount
2006	\$.0008
2007	\$.0011
2008	\$.0014
2009	\$.0018

2010	\$.0019 multiplied by the CPI Increase
------	---

3) The Adjustment Factor. The Adjustment Factor shall equal:

$1 + (.25 \text{ MULTIPLIED BY the Pro Rata Share of Wireless Performances})$.

4) Pro Rata Share of Wireless Performances. The Pro Rata Share of Wireless Performances shall equal the total number of monthly performances terminating on a wireless device DIVIDED BY the total number of monthly performances.

5) CPI Increase. The CPI Increase shall equal the percent change in the CPI-U from December of 2005 to December 2009 (e.g., if the CPI-U is 3% each year during the license period, the Per Play Amount in 2010 shall be \$.00214 per performance).

6) Minimum Annual Fee. For each year that a transmitting entity makes eligible nonsubscription transmissions under Section 114(d)(2) of the Copyright Act, the transmitting entity shall pay a non-prorated, recoupable but non-refundable minimum annual fee for each eligible nonsubscription transmission service that makes digital audio transmissions of sound recordings during the year equal to \$500 per channel or station offered by the service. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions between January 1 and January 31 but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license. Any unrecouped balance for a minimum annual fee remaining at the end of the calendar year shall not carry forward to any subsequent year.

7) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e)(1) for the making of ephemeral copies used solely by the eligible nonsubscription transmission service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

8) Performances Terminating on a Wireless Device. For purposes of the royalty calculation, a performance terminating on a wireless device shall include any performance transmitted over a wireless network and terminating on a cell phone, PDA or similar device; provided, however, that transmissions over a personal, short range residential wireless network, such as via a wireless router at a personal residence, shall be excluded from the calculation of the number of transmissions to a wireless device. For services that make transmissions to both fixed line devices and wireless devices, the responsibility shall be on the service to determine the number of performances terminating on a wireless device. To the extent that a service offers transmissions to both fixed line and wireless devices and the service cannot distinguish between transmissions to wireless devices and fixed line devices, the service shall pay the rate applicable to transmissions terminating on wireless devices (e.g., the Adjustment Factor shall equal 1.25).

B) New Subscription Services

Each transmitting entity providing transmissions through a new subscription service ("the transmitting entity" or "Licensee") shall pay a monthly fee (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies) for its new subscription service equal to

1) Monthly Fee. For each month, the Licensee shall calculate and report Gross Revenues, the number of performances of copyrighted sound recordings, and the number of subscribers to the service (including free trial subscribers). The monthly fee shall equal the greater of a), b), or c) below:

a) *Revenue Share:* 30% of Gross Revenues; or

b) *Usage Amount:* The applicable Per Play Rate multiplied by the number of performances of copyrighted sound recordings in the month (i.e., each instance where a webcaster transmits any portion of a single copyrighted sound recording to a single listener (i.e., a receiving device)) multiplied by the Adjustment Factor; or

c) *Per Subscriber Minimum:* \$1.37 per month for each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by Licensee without a fee (e.g., during a free trial period) multiplied by the Adjustment Factor.

2) The Per Play Rate. The Per Play Rate during each year of the license shall equal:

Year	Per Play Amount
2006	\$.0008
2007	\$.0011
2008	\$.0014
2009	\$.0018
2010	\$.0019 multiplied by the CPI Increase

3) The Adjustment Factor. The Adjustment Factor shall equal:

$1 + (.25 \text{ MULTIPLIED BY the Pro Rata Share of Wireless Transmissions})$.

4) Pro Rata Share of Wireless Transmissions. The Pro Rata Share of Wireless Transmissions shall equal the total number of monthly performances terminating on a wireless device DIVIDED BY the total number of monthly performances.

5) CPI Increase. The CPI Increase shall equal the percent change in the CPI-U from December of 2005 to December of 2009 (e.g., if the CPI-U is 3% each year during the license period, the Per Play Amount in 2010 shall be \$.00214 per performance).

6) Minimum Annual Fee. For each year that a transmitting entity makes new subscription service transmissions under Section 114(d)(2) of the Copyright Act, the transmitting entity shall pay a non-prorated, recoupable but non-refundable minimum annual fee for each new subscription service that makes digital audio transmissions of

sound recordings during the year equal to \$500 per channel or station offered by the service. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions between January 1 and January 31 but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license. Any unrecouped balance for a minimum annual fee remaining at the end of the calendar year shall not carry forward to any subsequent year.

7) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. 112(e) for the making of ephemeral copies used solely by the new subscription service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

8) Performances Terminating on a Wireless Device. For purposes of the royalty calculation, a performance terminating on a wireless device shall include any performance transmitted over a wireless network and terminating on a cell phone, PDA or similar device, provided that transmissions over a personal, short range residential wireless network, such as via a wireless router at a personal residence, shall be excluded from the calculation of the number of transmissions to a wireless device. For services that make transmissions to both fixed line devices and wireless devices, the responsibility shall be on the service to determine the number of performances terminating on a wireless device. To the extent that a service offers transmissions to both fixed line and wireless devices and the service cannot distinguish between transmissions to wireless

devices and fixed line devices, the service shall pay the rate applicable to transmissions terminating on wireless devices (e.g., the Adjustment Factor shall equal 1.25).

9) Services Covered. For purposes of this section, new subscription services shall include all subscription services that are making digital audio transmissions of sound recordings including a) subscription services that have come into existence since September 1, 2000 (the date of filing notice of petitions to participate in Docket No. 2000-9 CARP DTRA 1& 2) and b) subscription services offered by companies that also provide services that are separately licensed as preexisting subscription service ("PES") (17 U.S.C. § 114(j)(11)) or preexisting satellite digital audio radio service ("SDARS") (17 U.S.C. § 114(j)(10))), except to the extent that the activity of such companies falls within the narrow statutory licenses for a PES or SDARS.

II. BUNDLED SERVICES

A. Definition: A "Bundled Service" shall mean a service or product provided by a Licensee, or a third party on Licensee's behalf, that: (i) is eligible for a statutory license pursuant to 17 U.S.C. § 114(d)(2); (ii) is only offered to end users for a fee, other than for a limited duration on a promotional basis; and (iii) includes, as part of the end user fee, Connectivity Service (as defined below) provided by a third party that is not a parent, subsidiary, division, or affiliate of Licensee, or that otherwise controls or is controlled by Licensee. "Connectivity Service" shall mean a service or product whose primary purpose is to allow an end user to access the Internet, a cellular telephone network or such other network over or through which a sound recording is transmitted to the end user via a digital audio transmission (e.g., Internet access service or cell phone service).

Notwithstanding the foregoing, a service or product shall not be considered a Bundled Service if the sound recording transmission component of the service or product is otherwise made available on a stand-alone basis or as part of a package of services not considered a Bundled Service.

B. Each Licensee providing a Bundled Service shall pay a monthly fee (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies) for its Bundled Service equal to:

1) Monthly Fee. For each month, the Bundled Service shall report the number of performances. The monthly fee shall equal the applicable Per Play Rate multiplied by the number of performances of copyrighted sound recordings in the month (i.e., each instance where a webcaster transmits any portion of a single copyrighted sound recording to a single listener (i.e., a receiving device)) multiplied by the Adjustment Factor.

2) The Per Play Rate. The Per Play Rate for Bundled Services during each year of the license shall equal \$.002375 (adjusted each year of the term in accordance with the CPI Increase).

3) The Adjustment Factor. The Adjustment Factor shall equal:
 $1 + (.25 \text{ MULTIPLIED BY the Pro Rata Share of Wireless Transmissions}).$

4) Pro Rata Share of Wireless Transmissions. The Pro Rata Share of Wireless Transmissions shall equal the total number of monthly performances terminating on a wireless device DIVIDED BY the total number of monthly performances.

5) CPI Increase. Each year of the license period, beginning on January 1, 2007, the Per Play Rate shall increase according to the percent change in the CPI-U from the December of two year's prior to December of the prior year (e.g., the per performance rate in 2007 shall equal \$.002375 times the change in CPI-U from December of 2005 to December of 2006).

6) Minimum Annual Fee. For each year that a transmitting entity makes transmissions under Section 114(d)(2) of the Copyright Act as part of a Bundled Service, the transmitting entity shall pay a non-prorated, recoupable but non-refundable minimum annual fee for each new subscription service that makes digital audio transmissions of sound recordings during the year equal to \$500 per channel or station offered by the service. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions between January 1 and January 31 but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license. Any unrecouped balance for a minimum annual fee remaining at the end of the calendar year shall not carry forward to any subsequent year.

7) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. 112(e) for the making of ephemeral copies used solely by the new subscription service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

8) Performances Terminating on a Wireless Device. For purposes of the royalty calculation, a performance terminating on a wireless device shall include any

performance transmitted over a wireless network and terminating on a cell phone, PDA or similar device, provided that transmissions over a personal, short range residential wireless network, such as via a wireless router at a personal residence, shall be excluded from the calculation of the number of transmissions to a wireless device. For services that make transmissions to both fixed line devices and wireless devices, the responsibility shall be on the service to determine the number of performances terminating on a wireless device. To the extent that a service offers transmissions to both fixed line and wireless devices and the service cannot distinguish between transmissions to wireless devices and fixed line devices, the service shall pay the rate applicable to transmissions terminating on wireless devices (e.g., the Adjustment Factor shall equal 1.25).

9) Other Types of "Bundles" -- Any other Service for which a Licensee receives receive a fee (including services bundled with other products or services that do not meet the definition of Part II.A) shall pay monthly fees as a new subscription service in accordance with Part I.B above. Any Licensee's Service that is bundled with other products or services, but also sold on an ala carte basis for a separate fee shall pay monthly fees as a new subscription service in accordance with Part I.B above.

III. ADJUSTMENT FOR NON-MUSIC SERVICES

A. Definition: "Non-music services" shall mean services that are overwhelmingly news, talk, sports, or business programming and whose programming is, when calculated based on total time spent listening (i.e. as measured by listening time of end users, not by programming), less than 25% music. In determining whether time spent listening is to music programming or news, talk, sports, or business programming, advertisements (including advertisements for the service itself or affiliates) and programming replacing over-the-air

advertisements shall not be counted (i.e. in determining the total listening time of end users for all programming, advertisements and programming replacing over-the-air advertisements shall equal 0), .

B. Non-music services shall pay in accordance with Parts I and II above, except that

1. Revenue Share. For each month in which a monthly fee is owed, Gross Revenues shall equal Gross Revenues for the Service multiplied by the Music Percentage;

2. Per Subscriber Minimum. To the extent that a non-music station is offered by a new subscription service, then for each month in which a monthly fee is owed, the per subscriber minimum portion of the calculation shall equal the Per Subscriber Minimum calculated pursuant to Section I above multiplied by the Music Percentage;

3. Usage Amount. The Usage Amount shall be calculated as described in Sections I and II (i.e., the number of performances multiplied by the applicable Per Play Rate multiplied by the Adjustment Factor)

C. The Music Percentage. The Music Percentage shall equal the total time spent listening to music programming (e.g., programming that is more than 25% music) for the month divided by the total time spent listening to the service for the month.

IV. GROSS REVENUES

A. Definition of "Service"

"Service" shall mean a product or service offered, directly or through a third party, that engages in digital audio transmissions of sound recordings that is eligible for the statutory license pursuant to 17 U.S.C. § 114(f)(2) and § 112(e), provided that, for purposes of this regulation, where the same Licensee, directly or through a third party, offers different versions of the same product, e.g., a 20-channel offering and a 100-channel offering or a commercial-free offering and

an ad-supported offering, each version of the product that differs in material respects shall be a different "Service."

B. Definition of Gross Revenues

"Gross Revenues" shall mean all gross monies and other consideration, paid or payable to or on behalf of any person or entity, that are directly or indirectly attributable to a Service (including, without limitation, non-returnable advances and guarantees). Gross Revenues for any non-cash or in-kind consideration shall be accounted for on the basis of the fair market value of such non-cash or in-kind consideration. Gross Revenues shall be calculated prior to any deductions of any kind (including, without limitation, deductions for bad debt, discounts, taxes, returns, or payments provided to any third party), except as expressly permitted herein. For purposes of clarification, Gross Revenues shall include such gross monies and other consideration, paid or payable to or on behalf of a third party (including, without limitation, Licensee's agents, resellers, distributors, or service providers), that are directly or indirectly attributable to a Service (*i.e.*, such gross monies and other consideration shall be determined and calculated "at source").

Gross Revenues shall include but not be limited to:

(1) Subscription Fees: Any monies and other consideration for access to or use of the Service by or on behalf of end users receiving within the United States transmissions made as part of the Service; provided, however, that

(i) where a Licensee offers access to or use of the Service to an end user for free for a limited duration, the fee attributable to such end user shall equal the fee otherwise charged to end users for access to or use of the Service, e.g., where a Service offers "1-month free", the

fee attributable shall be the monthly fee for users not eligible for the "1-month free" promotion;
and

(ii) where a Licensee bundles access to or use of the Service (either directly or through a third party) to an end user for a fee, the fee attributable to such end user shall equal the fee otherwise charged to end users for access to or use of the Service, e.g., where a Service bundles commercial-free webcasting with Internet access service for a fee, the subscription revenue attributable to the Service shall be the monthly fee charged on an ala carte basis for the Service, assuming the ala carte version of the Service is the same in material respects to the Service offered as part of the bundled product. Where a Licensee bundles access to or use of the Service (either directly or through a third party) with other products or services and the Service is not offered on an ala carte basis and does not otherwise qualify as a Bundled Service, the subscription revenue attributable to the Service shall be the monthly fee charged for the entire bundled service.

(2) Advertising Revenue: Any monies and other consideration from any text, audio, visual, audio-visual or other advertising, promotions, or sponsorships (collectively "advertising") attributable to the Service, including but not limited to advertising presented:

(i) On or through the Service or the Service's media player;

(ii) On or through pages, interfaces, or displays associated primarily with the Service or predominantly targeted to end users of the Service (e.g., the LaunchCast radio home page and associated pages, the AOL Radio home page and associated pages, or all pages of a website whose primary purpose is provision of the Service, such as the website of a stand-alone webcaster such as AccuRadio.

(iii) On or through pages, interfaces, or displays (not otherwise encompassed in (ii)) from which an end user may launch and/or access a media player to listen to the Service (e.g., pages with "Listen Now" or "Listen Live" buttons), provided that advertising revenue attributable to the Service (as opposed to any other content on the page) shall equal the advertising revenue from such pages multiplied by the ratio of the number of visits to such pages by users that access the Service relative to the number of visits to such pages by all users;

(iv) On or through pages, interfaces, or displays (not otherwise encompassed in (ii)) that contain content related to the Services and other music-related content offered by the Licensee (e.g., a webpage that contains content related to a music video product and a Service such as the Yahoo! Music home page or the AOL Music home page), provided that advertising revenue attributable to the Service (as opposed to any other content on the page) shall equal the advertising revenue from such pages multiplied by the ratio of the number of visits to such pages by users that access the Service relative to the number of visits to such pages by all users);

(v) In e-mails, text messages, SMS messages, premium SMS messages, instant messages, or other communications targeted at or intended for end users or prospective end users of the Service (as opposed to general marketing activities undertaken by Licensee, or a third party on Licensee's behalf, not specifically or separately concerning the Service, Service end users, or prospective end users).

Such advertising revenues shall include the fair market value of barter from third parties or any affiliate of the Service, e.g., advertisements such as (i)-(v) by any affiliate of the Service for other products or services, and shall also include revenues from any other advertising of any

kind that the Licensee actually attributes to the Service. With respect to all types of advertising, the Service may deduct actual advertising agency commissions (not to exceed 15% of those monies or other consideration of each advertisement) actually paid to a recognized advertising agency not owned or controlled by Licensee.

Notwithstanding the foregoing, with respect to sales of advertising that bundle 1) advertising, sponsorships or promotions presented to an end user on or through the Service and 2) advertising, sponsorships or promotions presented to any users of any other Licensee owned, operated, branded, or controlled services or product (e.g., sale of in-stream advertising on a Service bundled with advertising on an over-the-air radio station), the Advertising Revenues attributable to such bundle shall be the fair market value of the Service-only portion of the advertisement, as calculated by the value of such advertising when sold on a stand-alone basis.

(3) Sales of Products and Services: Any monies and other consideration (including, by way of example and without limitation, the proceeds of any revenue-sharing, customer acquisition, customer referral, bounty or commission arrangements with any fulfillment company or other third party, and any charge for shipping or handling) from the sale of any product or service directly through the Service, less

(i) Monies and other consideration received from the sale of phonorecords and digital phonorecord deliveries of sound recordings that have been authorized by the applicable copyright owner,

(ii) The Licensee's actual, out-of-pocket cost to purchase for resale the products or services (except phonorecords and digital phonorecord deliveries of sound recordings) from third parties, or in the case of products produced or services provided by the Licensee, the Licensee's

actual cost to produce the product or provide the service (but not more than the fair market
wholesale value of the product or service), and

(iii) Sales and use taxes, shipping, and credit card and fulfillment service fees
actually paid to unrelated third parties; provided that:

Notwithstanding the foregoing, the fact that a transaction ultimately is consummated on a
different page or location than the Service page/location where a potential customer responds to
a "buy button" or other purchase opportunity for a product or service advertised directly through
the Service shall not render such purchase outside the scope of Gross Revenues hereunder, and


(4) Software Fees: Any monies and other consideration paid by or on behalf of end
users for any software, service or device owned or offered by Licensee (or any subsidiary or
other affiliate of the Licensee or a third party on Licensee's behalf) that is required as a condition
to access, use, or subscribe to the Service or that enhances use of the Service, and either is
purchased by an end user contemporaneously with or after accessing, using, or subscribing to the
Service or has no independent function other than to access or enhance the Service; and

(5) Data: Any monies and other consideration for the use and/or exploitation of data
specifically and separately concerning the Service and/or end users of the Service, but not
monies and other consideration for the use and/or exploitation of data wherein information
concerning end users or the Service is commingled with and not separated or distinguished from
data that predominantly concern Licensee's other services or end users.

V. TERMS

SoundExchange proposes that many, but not all of the terms of the current regulations, 37 C.F.R. Part 262, be maintained in their current form. SoundExchange proposes those changes to the current regulations described in the testimony of Barrie Kessler, as well as all such changes needed to implement the rate proposal discussed above. Pursuant to Section 351.4(a)(3), SoundExchange reserves the right to propose alternative or additional terms prior to submission of findings and conclusions if warranted by the record.

Respectfully submitted,

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Dated: September 29, 2006

Before the
COPYRIGHT ROYALTY BOARD

PUBLIC VERSION

Library of Congress
Washington, D.C.

In the Matter Of:

Digital Performance Right :
in Sound Recordings and :
Ephemeral Recordings :

Docket No. 2005-1 CRB DTRA

Rebuttal Testimony of ADAM B. JAFFE
On Behalf of National Public Radio

I. Introduction and Background

My name is Adam B. Jaffe. I have been asked by National Public Radio, Inc. ("NPR"), its member stations, and all stations qualified by the Corporation for Public Broadcasting ("CPB") to receive federal funding (collectively, "public radio") to provide rebuttal testimony regarding the valuation of the right of public performance of digital sound recordings over the Internet for the period beginning on January 1, 2006, and ending on December 31, 2010. I previously filed direct testimony before the Copyright Royalty Board (the "Board") in this matter. In addition, I filed testimony before a Copyright Arbitration Royalty Panel *In the Matter of the Rates for Noncommercial Educational Broadcasting Compulsory License, Before the Copyright Arbitration Royalty Panel, Docket No. 96-6, CARP NCBRA*,

regarding the congressionally mandated compulsory license for performance rights (section 118). I have structured this rebuttal testimony as follows: Section II discusses the unique circumstances of public radio, and why in light of those circumstances, the Board should set a rate for public radio that is lower than the rate for commercial Internet radio. Section III examines public radio-specific benchmarks that should be used in setting the royalty rate for public radio.

II. Public Radio and NPR

A. Background

The Corporation for Public Broadcasting is a non-profit organization established by Congress to facilitate the development of the public radio and television system. CPB receives federal funds on an annual basis which it uses to benefit both public radio and public television. NPR is a producer and distributor of non-commercial news, talk, and entertainment programming. NPR serves audiences in partnership with independently owned and operated non-commercial stations. CPB-qualified stations are non-commercial educational stations that meet the criteria established by CPB to receive funding. Many of these stations are members of NPR.¹ There are over 800 public radio stations that are represented in this proceeding.

Public radio has a mandate to serve listeners by providing educational and cultural programming not generally available on commercial stations or

¹ Stern Written Direct Testimony at 3.

that may not have mass market appeal. Public radio's goal is to reach audiences that might not otherwise be served by commercial radio broadcasters.² Public radio focuses on its mission of increasing public awareness of important news and information and cultural programming by distributing its contents in all types of media, including over-the-air broadcasts and more recently, Internet transmissions of terrestrial radio broadcasts. Over-the-air broadcasts are still the primary way that audiences access public radio content: the audience reached via content streamed over the Internet is dwarfed by public radio's over-the-air audience.³

B. Public Radio Is Distinct from Commercial Radio

Public radio is non-commercial and not-for-profit. Unlike commercial webcasters, whose programming decisions are based on the goal of obtaining advertising or subscription revenue, public radio derives its funding through a variety of public and private sources whose support is not necessarily related to reaching the maximum audience.⁴ The complex nature of funding sources includes federal, state, or local government, colleges, and voluntary donations. In addition, federal, state, and local public funding is determined by a political process that is largely out of the stations' control, and donations are raised through fund-drives. On the other hand, the revenues of commercial broadcasters are determined by their commercial success,

² Stern Oral Hearing Testimony, June 27, 2006, at 71:5-9; Stern Written Direct Testimony at 4.

³ Stern Oral Hearing Testimony, June 27, 2006, at 73:4-16.

specifically their success in the marketplace in attracting the largest possible audience to earn advertising revenue and/or subscription revenue.

SoundExchange witnesses attempt to equate revenues of commercial radio and webcasters with the total funding of non-commercial radio;⁵ these comparisons have no rational economic basis. The differences between commercial and public radio are fundamental and affect much of the operational structure of public radio as compared with commercial radio, from decisions to subsidize small stations in remote locations to continuing to fund costly programming because of its cultural or educational importance.⁶

C. The Use of Sound Recordings in Public Radio

Public performance rights for digital sound recordings are necessary for streaming programming that contains music. Public broadcasters do not have advertising or subscription revenues that can be used to cover the cost of music licensing fees; instead, they have limited budgets for different necessary resources, including program production and acquisition. These budgets are determined by the availability of financial resources. If music royalties increase, there is no mechanism that adjusts the budget upwards to

⁴ Stern Written Direct Testimony at 11.

⁵ See, for example, Griffin Oral Hearing Testimony, May 2, 2006, at 188:13-191:3; and Brynjolfsson Oral Hearing Testimony, May 18, 2006, at 28:12-17.

⁶ For example, Kenneth Stern noted in his testimony that a large number of NPR's approximately 280 member stations are very small "mom and pop" operations in places such as Alaska. See Stern Oral Hearing Testimony, June 27, 2006, at 107:1-5 and 115:5-12.

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C. 20540

In re: Digital Performance Right
in Sound Recordings and
Ephemeral Recordings

)
) No. 2005-1
) CRB DTRA

EXPERT TESTIMONY OF

ROGER J. NEBEL
FTI CONSULTING

I, Roger Nebel, testify:

1. I submit this testimony in support of the rebuttal case of the Digital Media Association. I am fully familiar with the facts set forth herein and make this testimony based on my personal knowledge unless otherwise stated, and, if called as a witness, could and would testify competently to these facts.

QUALIFICATIONS

2. I currently serve as a leader in the Electronic Evidence & Technology group which is part of the Forensic and Litigation Consulting business unit of FTI Consulting. I have over 30 years of experience in the Information Technology and Information Security fields. I am familiar with developing, testing, and implementing complex computer systems as well as the art and science of auditing and assessing systems for statutory and regulatory compliance. I am intimately familiar with the assessment of computer systems for legal proceedings and in regulatory settlement agreement oversight as an independent consultant, and have personally authored expert

Tull's "Aqualung" and was offered the opportunity to purchase. When I listened to the classic rock stations I did not hear the song.

12. Live365.com features several methods of access, all of which require you to enable unsolicited incoming UDP connections across a wide range of ports. While this operates correctly where there is not a firewall in place, it may not function in all modern business locations. To get Live365 to work, I had to connect outside of our corporate firewall. Griffin suggests that you can simply search Live365, find a song, start the player, start Replay Radio, and make an unlicensed copy on the spot (5/2/06 HT 86, 89-94, 216-17, 313; 5/3/06 HT 290-91). In fact this is far from the actual user experience. You can in fact search Live365 and obtain a list of stations that have the artist or song listed on their play list – again I searched for Jethro Tull's "Aqualung." However, because of DMCA restrictions, this only indicates that the song has played or may play at some indefinite time in the future. Moreover, Live365 monitors all of its broadcasters, and depending on the mode (live, relay, or basic) will shut down any broadcaster whose playlist breaks (or would break) the rules. So the actual user experience involves finding a station that has played or may play the song and then waiting and hoping that the song actually plays. In my experience this took hours and was not fruitful. In my experiment looking for Jethro Tull's hit song this involved hours of patient waiting and I failed to ever hear the song played. In other cases this could fail because Live365 coincidentally shuts down a specific stream for DMCA non-compliance or for other business reasons.

PEER-TO-PEER (P2P)

13. Peer-to-Peer (P2P) networks contain a wealth of high-quality digital audio. Most P2P networks today work in generally the same way – there is a client software module installed on your PC that allows you, the end-user, to publish and find music directly with other end-users. Because a centralized-server-based architecture lends itself

offered the other parties in this proceeding the opportunity to physically examine Exhs. 159B and 160B and that there have been no requests to do so.

The two discs -- which are to be marked as Exhibits 159B and 160B for identification and the photographic images of the discs and their respective album covers, marked Exhibits 159 and 160 for identification, which are to be reoffered for admission into evidence -- are discs that have actually been played over Station WHRB (FM) and are representative of a substantial class of recordings that are played over the station (and consequently webcast) in the course of regular programming. Despite using software of the sort described by Ms. Kessler, I have been unable to detect an ISRC embedded in either disc. Given the physical characteristics of these discs I should not have expected to find any. Taking both the disc label and the album for each disk, respectively, I could not confidently find all four of the default identifying data elements on either of the disks, so that neither WHRB (FM) nor anyone else would have been able to report all the elements Ms. Kessler proposed to require webcasters to report to SoundExchange in order to avoid the penalties she proposed.

As a practical matter, given its programming format, Station WHRB (FM) would not be able in a substantial number of cases each week to comply with SoundExchange's proposed data-reporting requirements. This is so, because many of the 1,500 sound recordings played by the station in the course of the week -- of which many are manufactured and/or distributed by labels that are members of SoundExchange's affiliated organization, the Recording Industry Association of America (RIAA) -- a substantial proportion do not contain embedded ISRCs. In fact, various examinations

were made of a spot-check of divers discs drawn from broadcast station libraries in the Boston area that were made by me or at my request did not detect embedded ISRCs, with the exception of one label. On discs issued under the SONY label from the late 80s-on the ISRC seemed to be regularly embedded.

Error Inherent in Sampling

Second, Ms. Kessler testified and was examined at length on the error inherent in any sampling method and on the materiality of such systemic errors in sampling digital recordings played by college radio stations and whether the census-type reporting she proposed would be cost-effective. I have made some simple and intuitive, back-of-the-envelope calculations to estimate the probable range of dollars-and-cents impacts on the average recording artist (or group) that would result from sampling certain representative classes of radio stations' use of digital sound recordings in their simultaneously webcasting their aired broadcasts. The formula underlying these estimates is simple enough to allow anyone to perform informal sensitivity analyses of the results obtained by varying the values assigned to the independent variables in the formula in light of whatever additional information might be available to him or her. There are certain limitations in the data available for analysis, and some of these are discussed in greater detail below. The approximations in the spreadsheet are simply the best available within the data-imposed limitations. Thus, while the calculations in the spreadsheet do not yield precisely accurate numbers, the figures in columns (14) -- (15) do provide qualitative insights into the bottom-line effect on ratios and orders of magnitude resulting from sampling.

In the Matter of

Docket No. 2005-1 CRB DTRA

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

REBUTTAL TESTIMONY OF ERIC JOHNSON, CDR RADIO NETWORK

1. My name is Eric Johnson. I submitted direct testimony in this proceeding on behalf of the National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC"), and my background is described in that testimony. I am submitting this rebuttal statement in order to respond to a few points that were raised by SoundExchange during the direct phase of this proceeding.

I. CDR'S LISTENERSHIP LEVELS

2. In my direct statement, I referred to CDR's online and over-the-air listenership levels as an example of the relative sizes of online audiences in comparison to over-the-air audiences for noncommercial religious radio stations. At the time I wrote my direct statement, I did not have precise numbers for either CDR's online or over-the-air listenership, so I made reasonable estimates of those listenership levels based on the best information that I had. During my cross-examination, the validity of the estimates I presented was questioned. I now have obtained much more precise numbers for CDR's listenership levels, and they demonstrate that my previous estimates of the sizes of CDR's online and over-the-air audiences were reasonably accurate.

A. Over-the-Air Listenership

3. CDR has obtained Arbitron over-the-air listenership data through an organization called Radio Research Consortium ("RRC"). Arbitron is the well-recognized service that tracks broadcast radio listenership and assigns ratings to stations. RRC is a non-profit research

20. While the NRBNMLC believes that sample reporting is appropriate for all webcasters and radio simulcasters, it is particularly appropriate for NRBNMLC stations such as CDR. CDR's playlist is rather narrow; in a given month, we probably play fewer than 1,000 different songs, nearly all of which are played at least once in any given week. What's more, with very few exceptions, once a song is added to CDR's playlist, it remains there for at least six months and often longer than a year. A sample of one week per year would therefore be sure to pick up the vast majority of music we played. Thus, for CDR, a sample would be a particularly accurate representation of the music played -- even more than it would be for webcasters with much more diverse playlists.

21. Finally, as the Board is considering the license administration process in setting rates and payment terms, I strongly urge it to take into account the administrative burdens that would be imposed on noncommercial licensees by notice and recordkeeping requirements more burdensome than those set forth in 17 U.S.C. § 118. Recordkeeping requirements more burdensome than those applicable to noncommercial terrestrial broadcasting of musical works, such as those proposed by SoundExchange, could rapidly overwhelm our staff and even make us reconsider our decision to stream altogether. Such a requirement might force CDR to spend countless hours and dollars collecting and reporting data and revamping our tracking software and practices. I do not believe that we would be likely to come up with those necessary resources, particularly given our small online listenership. In fact, if noncommercial broadcasters were required to report each and every song played for each and every hour of programming transmitted throughout the year, after evaluating how this recordkeeping burden would affect our staffing and budgetary needs, CDR could face the real possibility of shutting down our streaming operations altogether, regardless of the royalty fee we would be required to pay.

Before the
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In the Matter of

Docket No. 2005-1 CRB DTRA

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

REBUTTAL STATEMENT OF EUGENE LEVIN

I. SUMMARY

1. My name is Eugene Levin, and I am the Vice President, Treasurer and Controller of Entercom Communications Corporation ("Entercom"). I understand that in the direct phase of this proceeding, SoundExchange has proposed a number of changes to the 17 U.S.C. § 112 and § 114 payment terms. I offer this testimony on behalf of Radio Broadcasters¹ to explain why SoundExchange's proposed changes are unwarranted, punitive, unreasonable, and far outside the bounds of standard commercial practice. In response to Ms. Kessler's testimony, I propose a number of terms on behalf of Radio Broadcasters that maintain incentives for licensees to submit timely and accurate royalty payments while at the same time ensuring fairness to licensees who make a good faith effort to comply with the regulations. Radio Broadcasters' proposed terms, which incorporate the modifications I discuss below, are included with their Written Rebuttal Statement.

¹ Radio Broadcasters include Bonneville International Corp., Clear Channel Communications, Inc., The National Religious Broadcasters Music License Committee, and Susquehanna Radio Corp.

A. LATE FEE ISSUES

1. SoundExchange's Staggering Proposed Increase to the Late Fee Interest Rate Is Grossly Excessive and Unreasonable.

5. The current regulations require licensees to submit monthly payments to SoundExchange no later than 45 days after the end of each month. 37 C.F.R. § 262.4(c). After the due date, late fees of 0.75% per month – a simple interest rate of 9% annually – begin to accrue. 37 C.F.R. § 262.4(e). A 9% interest rate is already very generous, given the current cost of borrowing. The 9% interest rate is greater than the current cost of borrowing, which is more than enough to compensate SoundExchange for any loss it may experience from the time value of money and adequate to create an incentive for compliance. Moreover, interest rates in the range of 9% are typical in commercial transactions.

6. SoundExchange seeks to more than triple the already generous 9% late payment interest rate to 2.5% per month – an astounding simple interest rate of 30% annually. *See* Direct Statement of SoundExchange, Inc., vol. 2, tab 18, Testimony of Barrie L. Kessler, at 27 (Oct. 31, 2005) ("Kessler Test."). SoundExchange's proposed interest rate is clearly excessive and far outside the realm of standard business dealings.

7. To begin with, many businesses do not charge late fees at all when payments are late, particularly when they are in an ongoing business relationship with a payor. To provide one example, Entercom's standard advertising agreement requests payment upon receipt of an invoice but does not charge late fees when those payments are late. *See* RBX Ex. 27. In my experience, this practice is common in business dealings.

8. Even when businesses do provide for late fees contractually, most elect not to collect them at all or to waive them upon request. In my experience, businesses commonly waive late fees in order to maintain an amicable and ongoing business relationship with the

of which are not publicly traded. Public disclosure of such information would threaten to cause significant competitive harm to the webcaster or radio simulcaster at issue and should not be permitted. Therefore, I strongly urge the Board to maintain the confidentiality provisions that are set forth in 37 C.F.R. § 262.5.

E. VERIFICATION ISSUES

1. Auditors Must Be Independent Of Both The Licensee And Licensor.

28. The regulations state that audits must be conducted by an "independent and qualified auditor." 37 C.F.R. § 262.6(c). SoundExchange seeks to amend this language to provide that an auditor need only be independent of the licensee and not the licensor. Kessler Test. at 38-39. This proposed amendment makes no sense. It is common business practice for an auditor to be independent of both the party requesting the audit and the party being audited. Generally, the independence requirement is intended to protect the party being audited, not the auditing party. The auditing party – in this case, SoundExchange – typically selects the auditor and can avoid auditors who have a relationship with the party being audited. It is very important that the auditor also be independent of the requesting party to protect the party being audited from overreaching and unreasonable audit claims. For these reasons, I urge the Board not to adopt this proposed amendment.

29. SoundExchange also proposes that the regulations allow audits by individuals other than CPAs, including business managers, professional representatives of copyright owners and artists, and individuals skilled in interpreting server logs. Kessler Test. at 39. Radio Broadcasters oppose this proposed modification. Requiring a CPA who is independent of all parties is a standard commercial practice, and relaxing this requirement threatens to undermine the quality and care with which the audits are conducted. In any event, should the Board decide

Before the
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In the Matter of: *
The Digital Performance Right * Docket No.
in Sound Recordings and * 2005-1 CRB DTRA
Ephemeral Recordings *
(Webcasting Rate Adjustment *
Proceeding) *
Volume 37

Room LM-414
Library of Congress
First and Independence
Avenue, S.E.
Washington, D.C. 20540
Wednesday,
November 8, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.
BEFORE:

THE HONORABLE JAMES SLEDGE Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR. Judge
THE HONORABLE STAN WISNIEWSKI Judge

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1 interactive webcasters which say that if the
 2 webcaster were to enter into an agreement
 3 with some other record label at a higher
 4 sound recording performance royalty, the
 5 first record label, the one signing the
 6 contract at issue, would in effect be
 7 entitled to the economic benefit of that
 8 higher rate. And that's a kind of provision
 9 that one observes I contracts where the
 10 different sellers that are being referenced
 11 are selling complimentary inputs, inputs
 12 that are to be used together in the
 13 construction of the buyer's product. It
 14 makes no economic sense to have a most
 15 favored seller clause in a contract where
 16 the reference is to a seller that is
 17 perceived to be a competitor because if I as
 18 a webcaster am signing a contract with
 19 Record Label Number One, a provision that
 20 says if I were to pay more to Record Label
 21 Number Two I would then have to come back
 22 and give more to Number One, if they're

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1 competing with each other I'm never going to
 2 go pay more to Record Label Number Two. Why
 3 would I go, having secured what I want if we
 4 believe them to substitute for each other,
 5 having secured what I want at a lower price,
 6 why would I then go on and buy it again or
 7 more of it from someone else at a higher
 8 price? I would only do that if the two
 9 inputs are not in fact substituting for each
 10 other, but are actually things that I need
 11 both of them. And so the presence in the
 12 contracts of this most favored seller clause
 13 itself confirms in addition to or aside from
 14 the testimony on this point, as an economic
 15 matter the presence of those provisions in
 16 the contracts confirms that the parties
 17 themselves, the record labels and the
 18 webcasters, perceive these different record
 19 labels to be selling something to the
 20 webcasters which are not substitutes for
 21 each other but which in fact are
 22 complimentary inputs to the construction of

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1 the webcaster's product.
 2 Q And in this context again when
 3 you're speaking of webcasters, I take it
 4 you're referring to the market that Dr.
 5 Pelcovits is relying on.
 6 A That's correct. The market in
 7 which we observe these contractual
 8 provisions, the interactive market.
 9 JUDGE WISNIEWSKI: I'd like to
 10 follow up on that. That certainly wouldn't
 11 apply if the deal that was originally struck
 12 was a sweetheart deal in order to put
 13 pressure on the second deal-maker.
 14 THE WITNESS: I'm not sure I
 15 understand. Why would one record company
 16 agree to a deal to put pressure on another
 17 record company?
 18 JUDGE WISNIEWSKI: Well, it's not
 19 the record company that might be seeking to
 20 put the pressure on, but rather the buyer.
 21 Perhaps the buyer has sufficient market
 22 power.

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1 THE WITNESS: But if the - so,
 2 let's follow your hypothetical. So I'm a
 3 webcaster and I'm negotiating with Record
 4 Label Number One and I'm trying to get some
 5 particularly favorable deal to put pressure
 6 on a different record label.
 7 JUDGE WISNIEWSKI: Record Label
 8 Number Two.
 9 THE WITNESS: Okay. If the two
 10 products are substitutes for each other,
 11 however, why would I ever go to Record Label
 12 Number Two? Having gotten this particularly
 13 favorable deal with Record Label Number One
 14 -
 15 JUDGE WISNIEWSKI: But let's stay
 16 with your hypothetical which was that they
 17 aren't substitutes for one another, that
 18 they're compliments.
 19 THE WITNESS: I think that that's
 20 the only circumstance in which you would
 21 observe these provisions. Whether it's a
 22 sweetheart deal or some other deal, it only

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1 makes sense to have these provisions if both
2 parties understand that the webcaster is
3 going to be buying from both record labels.

4 JUDGE WISNIEWSKI: But in my
5 hypothetical they don't get the quote above
6 market rate that you're suggesting they
7 would automatically get.

8 THE WITNESS: Well, so you still
9 have to - I still don't understand why
10 Record Label Number One would have agreed to
11 this. Now, maybe they agreed to it because
12 they figured eventually somewhere along the
13 line one of these record labels, since
14 they're all necessary, is going to hold the
15 line and get the monopoly price. And so
16 they don't mind, they're willing to agree to
17 a below monopoly price in the first instance
18 and they're protecting themselves with this
19 provision knowing that eventually it's going
20 to turn out to be the monopoly price. It
21 seems to me you would have at the end the
22 same result which is if I look across the

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1 market at the rates in the market, they're
2 likely to be significantly above the
3 competitive level.

4 JUDGE WISNIEWSKI: Thank you.

5 MR. JOSEPH: Now, Dr. Jaffe on
6 Page 5 where you provide a summary of a
7 number of reasons that you believe Dr.
8 Pelcovits' benchmark market, the interactive
9 market, was not competitive. You refer to
10 market structure, and that's at the top of
11 Page 5, which I believe you discuss around
12 Pages 8 to 11 of your rebuttal testimony.
13 On what aspects of the market structure of
14 the licensing market for sound recording
15 licenses for interactive digital
16 transmissions do you rely when you refer to
17 the market structure?

18 THE WITNESS: Well, I looked at
19 the concentration in the industry, which is
20 a standard and probably the first factor
21 that any economist looks at in trying to
22 determine whether the market is likely to be

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1 competitive. And what I point out here is
2 that wholly aside and in addition to this
3 issue that we've been talking about, about
4 the nature of the demand for the product, if
5 you were to just think of this as a product
6 like any other product, an ordinary widget-
7 like product, in fact this market has a
8 concentration of sales among the largest
9 sellers which as that is normally measured
10 by economists within the framework of the
11 Justice Department guidelines, falls in the
12 range that is indicated as highly
13 concentrated. And what that means is that
14 it's not dispositive of the question of
15 whether prices are above the competitive
16 level, but what it means is that there is an
17 indication of prices that are likely to be
18 above the competitive level and you would
19 want to look at other factors to try to
20 determine whether in fact the market is
21 reasonably competitive. And I think, so if
22 you take that in combination with these

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1 other issues we've been talking about, it
2 reinforces the notion that this is not
3 likely to be anything close to a competitive
4 standard. And I think if we were to pursue
5 some of the issues we've been talking about,
6 about the complications in implementing the
7 contracts and some of the questions about
8 exactly what they mean, it's important to
9 then put it against this backdrop, that we
10 have an industry which has a so-called HHI,
11 which is the standard measure by 2150, when
12 the Justice Department says anything above
13 1800, is highly concentrated. So I think
14 when you take all of this together, it's a
15 combined picture that, as I said, makes it
16 not even a close call as to whether the
17 rates in this industry are likely to be
18 competitive.

19 JUDGE WISNIEWSKI: Mr. Joseph, if
20 I could follow up on that just briefly.
21 That's looking at one side of the market,
22 not at the other side of the market.

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1 certain other options for those users who do
2 not wish to license the entire repertoire.
3 But it's come about only as a result of the
4 Rate Court - the consent decree, the Justice
5 Department consent decree as interpreted by
6 the Rate Court.

7 CHIEF JUDGE SLEDGE: You can't
8 think of any other market that fits into
9 that kind of pattern?

10 THE WITNESS: Not as I sit here,
11 I can't.

12 CHIEF JUDGE SLEDGE: Thank you.

13 MR. JOSEPH: Dr. Jaffe, on Page 9
14 of your testimony you refer to a history of
15 regulators finding interdependent conduct in
16 the recording industry. What do you mean by
17 interdependent conduct and - well, let's
18 start by what do you mean by interdependent
19 conduct?

20 THE WITNESS: Well,
21 interdependent conduct is a concept used by
22 economists to deal with this intermediate

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1 world between pure monopoly and pure
2 competition. And it refers to the concept
3 in industrial organization that when you
4 have a concentrated industry so that you
5 have a relatively small number of
6 significant players, there is the
7 possibility that those players will to some
8 degree coordinate their actions, that's the
9 interdependent notion, coordinate their
10 actions in order to maintain prices above
11 the level that would occur if they each
12 individually were simply seeking to maximize
13 their own profits. And that coordinated
14 action that interdependent decision-making
15 can have the effect of raising prices above
16 what would occur even given the
17 concentration if the players in the industry
18 were acting independently, competing with
19 each other.

20 BY MR. JOSEPH:

21 Q And to what interdependent
22 conduct were you referring in your testimony

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1 within his model is the appropriate royalty
2 in the non-interactive market, that
3 specific, mathematical, numerical value for
4 the demand elasticity.

5 Q Let's start briefly by talking
6 about the demand elasticity in the more
7 descriptive first sense that you discussed.
8 Do you have a view on whether it's likely
9 that the demand elasticities in that
10 descriptive sense for interactive services,
11 interactive digital transmission services
12 and non-interactive webcasting is similar or
13 are similar?

14 A I don't think we have a basis to
15 conclude that they're necessarily similar.
16 The substitutes for the different products
17 are viewed - their relationships to
18 substitutes are somewhat different. In the
19 record companies' own documents they
20 recognize that DMCA-compliant streaming is
21 closer in some sense to terrestrial radio
22 than more interactive forms of webcasting.

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1 challenging a rate that's too high. And so
2 to the extent that litigation costs do have
3 a bearing, and I don't know how large that
4 extent is, the effect it would have would be
5 to tend to make any observed agreed upon
6 rates in the musical works arena on the high
7 side of what the Rate Court in setting a
8 reasonable competitive market rate would be
9 likely to set.

10 CHIEF JUDGE SLEDGE: Mr.

11 Sugarman, is this a good time for you to
12 break?

13 MR. SUGARMAN: I have two
14 questions. I don't think it'll take more
15 than three or four minutes. On Pages 38 and
16 following you talk about a spectrum of
17 different contexts for the sale or licensing
18 of sound recordings. Can you explain?

19 THE WITNESS: Yes. There are a
20 couple of documents from the record labels,
21 their own business documents, where they
22 analyze their strategies and their

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1 opportunities in different digital markets
2 in which they elucidate this idea of a
3 spectrum of contexts in which sound
4 recordings are utilized. And this spectrum,
5 on one end of this spectrum is terrestrial
6 radio where they earn no royalty for sound
7 recordings. On the other end of this
8 spectrum are uses like the actual
9 transference of the sound recording itself,
10 CDs, a download of an MP3 or other file.
11 And in between there's a range of different
12 uses, and the order that they identify in
13 this spectrum goes from terrestrial radio to
14 DMCA-compliant webcasting, which they see as
15 closest to terrestrial radio, through
16 various kinds of webcasting that are
17 interactive to certain degrees, and then
18 over to downloads. And what they observe
19 about this spectrum is that they expect that
20 the value that they can get from the
21 marketplace for sound recording rights will
22 increase as you move across this spectrum

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1 because of the fact that as you move towards
2 the CDs you're getting closer and closer to
3 something which is like actually delivering
4 the sound recording as distinct from just
5 allowing a performance of it. And so they
6 themselves recognize an intrinsic range of
7 values and an ordering of those values
8 increasing as you move from terrestrial
9 radio, DMCA-compliant radio, interactive
10 webcasting, downloads and CDs.

11 MR. SUGARMAN: Judge, I actually
12 may have more so I think this would be a
13 good time to take a break.

14 CHIEF JUDGE SLEDGE: We'll recess
15 for 10 minutes.

16 (Whereupon, the foregoing matter
17 went off the record at 11:05 a.m. and went
18 back on the record at 11:23 a.m.)

19 CHIEF JUDGE SLEDGE: We will
20 return to order. Make sure everyone got the
21 message put out in pieces during the break.
22 that we are changing our schedule today so

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1 that we have less interruption than we
2 expected and we will only recess for the
3 other hearing for an anticipated one hour
4 from 1:30 to 2:30 and resume this proceeding
5 at 2:30 rather than 3:30. Mr. Sugarman?
6 MR. SUGARMAN: Dr. Jaffe, in the
7 middle of Page 39, having described in the
8 previous paragraph the spectrum that you
9 just described, you say, quote, "In
10 particular, this uncontested view of the
11 relationship of these markets implies that
12 the royalties for DMCA-compliant streaming
13 must be less than the royalties for any form
14 of interactive streaming." Would you just
15 explain that?

16 THE WITNESS: Yes. As I
17 discussed before the break, if the record
18 companies themselves recognize that the
19 value of the sound recording performance
20 right decreases as you move towards the
21 terrestrial radio end of the spectrum where
22 the DMCA-compliant streaming lies, that

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1 implies that the royalty there would be less
2 than a competitive royalty in any kind of
3 interactive streaming, and certainly less
4 than a royalty in any kind of interactive
5 streaming which is not necessarily
6 competitive.

7 BY MR. SUGARMAN:

8 Q In the rest of that paragraph you
9 talk about customized radio contracts. At
10 the beginning of the next paragraph, the
11 middle of Page 40, you say, quote,
12 "SoundExchange and its experts have
13 dismissed the significance of these
14 customized service contracts on the grounds
15 that their royalty terms are somehow
16 contaminated by the existence of the
17 compulsory license for DMCA-compliant
18 streaming." Would you explain that?

19 A Yes. We're talking about
20 contracts here which, as I understand it,
21 the record labels deem to be interactive and
22 therefore not kinds of activities for which

1 CHIEF JUDGE SLEDGE: You're using
2 "user" in two different contexts there.
3 You're referring to -

4 THE WITNESS: I'm sorry. Maybe I
5 should be clearer. Yes, the listener is
6 deciding which songs to play and so a lower
7 price for the sound recording performance
8 right isn't going to - isn't likely to get
9 the sound recording owners a larger share of
10 the plays.

11 MR. JOSEPH: Now you were also
12 asked some questions about Congress creating
13 the statutory license and I believe it was
14 characterized as stepping in to interfere
15 with market power. Is there a reason that
16 you believe it would be reasonable for
17 Congress when it created a digital sound
18 recording performance right for non-
19 interactive webcasting to apply competitive
20 market pricing to that right and to those
21 services?

22 THE WITNESS: Yes.

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1 BY MR. JOSEPH:

2 Q What's your reason?

3 A Well, as we've already discussed
4 there is this sort of spectrum of uses. And
5 the DMCA-compliant streaming by
6 construction, I mean some of the
7 restrictions that are put into - that are
8 required to be met with to make it DMCA-
9 compliant keep that kind of streaming
10 relatively similar to terrestrial radio
11 where this right is free or this right
12 doesn't exist. Whereas as things become
13 more interactive, everyone including the
14 record labels acknowledged that you start to
15 enter a territory in which the digital
16 services are more and more like what has
17 traditionally been simply the sale of the
18 sound recordings where historically Congress
19 has not concerned itself with what level the
20 prices would be at.

21 Q Now I'm discussing Dr.
22 Brynjolfsson's model. Mr. Handzo asked

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1 determined what funds are released to NPR
2 and public radio from the public sources?
3 THE WITNESS: Well, it's decided
4 by Congress.

5 BY MR. STEINTHAL:

6 Q Now, how does the difference in
7 the funding of NPR and public radio compared
8 to commercial broadcasting, webcasting,
9 implicate your views with respect to whether
10 it is appropriate to rely on commercial or
11 broadcast radio benchmarks for fee-setting
12 as to NPR and public radio?

13 A Well, if we - once again, it
14 won't surprise you that I think of this from
15 a competitive market perspective. And in a
16 competitive market, the non-commercial
17 broadcaster's willingness to pay for this
18 input would affect what they were charged.
19 And therefore I think one needs to come at
20 it from that perspective and understand how
21 the way they use sound recordings, their
22 objectives in using sound recordings and the

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11/8/2006 Jaffe, Adam (open session)

1 funds that they have available to pay for
2 the sound recording performance right will
3 affect their willingness to pay, which in
4 the competitive market would have an impact
5 on what would be the competitive market
6 sound recording royalty rate for these non-
7 commercial users.

8 Q Now, you refer in your written
9 testimony to the separate issue of what the
10 mandate of public radio is. This is the
11 bottom of Page 2 going to Page 3. And let
12 me ask you to elaborate a little bit on what
13 that mandate is and how to the extent it's
14 different than commercial radio or
15 webcasting that implicates your views as to
16 whether it's appropriate to look to
17 commercial radio and commercial webcasting
18 as a benchmark for fee-setting here.

19 A Well, the mandate of public radio
20 is to provide educational programming and
21 cultural programming explicitly that is not
22 generally available in the commercial

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1 broadcasting. From an economist's
2 perspective the decision problem, the
3 objective that an entity is trying to
4 achieve is what determines how they will act
5 in the marketplace and a commercial
6 broadcaster has a particular objective, that
7 is earning profit. A non-commercial
8 broadcaster has a different, more
9 complicated frankly, set of objectives,
10 achieving certain educational and cultural
11 objectives. And therefore they're not
12 making their decisions in the same way and
13 you can't derive a willingness to pay for
14 the sound recording performance right from a
15 profit-maximizing model of their behavior
16 which is in fact what both Dr. Pelcovits and
17 Professor Brynjolfsson are attempting to do.
18 Q This may be somewhat similar in
19 question, but you talk about the audience of
20 public radio and the difference between the
21 audience of public radio and commercial
22 radio and commercial webcasting on Page 2

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11/8/2006 Jaffe, Adam (open session)

1 and 3 of your testimony. Can you elaborate
2 a little bit on the difference in the
3 audience and how that impacts your analysis?
4 A Well, because they're creating
5 their programming with different objectives,
6 I mean it's not a different audience in the
7 sense of a different species of human being,
8 but the kinds of people who are going to
9 listen, and how much they listen, and when
10 they listen is typically going to be
11 different for the programming on public
12 radio as compared to on commercial radio.

13 Q Now, you state on Page 4 of your
14 written testimony, you have a sentence, the
15 first full sentence on Page 4 where you
16 state, "SoundExchange witnesses attempt to
17 equate revenues of commercial radio and
18 webcasters with the total funding of non-
19 commercial radio. These comparisons have no
20 rational economic basis." Can you elaborate
21 a little bit more on what you meant by that?

22 A Yes. In the commercial sector

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1 the role of revenue is to generate profits
2 and I've quibbled with various ways on which
3 Dr. Pelcovits and Professor Brynjolfsson did
4 this, but I don't dispute the fundamental
5 proposition that the revenues being earned
6 by a commercial webcaster or broadcaster are
7 very central to what it's going to be
8 willing to pay for various inputs that it
9 needs to generate those revenues. The
10 situation in a non-commercial setting is
11 quite different. Their revenue is not in
12 any fundamental sense an end in itself. It
13 is to a significant extent determined
14 outside of their control and so it simply
15 does not play the same role in their own
16 decision-making and therefore their own
17 willingness to pay for the sound recording
18 right that the revenues of a commercial
19 entity play.

20 Q Following down on Page 4, this is
21 somewhat similar and somewhat different
22 because you start talking about budgets, but

1 Q Let me ask you to summarize, if
2 you would, your views as to how best to
3 develop a rate for NPR and public radio in
4 this proceeding.

5 A Public radio and NPR pay for the
6 performance rights for musical works and for
7 the reasons that I've already articulated
8 and will not repeat I think that makes a
9 reasonable benchmark, and so what one can do
10 is to look at what they actually pay for
11 musical works, make certain adjustments to
12 put it on a comparable basis to a sound
13 recording performance right license and that
14 produces an estimate of a reasonable fee for
15 the sound recording performance license.

16 Q I won't because you've testified
17 earlier in the case ask you to testify why
18 you believe starting from a benchmark of
19 PROBABLY license fees is an appropriate way
20 to do so just in the interest of time. Let
21 me ask you this question, however. Does
22 using the Performing Rights Organization

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1 fees as a benchmark enable you to take into
2 consideration differences between commercial
3 and non-commercial broadcasters?

4 A Yes because the musical works
5 benchmark is agreed to in the context of the
6 Rate Court - not the Rate Court, is agreed
7 to in the context of the CARP framework
8 which reviews the musical works rates for
9 non-commercial broadcasters. And having
10 participated in that I know that the issue
11 of differences between commercial and non-
12 commercial is something that was actually
13 considered in that framework. And at least
14 implicitly, rates determined in that
15 framework are therefore taking into account
16 whatever differences there are that are
17 economically important between commercial
18 and non-commercial broadcasters.

19 Q Now you also mention in your
20 testimony the other statutory factors. This
21 is on Page 8 of your testimony in Footnote
22 11. I think Footnote 11 when you say the

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JA 707

Before The
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In the Matter of: °

The Digital Performance Right° Docket No.

in Sound Recordings and ° 2005-1

Ephemeral Recordings ° CRB DTRA

(Webcasting Rate Adjustment °

Proceeding) °

Volume 39

Room LM-414

Library of Congress

First & Independence Ave., S.E.

Washington, D.C. 20540

Monday,

November 13, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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 Communications Corp., Susquehanna
 Radio Corp., The National Religious
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5

1 You know, even dealing with BMI
2 for the one week out of a year, it does take
3 time to get that report up and getting it sent
4 out, and it would be a large burden to do that
5 on a regular daily and weekly basis with
6 census reporting and it would be very
7 difficult.

8 Q How do you believe CDR
9 specifically would react if a census reporting
10 requirement were enacted?

11 A Well, we wouldn't be very happy
12 about it and we would probably have to make
13 some tough decisions about what we do when it
14 comes to our streaming. We do have options
15 with our stream because of how we operate our
16 station.

17 We could turn the stream on when
18 we're doing our programming block. We have
19 blocks. Like I said, we're 50 percent
20 teaching, 50 percent music. So when we're in
21 a programming block, we could turn on the
22 stream and when we're getting out of that

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1 programming block, turn off the stream.

2 Another option would be to turn
3 the stream off all together if we had to.
4 It's something we would have to discuss and
5 figure out what we would want to do and how
6 much time it would take for us but, again,
7 those would be a couple of options that we
8 would have to look into.

9 Q Okay.

10 MR. ASTLE: May I just have a
11 moment, Your Honor?

12 BY MR. ASTLE:

13 Q There's one thing I'm not sure if
14 we mentioned or not. On the -- is there any
15 sort of a limit on how many stations must
16 report their music use to ASCAP, BMI and
17 SESAC?

18 A 10 stations are required to send
19 their music in, so there is -- the answer to
20 that is yes, there is a limit.

21 Q And the limit is?

22 A 10 stations.

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JA 710

Before The
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Washington, D.C.

In the Matter of:

The Digital Performance Right* Docket No.

in Sound Recordings and * 2005-1

Ephemeral Recordings * CRB DTRA

(Webcasting Rate Adjustment *

Proceeding) *

Volume 40

Room LM-414

Library of Congress

First & Independence Ave., S.E.

Washington, D.C. 20540

Tuesday,

November 14, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

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11/14/2006 Levin, Eugene; Parsons, Brian; Isquith, Jack; Papish, Michael (all open)

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Broadcasters Noncommercial Music
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11/14/2006 Levin, Eugene; Parsons, Brian; Isquith, Jack; Papish, Michael (all open)

C-O-N-T-E-N-T-S

WITNESS	DIR	CROSS	REDR	RECR
Eugene Levin	7	52	94	
Brian Parsons	106	122	135	139
Jack Isquith	143	182		
Michael Papish	197	247		

Voir Dire by Mr. Handzo on page 240

Voir Dire by Mr. Astle on page 242

E-X-H-I-B-I-T-S

NO.	DESCRIPTION	MARK	REC'D
SOUND EXCHANGE			
164	Intercom-BMI agreement	157	
165	Intercom-Liquid Compass agreement	67	70
166	Intercom-SESAC agreement	69	71
167	Intercom-Arbitron agreement	70	
168	BMI invoice to Intercom	83	
169	Clear Channel-Warner video streaming agreement	123	
SERVICES			
159	AstroLaunch album cover	203	203
159B	AstroLaunch album	202	
160	Jason Molina album cover	208	208
160B	Jason Molina album	207	

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JA 712

1 that had been made, but they were paid late,
2 and we did not realize that they had been paid
3 late under the terms of the statutory license.
4 But we found out a year later.

5 Q And when you found out that they
6 had been late, at that time, I'm just asking,
7 were the royalty payments to which the late
8 fees attached, were the royalty payments made?

9 A Yes, the royalty payments had been
10 made.

11 Q What did you do when you received
12 the certified letter regarding the late
13 payments?

14 A I was surprised. It was unusual
15 for us to get bills for late fees, interest
16 and late fees. So I pulled out the contract.
17 I investigated it and determined that they
18 were in fact late and under the terms of the
19 statutory license that they were due, and we
20 subsequently paid the late fee.

21 Q Rather than just paying the late
22 fee, why did you investigate it and look into

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30

11/14/2006 Levin, Eugene; Parsons, Brian; Isquith, Jack; Papish, Michael (all open)

1 it so much?

2 A It was unusual. In the past we
3 very rarely paid any late fees, so it was
4 something that was a bit different, and
5 weren't used to paying late fees.

6 Plus I made corrections within our
7 system to make sure that they get paid within
8 the required period, so this is - I checked
9 with our people to make sure that they process
10 it within a required period.

11 Prior to receiving that certified
12 letter, had you received any phone calls or
13 other notice or statements that any payment
14 had been late?

15 A No. This was the first notice
16 that I had received from them.

17 Q Does Intercomm has businesses that
18 it sends bills to?

19 A Yes, we do.

20 Q Does Intercomm charge late fees if
21 those businesses remit payment after the bill
22 was due?

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JA 713

1 we need to make sure that we're - if we
2 haven't paid, that we get some communication
3 from the vendor to tell us otherwise.

4 Q And how long have you worked in
5 the financial world?

6 A Thirty five plus years.

7 Q In that time, what is your
8 experience though with respect to late fees as
9 between commercial entities during ongoing
10 business relationships?

11 A As part of a positive ongoing
12 business relationship they don't really charge
13 late fees. They want to maintain good
14 relations, and businesses don't intentionally
15 not pay vendors timely, so that the effort is
16 to work in a positive business to business
17 atmosphere.

18 Q Other than Sound Exchange, do you
19 know if Intercomm has been a party to a
20 commercial agreement where late fees have been
21 provided for in the agreement?

22 A Yes.

1 Sound Exchange nine percent, but can only earn
2 five percent on short-term investment, so the
3 decision would be, I won't pay Sound Exchange,
4 I'll take the money and invest it in a short-
5 term money market and earn five percent -
6 they're paying a penalty that doesn't make any
7 sense. So it would be an incentive - the nine
8 percent interest rate is an incentive for the
9 party to pay the bill to Sound Exchange.

10 Q And in terms of Sound Exchange, is
11 the nine percent interest rate generous to
12 Sound Exchange in any way?

13 A Well, it's a premium to them.
14 Because I'm sure that they couldn't invest the
15 money in a short term money market as well,
16 and they wouldn't earn more than five percent
17 as well.

18 Q Can you tell the board where nine
19 percent annual interest rate falls in the
20 general range of commercial practices?

21 A It certainly seems within the
22 range of interest rates that businesses might

1 are higher to consumers, which certainly are
2 more riskier than they would be to a business.
3 And that is really related to short term
4 bargaining.

5 Q Is the business model of a credit
6 card company the same as a business model of
7 a business like Intercomm?

8 A I wouldn't expect so. That's not
9 our focus. It's not to earn interest on our
10 clients.

11 Q What about the other commercial
12 entities that you have relationships with?

13 A Same purpose. Collecting interest
14 is not their focus, if they don't want to - if
15 they want to maintain good business
16 relationships, and it's a good faith effort
17 that they continue to work well together.

18 Q You talk about the rate that Sound
19 Exchange proposes, which is an increase to 30
20 percent per annum, or 2.5 percent per month.

21 A Yes.

22 Q Why do you say that that rate is

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1 charge each other.

2 Q Are you aware that there are some
3 late fee interest rates that are higher than
4 nine percent?

5 A Yes, I am.

6 Q What rates would those be?

7 A There could be 12 to 18 percent.
8 In fact several of our other royalty
9 contracts.

10 Q Have those other royalty
11 contracts, have they ever imposed a late fee
12 on you?

13 A No, they haven't. Or if they
14 have, they've been waived.

15 Q When we talk about nine percent,
16 the Chief Judge mentioned credit card
17 companies. What about the rates charged by
18 credit companies, how do they factor into what
19 is an appropriate rate here?

20 A Well, the rate charged by credit
21 card companies, that's their business model.
22 Their business model is to charge rates that

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39

1 excessive?

2 A Well, states have guidelines in
3 terms of how much an interest rate a company
4 can charge, and they call those rates in
5 excess of their defined amounts usurious. And
6 in most states that 30 percent amount is
7 usurious.

8 Q Well, leaving aside the states'
9 view of usurious interest rates, how does the
10 30 percent rate proposed by Sound Exchange
11 compare to the rates that other businesses set
12 forth in their commercial agreements.

13 A It certainly seems quite
14 excessive.

15 Q Do you mean by that that it's
16 higher?

17 A Yes, much higher.

18 CHIEF JUDGE SLEDD: If I could
19 interrupt one more time.

20 Mr. Levin, aren't all usury
21 statutes applicable to consumer contracts?

22 WITNESS: I believe so.

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11/14/2006 Levin, Eugene; Parsons, Brian; Isquith, Jack; Papish, Michael (all open)

1 CHIEF JUDGE SLEDD: Not commercial
2 contracts?
3 WITNESS: It's not my area of
4 expertise, but I don't think so.
5 JUDGE ROBERTS: Mr. Levin, are you
6 familiar with what late fees are charged by
7 ASCAP, BMI or SESAC?
8 WITNESS: Yes.
9 JUDGE ROBERTS: What are they
10 generally?
11 WITNESS: I believe they're in the
12 12 to 18 percent.
13 JUDGE ROBERTS: Twelve to 18
14 percent.
15 BY MS. RYAN:
16 Q You also discuss in your testimony
17 Sound Exchange's proposal for doubling the
18 late fee every five days; remember that?
19 A Yes.
20 Q Without going into all the
21 calculations themselves which are set forth in
22 your testimony, what did you find in the

1 A Yes, I am.

2 Q Can you tell me generally what

3 information is contained in the SOA or

4 statement of account at Intercomm?

5 A It contains a detail by radio

6 station of the total minutes and the aggregate

7 tuning hours, which is -

8 Q When you say total minutes, do you

9 mean the total minutes spent listening?

10 A Yes.

11 Q Is that information currently

12 treated as confidential?

13 A Yes, it is.

14 Q Does Intercomm share with its

15 competitors the information about the number -

16 the amount of time spent listening to its

17 streams?

18 A No, we do not.

19 Q Why does Intercomm care about this

20 information being made public?

21 A It may be distortive, it may not

22 be an accurate picture of our demographics,

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11/14/2006 Levin, Eugene; Parsons, Brian; Isquith, Jack; Papish, Michael (all open)

1 and it is something that we would not want our

2 peers to see.

3 Q Why wouldn't you want your peers

4 to see it?

5 A It's a competitive factor. There

6 are issues related to station listening that

7 we would not want our peers to see.

8 Q Okay, and when you say distortive,

9 do you mean in terms of that it's not a full

10 picture, or did you mean something else?

11 A No, the numbers on the SOA, they

12 are not of a granular nature; they are really

13 of a total amount. And it may be distortive

14 just in terms of our listening audience, the

15 demographics for our listening audience, which

16 may be different than the total numbers.

17 CHIEF JUDGE SLEDD: Mr. Levin, you

18 didn't answer Ms. Ryan's next to last

19 question. She asked you why wouldn't you want

20 your competitors to see it. And your answer

21 was, we don't want our competitors to see it.

22 WITNESS: Fear. The reason is that

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1 we use this information for internal purposes

2 of evaluating our audience. It's something

3 that we just don't want to share with our

4 competitors. If they knew what our listening

5 numbers were, they could sell it against us.

6 It's a pure - it's important for us to

7 maintain that information on a confidential

8 basis.

9 CHIEF JUDGE SLEDD: You keep saying

10 the same thing. I still haven't heard a

11 reason.

12 WITNESS: We feel that if the

13 information was dispersed to the public by our

14 peers it would be distortive.

15 BY MS. RYAN:

16 Q I understand your testimony that

17 releasing the information to the public would

18 be distortive because it's just a snapshot; is

19 that correct?

20 A That's correct.

21 Q It's not the full information

22 regarding any particular station?

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1 A Yes.

2 Q Is it just the information that

3 you are required to provide on the SOA?

4 A That's is correct.

5 Q Let's talk about your competitors,

6 and why Intercomm doesn't want its competitors

7 to have access to the amount of listening to

8 a station's stream that is done at any given

9 time.

10 Do you specifically have any

11 details for that?

12 A Well, we don't them to know how

13 well or not well we're doing from a

14 competitive standpoint.

15 Q Does that information have

16 anything to do with your ability to grow your

17 station?

18 A We would make competitive

19 decisions based on the number of listeners

20 that are tuning into our stations a month.

21 Q Finally could you review Ms.

22 Kessler's testimony regarding the information

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1 remedy would they have?

2 A I don't know.

3 Q Now, let me ask you a little bit

4 about this confidentiality issue that you

5 raised with respect to the statements of

6 account, and your opposition to the proposal

7 from Sound Exchange that the statements of

8 account be something that is available for

9 inspection by the copyright owners whose works

10 are being licensed.

11 Is it the ratings of the stations

12 that you find to be sensitive information?

13 The number of listeners to the webcast?

14 A It's the information contained on

15 the SOA.

16 Q What information is it on the SOA

17 that's competitively sensitive?

18 A The number of listening hours, the

19 aggregate tuning hours.

20 Q Isn't that something that is

21 routinely rated by rating services like

22 Arbitron and publicly known as a result?

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1 Would you please tell us how it
2 could harm individual stations and
3 broadcasting companies if it were made public?
4 WITNESS: Our competitors would use
5 this information selling against our
6 advertisers to try to switch our advertisers
7 as their advertisers based on this
8 information.
9 JUDGE ROBERTS: Now are you aware
10 of what is on the statements of account, the
11 information?
12 WITNESS: Yes, I am.
13 JUDGE ROBERTS: And could you tell
14 us exactly what the categories of information
15 are that are requested by the statement of
16 account?
17 WITNESS: Total listening minutes,
18 and aggregate tuning hours.
19 JUDGE ROBERTS: Now, Mr. Smith
20 asked you a question about the information
21 that is available through Arbitron, and you
22 noted that - well to get information from

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1 Arbitron, you have to be a subscriber,
2 correct?
3 WITNESS: That's correct.
4 JUDGE ROBERTS: But when you
5 subscribe to Arbitron, you don't just get the
6 information for your station, do you?
7 WITNESS: That's correct.
8 JUDGE ROBERTS: You get it for the
9 whole market in which that station is
10 operating, correct?
11 WITNESS: That's correct?
12 JUDGE ROBERTS: And you can also in
13 fact get the information from Arbitron for any
14 market -
15 WITNESS: Yes.
16 JUDGE ROBERTS: - by virtue of
17 being a subscriber.
18 So if you can get information from
19 Arbitron, and I would imagine virtually all
20 radio stations, because most of them have
21 advertisers, subscribe to Arbitron, because
22 advertisers use Arbitron ratings when making

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1 decisions about to whom they are going to
2 supply advertising.
3 Wouldn't that mean that all your
4 competitors, at least the commercial ones,
5 would have access to the total minutes and
6 aggregate tuning hours for your broadcast
7 stations?
8 WITNESS: I don't believe that they
9 would have access to the SOA-specific
10 information which may be different than the
11 company that measures test - they test the
12 listening in other ways. So this information
13 would still not be available to a company that
14 might measure streaming for the market.
15 JUDGE ROBERTS: So you are
16 suggesting that the Arbitron information may
17 be inaccurate?
18 WITNESS: No. That's for analog
19 broadcasting. We're talking about for
20 streaming broadcasting, whatever company would
21 be measuring that on behalf of the market for
22 a broadcaster, that information would still be

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1 Massachusetts.

2 Q And you have before you your
3 prepared rebuttal testimony?

4 A Yes, I do.

5 Q If I may refresh the words,
6 recollection, Exhibits 159 and 160 for
7 identification, copies of which are attached
8 to Mr. Papish's testimony, were not admitted
9 at the time they were used in the cross-
10 examination of Ms. Kessler because she was not
11 the qualified sponsoring witness.

12 And so my purpose here is to
13 present Mr. Papish as a sponsoring witness for
14 these two exhibits. And then I assume that
15 the board desires me to move their admission,
16 although I suppose since the copies are
17 attached to his testimony they are technically
18 in the record. But I see instruction on that
19 point.

20 CHIEF JUDGE SLEDD: None given.

21 MR. MALONE: All right.

22 BY MR. MALONE:

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1 Q Mr. Papish, do you have the
2 original from which Exhibit 159 was made?

3 A Yes, I do.

4 Q And could you just hold that up?
5 And I would represent to the board
6 that we had previously offered to make this
7 physical exhibit available for scientific
8 inspection, and there were no affirmative
9 responses to our offer.

10 CHIEF JUDGE SLEDD: Mr. Papish, is
11 that a 45?

12 WITNESS: Well, it's a 7-inch
13 record, although technically I believe this
14 one is a 33, but I just referred to a 45, yes.

15 BY MR. MALONE:

16 Q And can you describe the physical
17 object there that you have?

18 A Yes, it's a 7-inch vinyl
19 recording. Sometimes they are called 45s.
20 That refers to the speed at which they're
21 played, although oftentimes you'll find a 7-
22 inch record that can be played at 33. This

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1 one I believe is - this one might be - the
2 other exhibits we look at might not be. It's
3 put out by a band that appears to be called
4 Man dot dot dot, or Astroman question mark.
5 It's unclear exactly what the album recording
6 title is. I would call it Astrolaunch.

7 And there is other information on
8 the back. One might assume that the label
9 would be the Estrus Manufacturing Company, and
10 there is an address given.

11 Q And how did that record come into
12 your possession, and what did you use it for,
13 and is it still in your possession?

14 A This is a 7-inch record that was
15 played at a radio show at WHRB by a DJ. It is
16 currently in my possession.

17 Q Now have you had an opportunity to
18 examine that physical object in terms of
19 whether it contains an ISRC or not?

20 A Yes. I took a look at the
21 recording. As far as I can tell from the
22 specifications of ISRCs for an analog

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11/14/2006 Levin, Eugene; Parsons, Brian; Isquith, Jack; Papish, Michael (all open)

1 recording such as this, it would have to be
2 visually stamped somewhere on the recording.
3 And I cannot find a visual stamp of ISRC
4 anywhere on this recording.

5 Q And is there any element in the
6 four alternative data fields Ms. Kessler
7 identified in her testimony that is missing
8 from that?

9 A I'm not entirely sure without
10 doing additional research what the album title
11 is. Again, I assume it's Astrolaunch, but
12 that I am not positive of. I would also have
13 questions as to how I report the name of this
14 recording artist. Here in the front it's Man
15 dot dot dot, or Astro, all in capital letters,
16 hyphen man question mark.

17 However, in other places on this
18 recording it is also credited as man or
19 Astroman, no dot dot dot, and all the first
20 letters of each of those items in capital
21 letters.

22 So I'm not exactly sure how to

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1 report the name of this artist.
 2 Q Did you learn anything more from
 3 looking at the label?
 4 A The label of the -
 5 Q Of the physical recording?
 6 A No, actually the - as far as I can
 7 tell, the label of the physical recording
 8 doesn't seem to correlate at all with any of
 9 the other information that's in French.
 10 Q So you would anticipate difficulty
 11 in recording - reporting that - the play of
 12 that record?
 13 A Yes, I would be confused as to
 14 what I report.
 15 Q All right.
 16 MR. MALONE: I would like to mark
 17 the physical exhibit Exhibit 159B. I'd like
 18 to move the admission of a photocopy which
 19 constitutes Exhibit 159 into evidence.
 20 (Whereupon the
 21 aforementioned document
 22 was marked for

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1 identification as
 2 Services Exhibit No.
 3 159B)
 4 CHIEF JUDGE SLEDD: Any objection
 5 to the services Exhibit 159?
 6 MR. HANDZO: No.
 7 CHIEF JUDGE SLEDD: Exhibit 159 is
 8 admitted.
 9 (Whereupon the
 10 aforementioned document
 11 having previously been
 12 marked for
 13 identification as
 14 Services Exhibit No. 159
 15 was received into
 16 evidence)
 17 MR. MALONE: Thank you, Your Honor.
 18 BY MR. MALONE:
 19 Q Mr. Papish, I now turn to what has
 20 been marked as Exhibit 160 for -
 21 CHIEF JUDGE SLEDD: Do you intend
 22 to mark another exhibit?

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1 MR. MALONE: I will mark the
 2 physical exhibit as 160B and proceed in the
 3 same fashion.
 4 CHIEF JUDGE SLEDD: Well, 159, did
 5 you intend to mark another one too?
 6 MR. MALONE: The 159B.
 7 CHIEF JUDGE SLEDD: Have you done
 8 that?
 9 MR. MALONE: Well, he has it in
 10 hand, and 159 is the photocopy of what he has
 11 in hand.
 12 I am not going to entrust you with
 13 the physical exhibit.
 14 CHIEF JUDGE SLEDD: I misunderstood
 15 you. I thought you said you intended to do
 16 it.
 17 MR. MALONE: I apologize for my
 18 imprecision.
 19 BY MR. MALONE:
 20 Q Would you identify what you have
 21 in your hand?
 22 A This was the original object which

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1 is marked 160 in my testimony which there are
 2 photocopies of.
 3 Again, it's a 7-inch recording.
 4 This one, although it is not specifically
 5 labeled anywhere, when I attempted to play it
 6 on an actual turntable, I believe it does play
 7 at 45 RPM.
 8 Again, this is another somewhat
 9 confusing example. On the sleeve the only
 10 piece of writing is Jason Molina (phonetic),
 11 which is the name of an individual who has
 12 recorded under his own name, although on the
 13 actual recording there is also the name,
 14 Magnolia Electric Company, which is a band
 15 that he's also recorded as. And the only
 16 other text I would assume is the name of the
 17 track. There is one called, No Moon on the
 18 Water, and there is one called, In the Human
 19 World.
 20 And there are marks as to who owns
 21 the publishing rights, but it is unclear
 22 exactly who would be the recording label.

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1 Q And how did this come into your
2 possession, and what was it used for, and
3 where is its present home?
4 A This again was a recording that
5 was used to create a radio show at WHRB. I
6 currently have possession of the disk.
7 Q So just to make sure that the
8 record is clear, you don't find the ISRC on
9 it?
10 A Again, using the same method that
11 I did the other recording, I could not find
12 the visual stamp of an ISRC on this recording.
13 Q And would you have difficulty in
14 reporting the play of that record on station
15 WHPK?
16 A I would, and in this case, even
17 with additional research, actually it makes it
18 more complicated, the fact that I understand
19 that Jason Molina is an individual who has
20 recorded under this name, and that Magnolia
21 Electric Company is also a recording artist
22 name, and now a regular label name, actually

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1 makes it very complicated. I'm not sure who
2 this would be attributed to as a recording
3 artist, and then there does not seem to be a
4 recording label attributed to this.
5 Someone who had no knowledge
6 whatsoever of the music might assume that
7 Magnolia Electric Company would be the name of
8 the company that put out this recording, but
9 that's not in fact true.
10 MR. MALONE: Again, I would like to
11 mark the physical exhibit as Exhibit No. 160B
12 for identification.
13 (Whereupon the
14 aforementioned document
15 was marked for
16 identification as
17 Services Exhibit No.
18 160B)
19 MR. MALONE: And I would like to
20 move the admission of the photocopy thereof,
21 which has already been marked for
22 identification as Exhibit No. 160.

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1 CHIEF JUDGE SLEDD: Any objection?
2 Exhibit No. 160 is admitted.
3 (Whereupon the
4 aforementioned document
5 previously marked for
6 identification as
7 Services Exhibit No. 160
8 was received into
9 evidence)
10 MR. MALONE: Thank you, Your Honor.
11 BY MR. MALONE:
12 Q You alluded to your experience as
13 quote unquote disk jockey. Which stations
14 broadly have you performed that sort of
15 service?
16 A I've had a position of a disk
17 jockey playing multiple shows at two different
18 radio stations, WHRB and then WHPK, which as
19 I mentioned in my previous testimony is the
20 radio station attached to the University of
21 Chicago.
22 Q So would your experience enable

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1 you to give some idea to the board of how
2 frequently this sort of identification problem
3 that you've described with respect to two
4 disks comes up at least with the genre that
5 you play?
6 A Yes, it's fairly common.
7 Oftentimes, as is probably the case with
8 Exhibit No. 160 these seem to be recordings
9 that are created by the artists themselves,
10 with and often without any label help, and so
11 it's unclear what kind of information is
12 included, and oftentimes like the other
13 exhibit the recording is more of a piece of
14 artwork than it is necessarily used to convey
15 information, so using French words and strange
16 pictures, that's very common with vinyl
17 recordings.
18 Some CDs that are self-pressed
19 have these problems as well, but certainly
20 vinyl is definitely something where you often
21 see this.
22 Q And as you think over your

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1 exposure and familiarity with various radio
2 stations that play recordings from that source
3 or sources you've just described, are there
4 play policies in place that affect the
5 prevalence of that problem of identification?

6 A Right, so these problems of
7 identification often crop up with music that
8 is not necessarily released by a major record
9 label. Oftentimes it's by smaller labels or
10 even by artists without a label. And those
11 tend to be the areas that college radio
12 stations focus on in their programming.

13 I testified earlier that many
14 college radio stations have as a programming
15 philosophy and rule that they don't want to
16 play commercial recordings that can be found
17 on other radio stations. So that really does
18 end up leaving a lot of the programming to be
19 items like this.

20 Q Now in the middle of this process,
21 and this is addressed in the run over
22 paragraph on page two to page three of your

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1 testimony, did you have some tests run to
2 identify or get some feeling if you will for
3 the prevalence of ISRCs?

4 A Yes. So based on my knowledge of
5 vinyl recordings, I have never seen an ISRC
6 code on a vinyl recording, and it can only be
7 there visually. So everything I've done
8 demonstrates that I can't find ISRC codes on
9 vinyl recordings.

10 However, for compact discs, I had
11 a gentleman, Robert Landry, who is chief
12 engineer at WCRB and is an alumnus of Harvard
13 Radio, and helps us out from time to time on
14 technical issues, he did what I'd probably
15 describe as a spot check of the library of
16 WCRB, which is a classical radio station,
17 slightly more mainstream than WHRB. And he
18 used several different software programs to
19 try to find ISRC codes which can be embedded
20 digitally inside of a compact disc.

21 And from his investigations, he
22 found that they were not widely applied.

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1 Again, smaller labels and independent labels
2 never had ISRC codes. He was able to find,
3 and this is a correction I want to make to the
4 testimony here, on discs issued by the
5 Deutsche Grammophone label, which is owned
6 currently by Universal, not by Sony - so
7 that's the change here; I said Sony, but it's
8 actually a Universal label; I was in error as
9 to who was the owner of this label today - he
10 was able to find ISRC codes dating back to the
11 late 1980s, which was the first time that
12 actually that standard even existed.

13 JUDGE ROBERTS: Where are you
14 pointing to here? What section in your
15 testimony, Mr. Papish?

16 WITNESS: It's the last sentence of
17 the top paragraph on page three. And so it
18 just should be, just issued by the Deutsche
19 Grammophone label, which is now owned by
20 Universal.

21 JUDGE ROBERTS: Instead of Sony?

22 WITNESS: That's correct.

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1 MR. ASTLE: In that case I have no
2 further questions.
3 CHIEF JUDGE SLEDD: Any questions
4 by NPR or DIMA?
5 MR. LARSON: No, Your Honor.
6 CHIEF JUDGE SLEDD: I invited that,
7 didn't I?
8 Any questions by Sound Exchange?
9 MR. HANDZO: I have a few, Your
10 Honor.
11 BY MR. HANDZO:
12 Q Mr. Papish, you testified at the
13 outset about a couple of vinyl disks that I
14 think were identified as Exhibits 159 and 160.
15 And I take it those are from the
16 library of WHRB?
17 A That is correct.
18 Q Which is the Harvard radio
19 station?
20 A That is correct.
21 Q What percent of the programming at
22 WHRB is represented by those kinds of vinyl

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1 disks?
2 A It differs based on the program
3 format. And I would say in the rock format,
4 the rock programmers strive for about 50
5 percent vinyl. In the classical format it
6 depends on the era in which the music is
7 coming from. Oftentimes, the earlier
8 recordings, the best recordings exist on vinyl
9 only.
10 Obviously shows that focus on new
11 releases, new classical releases are rarely
12 put out on vinyl, where new rock, independent
13 rock, and electronic music, often do come out
14 on vinyl, so there is a difference there.
15 Jazz recording is similar, a jazz
16 format. Again earlier recordings oftentimes
17 only exist on vinyl. Newer recordings will
18 more likely be on a compact disc. And that
19 can vary based on the show.
20 Q Looking at WHRB programming
21 overall, do you have any way to say what
22 percentage of programming is represented by

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1 vinyl disks?
2 A I would estimate probably 40
3 percent, but I don't have a numerical way of
4 showing you that.
5 Q Now, I think you said, the only
6 other radio station you've worked for is
7 Chicago?
8 A WBBK is the only other station
9 that I've worked for. I've visited and seen
10 many radio stations, and talked to a whole lot
11 of people who do noncommercial college radio
12 stations.
13 Q If you know, is it fair to say
14 that commercial radio stations tend not to
15 play vinyl recordings?
16 A Yes. That's a point I think we've
17 been trying to make earlier in this proceeding
18 as well. There is a big difference between a
19 large commercial station, which often plays
20 music directly off of a hard drive, versus
21 these stations that are not only playing
22 physical media such as a CD or vinyl

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1 recording, but they are actually - I mean they
2 actually are playing vinyl.
3 Q So this issue that you have
4 identified is one that is really unique to
5 college stations; is that right?
6 A I believe that is correct, yes.
7 Q And you don't have any way to know
8 how many college stations are playing a lot of
9 vinyl, do you?
10 A That's actually interesting. So
11 there are several different organizations
12 which bring together college radio stations.
13 We've heard from some. IBS was one here; CBI.
14 CBI has an email listserv, so actually people
15 communicate quite a bit.
16 And from what I can tell most
17 stations do have a pretty large vinyl library.
18 All the stations that I've visited - so I've
19 probably visited maybe 60 different college
20 radio stations around the country, I talk at
21 different conferences, I visit students who
22 are very interested in learning about that.

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Transcript of:

Date: November 15, 2006

Volume: 41

Case: Digital Performance Rights

Neal R. Gross & Co., Inc.
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Internet: www.nealrgross.com

1 administered by one collective.

2 Q Mr. Gertz, did you ever say that a
3 competitive environment would increase
4 inefficiency?

5 A No.

6 Q Would increase inefficiency?

7 A No, I never said that.

8 Q Mr. Gertz, if Royalty Logic is not
9 given designation with DARPA, as you're
10 requesting, would you be able to compete in
11 the marketplace for statutory licensing?

12 A I think probably not.

13 Q And why is that?

14 A Because if we couldn't compete on
15 the same basis as SoundExchange with the same
16 information at the same time, I think it would
17 be very, very difficult to compete at all.

18 Q One final question before we get
19 into the terms of your proposal. In your
20 experience what's the best way to achieve
21 fairness, efficiency and promptness in the
22 collection and payment of royalties here in

Transcript of:

Date: November 21, 2006

Volume: 42

Case: Digital Performance Rights

Neal R. Gross & Co., Inc.
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Before the
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LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: *
The Digital Performance Right * Docket No.
in Sound Recordings and * 2005-1 CRB DTRA
Ephemeral Recordings *
(Webcasting Rate Adjustment *
Proceeding) *
Volume 42

Room LM-414
Library of Congress
First Street and
Independence Avenue, S.E.
Washington, D.C. 20540
Tuesday,
November 21, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.
BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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1

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11/21/2006 Brynjolfsson, Eric (open)

On Behalf of The National Religious
Broadcasters Noncommercial Music License
Committee, Bonneville International
Corp., Clear Channel Communications
Inc., Salem Communications Corp.,
Susquehanna Radio Corp., and The
National Religious Broadcasters Music
License Committee:

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11/21/2006 Brynjolfsson, Eric (open)

I-N-D-E-X

Voir

Witness	Direct	Dire	Cross	Redirect	Recross
Erik	7	12	112	285	287
Brynjolfsson					

E-X-H-I-B-I-T-S

Services

Rebuttal

Exhibit No.		Marked	Admitted
3	E. Brynjolfsson Deposition	13	
4	Brynjolfsson Deposition	157	
5	Analysis Group analysis of top simulcast streamers	219	222

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JA 730

1 A Are you referring to a particular
2 point?
3 Q Well, I think there was some
4 general testimony this morning about whether
5 the market was competitive, not competitive.
6 It's also in your report, but let's focus it
7 more clearly. Please turn to page ten of your
8 written testimony and you're here talking
9 about the benchmark that Dr. Pelcovits used in
10 the second paragraph and you're saying that,
11 about five lines down, "Furthermore, the
12 market for on-demand sound recordings reflects
13 essentially the same buyers and sellers and
14 essentially the same relative bargaining
15 power." And you're comparing there the on-
16 demand streaming market with the DMCA
17 compliant streaming market which are the two
18 markets Dr. Pelcovits deals with. Correct?
19 A Yes I am.
20 Q But that statement is at least
21 somewhat inconsistent, isn't it, with the
22 testimony that you gave this morning where you

1 same in that regard.
2 A It's the same -- I'd say it's
3 similar.
4 Q Similar, okay. Do you see -- You
5 do see some difference, don't you, between the
6 necessity of the webcasters in the on-demand
7 market to have all four as opposed to the
8 necessity of the webcasters in the DMCA
9 compliant market to have all four?
10 A I think they are broadly similar.
11 As I noted here, I think they are quite
12 similar markets, quite similar groups. One
13 difference is of course that by definition in
14 DMCA market we have a statutory license. So
15 people can just -- They automatically have a
16 license. So there's no real decision to be
17 made about whether you use all four. In the
18 on-demand market, they actually have to choose
19 whether or not they use the major record
20 labels or not. So we have some evidence that
21 in fact that in some cases they choose not to.
22 Q Are you familiar with the

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1 acknowledged that with respect to the DMCA
2 compliant market the webcasters don't
3 necessarily need the repertoire of all four
4 labels where I assume you would agree that in
5 the on-demand market the webcasters do need
6 all four?
7 A You're assuming incorrectly.
8 Q Excuse me?
9 A You're assuming incorrectly.
10 Q Incorrectly, I see. But you did
11 say this morning -- Well, let me restart. You
12 would agree that with respect to the on-demand
13 streaming market the webcasters need the
14 repertoire of all four labels, would you not?
15 A No, I wouldn't.
16 Q So you're saying that even with
17 respect to the on-demand market, a webcaster
18 could exist without all four. Is that what
19 you're saying?
20 A Yes, that's what I'm saying.
21 Q Okay. And so having said that,
22 you say that the DMCA compliant market is the

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1 A I'm not sure I can give you a
2 yes/no answer to that one.

3 Q Can you point to anything in your
4 written rebuttal testimony that describes any
5 analysis of the level of competition that
6 exists in any market for the licensing of
7 sound recording?

8 A Well, one place -- Could you ask
9 the question again? I just want to make sure
10 I'm answering precisely.

11 MR. JOSEPH: Actually, may I ask
12 for that to be read back? Is that difficult
13 to do?

14 CHIEF JUDGE SLEDGE: That's -- Why
15 don't you rephrase it?

16 BY MR. JOSEPH:

17 Q Dr. Brynjolfsson --

18 A It's hard to remember, isn't it?

19 Q -- can you point to anything in
20 your written rebuttal testimony that discusses
21 an analysis of the level of competition that
22 exists in any market for the licensing of

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1 sound recordings?

2 A Yes.

3 Q And what can you point to, sir?

4 A So when I came up with this 75/25
5 percent division of surplus, that reflected my
6 assessment of the level of competition in that
7 marketplace.

8 Q That's the result of -- And that's
9 -- I'm sorry. Let me withdraw that. And
10 that's referring to something you did in
11 connection with your written direct statement.

12 A I think yes. It was primarily
13 there. I mean there's a smidgen of it in here
14 when I talk about monopoly at one end being
15 100 percent or close to 100 percent, perfect
16 competition, stripping it of all power which
17 is, I guess, in that paragraph labeled
18 "Fourth" where it would be close to zero
19 percent, so you can get a sense of the
20 different levels of competition and some of
21 the different values that you would get in
22 each of them. As you note, I discuss this and

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JA 733

1 cannibalization on -- well, in this section.
2 I'm trying to find exactly. You remember
3 talking about cannibalization. Right?
4 A Yes, I do.
5 Q Okay. And just to be clear
6 because I believe that Mr. Smith actually made
7 this statement but since what you say is
8 evidence and what he says isn't, you haven't
9 done any quantitative study or analysis of the
10 cannibalization of commercial webcasters'
11 simulcast by noncommercial webcasters or
12 simulcasters, have you?
13 A I've not done a quantitative study
14 of that.
15 MR. JOSEPH: May I have a moment
16 or two?
17 CHIEF JUDGE SLEDGE: Mr. Joseph,
18 just where is this in his statement?
19 MR. JOSEPH: The cannibalization
20 point?
21 CHIEF JUDGE SLEDGE: Yes.
22 MR. JOSEPH: He was actually

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1 discussing that earlier. Let me see if I can
2 find it. On page 42 the witness talks about
3 "make sure that doing so interferes with as
4 little as possible with what should be a
5 single market rate" and then "from an economic
6 ..." "this reduces the change that small
7 noncommercial stations will cannibalize the
8 webcasters, the webcasting market more
9 generally." That was what I was referring to
10 and I had trouble finding. Thank you, Your
11 Honor.
12 CHIEF JUDGE SLEDGE: I am anxious
13 to see what Mr. Webster says about that word.
14 MR. JOSEPH: As I asked, may I
15 have a moment or two, Your Honor, just to be
16 sure I'm done?
17 CHIEF JUDGE SLEDGE: Yes sir.
18 (Pause.)
19 MR. JOSEPH: Nothing further for
20 now, Your Honor.
21 CHIEF JUDGE SLEDGE: Mr. Taylor.
22 CROSS EXAMINATION (Cont'd.)

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Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the matter of: *

The Digital Performance Right* Docket No.

in Sound Recordings and * 2005-1

Ephemeral Recordings *

CRB DTRA *

(Webcasting Rate Adjustment *

Proceeding) *

Volume XLIV

Room LM-414

Library of Congress

First & Independence Avenue, S.E.

Washington, D.C. 20540

Monday,

November 27, 2006

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30

a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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Broadcasters Noncommercial Music License
Committee, Bonneville International Corp.,
Clear Channel Communications Inc., Salem
Communications Corp., Susquehanna Radio
Corp., The National Religious Broadcasters
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11/27/2006 Pelcovits, Michael

I-N-D-E-X

Witness	Direct	Cross	Redirect	Recross
M. Pelcovits	6		275	

By Mr. Steinthal	64			281
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Services Rebuttal

Exhibit No.	Document	Mark	Recd
R-25	Pelcovits deposition	71	
R-26	Sony BMG-Verizon Ring Tones Agreement	99	
R-27	Yahoo-Sony Short Form Agreement	193	
R-28	NPD Data Table SX003149	220	
R-29	NPD Date Table SX003145	231	
R-30	NPD Date Table SX003097-8, 3109-10	236	
R-31	9/19/06 McQuillan to Pelcovits email, re: Digital Music Study - Add'l Methodology Info	238	
R-32	NPD Questionnaire SX REB003117-18	244	260
R-33	NPD Date Table SX REB003113-14	254	
R-34	NPD Date Table SX003099-100	269	

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JA 736

Before the

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Washington, D.C.

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(Webcasting Rate Adjustment *

Proceeding) *

Volume XLV

Room LM-414

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First & Independence Avenue, S.E.

Washington, D.C. 20540

Tuesday,

November 28, 2006

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THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

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11/28/2006 Kessler, Barrie; Wheeler, Simon; Lee, Tom

11/28/2006 Kessler, Barrie; Wheeler, Simon; Lee, Tom

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I-N-D-E-X

WITNESS DIRECT CROSS REDIRECT RECROSS

Barrie Kessler

By Mr. Smith 9

By Mr. Larson 37

By Ms. Ablin 42

By Mr. Freundlich 150

By Mr. Smith 187

By Ms. Ablin 189

Simon Wheeler

By Mr. Handzo 202

By Mr. Larson 211

By Mr. Taylor 229

Tom Lee

By Mr. Handzo 235

By Mr. Freundlich 254

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JA 739

1 broadcasters that are counted as multiple
2 services.

3 JUDGE ROBERTS: Oh, all right.

4 MS. ABLIN: That's all.

5 BY MS. ABLIN:

6 Q Are you at page 7?

7 A I am.

8 Q Give me a moment to prepare
9 myself. Now, you assert on that page that
10 the current late-fee provisions simply have
11 not been effective in promoting prompt
12 payments. Is that correct?

13 A That's correct.

14 Q I'm now handing out a document
15 that has been marked as Services' Rebuttal
16 Exhibit 37 and for the record, this document
17 has been Bates numbered SX-REB10705-26.

18 (Whereupon, the document
19 was marked as Services'
20 Rebuttal Exhibit 37 for
21 identification.)

22 BY MS. ABLIN:

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11/28/2006 Kessler, Barrie; Wheeler, Simon; Lee, Tom

1 Q And I will represent that this is
2 a document that was also produced to us by
3 SoundExchange in discovery in connection
4 with your testimony, Ms. Kessler.

5 A Yes.

6 Q Could you please describe this
7 document for us?

8 A It's an Analysis of the Top Ten
9 Webcasters with respect to the receipt date
10 of their payments.

11 Q And it's true, is it not, that
12 the payments made by the webcasters
13 identified in this document which you
14 identified as being the top ten webcasters
15 constitute the vast majority of all payments
16 made by all webcasters?

17 A A substantial amount. Yes.

18 Q And, in fact, it's a substantial
19 majority of the payments that SoundExchange
20 receives?

21 A It is.

22 Q Now, looking at the column labels

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1 at the top of the first page, we will start
2 there. The column labeled or I should say
3 the dates rather listed in the column
4 labeled period, the second column listed
5 there, I take it that this column represents
6 the last date of the payment month
7 pertaining to a given row?

8 A I'm not sure.

9 Q Have you ever seen this document
10 before?

11 A I likely have. Yes.

12 Q And you see the word period at
13 the top?

14 A I do.

15 Q Do you see the word received date
16 next to that?

17 A I believe that the period refers
18 to the period that the payment applies to
19 compared to the receipt date which is when
20 we actually received the payment.

21 Q Okay. Okay. So, in other words
22 just so we're clear on what this is just

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11/28/2006 Kessler, Barrie; Wheeler, Simon; Lee, Tom

1 looking at the first line item, for example,
2 the received date of July 7th, 2004 would be
3 a payment that SoundExchange received for
4 AOL.com that would cover the month of April
5 2004?

6 A I believe so. Yes.

7 Q Okay. And if you would look at
8 the last column on this document labeled
9 difference.

10 A Yes.

11 Q I take it that the numbers in
12 this column are the number of days
13 difference between the last date in the
14 period listed in the period column and the
15 received date in the column next to that.

16 A Yes.

17 Q And then I take it that -- do you
18 see the bolded numbers that are not
19 associated with a particular row and it
20 appears that there are three. That the line
21 items are grouped in threes and then there's
22 a bolded number directly below the three

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1 rows.
 2 A Yes.
 3 Q Do you see what I'm talking
 4 about?
 5 A I do.
 6 Q Now, I take it that that number
 7 represents the average of the difference
 8 numbers for that quarter, for the three
 9 months listed in that quarter?
 10 A It appears so. Yes.
 11 Q Now, the regulations provide for
 12 the Services analyzed in this spreadsheet
 13 that payments are due 45 days after the end
 14 of the month for which payments are due.
 15 Correct?
 16 A Correct.
 17 Q So, if I wanted to calculate the
 18 number of days late that a particular
 19 payment was, I would take the number in the
 20 column labeled difference and subtract 45.
 21 Is that correct?
 22 A That's correct.

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1 Q And if I wanted to calculate the
 2 average number of days late a service was in
 3 a particular quarters, I could simply take
 4 the bolded difference -- quarterly
 5 difference averages that you identified a
 6 few minutes ago and subtract 45 from those?
 7 A For the average, yes.
 8 Q For the average, yes. Now, if
 9 you could please turn to page SX-REB10725
 10 which is the second to last page of this
 11 exhibit.
 12 A Yes.
 13 Q Could you please describe what
 14 the column labeled quarterly average
 15 represents?
 16 A No, I can't describe what that
 17 means.
 18 Q Well, Ms. Kessler, I will
 19 represent to you that this file was produced
 20 to us in native format and that the formula
 21 for calculating the quarterly average was an
 22 average across the Services listed here

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1 starting with AOL continuing with Clear
 2 Channel.
 3 A Oh, all of the Services.
 4 Q All of the Services across the
 5 spreadsheet. So, in other words, this is
 6 one -- this was produced to us as one giant
 7 spreadsheet with very long rows and at the
 8 end of those very long rows was this
 9 quarterly average column where these numbers
 10 were the average. The formula to calculate
 11 the quarterly average column was the
 12 average. Does that sound -- is that
 13 consistent with your recollection of this
 14 document?
 15 A Yes.
 16 Q So, if I wanted to calculate the
 17 average number of days late that all
 18 Services listed in this document were for a
 19 given quarter, I could take this quarterly
 20 average number which is the average of the
 21 difference numbers across the spreadsheet
 22 and subtract 45. Is that correct?

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1 A I assume so. I would like to see
 2 the formulas and the spreadsheet to be able
 3 to say with certainty.
 4 Q Okay. Well, I have a calculator
 5 with me and I'd be happy to walk us through
 6 one of the rows if you'd like to do that to
 7 assure yourself in that --
 8 A No, thank you.
 9 Q So, you'll accept the
 10 representation that the quarterly average
 11 numbers are the average across the rows for
 12 all of the Services?
 13 A Let me flip through this for a
 14 moment --
 15 Q Okay.
 16 A -- until I get a sense. It
 17 appears that's the case. Yes.
 18 Q Okay. So, again, if I wanted to
 19 calculate the quarterly average dates late
 20 that all Services in a given quarter were in
 21 making payments, I could take the quarterly
 22 average numbers in this column and simply

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1 subtract 45.

2 A Yes.

3 Q Is that correct? Okay. I'm now
4 handing out a document that's been marked --

5 JUDGE ROBERTS: Before you do
6 that, Ms. Ablin, I'm looking at the -- back
7 to 10725. That first number 48, if you
8 subtract 45, that's three. Three days late
9 for what quarter?

10 MS. ABLIN: Your Honor, if you
11 will flip to the --

12 JUDGE ROBERTS: Are we able to
13 tell that?

14 MS. ABLIN: Yes, if you flip to
15 the first page of this document, the period
16 -- in other words, this document is just a
17 continuation of very long rows and so, the
18 period for that quarter would be the quarter
19 -- the second quarter of 2004. In other
20 words, April, May and June 2004.

21 JUDGE ROBERTS: All right. Thank
22 you.

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Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the matter of:)

)

The Digital Performance Right)

in Sound Recordings and) Docket No.

Ephemeral Recordings) 2005-1

) CRB DTRA

(Webcasting Rate Adjustment)

Proceeding))

Room LM-414

Library of Congress

First and Independence

Avenue, S.E.

Washington, D.C. 20540

Thursday,

November 30, 2006

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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11/30/2006 Eisenberg, Mark

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11/30/2006 Eisenberg, Mark

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11/30/2006 Eisenberg, Mark

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS		
Mark Eisenberg	10	43	224	233		
EXHIBITS:	IDENTIFIED RECEIVED					
Services:						
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1 sound recordings they should not be paying
2 more than what is paid for the performances of
3 musical works.

4 A They have never made that claim to
5 me.

6 Q Now, you are aware, are you not,
7 that the Department of Justice has an
8 investigation of the online music distribution
9 business going on?

10 A There have been investigations
11 over time. I'm not sure what their current
12 state of affairs is with respect to any one
13 inquiry. I was involved in one several years
14 ago relating to on-demand subscription
15 services. That was closed without any
16 conclusions.

17 Q And that investigation was an
18 investigation of the online music distribution
19 market limited to sale and distribution and
20 on-demand subscription streaming and
21 conditional download services. Right?

22 A It may have been just the on-

1 are for other investigations and I gave them
2 my files but I don't get involved in the
3 specifics of the investigation.

4 Q Let me see if I can trigger a
5 recollection. Are you aware that Judge Patel,
6 the Judge from the initial Napster case, made
7 a decision that required the disgorgement of
8 a lot of attorney/client privileged materials
9 associated with the original Press Play and
10 MusicNet services which then prompted the
11 Department of Justice to reopen the
12 investigation that you referred to previously
13 that you were aware about?

14 A I have heard kind of water cooler
15 talk about new investigations. I am familiar
16 with the Patel ruling in the Bertelsmann case
17 but I don't know what the exact investigation
18 is at this point.

19 Q Let me ask you to go to --
20 actually we are about to start on a new
21 subject. If this is an appropriate time to
22 take the morning the break, I am happy to do

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1 demand, not the digital downloads itself but
2 the on-demand subscription services.

3 Q But the Justice Department when it
4 was examining the market to determine whether
5 or not there are any competitive problems
6 associated with it was examining just the part
7 of the market that related to on-demand
8 streaming and subscription services and not
9 non-interacting webcasting. Right?

10 A There is a compulsory license for
11 noninteractive webcasting. It didn't come up
12 because we weren't setting rates and terms.
13 The Copyright Royalty Tribunal was setting the
14 rates and terms in those proceedings.

15 Q Are you familiar with the fact
16 that investigation was reopened in the last
17 year?

18 A I don't know the exact status of
19 any one negotiation -- any one investigation.
20 From time to time our legal department asks me
21 to produce documents. Some are for the
22 Attorney General, the State of New York. Some

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1 basis to the licensee that sells the
2 conditional downloads and on-demand streaming
3 subscriptions.

4 CHIEF JUDGE SLEDGE: Let's take a
5 short recess.

6 (Whereupon, at 11:27 a.m. briefly
7 off the record.)

8 CHIEF JUDGE SLEDGE: We'll come to
9 order.

10 BY MR. STEINTHAL:

11 Q Is it correct that in the typical
12 situation with respect to the on-demand
13 streaming conditional download subscription
14 services, the labels license their whole
15 catalog on a catalog-wide basis to those
16 services?

17 A Yes.

18 Q It is correct, is it not, that
19 those subscription services typically obtain
20 catalog licenses from all four of the majors?

21 A All of the services that we
22 participate in have licenses or distribution

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1 arrangements with all of the major record
2 companies.

3 Q Would you agree with the
4 proposition that it would be a bad consumer
5 experience if one were to subscribe to one of
6 those on-demand streaming conditional download
7 services and frequently couldn't get tracks
8 that you requested on demand?

9 A It would depend on how the service
10 markets itself because if you look at the
11 download market, for example, where you are
12 offering the full catalog of recordings, most
13 of the sales are just a small subset of the
14 catalog. People like to think that they want
15 two million tracks but they don't actually
16 listen to them.

17 Just like if you went into a Wal-
18 Mart store they are probably only going to
19 carry the top 200 albums because that is what
20 the top sellers are. A service could get by
21 no having the full panoply of catalog
22 offerings. It depends on how they want to

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Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN
SOUND RECORDINGS AND EPHEMERAL
RECORDINGS

)
)
)
) Docket No. 2005-1 CRB DTRA
)
)
)

PROPOSED CONCLUSIONS OF LAW
OF SOUNDEXCHANGE, INC.

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December 12, 2006

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[w]here the intent of Congress is to set a rate at fair market value, as in this proceeding, the Panel is not required to consider potential failure of those businesses that cannot compete in the marketplace. *See National Cable Television Ass'n. v. CRT*, 724 F.2d 176 (D.C. Cir. 1983) (holding that rates set at fair market value were proper even though cable operators argued that the rates were prohibitively high and would cause them to cease transmission of the distant signals at issue.).

The law requires only that the Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

SX 407 DP at 45254 (Webcaster I Librarian Decision).

II. THE HYPOTHETICAL MARKET

12. To establish rates the Judges must determine the nature of the marketplace in which the buyer and seller operate under Sections 112(e)(4) and 114(f)(2)(B). Generally speaking, a market is made up of a product or set of products, and buyers and sellers of that product.

The Product

13. The product bought and sold in this hypothetical marketplace is a blanket license to perform sound recordings over the Internet, and an accompanying blanket license to make ephemeral reproductions of those same sound recordings incident to their being performed over the Internet. *See Webcaster I CARP Report at 24; SX 407 at 45244 (Webcaster I Librarian Decision)* ("the product consists of a blanket license from each record companies which allows use of that company's complete repertoire of sound recordings"). It follows that the most relevant benchmarks for the setting of the rates and terms in this proceeding are prices for other

blanket licenses for the use of sound recordings. That conclusion is compelled by the Webcaster I CARP decision, the Librarian's decision, and the D.C. Circuit's decision upholding the Librarian's decision -- SX 408 (*Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939 (D.C. Cir. 2005)) -- as well as by the determinations of the Librarian in prior copyright royalty proceedings using blanket licenses for the specific copyrighted work at issue as the most relevant benchmark. See Librarian's Decision, Docket No. 96-6 CARP NCBRA, 63 Fed. Reg. 49823-49837 (Sept. 18, 1998).

14. To the extent that webcasters, through Professor Jaffe, argue that the CRJs should hypothesize a market in which there are millions of copyright owners licensing one or only a very small number of copyrighted sound recordings, that argument is foreclosed by the Webcaster I proceeding, as the CARP's decision on this point was upheld by the Librarian and the D.C. Circuit. It is also inconsistent with the statute itself, which encourages voluntary agreements for blanket licenses between copyright owners and digital music services and allows such agreements to be adopted as rates and terms for the entire industry.

The Willing Buyers

15. All parties agree that the buyers in this hypothetical marketplace are the actual Services that are subject to the statutory license. See SX 405 DP at 21 (Webcaster I CARP Report); SX 407 DP at 45244 (Webcaster I Librarian's Decision) ("the willing buyers are the services which may operate under the webcasting license"). This is so even though it may be that Services such as Yahoo! have market power in their dealings with certain sound recording copyright holders.

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Washington, D.C.

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Copyright Royalty Board

In the Matter of)

Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)

Docket No. 2005-1 CRB DTRA

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
COLLEGIATE BROADCASTERS INC.**

Pursuant to the Amendment to Amended Trial Order dated November 28, 2006, Collegiate Broadcasters, Inc. hereby respectfully submits its Proposed Findings of Fact and Conclusions of Law. Collegiate Broadcasters, Inc. also joins in the submission of the Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, which is incorporated by reference as if set forth herein in its entirety.

I. FINDINGS OF FACT

A. The Parties

1. Collegiate Broadcasters Inc. ("CBI") is a tax-exempt not-for-profit organization, under section 501(c)(3) of the Internal Revenue Code, whose membership consists of university and college radio and television stations. Written Direct Testimony of Will Robedee ("Robedee WDT") ¶ 37. CBI's mission is to represent students involved in radio, television, webcasting and other related media ventures; ensure a commitment to education and the student pursuit of excellence through active involvement in electronic media; promote cooperative efforts between CBI and other national, regional and state

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8. Many collegiate Noncommercial Educational Stations either have no professional involvement, or the professional involvement is limited to an on-paper advisor. Robedee Tr. at 127. The vast majority of the individuals operating these stations are students for whom this is an extracurricular and volunteer activity. Robedee Tr. at 128; *see also* Robedee WDT ¶¶ 18, 48. These students do not typically receive academic credit for their involvement. *Id.* Although some student managers may receive a stipend because of the number of hours they put in the operation of a station in lieu of working a part-time job, the vast majority act strictly on a volunteer basis. *Id.* Many Educational Stations are considered clubs, and have little in the way of resources, and have no formal ties to academic departments. Robedee WDT ¶ 43.

9. Many Noncommercial Educational Stations, particularly those that do not possess a broadcast license, do not operate year around. Many do not operate 24 hours a day during the times of the year that they are functioning. Robedee WDT ¶ 96.

C. CBI Member Stations Differ from Other Noncommercial Stations

10. Unlike National Public Radio ("NPR") stations, CBI Member Stations are not "public broadcasting entities" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

D. CBI Member Stations have Limited Funding.

11. Most Noncommercial Educational Stations are provided limited funding through student activity fees or the budgets afforded to academic departments. Robedee WDT ¶ 42.

12. The average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136.

13. FCC-Licensed Noncommercial Educational Stations are, with few exceptions, prohibited from airing advertisements. Robedee WDT ¶ 46, 59. They are allowed to solicit underwriting. *Id.* Some stations enjoy success with their underwriting endeavors, but most do not due to their small signals and small, sometimes unmeasurable audiences. *Id.* Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience.

14. CBI Member Stations' Internet simulcasts operate with fewer, and even more limited, resources. The stations' limited budgets and limited means of adding to the operating budgets, along with their inability to carry funds forward from one year to the next, prohibits many of these stations from making non-essential capital acquisitions, such as automation systems that are the norm for commercial webcasters. Robedee WDT ¶ 47.

15. CBI Member Stations that webcast typically do so using computers that have been handed down from other applications or using resources from other departments. Robedee WDT ¶ 22; *see also* Robedee Tr. at 129-130, 179. Noncommercial Educational Stations typically webcast using one of four

implementations: "Self-contained" in which the station hosts both the encoding computer and the Internet server; "Institutionally Assisted" in which the station hosts the encoding computer but another college department hosts the Internet server; "Externally Served" in which the station owns the encoder but the Internet server is hosted by an outside service; or a combination of these. Robedee WDT ¶ 71.

E. CBI Member Stations' Small Internet Listenership

16. CBI Member Stations' webcasts generally have small listenerships that pale by comparison to commercial webcasting entities. Robedee Tr. at 137, 175; Robedee WDT ¶ 24.

17. Moreover even the stations' estimated listenership figures may overstate actual listenership of the stations' webcasts due to internet listeners' propensity to remain connected for long periods of time sometimes exceeding 24 hours when they are not, in fact, actually listening to the stream. Willer Tr. at 292.

18. The Noncommercial Educational Stations' webcasts occasionally do garner larger audiences -- running in the thousands -- from local and out-of-area alumni listening to certain sporting events. Robedee Tr. at 138; *see also* Robedee WDT ¶¶ 24-25. This programming is not compensable under the statutory license. Robedee Tr. at 151-152.

F. Generally CBI Stations Do Not Use Ephemeral Recordings

19. The vast majority of CBI stations' webcasts consist of simulcasts. Robedee Tr. at 137; Willer Tr. at 288. Music may not be recorded to servers. Robedee Tr. at 144. With the exception of some athletic programming, which is not compensable under the statutory §§ 112 and 114 licenses, the programming is not recorded for later

airplay. Robedee Tr. at 137-138.

G. How CBI Member Stations Maintain Playlist Information

20. Unlike most commercial stations, CBI stations do not use pre-programmed playlists. Although there are some loose guidelines that the DJs need to follow in terms of what to play--i.e. a certain number of tracks within a given period of time and certain genres of music--what they play is at their discretion. Robedee Tr. at 132-134.

21. Student volunteers keep a log of the recordings that have been played on the air. Robedee Tr. at 218. Some of them enter the information into a computer Robedee Tr. at 140, 218. Many others still keep such records written by hand, with no ability to enter or maintain this information on computer. Robedee Tr. at 144, 219, 224.

22. Music playlists for broadcast may not be pre-programmed using software that automatically generates playlist data. Robedee Tr. at 144.

H. Fee Proposal from CBI

23. Non-commercial stations have historically paid the PROs a flat fee for the use of musical works. Robedee WDT ¶ 20. This rate structure is simple, easy to manage and places no burden on the station in the form of calculating a fee and in terms of recordkeeping. Robedee WDT ¶ 21. Under these PRO agreements, Noncommercial Educational Stations are treated differently and pay substantially less in fees than both NPR and Non-NPR Non-Educational Stations. Robedee WDT ¶¶ 62- 63. Therefore, the PRO model results in appropriate compensation for the copyright owners, at a rate and under minimal reporting obligations that can be afforded by Noncommercial Educational Stations.

24. The most recent benchmark for CPB-funded stations which was

established by a CARP came in 1998. After these rate-setting proceedings, the per station fees for Noncommercial Educational Stations were 19% of the representative per radio station CPB fee. Thus, the Educational Station fee should, at a maximum, be 19% of the fee offered by the RIAA for CPB stations.

25. Although almost every Noncommercial Educational Station pays the minimum fee under the current structure, but that an actual application of the current rates would result in an actual fee substantially lower than the current minimum. Robedee WDT ¶¶ 76-77. That so many of these stations pay the minimum fee suggests that the current fee is set too high for Noncommercial Educational Stations. *Id.*

26. A lower rate is appropriate in light of evidence that webcasts expose listeners to new artists whose recordings they subsequently purchased because of that exposure. Robedee WDT ¶ 91.

27. A lower rate also is warranted in light of the cost and burden of other license requirements, such as recordkeeping. For Noncommercial Educational Stations, the costs and burdens of recordkeeping are substantial, and potentially prohibitive. Robedee Tr. at 165-166, 237.

28. An appropriate fee would be calculated as a flat fee. Percentage of revenue metrics will not be appropriate for noncommercial stations, including Noncommercial Educational Stations, that do not seek to maximize revenue. Calculations based upon listenership would require software and resources that many stations do not possess, and would impose additional administrative burdens that these stations could not readily support through volunteer student staffs.

29. CBI proposes a minimum fee for the statutory § 112 and § 114 licenses to

be set as \$175 per annum.

II. CONCLUSIONS OF LAW

1. The section 114 statutory license requires the Copyright Royalty Judges to set separate royalty rates for different types of services. *See* 17 U.S.C. § 114(f)(2)(B). That Congress granted the § 114 statutory license to be available to webcasters of all types and sizes indicates, first, that Congress believed that there are, in fact, "different types" of services; second, that Congress did not intend to exclude small Noncommercial Educational Stations from the statutory license; and third, and most importantly, that Congress intended that rates for these services be set at rates that these services could afford.

2. As further evidence of this intent with respect to Noncommercial Educational Stations in particular, Congress in 2002 passed the Small Webcasters Settlement Act ("SWSA") in response to the outcry from smaller noncommercial webcasters who could not afford to pay the rates set by the previous webcasting CARP. Small Webcaster Settlement Act of 2002, Pub. L. 107-321, 116 Stat. 2780 (2002);

3. As recognized previously by a Copyright Arbitration Royalty Panel in a proceeding under § 118, it is appropriate that lower rates should be set for Noncommercial Educational Stations than for other noncommercial webcasters. Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA (July 22, 1998). Regulations promulgated by the Copyright Office, in 37 CFR 253.5, apply a separate, lower rate specifically to Noncommercial Educational Stations (described in the regulation as "noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National

Public Radio"). Furthermore, these regulations impose minimal reporting requirements upon such Noncommercial Educational Stations.

4. The impact of the rate on Noncommercial Educational Stations also must be evaluated in tandem with other costs imposed under the statutory license, and in particular the cost of recordkeeping. In keeping with Congressional intent, the combined cost of both the royalty and the recordkeeping obligations imposed on the Noncommercial Educational Stations should be set at a reasonable level that these services can readily afford. The combined costs should not prevent these Noncommercial Educational Stations from fulfilling their mission. Such a result would defeat the purpose of the statutory license..

5. Any "willing buyer/willing seller" analysis of an appropriate rate likewise would take into account the not-for-profit status of these stations, their educational purpose, limited audience, limited budgetary resources, limited opportunities to generate revenue, limited broadcast days, limited uses of music, and the costs of compliance with the license requirements.

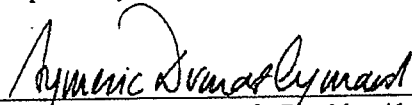
6. In light of these factors, it is appropriate to set a rate in this proceeding that would be affordable to Noncommercial Educational Stations, which serve a socially beneficial purpose.

7. In light of the evidence in this proceeding, the fee that most clearly represents what a willing Noncommercial Educational Station would pay to a willing seller would be a flat fee of \$175 per year.

849U7.3

Date: December 12, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Proposed Findings of Fact and Conclusions of Law of Collegiate Broadcasters Inc. has been served this 12th day of December 2006, by electronic mail and overnight express mail, to the following persons identified on the Service List for Docket No. 2005-1 CRB DTRA:

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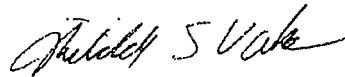
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Before the
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In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2005-1 CRB DTRA

JOINT PROPOSED FINDINGS of IBS and WHRB

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The Intercollegiate Broadcasting System, Inc., a Rhode Island not-for-profit corporation, (IBS) and Harvard Radio Broadcasting Co., Inc., licensee of Station WHRB (FM), Cambridge, Massachusetts, a Massachusetts eleemosynary corporation (WHRB), both being parties to this proceeding, jointly file these proposed findings and fact and conclusions of law.

The undersigned parties submitted testimony and exhibits on the record-keeping and reporting requirements and penalties submitted by Ms. Barrie Kessler, SoundEx's chief operating officer. See, e.g., written testimony of Capt. Kass at ¶¶ 11, 13, and Papish (direct at 5, (rebuttal) at 1-3; Kass WORD Tr (8/7/06) 23-24, 51, 53-56, 62-67; Papish WORD Tr. (8/7/06) at 98-112; Papish Tr XL-199-212, 259-66; and Svcs. Exhs. 159, 160. In accord with their understanding of the Board's order herein of September 8, 2006, on the admissibility of testimony and other evidence introduced in response to Ms. Kessler's testimony, the undersigned parties are not proposing findings or conclusions directly with respect thereto in this proceeding.

The testimony of Capt. Kass, Mr. Papish, and Dr. Picard on the cost-effectiveness of, and effective royalty rate of, SoundEx's proposed royalty scheme for the non-commercial, educationally affiliated webcasters, *infra*, is introduced for a quite different purpose. The practical point is this -- by analogy to "total-life costing" -- the *total price* to the non-commercial, educationally affiliated webcasters includes the cost to them of the recordkeeping and reporting that is packaged in with the deal. That must necessarily enter into an estimation of the price of any sale between a willing seller and a willing buyer. If there is no sale, there is no FMV, and that is a result Congress did not intend, or it would not have adopted Section 114(f)(5)(E)(i). Picard, written testimony at 7-8. For small webcasters, the costs of recordkeeping and reporting could readily exceed any cash payments to SoundEx.

I. Non-commercial, Educationally Affiliated Webcasters

1. The *non-commercial, educationally affiliated webcasters*, whose distinctive purposes, operations, and programming are the subject of these proposed findings and conclusions of law, may be conveniently described as non-commercial webcasting operations within the meaning of Section 114(f)(5)(E)(i), operated for educational purposes at or in conjunction with a domestic institution of secondary and higher education, and staffed in substantial part by students affiliated with such institution.

2. Intercollegiate Broadcasting System, Inc., is a not-for-profit, tax-exempt membership organization of non-commercial, educationally affiliated stations, which was incorporated in Rhode Island in 1944. It is a volunteer association, and it has no paid officers, directors, or employees. It no longer distributes broadcast programming. Some thousand of the estimated 1500 domestic broadcasting operations by students of colleges, high schools, and like institutions are members of IBS, making it by far the dominant national organization of college stations. Some of these member stations are FM broadcast stations, licensed by the Federal Communications Commission; some distribute their signals to their campuses and surrounding areas via wire or by free-field radiation under Part 15 of the FCC's rules, 47 C.F.R., Part 15(A); some distribute their programming by webcasting over the Internet; and some, by a combination of these methods. IBS estimates that approximately 28 percent of its member stations are currently webcasting. Written direct testimony Capt. Kass, COO of IBS, at ¶¶ 5-7; *id.* WORD Tr. (8/7/06) at ¶ 13. The licensed educational stations were exempted by Congress from the FCC's licensing fees under Section 8(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 158(g), and from the FCC's annual regulatory fees under Section 9(h)(1) of the Communications Act, as amended, 47 U.S.C. § 159(h)(1).

3. All of these stations are staffed by students, most of whom are unpaid volunteers. Some are operated by the sponsoring educational institution for curricular purposes; their operations are typically overseen by faculty members, and academic credit may be given in connection with participation by some or all student volunteers. Kass, written testimony at ¶¶ 7-8; Kass WORD Tr. (8/7/06) at 19-20; Papish WORD Tr at 78-81.

4. Their purpose and *raison d'être* are neatly encapsulated in paragraph 8 of the written statement of Capt. Kass, IBS' chief operating officer, filed with the CRB on August 24, 2006:

8. IBS' member stations are not in the business of selling music or anything else. They are interested in educating America's sons and daughters. The use of digital recordings, though essential as a practical matter, is merely incidental to their primary educational purpose. Operating a radio station offers opportunities to learn by doing. It gives the next generation many of the skills and abilities essential to success in our society, including personal responsibility and initiative, management skills, business skills, marketing, music, writing and journalism, engineering, digital communications, digital networking -- streaming audio, and a lot of other extra-curricular knowledge. A generation or so ago a fair percentage of students matriculated with some of this knowledge already, it having rubbed off from voluntary or involuntary participation in small family businesses. Today the employment of the parents of a majority of students -- and those students who are themselves employed -- is as "salary men," to appropriate the Japanese term, and the students have no firsthand experience or perspective on standalone enterprises -- what makes them operationally successful and how one conducts himself or herself to succeed in such an environment. These are abilities and skills that are not listed in the course syllabi. USA students and worldwide students are in a critical competition for world economic productivity.

See also WORD Tr (8/7/06) at 19-20, 23-24. Papish, WORD Tr (8/7/06) at 83-85, 112-14. Dr. Picard made the same points in his rebuttal testimony. Tr. XXXIX-146, 171.

5. The institutionally funded operating budgets of IBS member-stations are extremely limited in size -- some as little as \$ 250 per annum, with an average of about \$ 9000. "Maybe five percent" of these stations solicit and accept commercial sponsorships as "a very valuable educational tool", but the amounts are generally small in quantitative terms and in

relation to their annual operating budgets. A few solicit contributions for capital and/or operational purposes from their alumni or audiences. Kass written testimony, ¶¶ 9-11; Kass WORD Tr. (8/7/06) at 20-22; Papish WORD Tr (8/7/06) at 115-16.

6. Station WHRB, a member of IBS, began operating in 1940, serving student dormitories and residential Houses over electrical wires using carrier current technology (the precursor of today's BPL [broadband over power lines] technology.¹), abandoned in 1973. The station has no employees, and unpaid volunteers from among undergraduates at Harvard College comprise its management and staff. (Direct testimony of Michael Papish at ¶ 4; WORD Tr (8/7/06) at 82-83.

7. Harvard Radio Broadcasting Company, Inc., has held the license from the Federal Communications Commission for Station WHRB (FM) to operate as a Class A FM broadcast station at Cambridge, Massachusetts since 1957.² The student organization was incorporated in Massachusetts as a tax-exempt, eleemosynary corporation in 1951. It is governed by an independent, self-perpetuating board of trustees, currently comprised largely of alumni of Harvard University. The station has simulcast over the Web since 1999. The station is operated on a day-to-day basis by an administrative board elected semi-annually by the undergraduate volunteer staff. It has no employees within the meaning of Section 73.2080 of the FCC's rules, 47 C.F.R. § 73.2080. As a non-profit entity, WHRB (FM) is exempted by Congress from the FCC's annual regulatory fees under Section 9(h)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 159(h)(1). Its income is also exempt from tax, and gifts to it qualify for

¹ The definition of BPL (Broadband over Power Lines) recently adopted in Section 15.3 of the FCC's rules, 47 C.F.R. § 15.3, is described in the Commission's adopting order under Point III(B), FCC 04-245 (released October 28, 2004), found at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516882767.

² See Section 73.202 of the FCC Rules, 47 C.F.R. § 73.202.

deduction under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). (Papish direct testimony at ¶ 4; WORD Tr (8/7/06) at 75, 78-88, 92-94, 112-16.

8. The principal purpose of WHRB, as described by Mr. Papish, its then-treasurer, in his direct testimony at ¶ 5 is:

to offer musical, cultural, educational, informational, and other programs and materials for the entertainment and benefit of the public and for the education and training of its staff. The commercial nature of the station's operations provides opportunities for practical training its undergraduate staff in management, programming, marketing, finance, and engineering. Over the past sixty-five years many of the station's alumni have gone into broadcasting, journalism, music, finance, engineering, and allied fields.

Continuing he said at ¶ 12:

WHRB operates as a tax-exempt, non-profit organization for educational purposes: It educates its listeners and its all-student staff. It has no stockholders; it pays no dividends; being staffed exclusively by volunteers, it has no employees and no payroll.

See also Papish, WORD Tr (8/7/06) at 95-96, 110-11.

II. The Distinctive Operations and Programming of the Non-Commercial, Educationally Affiliated Webcasters

9. Though far from homogeneous, the non-commercial, educationally affiliated webcasters typically operate during shorter hours, operate with volunteer staffs, program less frequently played music and instructional programs to institutionally centered listenerships, and operate for educational, rather than profit-making, purposes. Consequently, they do not "resell" musical performances or deliver them as a "product" to their listeners for profit. Rather, the varied programming itself is a means for the education of the staff and listeners in the substantive content of that programming, and of the staff in the techniques of programming, technology, business operations, promotion, leadership and management, etc. Picard, Tr. XXXIX-171-72, 177; Kass, WORD Tr (8/7/06) 16-20; Papish, WORD Tr (8/7/06) at 83-98, 110.

10. Non-commercial, educationally affiliated webcasters, by definition and uniformly in practice, fall within the statutory definition for non-commercial webcasters in Section 114(f)(5)(E)(i) of the Copyright Act, as amended by the Small Webcaster Settlement Act of 2002, 17 U.S.C. § 114(f)(5)(E)(i), viz., webcasters that are (I) exempt or (II) exemptible from taxation under Section 501 of the Internal Revenue Code, 17 U.S.C. § 501, or (III) are operated by governmental entities for exclusively public purposes.

11. With specific regard to Section 114(f)(5)(E)(i)(III), many of the non-commercial, educationally affiliated webcasters are part of the curricular and/or extra-curricular programs of public high schools and colleges; the financial accounts of some of those stations in turn are regulated and/or audited by a state board of accounts; and the purposes described in paragraph 6 *ante* are public purposes within the meaning of the statutory definition. Kass WORD Tr (8/7/06) at 16-19.

12. The use of recorded musical performances by the non-commercial, educationally affiliated webcasters typically differs -- often differs radically -- from that of commercial, audience-driven webcasters. On these non-commercial, educational webcasting operations, the music programming gives way to broadcasts of the athletic events more attractive to many student and alumni listeners than recorded music. Some of the music -- often only excerpts -- is used for instructional or otherwise educational purposes. Local concerts, studio performances, and even jam-sessions are broadcast live. The repertory of music by these webcasters is far more eclectic than that of the commercial webcasters. Unlike some commercial webcasters who may play and promote a limited number of individual musicals work very intensely over limited periods of time according to a computerized playlist, among the non-commercial, educationally affiliated the programming of music is much more diverse, both among genre and within

individual genre. Many stations have programming policies against airing a given musical performance more than once or twice a year, so that necessarily more less-popular music by less-popular artists is aired. Typically so-called disk jockeys are not held to -- or even given -- playlists and may program music "on the fly." Papish direct testimony at ¶ 9; Papish rebuttal testimony at 6; Kass WORD Tr (8/7/06) at 21; Papish, WORD Tr (8/7/06) at 98-102, 109-10.

13. A spectacular example of distinctive use of music on non-commercial, educationally affiliated stations is provided by the musical marathons, so-called Orgies®, programmed by Station WHRB (FM) over-the-air and simultaneously over the Internet. These orgies probably constitute the station's most-popular musical programming. In these blocks of programming during the semi-annual reading and examination periods at the College, the station plays, largely without the interruption of other programming, all or substantially all of a given composer's compositions that have been recorded. In the Spring of 2006 the station programmed virtually every musical work written by Mozart (1751-1791) available on recordings. The orgy consisted of over two hundred hours of Mozart over ten consecutive days around the clock, and required many months of preparation. Some of the music faculty advised the students preparing the programming and provided some of the over-the-air commentary. World-famous Mozart scholar, performer, member of the faculty, and WHRB alumnus Robert Levin wrote an essay on the development of the cataloguing of Mozart's music for the station to publish along with its presentation of the music. Many of these recordings -- particularly of his more obscure compositions -- were non-digital; many essential recordings are no longer available through commercial channels but were borrowed from archives and from the collections of other radio stations and individuals. In addition the station has programmed from time-to-time programs that are virtual listening labs, where musical works which assigned to the students in support of the course syllabi are played and commented on by a professor or teaching

fellow. Papish written direct testimony at ¶ 6; Papish, WORD Tr. (8/7/06) at 86-94; Svcs. Exh. 103 (WHRB Program Guide).

14. Over the past three decades IBS has negotiated licensing agreements with the performing rights organizations, viz., ASCAP, BMI, and SESAC. In addition, a few member stations report operating under campus-wide blanket licenses negotiated between the PROs and the parent academic institutions. The IBS-negotiated license terms are tailored to the distinctive characteristics of campus stations. These licenses with ASCAP and BMI provide for annual fees per station of under \$ 300 and for reporting music played on a sampling basis. WHRB (FM) operates under such licenses. Kass direct testimony at ¶ 13; Papish direct testimony at ¶ 14; Papish, WORD Tr (8/7/06) at 116-18.

15. From October 28, 1998, until 2005, the webcasting activities of IBS member stations were licensed under rates and terms negotiated non-precedentially with RIAA and SoundEx in 2003 and tailored to the non-commercial, academically affiliated webcasters' uses and capabilities. These rates and terms were published in 68 Fed. Reg. 35,008 (June 11, 2003). (Kass direct testimony at ¶ 14; Papish direct testimony at ¶ 15; a copy of the parties' joint petition, filed with the Office on August 26, 2004, is attached to both Capt. Kass' and Mr. Papish's direct testimony; Kass written testimony at ¶ 14-15; Papish WORD Tr (8/7/06) at 118-19.

III. The FMV Market for Rights for the Non-commercial, Educationally Affiliated Webcasters is Determinable Only within their Market Segment.

- A. The FMV relevant to the non-commercial, educationally affiliated webcasters is that for their market segment.

16. The market for webcasting rights is effectively segmented, and the rate for the non-commercial, educationally affiliated webcasters, is properly determinable only within their distinctive market segment. The non-commercial, educationally affiliated webcasters, to whom rights are being licensed, employ webcasting rights for a substantially different purpose from those of other webcasters, and Congress defined them as a separate class of licensees in the Small Webcaster Settlement Act of 2002, 116 Stat. 2781, 2784. These educationally affiliated non-commercial webcasters have a distinctive lack of financial ability to buy webcasting rights at higher rates structured to reflect the different purposes, audiences, and business models of other webcasters. If SoundEx's price were effectively too high for them to afford, there would be no sales and, hence, no FMV as to them. Rebuttal testimony of Dr. Picard at 7-8. Such a result would frustrate Congress' obvious legislative intent that there be an FMV as to the intended beneficiaries of the Small Webcasters' Settlement Act of 2002.

17. Moreover, Congress specifically provided for market segmentation in Section 114(f)(2)(B), providing that any rates and terms set by the Board

shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.

18. The concept of market segmentation is a well-understood economic concept. Rebuttal testimony of Dr. Picard, ¶ 2. As an integral part of Congress' intent to replicate a free

market, Congress cannot properly be understood to have discarded it *sub silentio*, and SoundEx makes no showing that that in fact did occur.

B. SoundEx's Contention that Market Segmentation Theory Does Not Apply to this Submarket is Unsupported in the Record.

1. *Cannibalization or Diversion is Sound Theory but Unsupported by this Record.*

19. The non-commercial, educationally affiliated webcasters have neither the purpose nor a demonstrated ability to compete for audience or advertisers in the other market segments. Any cannibalization from these other submarkets is likely to continue to be *de minimis*, because the non-commercial, educationally affiliated webcasters attract only small audiences, and their distinctive programming would not be attractive to the audiences and potential audiences for the substantially different programming of the larger, commercial webcasters. That has been the experience since the beginning of World War II; it is the case today; and SoundEx has offered no evidence to point to a different result during the 2006-10 period.

20. In SoundEx's opening rate proposal, filed October 31, 2005, point I(C), it "reserve[d] the right to propose an alternative rate structure for noncommercial entities upon review of the evidence submitted by such entities...." In his direct testimony, SoundEx's economist, Dr. Brynjolfsson, conceded that his analysis was not based on data pertaining to this group of webcasters. Despite the evidence presented by the non-commercial, educationally affiliated webcasters in the direct phase of this proceeding, SoundEx's economist Dr. Brynjolfsson omitted any discussion of the points of differentiation between the noncommercial, educationally affiliated webcasters and the non-commercial webcasters more generally, in his rebuttal testimony under point 7 (Non-commercial stations), lumping them with a quite different category of large non-commercial webcasters, where he "continue[s] to hold the view that it

does not make sense from an economic perspective for noncommercial stations to pay less than commercial stations....[where] many noncommercial stations increasingly resemble commercial stations...." Op. cit. at 40. As to the non-commercial, educationally webcasters, who are members of IBS there is no support in the record for the implied assertion that the non-commercial, educationally affiliated webcasters "increasingly resemble commercial stations" and, as to them, the Board should reject it. Indeed, further down the page Dr. Brynjolfsson concedes that "given the testimony that many noncommercial stations have 10 or fewer listeners at any one time, a cap ... would give a lower rate to small stations so long as they stayed small and apparently would cover the college and religious stations that have submitted testimony in this case...." Op. cit. at 42.

21. Concern was expressed by SoundEx's economist Dr. Brynjolfsson in his rebuttal testimony that the Board, should it "set a separate royalty rate for very small noncommercial stations streaming...", should minimize "cannibaliz[ation of] the webcasting market more generally[,] ... thus affect[ing] the fair market value of the digital performance right in sound recordings." The Board should disregard this testimony as mere speculation unsupported by any fact that would suggest any such cannibalization would occur at a cognizable level; it is no more than a theoretical possibility.

22. At the present level of license fees there is no evidence of material diversion of audience or revenue of the other webcasters. Capt. Kass and Mr. Papish testified that listening levels to campus webcasters average below five listeners! Kass WORD Tr (8/7/06) 21, 63-65; see also Papish, WORD Tr. (8/7/06) at 95. That average includes highly popular sports play-by-play broadcasts. Dr. Picard testified that the audience for campus stations was highly localized. Picard Tr. XXXIX-221. The Board should find that there is no evidence of actual or potential

material audience or revenue diversion at the present licensing fee level of effectively \$ 275 (\$ 250/500 + 25) per annum.

23. Moreover, there is no evidence as to how many of the listeners to the webcasts of other webcasters in the 2006-10 period would be susceptible of diversion to the distinctive selection of digital music performances on non-commercial, educationally affiliated webcasts. SoundEx has offered no evidence that even so much as suggests, let alone proves, that even a theoretical *de minimis* diversion at the existing rate -- effectively \$ 250/500 + 25-per annum per webcaster, for this period for this subcategory of webcasters -- to the rate level jointly proposed by IBS and WHRB at the hearing before the Board on August 7, 2006, Kass, WORD Tr (8/7/06) at 35-38, 40, IBS and WHRB's Clarification of Common Rate Proposal, filed August 10, 2006, would even tend to effect a material diversion.

2. *The Board Should Reject the Contention that Market Segmentation Theory is Inapplicable.*

24. The Board should reject any intimation that market segmentation theory is inapplicable to the hypothetical market contemplated by Congress for rate-setting purposes in Section 114(f)(2). First of all, any such contention is not supported on this record by expert testimony, either on direct examination or cross-examination. Dr. Picard's testimony is quite clear that he believes market segmentation theory to be applicable to the market for rights. Tr. XXXIX-219-20. Second, whatever the theoretical basis for that intimation may be, Congress did not contemplate a perfectly competitive market. What Congress did say in Section 114(f)((2)(B) was that the Board, distinguishing among "the different type of eligible nonsubscription transmission services then in operation", should set rates and terms "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."

25. SoundEx has presented no evidence as to the proper rate for the non-commercial, educationally affiliated webcasters, nor shown that the rate for the larger and commercial webcasters³ should apply to the non-commercial, educationally affiliated webcasters. In the Introductory Memorandum to SoundEx's Written Rebuttal case, filed September 29, 2006, Dr. Brynjolfsson's financial model is that "for a large webcaster in today's market based on an analysis of the relevant costs and revenue opportunities." None of his assumptions matches the evidence as to the nature and operations of non-commercial, educationally affiliated webcasters. As to them, we submit, there is an utter failure of proof in SoundEx's case, and, by the terms of paragraph (B) the Board "shall base its decision on economic, competitive and programming information presented by the parties...."

IV. The Value to the Artist of Promotional Airplays and the Imposed Costs of Recordkeeping and Reporting Should be Included in Computing the Effective Payments to SoundEx.

26. A different balance between exposure and current compensation appears to be struck by the established artists that are commercially viable through conventional marketing channels on the one hand and by the less-established, generally younger, artists on the other hand. The less-well-established artists need exposure before they can be commercially viable. For exposure they are dependent on, and grateful for, the eclectic playlists of the non-commercial, educationally affiliated stations and webcasters. They do not want cost or inconvenience to stand between them and their primary objective, viz., airplay. They do what they can to promote it, by delivering promotional copies of their recordings, coming to the campuses for studio interviews and performances, etc. For many such artists the small amount

³ Rate Proposal for SoundEx, filed October 31, 2005, at point I(C) (Non-Commercial Entities). As to Point I(A) of SoundEx's revised rate proposal, filed September 29, 2006, there is an utter disconnect between the proposal and the "business plans" of the non-commercial, educationally affiliated webcasters described in this record.

of money they would get from payments from the non-commercial, educationally affiliated webcasters with small audiences would not compensate for the chance of becoming mainstream performing artists through exposure over such stations. Even SoundEx's own witness, Harold Ray Bradley, International Vice President of the AFM, a union of recording artists, testified on cross-examination as follows:

Q (by Mr. Malone): Are any of your recordings performed on college radio stations?

A: I really don't know. I would just hope so.

Q: And why would you hope so?

A: Well, naturally you would want them to be played, and hope that people would enjoy them and like them, you know?

Bradley Tr (5/9/06) at 234-35; Kass direct testimony at ¶ 12; Kass, WORD Tr (8/7/06) at 26-31, 56, 66-67; Papish direct testimony at ¶ 10; Papish, WORD Tr (8/7/06) at 110-12. The conduct of these small artists, as established on the record, is the best evidence under paragraph (B) of the Act "whether use of the service ... may promote the sales of phonorecords ...", and the Board should accept this evidence as to the small artists and the small (or private) labels in preference to the institutional position of SoundEx, which is conflict out by the overwhelming domination of the big labels and the big recording artists.

27. The undisputed facts are that at the present time the consideration for airplay on the non-commercial, educationally affiliated webcasters flows from the artists and labels to the webcasters, and not vice versa. It is the artists and labels who provide tangible promotional copies of their performances and allied promotional services, such as studio appearances, to the campus broadcasters. Kass written testimony at ¶ 12; Kass, WORD Tr (8/7/06) at 26-31; Papish WORD Tr (8/7/06) at 110-12. This is what the anti-payola provisions of the Communications Act of 1934, as amended, of Sections 317 (Announcement with Respect to Certain Matter Broadcast) and 507 (Disclosure of Certain Payments), 47 U.S.C. §§ 317, 508; cf. Section 73.4180 (Payment Disclosure: Payola, plugola, kickbacks), 47 C.F.R. § 47.4180), are all

about. This is what the settlement recently announced between the New York Attorney General and certain record labels and radio stations was all about. See A-G's press release of October 19, 2006, at http://www.oag.state.ny.us/press/2006/oct/oct19a_06.html (CBS Radio Settles Payola Allegations; Court Rejects Entercom's Challenge to Spitzer Lawsuit); and as to the labels: <http://www.oag.state.ny.us/press/2006/oct/entercom%20motion%20to%20dismiss%20decision.pdf> for CBS; <http://www.oag.state.ny.us/press/2005/nov/Warner%20Music%20Group%20Corp.pdf> for Warner; <http://www.oag.state.ny.us/press/2005/jul/payola.pdf> for Sony; <http://www.oag.state.ny.us/press/2006/jun/EMI%20Settlement.pdf> for EMI.

28. The FMV price for licensing set by the Board should allow for the added recordkeeping and reporting costs imposed by or on behest of the licensor as a condition of the license. This is analogous to the well-known business concept of "total-life costing," i.e., the total effective price to the non-commercial educationally affiliated webcasters includes the cost to them of the recordkeeping and reporting that is packaged in with the deal. Dr. Picard explained the concept in this way:

[T]he maximum amount that the buyer is willing to pay is the value to him of the good or service, less the expense to him of making the purchase. For example, if the sale of goods is FOB the seller's dock, then the shipping expense is an additional cost to the buyer, and he deducts that expense from the [total] price he is willing to pay the seller. ... A closer analogy would be the purchaser of anti-virus software who must buy an annual subscription to virus definition updates. The total annual cost to the computer user is the initial price for the software, plus the annual subscription price. Here, the added expense to the buyers of rights is any expense of recordkeeping and reporting requirements imposed by the seller as a condition of sale.

Picard written testimony at 7-8. Conversely, the value to SoundEx of recordkeeping by the non-commercial, educational webcasters has been nothing at NPR's \$ 100-per-station annual rate and \$ 25 per station for the educationally affiliated webcasters at the \$ 250/500 level.

CONCLUSIONS

I. The Board should set a separate rate for that segment of the webcasting rights market in which the non-commercial, educationally affiliated webcasters operate.

II. The non-commercial, educationally affiliated webcasters operate in, and program to, an effectively separate and independent segment of the webcasting market.

III. In enacting Section 114(f)(2) of the Act, Congress intended that the accepted theory of pricing, including market segmentation, be applied, and its application to the submarket for distinctive programming by non-commercial, educationally affiliated webcasters is compelling.

IV. The FMV of the non-commercial, educationally affiliated webcasters' performance of digital recordings in their segment of the webcasting market is determined by the FMV of such rights in that market segment.

V. SoundEx has offered no evidence that theoretical cannibalization or diversion of other submarkets' audience or revenues has occurred under present conditions in the 2002-05 period under existing rates or would occur in the 2006-10 timeframe if the rates jointly proposed by IBS and WHRB were adopted by the Board.

VI. In setting the effective rates and terms for the non-commercial, educationally affiliated webcasters, the rates and terms should reflect an allowance for the promotional benefits to the artist and for the costs of recordkeeping and reporting imposed by or at the behest of the licensor, SoundEx.

ORDERING PARAGRAPH

Accordingly, the Board adopts for the non-commercial, educationally affiliated webcasters*/ the following rates:

Webcasts by non-commercial educational broadcast stations qualified to receive funding under Section 201(9) of the Public Broadcasting Act of 1967, as amended, 47 U.S.C. § 396, shall be covered by the annual lump-sum payment proposed by NPR and CPB.

Large non-commercial webcasters, *i.e.*, those with five or more fulltime employees during the calendar year and also those affiliated with educational institutions having not less than ten thousand fulltime students domestically, shall annually make an advance lump-sum payment of \$ 100.

The remaining Small non-commercial webcasters shall annually make an advance lump-sum payment of \$ 25.

*/ The *non-commercial, educationally affiliated webcasters* may be conveniently described as non-commercial webcasting operations within the meaning of Section 114(f)(5)(E)(i), operated for educational purposes with fewer than five fulltime paid employees.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

HARVARD RADIO BROADCASTING CO., INC.

by 

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December 12, 2006
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Certificate of Service

I hereby certify that I have caused to be dispatched by e-mail and overnight delivery copies of the foregoing Joint Proposed Findings of IBS and WHRB (FM) to the following persons:

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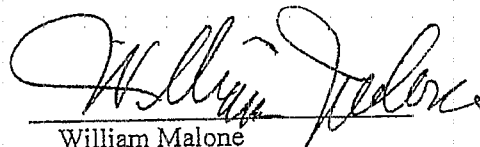
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Washington, D.C.
December 12, 2006
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Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of)
)
)

Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
_____)

Docket No. 2005-1 CRB DTRA

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
ROYALTY LOGIC, INC.

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December 12, 2006

RLI'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION AND OVERVIEW

1. This is a rate adjustment proceeding pursuant to which the Copyright Royalty Board ("CRB") has been empanelled to set rates and terms of the statutory licenses for digital transmission of sound recordings by eligible nonsubscription services and new subscription services, pursuant to Section 114 of the United States Copyright Act (the "Copyright Act") and ephemeral reproduction under Section 112 of the Copyright Act (the "Statutory Licenses"). The CRB is setting rates and terms for the statutory license period beginning January 1, 2006 and ending December 31, 2010.

2. Congress created the Statutory Licenses to allow webcasters and new subscription services to use the sound recordings of *all* copyright owners and performers without requiring them to seek prior permission. The Statutory Licenses cover a limited class of digital audio transmissions and ephemeral reproductions, which must conform to a detailed set of restrictions and limitations, as enumerated in Sections 114(d)(2) and 112(e) of the Copyright Act. The Statutory Licenses are to be administered for the benefit of *all* copyright owners and performers.

3. Congress granted a limited antitrust exemption to permit the collective negotiation of Statutory Licenses but not the collective negotiation of voluntary licenses that do not conform to the limited statutory requirements.

4. The Librarian has stated that the objective of the collection and distribution of royalties under the Statutory Licenses are "to make prompt, efficient and

49. Most recently, SoundExchange took the position that RLI is not entitled to records of use, in its comments filed with the Copyright Royalty Board relating to notice and recordkeeping requirements under the statutory licenses. SoundExchange stated that: "Because RLI has not been designated by the Copyright Office to distribute royalty payments as a "Designated Agent", see 17 U.S.C. 114(g)(3) (referring to the possibility of "designated agents" in addition to SoundExchange), it has no basis for claiming entitlement to the receipt of reports of use." ⁶⁸

50. As a general example of the confusion about the authority of RLI to act as an agent to receive records of use, one of the pre-existing subscription services took the position, through a letter to RLI from its lawyers, that RLI's status as an agent designated by its affiliates "*...does not appear to be a basis upon which RLI can collect statements of account and records of use for licenses where RLI has not been authorized as a Designated Agent.*" ⁶⁹

51. The obstructionist positions taken by SoundExchange have necessitated RLI's participation in this proceeding. If the Board does not clarify the ability of RLI to act as an agent for the collection of royalties under the statutory license at issue, RLI affiliates could be forced to wait, for years for some future Copyright Royalty Board proceeding, or litigation, which would entitle them to take advantage of the exemption against cost deductions to which they are entitled.

⁶⁸ Comments of SoundExchange in response to the Supplemental Request for Comments (Fed. Reg. dated July 27, 2005) regarding Notice and Recordkeeping for the Use of Sound Recordings Under Statutory License.

⁶⁹ See RLI Exhibit 5.

H. The CRB's Interim Recordkeeping Ruling

52. In its interim rulemaking, the CRB reserved decision as to RLI's standing to receive reports of use directly from the Services. The CRB stated that if RLI becomes a Designated Agent, "then SoundExchange is required to forward copies of reports of use to all other such "collectives."⁷⁰ However, in implementing DARPA, the CRB should provide, that transmission services be required to send electronic files directly to both RLI and SoundExchange. This would not increase the Service's burden at all. They would simply put RLI's email address next to SoundExchange in the required email and hit the "send" button.⁷¹ Therefore, the CRB must modify the regulations to provide that Webcasters deliver record of use directly to each Designated Agent pursuant to the electronic file format described in the regulations.

VI. THE APPLICABLE LEGAL STANDARD

53. Congress explained its reasons for adopting the DMCA webcasting amendments as follows: "...to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, *to create fair and efficient licensing mechanisms* that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services."⁷² As this legislative history illustrates, Congress enacted the DMCA webcasting amendments to "protect" recording artists and record companies and to establish "fair and efficient" mechanisms for the licensing of sound recordings. In

⁷⁰ *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, Interim final rule (October 6, 2006) 37 CFR Part 370.

⁷¹ Gertz Tr. Vol. 41, at 41:17-42:7.

⁷² DMCA Conference Report at 79-80

costs are being deducted, in sharp contrast to the current SoundExchange statements.¹⁶⁵ If RLI's statements are transparent, SoundExchange will have no choice (if it is to be competitive), but to revise and revamp its own statements to make them truly transparent.

D. DARPA Will Minimize Disputes Among Designated Agents And Ensure Prompt Payment To Sellers

90. DARPA, which provides that each Designated Agent receive all of the information necessary to calculate a distribute royalties to its affiliates without interaction with any other Designated Agent, allows each Designated Agent to establish its own distribution policies, consistent with the payout formula required by the statute, and its own administrative fee structure according to the marketplace demands of their respective affiliates. DARPA allows distribution policy and fee issues to be resolved among a Designated Agent and its affiliates thus minimizing potential disputes among the Designated Agents.¹⁶⁶

91. RLI has proposed a term that would refer disputes, if any, regarding the allocation of royalties to the Designated Agents to the Board for mediation. In Webcaster I, the Designated Agents were to agree on a methodology for allocating royalties between the Designated Agents. The Register of Copyrights was concerned that RLI and SoundExchange might not be able to agree on the allocation methodology. Accordingly, the Librarian adopted a term¹⁶⁷ such that in the event that SoundExchange and RLI could not agree on an allocation methodology, either Designated Agent could seek the

collectives and counsel's answer was equivocal. RLI's proposal *does not*, in fact, support any changes to the existing confidentiality provisions.

¹⁶⁵ Gertz Tr., Vol. 18, page 78:2-20; Paterno Tr. Vol. 41, page 165:3-8.

¹⁶⁶ Gertz Written Dir. ¶ 43; Gertz Tr. Vol. 18, page 86:2-19

¹⁶⁷ 37 CFR § 261.4.

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC 20540

In the Matter of)

Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)

Docket No. 2005-1 CRB DTRA

JOINT PROPOSED REPLY FINDINGS of IBS and WHRB

I. The Rates and Reporting Must Reflect the Diversity of Non-commercial Webcasting.

A disproportionately large amount of confusion, compared to the relatively small amount of revenue SoundEx might reasonably expect to extract from the non-commercial sector, surrounds the determination of the proper rate or rates for non-commercial webcasters. Chief Judge Sledge's early perception, or at least premonition, of this disparity was reflected in the colloquy between him and Capt. Kass where, at the conclusion of Capt. Kass' testimony, he asked Capt. Kass "why it's appropriate for a government agency ... to be spending time dealing with clubs of students who may have five people listening to them...." WORD Tr (8/7/06) at 61-65.

There is a wide continuum of non-commercial webcasters, ranging from the large non-commercial webcasters described in ¶¶ 1122 - 23 of SoundEx's proposed findings under Point IX(E) with hundreds of thousands of listeners per month to the college webcasters with an average of five, Kass WORD Tr (8/7/06) at 21, 37, or twelve, Papish WORD Tr (8/7/06) at 95, 157-58, or <3, Willer WORD Tr (8/2/06) at 290, 285-86, simultaneous listeners, and those

averages including listeners to broadcasts of varsity athletic events involving no digital music at all. Willer WORD Tr (8/2/06) at 333. In fact, there is wide diversity among even non-commercial, educationally affiliated webcasters.* / Kass written testimony at ¶¶ 7, 9, WORD Tr (8/7/06) 16-19; Willer WORD Tr (8/7/06) at 278 ("wide variety"), 333 ("great variation"). As to the great "advertising" revenues depicted by SoundEx for the large non-commercial webcasters, SoundEx prop. fdgs. ¶¶ 1110-12, 1134ff., the situation for the non-commercial, educationally affiliated webcasters is again quite different. CBI's proposed findings note that "unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience." Op. cit. at ¶ 13.

SoundEx in paragraphs 1187-91 would make WHRB out to be a poster child for advertising revenues on the non-commercial educationally affiliated webcasters, implying that these revenues come from exploitation of musical artists. Of course, the record shows a quite different picture. As numerous witnesses, including one offered by SoundEx, have pointed out in their testimony, the less-popular artists see the non-commercials as their hope for public exposure of their music at that stage of their careers. IBS-WHRB joint prop. fdgs, ¶¶ 26-27. In paragraphs 1187-91 SoundEx does not trace any of these advertising dollars to the webcasting of digitally recorded music, for "the major source of advertising revenue is, again, sports or other broadcasts, such as commencement, things associated with Harvard University...." Papish, WORD Tr (8/7/06) at 114. As to the source of advertising dollars, "many of the advertisers in the local Boston-Cambridge area are folks that market ... products to the Harvard

* / The *non-commercial, educationally affiliated webcasters* may be conveniently described as non-commercial webcasting operations within the meaning of Section 114(f)(5)(E)(i), operated for educational purposes at or in conjunction with a domestic institution of secondary and higher education, and staffed in substantial part by students affiliated with such institution.

community. And this tends to be the type of program that has the largest number of Harvard-based listeners." Id. at 114-15. In short, an appropriate characterization of these particular SoundEx proposed findings will be found in Gilbert & Sullivan's "H.M.S. Pinafore."

The Board cannot reasonably conflate the operations of the commercial webcasters with those of the non-commercial webcasters. If anything is clear in this record it is that the commercial webcasters, educationally affiliated webcasters are different "types" than the non-commercial, educationally affiliated webcasters. They act differently, and they use music differently. That is, the commercial webcasters are profit-driven; the non-commercial, educationally affiliated webcasters are mission-oriented. IBS-WHRB joint prop. fdgs. ¶ 4. The commercial webcasters typically program their computers to play a limited playlist intensely; the non-commercial, educationally affiliated webcasters typically play a much more eclectic mix of music, often not from a playlist but "on the fly." IBS-WHRB joint prop. fdgs. ¶ 12. The commercial webcasters are not focused on educating the public or volunteer staffs; the non-commercial, educationally affiliated webcasters are.

Most of the characterizations of the non-commercial, educationally affiliated webcasters in SoundEx's proposed findings are over-simplified to such an extent that the Board would be justified in disregarding them. When all is said and done, the core and undisputed facts remain that audiences for the non-commercial, educationally affiliated webcasters are small, very small, typically in the 2.94 - 20 range,¹ *ante* at 1. IBS-WHRB joint prop. fdgs., ¶ 22. Just this fact alone should drive the Board to three conclusions with respect to the non-commercial, educationally affiliated webcasters:

¹ These average figures for instantaneous connections materially overstate the relevant webcasting audiences they represent, i.e., they include more popular webcasts of non-licensable music and they are so small as to be materially distorted by measurement anomalies, such as those testified to by Prof. Willer, WORD Tr (8/2/06) at 289, 291-93, 335.

- I. SoundEx's fears about cannibalization of the webcasting audience or webcasting advertising dollars are purely theoretical, if not hypothetical. In numbers it hasn't happened so far, and SoundEx has offered no evidence that it would be larger in the future. More specifically, SoundEx has offered no evidence that mainstream webcasting audiences would be diverted in the future by the eclectic music that is typically the mainstay of non-commercial, educationally affiliated webcasters.
- II. The non-commercial, educationally affiliated webcasters typically do not use digitally recorded music as their principal market-product but only as a partial means of carrying out their educational missions.
- III. The recordkeeping and reporting requirements urged upon the Board here -- despite the Board's order of September 10, 2006 --, are totally inappropriate for these webcasters, because the burdens on limited budgets and volunteer staffs are simply disproportionate to the potential revenue yield. In short they are not cost-effective, and they would be at war with the efficiency criteria that Ms. Kessler testified to.

There are obviously other, less-central considerations and controverted fact issues in play, but their disposition is driven by the same relative commercial--non-commercial audience disparity.

II. The Challenge to the Board and a Possible Resolution Suggested by the Record

The two-part challenge that the Board faces as to the non-commercial webcasters under Section 114(f)(2)(B) of the statute, is (i) devising a series of category "types" that in the aggregate encompass all non-commercial webcasters and then (ii) prescribing rates for each that reflect that submarket, exhibiting a proportionality or rightness-of-fit among the continuum of categories.

What IBS and WHRB attempt to do in the instant reply findings is (i) to suggest such a comprehensive categorization of the diverse components of the non-commercial universe and (ii) to suggest a scheme of levels of rates and terms for each category, scaled to the dominant characteristics in the resulting categories. This analysis is intended to be driven by an appraisal of the central commonalty in the record, including the proposed findings of the parties and is

different from IBS and WHRB's joint proposal² and from the ordering paragraph suggested in the two parties' proposed findings.³

SoundEx recognizes the possibility that the Board might treat the small non-commercial, educationally affiliated webcasters differently from the commercial and the big non-commercial webcasters based on 14,600 ATH per month per entity. Brynjolffson rebuttal testimony at 41; SoundEx prop. concl. at ¶¶ 65-67. Of course, the ATH must fairly be "normalized" for proportion of licensable music played. Building on that recognition, IBS and WHRB suggest that the record would support the following scaling of rates -- higher rate in case of overlap:

1. NPR-CPB negotiated rate for other non-commercials with over 146,000 normalized ATH per entity per month (> two hundred average monthly listeners [ACL]) on the average and more than five fulltime employees per entity per year on the average.
2. Larger small non-commercial webcasters under 146,000 normalized ATH per entity per month on the average (< two hundred average monthly listeners [ACL]) or with at least two fulltime employees: \$ 250 annually.
3. Medium small non-commercial webcasters under 14,600 normalized ATH per entity per month (< twenty average monthly listeners [ACL]), with less than two fulltime employees, at institutions with enrollments in excess of 10,000 FT students: \$ 100 annually.
4. Small non-commercial webcasters, e.g., schools (grades K-12), colleges, under 14,600 normalized ATH per month (< twenty average monthly listeners [ACL]), with not more than two fulltime employees: \$ 25 annually.

The minimum fees of \$ 25 per year for the small non-commercial, educationally affiliated webcasters and the \$ 500 per year for the commercial webcasters would be roughly proportionate to the value of digitally recorded music to them.

² That is contained in IBS and WHRB's Clarification of Common Rate Proposal, filed August 10, 2006, a copy of which is appended hereto. SoundEx's complaint, prop. fdg. ¶¶ 1485-87, that this proposal is not explained on the record, ignores Capt. Kass' testimony, WORD Tr (8/7/06) at 36 and SoundEx's own cross-examination of Mr. Papish in WORD Tr (8/7/06) at 129-37; see also 8/7/06 tr at 164-67.

³ For the convenience of the Board the last pages of IBS and WHRB's joint proposed findings, filed December 12, 2006, are also appended hereto for the convenience of the Board.

Recordkeeping and reporting requirements would be imposed only on those noncommercial webcasters paying \geq \$ 250 per annum. They by definition would have more than two fulltime employees to do the recordkeeping and reporting; and, at SoundEx's option, the annual payments from the smaller non-commercial webcasters could be allocated on the basis of plays by the larger non-commercial webcasters. Because reporting and allocation of the smaller amounts is not cost-effective, the omitting of reporting requirements for the smaller webcasters would maximize returns to the artists, i.e., all the money wouldn't be eaten up by processing costs.

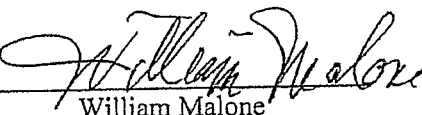
CONCLUSIONS

Any rate schedule adopted by the Board should take into account the dominant facts that the non-commercial, educationally affiliated webcasters are materially *smaller* than commercial webcasters and they use different music differently for educational purposes, and their cannibalization ability has been demonstrated to be *de minimis*.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

HARVARD RADIO BROADCASTING CO., INC.

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December 15, 2006

Before the
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in the Library of Congress
Washington, D.C.

In the Matter of)

Digital Performance Right in Sound
Records and Ephemeral Recordings)

Docket No. 2005-1 CRB DTRA

CLARIFICATION OF COMMON RATE PROPOSAL
of Intercollegiate Broadcasting System
and Harvard Radio Broadcasting Co., Inc.

Pursuant to the procedural rules governing this hearing, the questions from the bench to witnesses, and the colloquy between counsel and the bench at the conclusion of the Board's hearing direct testimony on August 7th, Intercollegiate Broadcasting System (IBS) and Harvard Radio Broadcasting Co., Inc. (WHRB), file this modification of their common proposal as to rates and terms in light of the evidence adduced into the record to date.

This proposal is intended to be complementary to the proposal of National Public Radio, as reflected in the written testimony of Kenneth P. Stern, dated October 31, 2005, the proposals thereby encompassing between them the entire universe of non-commercial webcasters, as defined in Section 114(f)(5)(E)(i) of the Copyright Act, as amended, 17 U.S.C. § 114(f)(5)(E)(i).

Webcasts by non-commercial educational broadcast stations qualified to receive funding under Section 201(9) of the Public Broadcasting Act of 1967, as amended, 47 U.S.C. § 396, shall be covered by the annual lump-sum payment proposed by NPR and CPB.

Large non-commercial webcasters, i.e., those with five or more fulltime employees during the calendar year and also those affiliated with educational institutions having not less than ten thousand fulltime students domestically, shall annually make an advance lump-sum payment of \$ 100.

The remaining Small non-commercial webcasters shall annually make an advance lump-sum payment of \$ 25.

The receiving agent(s) may require annually reasonable, proportionate, and economic reporting of usage by members of each class of webcasters, not to exceed BMI's current requirement under Section 118 of a seventy-two-hour playlist in handwritten form.

Respectfully submitted,

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August 10, 2006

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because those buyers are not primarily driven by market concerns. Brynjolfsson WDT at 6.

RESPONSE: The section 114 statutory license requires the Copyright Royalty Judges to set separate royalty rates for different types of services. *See* 17 U.S.C. § 114(f)(2)(B). That Congress granted the § 114 statutory license to be available to webcasters of all types and sizes indicates, first, that Congress believed that there are, in fact, "different types" of services; second, that Congress did not intend to exclude small Noncommercial Educational Stations from the statutory license; and third, and most importantly, that Congress intended that rates for these services be set at rates that these services could afford. As further evidence of this intent with respect to Noncommercial Educational Stations in particular, Congress in 2002 passed the Small Webcasters Settlement Act ("SWSA") in response to the outcry from smaller noncommercial webcasters who could not afford to pay the rates set by the previous webcasting CARP. Small Webcaster Settlement Act of 2002, Pub. L. 107-321, 116 Stat. 2780 (2002). As recognized previously by a Copyright Arbitration Royalty Panel in a proceeding under § 118, it is appropriate that lower rates should be set for Noncommercial Educational Stations than for other noncommercial webcasters. Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA (July 22, 1998). Regulations promulgated by the Copyright Office, in 37 CFR 253.5, apply a separate, lower rate specifically to Noncommercial Educational Stations (described in the regulation as "noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio"). Furthermore, these regulations impose minimal reporting requirements upon such Noncommercial Educational Stations. The impact of the rate on Noncommercial Educational Stations also must be evaluated in tandem with other costs imposed under the statutory license, and in particular the cost of recordkeeping. In keeping with Congressional intent, the combined cost of both the royalty and the recordkeeping obligations imposed on the Noncommercial Educational Stations should be set at a reasonable level that these services can readily afford. The combined costs should not prevent these Noncommercial Educational Stations from fulfilling their mission. Such a result would defeat the purpose of the statutory license. Any "willing buyer/willing seller" analysis of an appropriate rate likewise would take into account the not-for-profit status of these stations, their educational purpose, limited audience, limited budgetary resources, limited opportunities to generate revenue, limited broadcast days, limited uses of music, and the costs of compliance with the license requirements.

212. The CARP rejected agreements between the record companies and smaller webcasters because it found that the larger webcasters, which had more bargaining power, were more relevant to establishing a market rate. Brynjolfsson WDT at 6.

RESPONSE: The CARP itself stated, "Applying the same commercial broadcaster rate to noncommercial entities affronts common sense." Report of the Copyright Arbitration Royalty Panel, Docket No. 2000-9, CARP DTRA 1 & 2, at 89 (Feb. 20, 2002). The commercial CARP rates, the Yahoo!-RIAA agreement on which they were based, and the 2003 agreement to continue the rates through 2005 all are very explicitly a commercial rate that is wholly inapplicable to Noncommercial Broadcasters. Moreover, as

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recognized previously by a Copyright Arbitration Royalty Panel in a proceeding under § 118, it is appropriate that lower rates should be set for Noncommercial Educational Stations than for other noncommercial webcasters. Report of the Copyright Royalty Arbitration Panel, Docket No. 96-6 CARP-NCBRA (July 22, 1998). Regulations promulgated by the Copyright Office, in 37 CFR 253.5, apply a separate, lower rate specifically to Noncommercial Educational Stations (described in the regulation as "noncommercial radio stations which are licensed to colleges, universities, or other nonprofit educational institutions and which are not affiliated with National Public Radio"). Furthermore, these regulations impose minimal reporting requirements upon such Noncommercial Educational Stations. The impact of the rate on Noncommercial Educational Stations also must be evaluated in tandem with other costs imposed under the statutory license, and in particular the cost of recordkeeping. In keeping with Congressional intent, the combined cost of both the royalty and the recordkeeping obligations imposed on the Noncommercial Educational Stations should be set at a reasonable level that these services can readily afford. The combined costs should not prevent these Noncommercial Educational Stations from fulfilling their mission. Such a result would defeat the purpose of the statutory license. Any "willing buyer/willing seller" analysis of an appropriate rate likewise would take into account the not-for-profit status of these stations, their educational purpose, limited audience, limited budgetary resources, limited opportunities to generate revenue, limited broadcast days, limited uses of music, and the costs of compliance with the license requirements.

216. Dr. Pelcovits looked at the market closest to non-interactive webcasting — a market which had the identical sellers, many of the same buyers, the same product to be licensed (a blanket license in sound recordings), for a service delivered to the consumer in the same way (music performed over a personal computer). That market — for interactive webcasting — provided a close benchmark from which one could make relatively simple adjustments to determine a rate for non-interactive webcasting. Pelcovits WDT at 12-15.

RESPONSE: Not one of the agreements relied upon by Dr. Pelcovits in the creation of his benchmark involved a single noncommercial entity. See Servs. Ex. 63 (list of the 17 agreements on which Dr. Pelcovits relied; see 5/16/Tr. 128:7-11 (Pelcovits)). Therefore, because of the differences between noncommercial and commercial entities, his model is particularly inapposite to Noncommercial Broadcasters. Dr. Pelcovits himself admitted as much. See Pelcovits WDT at 5-6; 5/16/06 Tr. 221:6-223:5 (Pelcovits) (stating that his model assumes a profit-driven commercial webcaster and does not set a separate rate for Noncommercial Broadcasters). Further, CBI testified that for Noncommercial Educational Stations, a "flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings." Robedee WDT ¶ 92.

219. For the reasons discussed below, Dr. Pelcovits' benchmark analysis is fully consistent with the willing buyer/willing seller standard and is an appropriate approach to determinate the rates that would be negotiated in the absence of a statutory license. Dr. Jaffe's benchmark approach is invalid for all of the reasons discussed by the Webcaster I CARP, as well as the reasons discussed below.

RESPONSE: Not one of the agreements relied upon by Dr. Pelcovits in the creation of his benchmark involved a single noncommercial entity. See Servs. Ex. 63 (list of the 17 agreements on which Dr. Pelcovits relied; see 5/16/Tr. 128:7-11 (Pelcovits)). Therefore, because of the differences between noncommercial and commercial entities, his model is particularly inapposite to Noncommercial Broadcasters. Dr. Pelcovits himself admitted as much. See Pelcovits WDT at 5-6; 5/16/06 Tr. 221:6-223:5 (Pelcovits) (stating that his model assumes a profit-driven commercial webcaster and does not set a separate rate for Noncommercial Broadcasters). Further, CBI testified that for Noncommercial Educational Stations, a "flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings." Robedee WDT ¶ 92.

236. Almost all of the contracts for the benchmark market for interactive music services examined by Dr. Pelcovits contained a three-part rate structure, in which the buyer paid the greater of a per-play rate, a percentage of revenue rate, or a per-subscriber rate. Pelcovits Dir. Test. I at 27; Pelcovits WDT at 22-23.

RESPONSE: Not one of the agreements relied upon by Dr. Pelcovits in the creation of his benchmark involved a single noncommercial entity. See Servs. Ex. 63 (list of the 17 agreements on which Dr. Pelcovits relied; see 5/16/Tr. 128:7-11 (Pelcovits)). Therefore, because of the differences between noncommercial and commercial entities, his model is particularly inapposite to Noncommercial Broadcasters. Dr. Pelcovits himself admitted as much. See Pelcovits WDT at 5-6; 5/16/06 Tr. 221:6-223:5 (Pelcovits) (stating that his model assumes a profit-driven commercial webcaster and does not set a separate rate for Noncommercial Broadcasters). Further, CBI testified that for Noncommercial Educational Stations, a "flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings." Robedee WDT ¶ 92.

246. Adjusting for interactivity by looking at how consumers value interactivity makes sense because the webcasters' demand for sound recordings from record companies is derived from the consumers' demand to hear sound recordings played by webcasters. This concept, called derived demand, is commonly used in economics. Pelcovits Dir. Test. I at 43-44.

331. Given that the issue raised by Dr. Jaffe is relevant only to the per play rate component of Dr. Pelcovits's rate proposal, the fact that SoundExchange revised its rate proposal during the rebuttal phase of the case to phase in increases in the per play rate renders the matter moot. The revised proposal maintains a per play rate close to the rate that has been in effect during the first year of the current license term, and increases over time to the per play rate originally proposed by SoundExchange. This allows the per play rate to increase as the advertising market matures. Pelcovits WRT at 15-16; Eisenberg WRT at 18-21.

RESPONSE: This argument by SoundExchange assumes that the service are monetizing their streams. Notably, however, SoundExchange failed to offer evidence that such monetization is either widespread or growing among Noncommercial Education Stations; indeed, it is rare. More generally, CBI testified that for Noncommercial

Educational Stations, a "flat fee appears to be the only appropriate means of charging stations for the use of sound and ephemeral recordings." Robedee WDT ¶ 92.

595. All evidence indicates that the webcasting audience has grown tremendously since the CARP set its rate and that it will continue to grow at a significant rate through the statutory period. Dr. Brynjolfsson projected that listenership to webcasters would grow at the rate of 25% per year. Brynjolfsson WDT at 13. That projection is certainly reasonable and, if anything, likely to be low.

RESPONSE: SoundExchange argues that the "webcasting audience has grown tremendously," but notably fails to demonstrate any such growth in audience for webcasting by noncommercial services, generally, or by Noncommercial Educational Stations, specifically. Moreover, Dr. Brynjolfsson's model is, on its face, inapplicable to noncommercial services anyway, as it, like the model offered by Dr. Pelcovits, is based entirely upon an assumption of a profit-driven commercial webcaster as buyer. Dr. Brynjolfsson said he "focused on webcasters of significant size that are actively seeking to maximize the long-term value of their enterprises." Brynjolfsson WDT at 6.

601. The webcasting advertising market experienced a decline in 2001 and 2002, but since 2003, the market has rebounded. Brynjolfsson WDT at 18. Webcasters have been charging more for their ads and have sold a higher percentage of their inventory. Brynjolfsson WDT at 18.

RESPONSE: SoundExchange's arguments regarding advertising are inapplicable to noncommercial services, generally, and Noncommercial Educational Stations, specifically. Moreover, Dr. Brynjolfsson's model is, on its face, inapplicable to noncommercial services anyway, as it, like the model offered by Dr. Pelcovits, is based entirely upon an assumption of a profit-driven commercial webcaster as buyer. Dr. Brynjolfsson said he "focused on webcasters of significant size that are actively seeking to maximize the long-term value of their enterprises." Brynjolfsson WDT at 6.

650. Dr. Brynjolfsson testified that he was confident that the rate set by the CARP was not too high because there has been continued investment in the market by webcasters since that time. Brynjolfsson Dir. Test. I at 33-34. As is discussed below, see supra Section VII.A & B, there has been considerable entry in the webcasting market in recent years. See, e.g., SX Ex. 22 RR; Brynjolfsson WRT at 18-25; compare, e.g., RBX 4 with SX Ex. 235 RP; compare also Porter Dir. Test. at 51 with Lam Reb. Test at 76.

RESPONSE: SoundExchange argues that investment in webcasting and entry into the "webcasting market" has been growing," but notably fails to demonstrate any such growth in for webcasting investment or entry by noncommercial services, generally, or by Noncommercial Educational Stations, specifically. Moreover, Dr. Brynjolfsson's model is, on its face, inapplicable to noncommercial services anyway, as it, like the model offered by Dr. Pelcovits, is based entirely upon an assumption of a profit-driven commercial webcaster as buyer. Dr. Brynjolfsson said he "focused on webcasters of significant size that are actively seeking to maximize the long-term value of their enterprises." Brynjolfsson WDT at 6.

676. Webcasters commonly sell in-stream ads, banner ads on both the players and their webpages, video pre-roll ads, audio pre-roll ads, click-throughs, and sponsorships. Griffin WDT at 47-49; Porter Dir. Test. at 22; Serv. Trial Ex. 168; Brynjolfsson AWDT at 13; Porter Dir. Test. at 41; Brynjolfsson WDT at 23-28; Hanson Dir. Test. at 19-21. Non-commercial stations sell sponsorships, seeking revenue from the same advertisers as commercial stations. Griffin WDT at 47-49; Griffin WRT at 10.

RESPONSE: CBI testified that Noncommercial Educational Stations "are primarily operated for the educational benefit of its members. They are not in there to generate money to put in anybody's pockets. It doesn't have shareholders or anything else like that." 8/2/06Tr. 168:21-169:3 (Robedee). The average budget of a noncommercial educational station is only \$9,000 and FCC-licensed Noncommercial Educational Stations are prohibited, with few exceptions, from airing advertisements. Robedee WDT ¶¶ 42, 46, 59 and Robedee Tr. at 136. While these stations are allowed to solicit underwriting, most do not enjoy success due to their small signals and small, sometimes un-measurable audiences. *Id.* Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience. CBI Member Stations' Internet simulcasts operate with fewer, and even more limited, resources. The stations' limited budgets and limited means of adding to the operating budgets, along with their inability to carry funds forward from one year to the next, prohibits many of these stations from making non-essential capital acquisitions, such as automation systems that are the norm for commercial webcasters. Robedee WDT ¶ 47.

777. None of the above analysis of webcaster revenues includes the substantial additional value that they receive from other, direct and indirect, benefits derived from webcasting.

RESPONSE: This argument by SoundExchange assumes that the service are monetizing their streams. Notably, however, SoundExchange failed to offer evidence that such monetization is either widespread or growing among Noncommercial Education Stations; indeed, it is rare.

885. But wireless webcasting is not simply coming in the next five years — it is already here. Commercial webcasters, noncommercial webcasters, and small webcasters are all investing in mobile technologies and encouraging consumers to listen to streams over wireless devices. Griffin WRT at 25.

RESPONSE: Notably, SoundExchange failed to offer evidence that such investment in wireless/mobile webcasting is either widespread or growing among Noncommercial Education Stations

891. That is why they — Internet-only, simulcasters, and non-commercial stations — are all investing heavily in mobile webcasting. Griffin WRT at 19-20. Yahoo! is explicitly strategizing [REDACTED]. SX 30 DR. In a September 2005 presentation, Mr. Roback made numerous comments to this effect: [REDACTED] SX 30 DR.

RESPONSE: Notably, SoundExchange failed to offer evidence that such investment in wireless/mobile webcasting is either widespread or growing among Noncommercial Education Stations

1086. SoundExchange has proposed that all webcasters — Internet-only and simulcasters; large and small; commercial and noncommercial — should pay the same royalties. The evidence in this proceeding supports no distinction between different types of webcasters that is consistent with the willing buyer/willing seller standard. See SoundExchange Revised Rate Proposal.

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service.” 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress’s view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. See Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges (“Judges”) are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio (“NPR”) stations, CBI Member Stations are not “public broadcasting entities” (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1087. As set forth below, willing sellers would not offer a separate rate to simulcasters or noncommercial stations as a matter of economics because those stations compete directly with Internet-only and commercial stations for audience. To the extent that noncommercial stations paying a lower rate take audience from commercial stations paying a higher rate (i.e., “cannibalize” the audience), copyright owners and performers would be harmed. In the absence of a compulsory license, record companies and performers would not agree to such an across-the-board discount. See Section XI(C).

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges “shall distinguish among the different types of eligible nonsubscription transmission services then in

operation, and shall include a minimum fee for each such type of service." 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress's view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. See Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges ("Judges") are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio ("NPR") stations, CBI Member Stations are not "public broadcasting entities" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1088. In practical reality, webcasters of all kinds are converging, seeking the same audience, selling to the same advertisers, and using the same strategies in the market. Commercial and noncommercial stations compete with each other, and there are many large noncommercial stations that behave very much like commercial stations, with aggressive plans for growth and significant revenues. See Section XI(D)-(E).

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges "shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service." 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress's view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. See Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges ("Judges") are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio ("NPR") stations, CBI Member Stations are not "public broadcasting entities" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public

Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1090. To the extent that the Judges desire to consider a discounted rate for noncommercial stations for reasons other than the willing buyer/willing seller standard, they should ensure that any discounted rate minimize the threat of cannibalization. Imposing a cap on listenership at a modest level (no more than 20 simultaneous listeners) would decrease, though not eliminate, the risk of harm to sound recording copyright owners from such a discount. See Section XI(C).

RESPONSE: Dr. Brynjolfsson presented testimony that a separate rate for noncommercial broadcasters would lead to cannibalization, but this testimony is nothing but another example of his baseless opinions. Dr. Brynjolfsson did not do any quantitative study of his cannibalization theory. 11/21/06 Tr. 257: 5-14 (Brynjolfsson). So when he suggests that the risk of cannibalization is very real and enormous, he has no way to support those claims.

In fact, the evidence suggests otherwise. Noncommercial Broadcasters have been paying under separate rates since the last CARP and neither Dr. Brynjolfsson (nor any of SoundExchange's witnesses) have proffered any explanation for why there has been no evidence of cannibalization in the marketplace as a result of Noncommercial Broadcasters paying these separate, lower rates. The reality of the marketplace is that Noncommercial Broadcasters offer different programming and do not compete with commercial services.

Dr. Brynjolfsson's cannibalization theory relies on the premise that commercial services and Noncommercial Broadcasters offer "identical products" in the marketplace. 11/21/06 Tr. 106:13-17 (Brynjolfsson). However, he has offered no evidence that the Noncommercial Broadcasters are indeed offering an "identical product." In fact, the evidence, as presented above, is quite to the contrary.

Indeed, Dr. Brynjolfsson cannot proffer any testimony that noncommercial broadcasters are offering the identical product, because Dr. Brynjolfsson knows almost nothing about noncommercial broadcasters. Other than a few NPR stations cited in his testimony, he did not look at any data concerning any other noncommercial licensees. 11/21/06 Tr. 256:8-13 (Brynjolfsson). More importantly, he even admitted that the few NPR stations cited in his testimony are not meant to be representative of noncommercial stations. 11/21/06 Tr. 256:14-21.

1091. Nothing in the DMCA requires the Judges to set a separate rate for simulcasters or noncommercial webcasters. The DMCA does not create a separate

category for such webcasters. Nor does it exempt simulcast or noncommercial stations from the willing buyer/willing seller standard.

RESPONSE: The Section 114 statutory license at issue in this proceeding specifically mandates that the rates and terms set by the Copyright Royalty Judges "shall distinguish among the different types of eligible nonsubscription transmission services then in operation, and shall include a minimum fee for each such type of service." 17 U.S.C. § 114(f)(2)(B) (emphasis added). This is not a permissive request, but an affirmative obligation. The statute does not require the Judges to determine whether or not there are different types of services; clearly, in Congress's view, there are. Rather, the Judges must examine each of the different types of services and prescribe a royalty rate that reflects the competitive market rate for each type. Noncommercial licensees are fundamentally different than commercial licensees. See Joint Noncommercial Proposed Findings of Fact and Conclusions of Law, Proposed Findings of Fact Nos. 6-34. Their motivations are different, their restrictions are different, their format is different, and their sources of funding are different. These differences would all come into play in the hypothetical marketplace the Copyright Royalty Judges ("Judges") are asked to consider. The differences between noncommercial and commercial licensees mandate that a separate rate be set for noncommercial licensees. Moreover, unlike National Public Radio ("NPR") stations, CBI Member Stations are not "public broadcasting entities" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4. As has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, these differences justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1100. Dr. Pelcovits agreed with Dr. Brynjolfsson's approach, finding that a seller might be willing to offer different rates to different buyers if market segmentation of consumers was possible, but would not do so for different webcasters selling to the same group of consumers. Pelcovits Dir. Test. II at 222-23.

RESPONSE: The primary motivation for a noncommercial licensee must be its non-profit mission, and that will undoubtedly result in different business decisions than would be made by a profit-motivated buyer. Because Noncommercial Broadcasters are terrestrial radio stations, streaming is at most an ancillary activity to them. Johnson WDT ¶¶ 13-18; Stern WDT at 10-11; Robedee WDT ¶ 28; Willer ¶ 21; 6/27/06 Tr. 73:4-20 (Stern); 8/1/06 Tr. 17:1-15 (Johnson). They will not be willing buyers of the digital public performance right if the fee is set too high. They will simply return to being over-the-air broadcasters. See Coryell WDT ¶ 46; Parsons WDT ¶¶ 1(B), 52.

It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, see Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were

entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

The only way to set an appropriate rate for noncommercial licensees is to look to evidence specific to noncommercial licensees. Willer WDT ¶ 91. SoundExchange completely ignored the participation of noncommercial licensees in the direct phase of this proceeding, and on rebuttal only presented a small amount of evidence regarding five noncommercial radio stations that is inapplicable to the hundreds of noncommercial licensees in general. Therefore, the Judges must look solely to the evidence presented by the noncommercial participants in this proceeding.

It is beyond dispute that services such as Noncommercial Broadcasters that use less music should pay less in sound recording performance royalties. As even SoundExchange's own economist, Dr. Brynjolfsson, affirmed, "a company who uses more music should pay more all else equal," and "a company that uses less music should [pay] less, all else equal." 11/21/06 Tr. 251:19-252:4 (Brynjolfsson). Even music formatted radio stations play less music than Internet-only webcasters. They should pay less. Similarly, Russell Hauth, the Executive Director of the NRBMLC, stated that mixed format stations "should not be required to pay the same fee as a music formatted station." 7/27/06 Tr. 287:9-17 (Hauth).

Given that fewer songs, on average, are played on Noncommercial Broadcasters' stations than on Internet-only webcasting, Noncommercial Broadcasters should be subject to a lower sound recording performance royalty. Moreover, as has been recognized in regulations promulgated by the Copyright Office pursuant to a royalty rate-setting arbitration under § 118 of the Copyright Act, differences between even noncommercial stations justify setting an even lower rate for Noncommercial Educational Stations than the rates set for other noncommercial entities (which, themselves, historically have been set substantially lower than rates for commercial services). 37 C.F.R. § 253.5.

1101. Dr. Jaffe also agreed that in deciding whether different rates would be set for different webcasters, an important factor to consider is the degree to which the different webcasters compete for the same audience. Jaffe Reb. Test. at 195-96, 201. The concept applies to non-commercial as well as commercial webcasters. Jaffe Reb. Test. at 274.

RESPONSE: It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, *see* Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

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1104. The evidence presented by SoundExchange establishes that all types of webcasters — Internet-only services, simulcasters, small commercial services, noncommercial services, and educational stations — compete against each other in the marketplace: "It is impossible to segregate Internet-only webcasters from simulcasters and non-commercial stations from commercial stations. They are all competing for the same listeners in the same ways and raising money in essentially the same fashion. They all recognize that the future (and the present) is in offering many channels of music programming that users can access over the Internet and over wireless networks. And they are all aggressively investing in that future, recognizing that there are enormous sums of money to be made." Griffin WRT at 17-18.

RESPONSE: It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, *see* Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

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1115. At the most basic level, noncommercial webcasters are selling the same thing as AOL, Yahoo!, and Clear Channel — access to an audience that sponsors want to buy their products. Griffin WRT at 12.

RESPONSE: It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, *see* Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

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1119. SoundExchange submitted expert testimony from Dr. Erik Brynjolfsson, Dr. Michael Pelcovits, and James Griffin showing that noncommercial stations increasingly resemble commercial stations in all aspects relevant to this proceeding and to the willing buyer/willing seller standard and therefore are not entitled to a separate rate. E.g., Brynjolfsson Reb. Test. at 107-08.

RESPONSE: The primary motivation for a noncommercial licensee must be its non-profit mission, and that will undoubtedly result in different business decisions than would be made by a profit-motivated buyer. Because Noncommercial Broadcasters are terrestrial radio stations, streaming is at most an ancillary activity to them. Johnson WDT ¶¶ 13-18; Stern WDT at 10-11; Robedee WDT ¶ 28; Willer ¶ 21; 6/27/06 Tr. 73:4-20 (Stern); 8/1/06 Tr. 17:1-15 (Johnson). They will not be willing buyers of the digital public performance right if the fee is set too high. They will simply return to being over-the-air broadcasters. See Coryell WDT ¶ 46; Parsons WDT ¶¶ 1(B), 52.

It is clear that any application of a commercial fee model to noncommercial licensees would not make sense. Willer WDT ¶ 91. For example, the interactive service agreements reviewed by Dr. Pelcovits to arrive at his benchmark proposal, see Pelcovits WDT at 22, are wholly inapplicable to noncommercial licensees because they were entered into by buyers with completely different business models, sources of funding, and motivations. Equating a business decision by Napster to a business decision by a small student-run college radio station is laughable.

The only way to set an appropriate rate for noncommercial licensees is to look to evidence specific to noncommercial licensees. Willer WDT ¶ 91. SoundExchange completely ignored the participation of noncommercial licensees in the direct phase of this proceeding, and on rebuttal only presented a small amount of evidence regarding five noncommercial radio stations that is inapplicable to the hundreds of noncommercial licensees in general. Therefore, the Judges must look solely to the evidence presented by the noncommercial participants in this proceeding.

1184. In many respects, college stations are in a substantially similar situation to other kinds of noncommercial stations. As set forth below, the evidence established that some collegiate broadcasters have large audiences, stream significant amounts of music, sell underwriting and sponsorships, carry side channels, and have enormous resources, just like commercial and NPR stations. Brynjolfsson Reb. Test. at 281-82. Some collegiate broadcasters even sell actual advertising on their streams. Brynjolfsson Reb. Test. at 282. A willing seller would not license music to those stations at a reduced rate, because that would have the effect of cannibalizing revenue from commercial use of the license.

RESPONSE: Noncommercial Educational Stations' webcasts, which are the subject of this proceeding, have significantly smaller audiences than their than over-the-air broadcasts. CBI Member Stations' webcasts generally have small listenerships, typically averaging fewer than 10 listeners at any given time, that pale by comparison to commercial webcasting entities. Robedee Tr. at 137, 175; Robedee WDT ¶ 24; Willer Tr. at 293; Brynjolfsson WRT at 42.

Most Noncommercial Educational Stations do not have significant financial resources. The average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136. This is a far stretch from the hundreds of thousands of dollars of revenue alluded to by Prof. Brynjolfsson in his testimony. Brynjolfsson WRT at 41.

FCC-Licensed Noncommercial Educational Stations are, with few exceptions, prohibited from airing advertisements. Robedee WDT ¶ 46, 59. They are allowed to solicit underwriting. Id. Some stations enjoy success with their underwriting endeavors, but most do not due to their small signals and small, sometimes un-measurable audiences. Id. Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience.

In addition, Professor Brynjolfsson could only provide two examples of educational stations that have large audiences, stream significant amounts of music, sell underwriting and sponsorships, carry side channels, and have enormous resources. Brynjolfsson Reb. Test at 282. One is WHRB, the Harvard University station. WHRB is not the typical educational station because it operates in the commercial portion of the band, in a large market at a well known and prestigious university and is allowed to carry advertising. The other is WBUR, which is also unlike other Noncommercial Educational Stations because it is an NPR station, funded by the CPB.

1185. There is no basis under the statute for carving out a unique discount for educational stations. Through their streaming services, educational stations are now offering music that users can listen to over the Internet anywhere in the world. Willer Dir. Test. at 327, 330-31 (KXUL's Internet outreach makes the radio station's

programming available to a worldwide audience); Papish at 94 (Harvard's webcasting programming is aimed at "a world wide audience").

RESPONSE: SoundExchange confuses the availability of these webcasts with their actual use. CBI Member Stations' webcasts generally have small listenerships, typically averaging fewer than 10 listeners at any given time, that pale by comparison to commercial webcasting entities. Robedee Tr. at 137, 175; Robedee WDT ¶ 24; Willer Tr. at 293; Brynjolfsson WRT at 42. This includes international listeners, if any.

1186. Some college stations position their services to compete with commercial stations. The evidence in the record shows that some of IBS's member stations use the Live365 service to stream their simulcasts — thus, their services are in side-by-side competition with thousands of other non-collegiate stations, including numerous commercial stations, available on Live365. Kass Dir. Test. at 46-47.

RESPONSE: There is no evidence that the stations in question were motivated by a desire to compete when they decided to use when they decided to use Live365 as its streaming provider. Moreover, of the thousands of stations that stream via Live365, only a handful are Noncommercial Educational Stations.

1187. In some cases the competition between college and commercial stations is explicit; one educational station has trademarked a phrase describing their programming because "in radio, the way one markets its brand or its programming tends to be very competitive." Papish Dir. Test. at 89-90.

RESPONSE: The fact that one out of the thousands of Noncommercial Educational Stations in the United States has trademarked a phrase describing their programming has no evidentiary value.

1188. The record evidence does not establish that educational institutions as a general matter are unable to pay a market rate for the royalties. To the contrary, some college radio stations have large budgets, and some college radio stations have ample revenue to pay a market rate for the sound recording royalty. For example:

- *One station reported an annual operating budget of \$550,500; another reported an annual operating budget of \$200,000; another reported an annual budget of \$75,000. Robedee Dir. Test. at 194-95.*

- *Mr. Kass testified that educational budgets might range from \$250 per year to \$100,000 per year, and estimated the average operational budget of IBS member stations at \$9,000 per year. Kass WDT at ¶ 9; Kass Dir. Test. at 22.*

- *Mr. Papish testified that WHRB's budget is \$130,000 per year. Papish Dir. Test. at 113. WHRB also has a savings account it can draw upon in the case of financial necessity. Papish Dir. Test. at 152.*

RESPONSE: These examples are in no way representative of the financial position of the vast majority of Noncommercial Educational Stations. One again, the average budget

of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136.

1189. Larger stations obtain revenue and financial resources from advertising or underwriting, sponsorships, donor acknowledgement, and various financial forms of support from their educational institutions. Brynjolfsson Reb. Test. at 272-75, 282; Stern Dir. Test. at 242; SX Ex. 202 RP (WAMU Financials, at 3). For example, Mr. Papish testified that WHRB sells advertisements, as well as accepts donations. Papish Dir. Test. at 114-15. WHRB also raised \$100,000 during its last capital campaign. Papish Dir. Test. at 153.

RESPONSE: That Congress granted the § 114 statutory license to be available to webcasters of all types and sizes indicates that Congress did not intend to exclude small Noncommercial Educational Stations from the statutory license and that Congress intended that rates for these services be set at rates that these services could afford. The fact that some of the larger, high-profile educational stations are able to secure underwriting, sponsorships, donor acknowledgement, and financial support from their educational institutions should not detract from the fact that most Noncommercial Educational Stations cannot because:

- The average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136.
- FCC-Licensed Noncommercial Educational Stations are, with few exceptions, prohibited from airing advertisements. Robedee WDT ¶ 46, 59.
- Although they are allowed to solicit underwriting, most are not successful in attracting such underwriting due to their small signals and small, sometimes unmeasurable audiences. *Id.*
- Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience.

1190. Educational stations also typically receive funds through student activity fees and budgets afforded to academic departments. Robedee WDT at ¶ 42.

RESPONSE: These are meager resources, which explains why the The average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136.

1191. The ability of college stations to pay the statutory webcasting rates was crystallized by the testimony of WHRB's Mr. Papish. He testified that in 2005 WHRB paid only slightly more for all of its licensing fees (including SoundExchange, ASCAP, BMI and SESAC), than it did for food. As Mr. Papish was quick to point out, the food costs included alcohol. Papish Dir. Test. at 154-55; SX Trial Ex. 135. Thus, WHRB paid more for its food and alcohol in 2005 than it did for the use of the 70,000 - 90,000 unique sound recordings it streamed during the year. Papish Dir. Test. at 156.

RESPONSE: As mentioned above, WHRB is not the typical educational station because it operates in the commercial portion of the band, in a large market at a well known and prestigious university and is allowed to carry advertising.

1192. In addition, educational stations' operational budgets do not always reflect the stations' full array of financial resources. The official budget figures for educational stations can be arbitrary. For example, Mr. Robedee discussed the small budget of his radio station KTRU, but his own salary as General Manager is not included in that budget. Robedee Dir. Test. at 196. Some of KTRU's computing hardware was acquired for free from the university. Robedee Dir. Test. at 196. The student operation of the station itself is paid for out of student fees. Robedee Dir. Test. at 199. Mr. Robedee testified that many other educational stations receive computing services from universities without those costs being reflected by the educational station's budget.

RESPONSE: None of these "financial resources" amount to cash available for the station to spend. In order to pay substantially increased rates, the Noncommercial Educational Stations would have to have access to a significantly increased cash flow. As previously mentioned, most of them have very limited budgets. Moreover, the example of an employee's salary is misleading because approximately 80 percent of CBI member stations do not have an employee associated with the station, except for an advisor role, and these individuals do not get compensated for that advisor role in many instances. Robedee Tr. at 201.

1193. Even stations were [sic] fewer resources would be able to pay under SoundExchange's proposed rate. SoundExchange's proposed rate for 2006 is \$.0008 per performance. CBI's Mr. Willer testified that KXUL had an average of 2.94 simultaneous listeners in 2004, or 25,754 aggregate tuning hours for the entire year. Willer Dir. Test. at 290. Assuming that KXUL had 12 performances of sound recordings for every one of those hours, SoundExchange's proposed per play rate for 2006 would result in royalties of \$247.24 owed by KXUL. Ultimately, under SoundExchange's proposed minimum fee, KXUL would pay \$500 for the year.

RESPONSE: It follows that in 2006, the \$500 minimum fee owed by KXUL would represent more than 100% the amount it would owe if the per listener/per play rate of \$.0008 was applied strictly. Moreover, this calculation is based on average listenership which overstates the number of listeners actually listening to music because (a) many listeners stay connected even when they are not actually listening to the stream (See Willer Tr. at 292); and (b) the average listenership figures include non-music programming, including athletic events which garner by far the largest audiences (See Robedee Tr. at 138; see also Robedee WDT ¶¶ 24-25) and the performance of which is not compensable under the statutory license. Robedee Tr. at 151-152. This "overpaying" would be exacerbated by the annual rate increases proposed by SoundExchange, totaling 137% in the next 4 years

1194. Similarly, IBS's Mr. Kass testified that the typical web audience of an IBS station is five simultaneous listeners, or 43,800 aggregate tuning hours per year. Kass

Dir. Test. at 21. Assuming that these stations had 12 performances of sound recordings per hour, they would owe no more than \$420.48 in 2006 under SoundExchange's per play rate, and would also pay the \$500 minimum fee.

RESPONSE: It follows that in 2006, the \$500 minimum fee owed by KXUL would represent almost 20% more than the amount it would owe if the per listener/per play rate of \$.0008 was applied strictly. In addition, this is again based on overstated listenership figures and the "overpaying" would be exacerbated by SoundExchange's proposed rate increases totaling 137% in the next 4 years

1195. Mr. Robedee testified that KTRU had an average of 8.6 simultaneous listeners in 2004, or 75,336 aggregate tuning hours for the entire year. Robedee Dir. Test. at 137. Assuming that KTRU had 12 performances of sound recordings for every one of those hours, KTRU would owe no more than \$723.23 in 2006 at SoundExchange's proposed per play rate.

RESPONSE: This calculation is based on average listenership which significantly overstates the number of listeners actually listening to music because (a) many listeners stay connected even when they are not actually listening to the stream (See Willer Tr. at 292); and (b) the average listenership figures for KTRU include non-music programming, including athletic events which garner by far KTRU's largest audiences (See Robedee Tr. at 138; see also Robedee WDT ¶¶ 24-25) and the performance of which is not compensable under the statutory license. Robedee Tr. at 151-152. Once again, this "overpaying" would be exacerbated by the annual rate increases proposed by SoundExchange, totaling 137% in the next 4 years

1196. Witnesses for college stations testified that a special rate for educational stations is appropriate because their mission is educational rather than commercial. Robedee Dir. Test. at 168-169; Kass WDT at 4; Willer Dir. Test. at 284-85; Papish Dir. Test. at 113.

1197. But the willing buyer/willing seller standard applies to all webcasters — including collegiate stations — and there is no evidence in the record that the educational mission of a station is relevant in any way to that standard. The collegiate broadcasters did not present any evidence that their educational goals affect the rate that a willing buyer and willing seller would agree to in the marketplace. Nor did the collegiate broadcasters offer any statutory basis for allowing them to enlist the intellectual property of copyright owners at a discount to further their educational mission.

RESPONSE: There, is on the contrary, a great deal of evidence in the record that Noncommercial Educational Stations have very different economics from other noncommercial stations, which is relevant to the willing buyer/willing seller standard, such as:

- the fact that, unlike NPR stations, CBI Member Stations are not "public broadcasting entities" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the

Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. § 396. Robedee WDT, footnote 5 at p.4;

- the fact that most Noncommercial Educational Stations are provided only very limited funding through student activity fees or the budgets afforded to academic departments. Robedee WDT ¶ 42;
 - the fact that the average budget of a noncommercial educational station is \$9,000. Robedee WDT ¶ 42 and Robedee Tr. at 136;
 - the fact that FCC-Licensed Noncommercial Educational Stations are, with few exceptions, prohibited from airing advertisements. Robedee WDT ¶ 46, 59
- to name only a handful of the plethora of facts submitted by Noncommercial Educational Stations.

Moreover, when the previous determination of the royalties for licenses under §§ 112 and 114 occurred, Noncommercial Educational Stations were not represented. The present proceedings are the first opportunity for a rate setting court to consider evidence submitted by Noncommercial Educational Stations as to why a rate lower than that applicable to other noncommercial stations should apply to them, as is the case under §118.

SoundExchange economic expert witness Professor Brynjolfsson has conceded that in the context of the willing buyer/willing seller dynamic, a willing seller might choose to take account of the special circumstances of Noncommercial Educational Stations and offer them special terms and an adjusted price. Brynjolfsson Reb. Test. 293-294.

Moreover, because of the abovementioned limitations on Noncommercial Educational Stations ability to absorb the cost of increased royalties by means available to commercial stations (e.g. increasing the price of advertising on their stations), the cut-off point for Noncommercial Educational Stations' willingness to buy at a given rate is inevitably much lower than for commercial stations.

1198. Even if their educational mission were relevant to the current statutory standard (which it is not), properly paying for and reporting the use of sound recordings is entirely consistent with their purported exclusively educational purpose. Mr. Kass of IBS testified that "operating a radio station offers opportunities to learn by doing." Kass WDT at 4. Part of this "learning by doing" approach can and should include the business aspects of running a business. Willer Dir. Test. at 339-40; 365-66. Mr. Kass testified that some students participating in student radio should learn these basic "business skills" as part of their education. Kass WDT at 5; Kass Dir. Test. at 50. One critical aspect of operating a webcasting business involves paying for the goods you sell and complying with regulatory requirements.

RESPONSE: None of the Noncommercial Educational Stations' witnesses suggested that these stations should be exempt from paying the royalties and nothing about the proposal from CBI would be contrary to any of the above statements.

1199. Educational stations already track data on what song is played and are equipped to provide it to SoundExchange so that their royalties can be properly attributed and distributed to the copyright owners and artists. The DMCA requires that webcasters transmit digital information about the song being played, such as the artist being played and the album. Robedee Dir. Test. at 221-23; Kass Dir. Test. at 57-58. Any station compliant with the law must enter this information automatically or manually. Robedee Dir. Test. at 222; 260-62.

RESPONSE: While educational stations do track data, anything beyond the recordkeeping as now exists would make the value of the license drop dramatically, because they go beyond the capabilities of many Noncommercial Educational Stations. Robedee Tr. at 165-166

1200. Although WHRB's Mr. Papish freely admitted that WHRB is currently not in compliance with this legal requirement, Papish Dir. Test. at 147, he acknowledged that it is technologically possible to comply. Papish Dir. Test. at 149. In fact, countless webcasting services do comply.

1201. Evidence in the record belies any claims by the collegiate broadcasters that the record-keeping requirements are too burdensome. For example, with a staff of four people, SBR Creative Media is able to handle the record-keeping and terms compliance for all of the twelve to fifteen webcasting channels plus approximately 70 to 100 holiday channels that it offers. Rahn Dir. Test. at 65-66, 106-08.

RESPONSE: SBR is a commercial enterprise which streams music already recorded on servers with the meta data needed already incorporated into the files, which is in stark contrast to the operations of the vast majority of Noncommercial Educational Stations. Robedee Tr. at 137-138, 144. This is due to the fact the SBRs services were built for webcasting in a commercial environment, whereas Noncommercial Educational Stations, most of which pre-date webcasting, were built on an entirely different model. Further, unlike SBR, most Noncommercial Educational Stations do not have employees. Robedee Tr. at 201.

1202. Educational stations have argued that it is impractical to require them to pay for their use of copyrighted music on a per-performance basis because it's too difficult for them to come up with the data that requires. Robedee Dir. Test. at 211. Paying on a per-performance basis requires providing a log of the songs that are played during a webcast and a log that shows how many people were listening that the time those songs were played. Robedee Dir. Test. at 211. However, educational station witnesses have testified that commercial radio has managed to perform this task. Willer Dir. Test. at 348.

RESPONSE: Commercial webcasters are able to do that because their systems were developed that way, with two computers connected together, so that when the song is logged in, the number of people listening at that moment and simultaneously recorded. Willer Tr. at 348. In order to do the same thing, the Noncommercial Educational Stations

would have to entirely retool their operations. Id. Because the average budget of an Educational Station is \$9,000, this would be a considerable burden, beyond the capability of many Educational Stations.

1204. Educational stations are equipped to track the songs that are played. Some educational stations have computers that automatically track which songs are played. Robedee Dir. Test. at 219-20. Other stations keep a log where they record the songs they choose to play, on paper or on a computer. Robedee Dir. Test. at 218-20; Willer Dir. Test. 341-43, 368. Mr. Willer testified that the software and hardware costs of stations complying with these reporting obligations was about \$3,000 — far less than WHRB paid for food and alcohol last year. Willer Dir. Test. at 337; Papish Dir. Test. at 154-55. In fact, educational station WHRB submitted a report to its board stating that WHRB is "certainly capable" of creating an extensive database and system to automate reporting. Papish Dir. Test. at 139-142; SX Ex. 134.

RESPONSE: The sum of \$3,000 represents no less than one third of the average budget of Noncommercial Educational Stations (\$9,000). This is a considerable burden, beyond the capability of many Noncommercial Educational Stations.

1205. Educational stations are equipped to provide SoundExchange with the required information about how many listeners receive the performances the educational stations webcast, so that their royalties can properly be attributed and distributed to the artists and owners of the copyright. Servers automatically retain logs of how many listeners are receiving these performances, and many servers are located right in the educational radio station itself. Robedee Dir. Test. at 213-214; 216-17; Willer Dir. Test. at 344.

RESPONSE: That Congress granted the § 114 statutory license to be available to webcasters of all types and sizes indicates that Congress intended to preserve the diversity of Noncommercial Educational Radio. While many stations have their servers located in the educational radio station itself, many do not and would be excluded from the diverse landscape of Noncommercial Educational Radio if the issues specific to them were not addressed. Moreover, many stations do not have the hardware or software to provide as detailed information as is requested and the cost of retooling and would be exorbitant and for many of them. As mentioned Mr. Willer testified that the software and hardware costs of stations complying with these reporting obligations was about \$3,000. Willer Tr. at 337. This represents no less than one third of the average budget of Noncommercial Educational Stations (\$9,000).

1243. SoundExchange remains ready to work with non-commercial services on ensuring that they too provide copyright owners with reasonable notice of use of sound recordings under the statutory license. Kessler WRT at 8.

1244. However, SoundExchange's efforts to assist educational and other noncommercial webcasters in fulfilling their reporting obligations is not inconsistent with the important fact that commercial and non-commercial licensees — and not copyright

owners and performers — should bear the costs for providing reports of use. Kessler WRT at 8. The royalty recipients should not have their income reduced by having to pay the cost of monitoring transmissions made under the privilege of the statutory license. Kessler WRT at 8.

RESPONSE: None of the testimony submitted by CBI suggests that Noncommercial Educational Stations should not have to bear the cost of reporting but rather that the reporting requirements should be realistic and not be so burdensome as to threaten the very existence of some of these stations.

1488. Both the IBS and CBI proposals are also absurdly low when compared to other expenditures made by noncommercial stations. CBI's proposal — \$85 per year — is less than the \$90 annual fee for education stations that CBI charges its members. Robedee Dir. Test. at 202-203. The evidence in the record demonstrates that IBS's proposed rate is less even than the amount that WHRB, the Harvard radio station, currently pays each year for food and alcohol for its student staff. SX Ex. 135; Papish Dir. Test. 155. Mr. Kass admitted that college webcasters pay Live365 \$63.50 per month to stream their webcasts, but argues that college webcasters should pay only \$25 per year for the use of all sound recordings. Kass Reb. Test. at 59-60.

RESPONSE: CBI testified that Noncommercial Educational Stations "are primarily operated for the educational benefit of its members. They are not in there to generate money to put in anybody's pockets. It doesn't have shareholders or anything else like that." 8/2/06Tr. 168:21-169:3 (Robedee). The average budget of a noncommercial educational station is only \$9,000 and FCC-licensed Noncommercial Educational Stations are prohibited, with few exceptions, from airing advertisements. Robedee WDT ¶¶ 42, 46, 59 and Robedee Tr. at 136. While these stations are allowed to solicit underwriting, most do not enjoy success due to their small signals and small, sometimes un-measurable audiences. Id. Most unlicensed Noncommercial Educational Stations also struggle to obtain ongoing advertising or underwriting of any consequence due to their limited signal and audience. CBI Member Stations' Internet simulcasts operate with fewer, and even more limited, resources. Notably, SoundExchange failed to offer any evidence to the contrary.

1490. But that provides no basis for a single flat fee to apply to all stations regardless of size, resources, or size of audience. Robedee Dir. Test. at 191. The record in these proceedings reflects that there is significant variation in the budgets of educational radio stations and in their webcasting listenership. Robedee Dir. Test. at 193-99 (testifying about variations in station budgets and accounting practices); Willer Dir. Test. at 333 (testifying that there is great variation in listeners among college radio stations for webcasting). Mr. Papish admitted that, when the Harvard Radio station needs to raise money, it has a contribution drive and can raise \$100,000. Papish Reb. Test. at 153.

RESPONSE: It is precisely because of the significant variations in the budgets of Noncommercial Educational Stations, some of which have very have limited budgets that

CBI is proposing a flat fee. The costs of administering a per listener/per song fee would stretch some of these stations' resources to breaking point. Robedee WDT ¶ 69.

1492. Finally, both IBS and CBI make a series of arguments concerning the burdens of recordkeeping and claim that their fees should be reduced because they cannot keep records sufficient to comply with the statute and regulations. As the Board has made clear, recordkeeping is not part of this proceeding. In addition, the statute itself requires all services to transmit basic information about sound recordings to each listener. That some noncommercial stations violate the statute, Papish Reb. Test. at 147, does not provide a basis for reducing the rates of all noncommercial stations.

RESPONSE: The burdens of recordkeeping are highly relevant to this proceeding. The recordkeeping requirements are often cost prohibitive. Anything beyond the recordkeeping as now exists would make the value of the license drop dramatically, because they go beyond the capabilities of many Noncommercial Educational Stations. Robedee Tr. at 165-166

1493. Moreover, as discussed above, the record demonstrates that recordkeeping is both technically feasible and relatively inexpensive, especially given the statute's requirement that all webcasters must transmit the artist, sound recording, and album title to each listener. Griffin WRT at 40-42. Indeed, many colleges webcasters stream through Live365, Kass Reb. Test. at 46, 59-60. Live365 offers precisely these recordkeeping services for a modest fee. Griffin WRT at 40-42.

RESPONSE: Recordkeeping is anything but inexpensive. Mr. Willer testified that the software and hardware costs of stations complying with the recordkeeping and reporting obligations was about \$3,000. This is an excessive burden for many Noncommercial Educational Stations given their limited budgets (\$9,000 on average).

Respectfully submitted

December 15, 2006



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Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the matter of:)

)

The Digital Performance Right)

in Sound Recordings and) Docket No.

Ephemeral Recordings) 2005-1

) CRB DTRA

(Webcasting Rate Adjustment)

Proceeding))

Volume XLVIII

Room LM-414

Library of Congress

First and Independence

Avenue, S.E.

Washington, D.C. 20540

Thursday,

December 21, 2006

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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12/21/2006 Closing Arguments

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12/21/2006 Closing Arguments

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12/21/2006 Closing Arguments

On Behalf of The National Religious
Broadcasters Noncommercial Music License
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Clear Channel Communications Inc., Salem
Communications Corp., Susquehanna Radio Corp.,
The National Religious Broadcasters Music
License Committee

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1 is that those services effectively require a
 2 license from all the majors. Why? Because
 3 the repertoires of each of the four majors are
 4 entirely nonexclusive and you can't satisfy a
 5 consumer's request and demand for all the
 6 music you want when you want it if you're
 7 missing a huge catalog and each of the four
 8 majors represents a huge catalog. So
 9 everybody -- there's testimony. I don't know
 10 how to answer the question other than that
 11 they admitted it and when the label
 12 representatives admit that those services
 13 effectively require a license from all the
 14 majors or they don't have a competitive
 15 service to offer, what more should we do to
 16 prove the fact than to have them -- the people
 17 that license them admit that.

18 CHIEF JUDGE SLEDGE: If it was a
 19 cornerstone of my argument I think I would
 20 want to explain why that assumption is valid.

21 MR. STEINTHAL: And we did
 22 explain, Your Honor --

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1 CHIEF JUDGE SLEDGE: It's never
 2 been done.
 3 MR. STEINTHAL: We did explain it
 4 in the following way, because we have
 5 witnesses testify on all sides of this that
 6 the consumer expectation in the on-demand
 7 market is that you will get the music you want
 8 when you want it. Why else would you pay \$10
 9 or \$15 a month, as a subscription to get
 10 access to the world's music? If you're paying
 11 \$10 to \$15 a month and you ask for Billy Joel
 12 and you don't get it, and you ask for the
 13 Rolling Stones and you don't get it, you're
 14 not going to buy the product. And that's what
 15 the testimony was.

16 CHIEF JUDGE SLEDGE: Nobody ever
 17 proved that. That was assumed that nobody
 18 will buy the product. Nobody proved it.
 19 Nobody addressed what will happen if we offer
 20 a product that sells 90 percent of what the
 21 consumer wants? If you went into a grocery
 22 store, you don't find 100 percent of what you

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1 want, you go to the grocery store that gives
 2 you most of what you want at a price that
 3 you're willing to pay.

4 MR. STEINTHAL: And that's a
 5 different market than one in which you're
 6 buying access to the world's music in return
 7 for a monthly subscription fee and if you
 8 posit that in the past, we had a world in
 9 which you go to Sam Goode and you buy an album
 10 or you buy a track and at the end of the day
 11 you get your on-demand consumption that way.

12 What the labels have tried to do
 13 is move things to a market in which you can
 14 now almost like the cable model, get what you
 15 want when you want it by paying a subscription
 16 fee. But the labels' own testimony was that
 17 they understood it. And why? Remember the
 18 spectrum from the documents that -- from Sony.
 19 All the documents that talked about the
 20 spectrum of services ranging from on-demand on
 21 the one side to DMCA radio and customized
 22 radio on the other side.

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1 still want the revenue alternative?

2 MR. STEINTHAL: Your Honor, I

3 can't fight you all the way on that. I think

4 that users prefer to have an option to choose

5 between one metric and another. In the ad

6 supported universe of webcasting, because one

7 doesn't -- and I hate to use this word, and

8 I'll use it only because everyone else did --

9 monetize on the basis of the volume of

10 streaming. It's not like you make more money

11 as you stream more units. So the feeling is

12 that since you don't make money or generate

13 proceeds in direct correlation to how much,

14 how many songs you stream, then the

15 appropriate metric ought to be on an

16 advertiser base.

17 But I would agree with you that if

18 you accept the proposition that the per-use

19 rates have to come down to the level that we

20 posited based on the actual agreements with

21 the PROs, then the percentage of revenue

22 alternative wouldn't be as pressing. Let me

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1 Everybody is going after that.

2 It's not a limitless universe of

3 money that people have to spend on

4 advertising, and we're competing head to head

5 in that radio ad market with terrestrial

6 radio, with terrestrial radio that's

7 simulcast, with other webcasters and that is

8 why, especially when you view the webcasting

9 royalty relative to terrestrial radio, it is

10 so punitive because terrestrial is paying zero

11 for the same uses on broadcast.

12 Let me briefly before my initial -

13 -

14 JUDGE ROBERTS: Before we leave

15 the percentage of revenue, I had a related

16 question. This is 38B of your proposed

17 findings. Also using the dreaded word

18 monetize, and this talks about the charge made

19 by SoundExchange about not fully selling

20 advertising for a service that elects to use

21 the percentage of revenue basis, and you have

22 suggested that in that instance, the licensee

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1 turn briefly --

2 JUDGE WISNIEWSKI: Before you do

3 that, actually your mention of advertising

4 reminded me of another question that I had for

5 you. That is in your Findings of Fact Number

6 26, you say DiMA members seek to sell their

7 advertising at the premium versus terrestrial

8 radio. I take that that was a goal?

9 MR. STEINTHAL: Yes.

10 JUDGE WISNIEWSKI: And I guess the

11 question I have is doesn't that mean that your

12 members regard the broadcasters as

13 competitors?

14 MR. STEINTHAL: Yes.

15 JUDGE WISNIEWSKI: In terms of

16 simulcasting that they do?

17 MR. STEINTHAL: We are head-to-

18 head competitors with the terrestrial stations

19 and their simulcasting. It's the same ad

20 market. As Mr. Roback said, that the market

21 opportunity here is the radio advertising

22 market, the \$20 billion radio ad market.

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1 JUDGE WISNIEWSKI: That's what I
2 thought was the case. I believe that's
3 mentioned in CBI's findings of fact, but I
4 wanted to make sure I wasn't missing
5 something.
6 MR. STEINTHAL: Okay. Clearly, if
7 I had at my fingertips the answer and the
8 details I would give it to you, other than
9 giving you the citation. I don't.
10 In terms of what the importance --
11 JUDGE WISNIEWSKI: That's okay.
12 That clarifies it.
13 MR. STEINTHAL: The importance of
14 those differences I think are, as I said, that
15 what makes NPR and noncoms tick in terms of
16 what they do and how they do it, is
17 fundamentally different than commercial
18 webcasting and the experts for SoundExchange
19 conceded the same thing and they made a
20 considered choice. Even though the statute
21 and in this respect --
22 JUDGE ROBERTS: Is fundamentally

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1 JUDGE ROBERTS: So the operable
2 word here is types.
3 MR. STEINTHAL: Yes.
4 JUDGE ROBERTS: And how is a --
5 other than the funding issues that you
6 mentioned, how is a noncommercial simulcaster
7 a different type than a commercial
8 simulcaster?
9 MR. STEINTHAL: The answer to that
10 lies in the fact that -- it goes back to the
11 same issue which is the decisions that are
12 made as to programming, the ability to have
13 funds to create programming and deliver
14 programming and to invest in technologies
15 associated with webcasting, for example,
16 varies dramatically. And whether the word
17 "types" --
18 JUDGE ROBERTS: Well, that's the
19 word in the statute, so that's what we have to
20 focus on.
21 MR. STEINTHAL: But also we have
22 the experience, Your Honor. We have the

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1 different than commercial webcasting or does
2 that include fundamentally different than
3 commercial simulcasting?
4 MR. STEINTHAL: Both.
5 JUDGE ROBERTS: Both.
6 MR. STEINTHAL: I mean the
7 commercial entities, Your Honor, operate in a
8 fundamentally different way. Their
9 motivations, their funding are entirely
10 different. It's apples and oranges and that's
11 why, among other things, the first CARP ended
12 up setting different rates for noncoms than
13 commercial webcasting, why the first CARP
14 directed the parties to try to work something
15 out with respect to NPR, rather than let it go
16 to be decided with the rest of the case and
17 that's clear in the decisions as well.
18 And the statute at Section
19 114(f)(2)(B) does say that the rates and terms
20 set by the Judges shall distinguish among the
21 different types of eligible, nonsubscription
22 services then in operation.

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1 experience from the first CARP and clearly the
2 first CARP made the distinction.
3 JUDGE ROBERTS: Well, maybe they
4 did. Maybe they got it right, maybe they got
5 it wrong.
6 MR. STEINTHAL: It's something to
7 look at.
8 JUDGE ROBERTS: I'm trying to
9 flesh out here what the meaning of types is.
10 MR. STEINTHAL: I think the
11 combination of precedent in that respect and
12 clearly Section 118 breaks out noncoms from
13 others and there are a lot of different ways
14 in which Congress has singled out, if you
15 will, noncommercial and public broadcasting
16 from commercial broadcasting. And it's not --
17 it doesn't require a lot of interpretation to
18 think that the proper interpretation of shall
19 distinguish among the different types of
20 eligible and nonsubscription services would
21 include distinguishing between commercial and
22 noncommercial. That's what CARP 1 did.

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1 Even their experts, I come back to
2 this, because it is a classic case of wanting
3 to have your cake and eat it too. What have
4 they done? They decided to try to drive the
5 highest possible model, right? To go after
6 and Brynjolfsson talked about it. I want to
7 look at only the most successful, commercial
8 enterprises. Okay? That's what he said.

9 And Pelcovits said the same thing.
10 I want to look at these services over here
11 that are on-demand services, commercial
12 incentives and everything else. Why? To
13 drive the highest possible benchmark to begin
14 with and specifically, when we asked him well,
15 did you consider even on the commercial side,
16 did you consider looking at some of the less
17 successful or less large webcasters, they said
18 no. We're going to run away from that. We
19 don't have to do that. We started it this
20 way. It's appropriate to look at it that way.

21 And the quote from Dr. Pelcovits
22 is right on. I mean clearly they wanted to

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1 have it both ways.

2 CHIEF JUDGE SLEDGE: So the
3 difference in types based on your argument is
4 the weighing of the evidence and you say that
5 when you weigh the evidence, the weight is in
6 favor of a finding that noncommercial stations are a
7 different type because there is substantial
8 evidence that noncommercial stations operate
9 the same as commercial stations, hiring, have
10 people to go after advertising, moving to an
11 advertising base, including so much of their
12 total revenue being based on advertising they
13 sell and all of that is evidence of being like
14 a commercial, but you're saying the weight of
15 the evidence favors being different?

16 MR. STEINTHAL: I wouldn't put it
17 that way, Your Honor. And plus, NPR doesn't
18 sell advertising.

19 CHIEF JUDGE SLEDGE: Well, that's
20 --

21 MR. STEINTHAL: It doesn't.

22 CHIEF JUDGE SLEDGE: They don't

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1 call it advertising. They hire people to sell
2 advertising.

3 MR. STEINTHAL: They hire people
4 to try to get people to donate.

5 CHIEF JUDGE SLEDGE: They call it
6 something else.

7 MR. STEINTHAL: They hire people
8 to try to drive funding, but at the end of the
9 day it's a totally different marketplace. You
10 don't get a certain amount of money based on
11 ratings. The whole concept of advertising is
12 audience equals ratings equals more
13 advertising money.

14 The concept of raising money for
15 NPR is a totally different thing. You appeal
16 to different parts of what hopefully someone
17 willing to make a donation will be willing to
18 do. And you appeal to the educational aspects
19 of the programming. There's no evidence that
20 there's a relationship between the funding
21 that is capable of being driven by -- in NPR,
22 has any relationship whatsoever to the amount

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1 of music they use or the amount of webcasting
2 they do. None.

3 And it is a fundamentally
4 different business proposition which
5 SoundExchange's own experts concede that these
6 are commercial entities that we relied on for
7 our model. We did not rely on noncoms. We
8 did not rely on public broadcasting and then
9 only -- they whipsaw back in the second part
10 of the proceeding and they say well, there's
11 not really a big difference between the two.
12 Therefore, we're going to apply the same
13 rates.

14 And the evidence that they rely on
15 is marginal at best. They take -- and we
16 address this in the findings. They take some
17 very nonrepresentative stations that are NPR
18 stations and say these look like webcasters.
19 These look like the same kinds of services
20 that are -- that you can get commercially.

21 But in fact, the evidence was very
22 clear that that was the exception and not the

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1 rule and that no effort had been made to try
2 to equate the NPR universe in any respect to
3 the commercial webcasting universe and the
4 evidence from the concessions of Dr.
5 Brynjolfsson and Dr. Pelcovits were absolutely
6 clear that, in fact, they did not consider
7 them as comparable when they created their
8 models.

9 JUDGE ROBERTS: Mr. Steinthal, is
10 it National Public Radio's view that it is a
11 different type of simulcaster than a
12 noncommercial broadcaster that does not
13 receive funding from the Corporation for
14 Public Broadcasting?

15 MR. STEINTHAL: Yes. It is NPR's
16 view that it is a different type of
17 broadcaster from commercial and if you're
18 asking me whether it's a different type from
19 other noncoms --

20 JUDGE ROBERTS: That's what I'm
21 asking you.

22 MR. STEINTHAL: I think you're

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1 MR. STEINTHAL: Yes.

2 JUDGE ROBERTS: Thank you.

3 MR. STEINTHAL: Just not as much
4 so vis-a-vis the commercial.

5 JUDGE WISNIEWSKI: These different
6 types that we've been talking about, does that
7 coincide with what some of the witnesses have
8 talked about in terms of segmented markets,
9 some of your expert witnesses?

10 MR. STEINTHAL: On the segmented
11 markets, I think market segmentation, Your
12 Honor, beauty is in the eye of the beholder to
13 some degree. Are you segmenting by what? It
14 seems to --

15 JUDGE WISNIEWSKI: I'm asking you.

16 MR. STEINTHAL: We clearly make a
17 division between commercial webcasters and
18 noncommercial webcasters. If you want to call
19 it market segmentation, I would say it's a
20 different type of service.

21 JUDGE WISNIEWSKI: It's important
22 to any economic analysis. If we have a

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1 parsing -- I think it is different. I think
2 one could reach a conclusion that it is a
3 different type, but --

4 JUDGE ROBERTS: Well, can one
5 reach a conclusion or is it different?

6 MR. STEINTHAL: I think the
7 funding circumstances of NPR are unique and
8 they -- the relationship with CPB and the
9 funding they get that way, I think that it is
10 a separate type of animal under the statute.
11 It doesn't mean that it should be treated
12 necessarily differently than other noncoms.
13 I think the basis in the record for you to
14 conclude that it is a separate type. But what
15 we are proposing is that you have to take the
16 noncom --

17 JUDGE ROBERTS: I just want an
18 answer as to whether National Public Radio
19 considers itself a different type of
20 simulcaster than noncommercial broadcast
21 stations that do not receive funding from the
22 Corporation for Public Broadcasting?

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1 segmented market, then what we apply and
2 particularly in a rate making session is a
3 price discrimination model where you have
4 different rates, for example, in electricity
5 for industrial versus residential customers.

6 MR. STEINTHAL: And I think that
7 as stated that way, there is a basis to
8 segment the market because of the very
9 different nature of the buyers and that would
10 be one of the reasons you do segment the
11 market.

12 JUDGE WISNIEWSKI: Should we do
13 that here?

14 MR. STEINTHAL: Yes, you should.
15 And that is exactly what we have said from the
16 beginning, is that the statute we believe
17 requires it. I guess we could have a fair
18 degree of debate about what the word "type"
19 means. We know that it was treated
20 differently in the last CARP, whether we want
21 to say it was segmented or not, I don't know
22 what the correct answer is, whether you would

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1 arbitrary allocation, and yet they based their
2 rate proposal on it.

3 So I guess my point is if you
4 disagree with us on who gets different rates,
5 I agree that we haven't proposed different
6 rates for different types of webcasters,
7 because we don't think there are any. If you
8 disagree with us on that, it doesn't mean you
9 necessarily have to accept their proposal. I
10 think you still have to look at it and see
11 whether it makes sense.

12 CHIEF JUDGE SLEDGE: All right.
13 I'll follow you down that line, which is
14 different from where I was, but I'll follow
15 you there. What authority do we have to set
16 a rate that no one has proposed?

17 MR. HANDZO: I think you have
18 authority to do it if there is evidence in the
19 record to support it. I certainly don't think
20 you have authority to come up with a rate that
21 simply has no support in the record. I can at
22 least hypothetically imagine situations where

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1 no one has proposed a particular rate,
2 nevertheless you think there is evidence in
3 the record to support it.

4 I can't think of an example that
5 comes to mind, particularly, but I don't think
6 you're bound by the parties' proposals. I
7 think you're bound by the record in the case.
8 The record might support different proposals
9 that nobody has actually articulated.

10 CHIEF JUDGE SLEDGE: I'm surprised
11 to hear you say that. So you would suggest --

12 MR. HANDZO: I hate to invite you
13 to go down that road, frankly, but --

14 (Laughter.)

15 -- I think that's the truth.

16 CHIEF JUDGE SLEDGE: You would
17 suggest that this body created by statute to
18 incorporate a model, an adversarial model,
19 would authorize this Court to adopt rates not
20 proposed by any adversary before it.

21 MR. HANDZO: I think that you
22 would certainly have to swallow hard about

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1 doing that, because the fact that nobody has
2 proposed a rate would seem to me to be pretty
3 good evidence that it's not a market-based
4 rate.

5 But I just -- I've got to say,
6 maybe I'm sticking my foot in my mouth here,
7 but I just don't see that the statute forbids
8 you from doing your own independent
9 examination of the record and drawing what
10 conclusions you will from it. I don't think
11 you are absolutely locked into truly the
12 proposals that the parties have made.

13 CHIEF JUDGE SLEDGE: That would
14 make some sense to me if the Court had
15 developed evidence and subpoenaed the parties
16 and required evidence other than what the
17 parties submitted. But that hasn't happened
18 here.

19 JUDGE ROBERTS: Mr. Handzo, in
20 your time remaining here, let's talk about
21 some things not proposed. The 112 license,
22 the record on the 112 license, as

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Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
)

Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
_____)

Docket No. 2005-1 CRB DTRA

MOTION OF FOR REHEARING
BY ROYALTY LOGIC, INC., ON BEHALF OF ITS COPYRIGHT OWNER AND
PERFORMER AFFILIATES

Pursuant to 17 U.S.C. Section 803 and 37 CFR 353 et seq., Royalty Logic Inc.

("RLI") respectfully moves for rehearing of the Board's March 2, 2007 decision ("Decision") holding "selection of a single Collective represents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses." Decision p. 77.¹

The Board's designation of SoundExchange as the sole national "Collective" impermissibly creates a national monopoly that flies in the face of the statutory framework (enabling competition and choice) in which this Board operates. The Decision is erroneous, without evidentiary support and contrary to law.² The resulting uneven playing field among common agents will force RLI to cease all activities on behalf of its affiliates in the face of a SoundExchange monopoly on fee collection, distribution and the information necessary to collect and distribute fees. The Boards' decision prevents

¹ This Motion is limited to rehearing on the stated issue and RLI reserves its rights to appeal the entirety of the Board's Decision despite the limited scope of this Motion.

² This Board's error is compounded by providing that only the "Collective" is entitled to receive royalty payments, statements of account and records of use of sound recordings directly from statutory licensees. Participant RLI is prevented from performing all competitive collection and distribution functions, on the designation of its copyright owner and performer affiliates, because this Board denies RLI direct access to payment, statements of account, records of use and participation in the apportionment and calculation of license fees due its affiliates.

copyright owners and performers who have designated RLI as their "common agent" for the collection and distribution of royalties in accordance with the statute (herein the "RLI Affiliates") from enjoying the full benefit of that choice competing on a level playing field with SoundExchange.³

RLI respectfully requests that the Board re-hear these issues, correct its decision to the extent it creates an impermissible national monopoly, and provide RLI with a level playing field to compete on the same basis as SoundExchange – i.e., entitled equally to receive all required notices and to receive Direct Accounting, Reporting, Payment and Audit rights - "DARPA" - from statutory licensees.

DISCUSSION

This Board correctly rejected the previous two-tier Receiving Agent/Designated Agent structure agreed to among the parties in Webcaster I stating: "The entire Receiving Agent/Designated Agent structure is a legal fiction with no basis or grounding in the statute, and we are under no obligation to preserve it . . ." Decision at page 72. The Board itself recognized that neither the Librarian nor any of the participants in this proceeding support the two-tier structure. The Board rejected both SoundExchange and RLI's request for "Designated Agent" status, which it found inconsistent with Sections 112(e) and 114(e) of the Copyright Act in that the Board states: "it is *copyright owners and performers* who may designate common agents for the receipt or royalties." (emphasis supplied by the Board at p. 74 of the Decision).

³ Although the Board speculates that it is "plausible" that a copyright owner or performer might still designate an agent of his or her own choosing (including RLI), the practical result of the Board's ruling is that only the "Collective" designated by this Board will be able to perform all of the collection and distribution functions that Congress, by express statutory authority, assigned to multiple "common agents (*emphasis added*). SoundExchange will become an exclusive national monopoly on all collection and distribution functions and RLI will be forced to cease all activities on behalf of its affiliates.

Without any record evidence in support of anything other than creating one or two "Designated Agents", this Board substituted one fiction for another - creating the concept of a single "Collective" to replace its functional equivalent -- the two-tier Receiving Agent/Designated Agent structure that the Board soundly rejected.

But the Board's chosen structure is dramatically more invidious and anti-competitive than the Receiving Agent/Designated Agent structure it replaces. The prior structure, was a flawed attempt to preserve the competitive mandates of the statute in that it provided that the Receiving Agent could not distribute collected fees unless and until the Designated Agents agreed on the methodology for allocating collected fees among the Designated Agents and their respective copyright owner and performer affiliates, and further provided that both Designated Agents were to receive statements of account and records of use of sound recordings. Here, distribution is permitted without agreement, and SoundExchange is the sole determinator of policies of collection, allocation and distribution of royalties without even an obligation to share records of use with "common agents" seeking to be paid their share of royalties from SoundExchange.

As demonstrated below, the governing statutes, including section 114(g)(3-4) of the Copyright Act, clearly evidence Congress's mandate for competition and choice among agents designated to collect and distribute royalties. This Board's decision to create a monopoly contravenes the clear language of the statute and the expressed intention of Congress, which is an abuse of the Board's authority and contrary to law.

When the language of the statute is clear, no further inquiry into its meaning is necessary or proper, and the Court should apply the statute as written, giving effect to Congress's unambiguous intent. BedRoc Ltd., LLC v U.S., 541 U.S. 176, 183 (2004).

"The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

It is a fundamental error for this Board to adopt a national monopoly in the guise of a sole national "Collective", that is contrary to Congress's clear intention to promote and enable competition among common agents as the means of achieving the fair, prompt and efficient distribution of royalties.⁴ The Board should give effect to the straightforward meaning of the statute, rehear this issue, and eliminate the national monopoly it has created.

A. Sections 112(e)(2) and 114(e)(1-2) of the Copyright Act

In sections 112(e)(2)⁵ and 114(e)(1-2),⁶ Congress clearly provided that any copyright owner could agree to direct payment and receipt of royalties from licensees or

⁴ Notably, the Board's ruling, creating a single national "Collective", is internally inconsistent with its own acknowledgement that Congress did not create a *single* national collection agent under these statutory licenses as it did in sections 111 and 119. In the Copyright Act, Congress knew how to provide for a single collection agent, as the Board recognized (see sections 111 and 119). Congress also knew how to provide for multiple collectives, utilizing the language of "common agents" to act as such in sections 115 and 116. Here, in sections 112 and 114, Congress choose language virtually identical to the language of multiple collectives in sections 115 and 116 and this Board must be consistent with that mandate.

⁵ §112(e)(2) "...any copyright owners of sound recordings...may designate common agents to negotiate, agree to, pay, or receive...royalty payments."

⁶ §114(e)(1) "...in negotiating statutory licenses in accordance with subsection (f), any copyright owners of sound recordings and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments."

§114(e)(2) "For licenses...other than statutory licenses...copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments:..."

could designate "common agents" [plural], on a non-exclusive basis, to "agree to, pay or receive payments" (functions, in the aggregate, comprising the collection and distribution functions). The statutory language is clear and unambiguous on its face – it explicitly fosters competition among common agents (and direct licensing transactions between users and copyright owners, or their common agents) as the means for the marketplace to develop efficient systems for the collection and distribution of royalties and to safeguard against exclusive arrangements by which copyright owners could use a single common agent to demand exorbitant rates.⁷ Congress specifically chose to leave the myriad issues of administrative detail to marketplace competition, and not to a single monopolistic collective. Yet, in designating SoundExchange as the sole national "Collective" this Board has created exactly what Congress intended to avoid.

This Board ignores Congress's expressed intention to create a competitive marketplace and substitutes instead, its own judgment that "...selection of a single "Collective" represents the most economically and administratively efficient system for collecting royalties under the...statutory licenses."⁸ Acting more like a legislative body than a Court, the Board then deems the potential benefits of competition on administrative fees, as set forth in statute, to be irrelevant.⁹ Destroying the means by which Congress seeks to accomplish its policy goals is contrary to the clear language of the statute, the expressed intention of Congress and is an abuse of this Board's authority.

⁷ "The requirement of nonexclusivity is intended to preserve the possibility of direct licensing negotiations between individual copyright owners and operators of digital services, rather than merely between their common agents. For example, nonexclusivity should help prevent copyright owners from using a common agent to demand supracompetitive rates, because such demands might be avoided by direct negotiations with individual copyright owners." Senate Report, Digital Performance Right in Sound Recordings Act 1995 (August 4, 1995) pages 12-13.

⁸ Decision at page 77.

⁹ "...the potential effects of competition on administration fees to be charged to copyright owners and users is not relevant," Decision at page 81.

This Board is bound to respect the legitimate policy choices made by Congress. See BedRoc Ltd., LLC., supra.

Furthermore, Congress has made the legitimate policy choice (i.e., competition over monopoly) as the means to facilitate pro competitive arrangements, licensing functions and reduce transaction costs.¹⁰ It is not necessary for RLI or its affiliates, as this Board intimates, to prove what Congress has already determined – i.e., that competition would decrease administrative costs, increase net distributions or be otherwise beneficial to copyright owners and performers.¹¹

B. Sections 114(g)(3-4) of the Copyright Act

Although no secondary source is required to understand the plain language of the statute, this Board must be guided by the plain meaning of specific subsequent legislation that further promoted competition among agents designated by individual copyright owners and performers. See Great Northern Ry Co. v U.S., 315 U.S. 262, 277 (1942) (citing Tiger v. Western Inv. Co., 221 U.S. 286, 309 (1911)); In re Chin Thloot Flar Wong, 224 F. Supp, 155, 161 (S.D.N.Y.1963). Congress made its intent to foster competition and choice even more apparent when it enacted sections 114(g)(3¹² - 4¹³) as

¹⁰ "The anti-trust protections provided for common agents...are important to facilitate the licensing of digital sound recording performances...*by reducing transaction costs*....the statutory exemption...will ensure that the formation of beneficial and procompetitive arrangements to facilitate licensing of performances will not be deterred by concerns over the possible application of antitrust laws." Senate Report, Digital Performance Right in Sound Recordings Act 1995 (August 4, 1995) pages 12-13.

¹¹ Nevertheless, this Board is wrong when it claims that there is no evidence in the record demonstrating that "any copyright owners or performers sought or claimed [the] supposed benefit [of competition]." ¹¹ The Board ignores the fact that RLI Affiliates have expressed their demand for competition with their memberships in RLI – not SoundExchange. The Board further ignores the testimony of Mr. Paterno, the attorney who represents platinum selling artist Metallica, who testified in support of competition and choice.

¹² §114(g)(3) "A nonprofit agent designated to distribute receipts...may deduct...prior to the distribution of such receipts to any person...*other than copyright owners and performers who have elected to receive royalties from another designated agent* and have notified such nonprofit agent in writing of such election, the reasonable costs of such agent..." (emphasis added).

¹³ "Notwithstanding paragraph (3), any designated agent designated to distribute receipts from the licensing

part of the Small Webcasters Settlement Act. These statutory sections work together to allow copyright owners and performers to elect whether or not they want to affiliate with a non-profit agent (i.e. SoundExchange). The non-profit agent (i.e., SoundExchange) may deduct historical licensing, litigation and other costs, retroactive to 1995, from royalties to be distributed under the statutory license from its members. But others are free to designate another agent and avoid such deductions by SoundExchange (i.e., RLI).

Section 114(g)(4) further expresses Congress's intent in this regard by providing that a "for-profit" agent (i.e., RLI) could also deduct such costs, provided that it secured the authorization from its affiliates to do so. Senator Jesse Helms provides clear guidance as to Congress's intent in enacting this statute: "The deductibility provision contained in...the bill is one that was viewed as important to several parties. The final provision is *intended to encourage competition among agents designated to distribute royalties.*" ¹⁴

The Board's Decision renders sections 114(g)(3-4) surplusage — without meaning - and is contrary to law. These provisions were enacted to allow certain copyright owners and performers to receive "gross" royalties from licensees without having to go through SoundExchange and being subject to SoundExchange's administrative costs. Copyright Owners and performers who do not want to pay for SoundExchange's administrative costs, litigation or policy initiatives, do not have to do so under this clear statutory mandate. Yet the Board's decision is contrary in all respects

of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts, the reasonable costs identified in paragraph (3) of such agent incurred after November 1, 1995, with respect to such copyright owners and performers who have entered with such agent a contractual relationship that specifies that such costs may be deducted from such royalty receipts."

17 U.S.C. §114(g)(4).

¹⁴ 107 Cong. Rec. S11549 (Nov. 19, 2002) (Statement of Sen. Jesse Helms) (emphasis added).

to Sections 114(g)(3-4). The Decision gives SoundExchange a national monopoly to collect the "gross" dollars from the user community while leaving RLI and any other designated "common agents" to collect their members' royalties, without any way of verifying the amounts due (SoundExchange is the only entity that gets DARPA), and subject to the vicissitudes of SoundExchange's Board of Directors and their policies with respect to incurring chargeable costs.¹⁵

It is clearly erroneous and contrary to the evidence and the law for the Board to inhibit certain copyright owners and performers (the RLI Affiliates for example) from choosing among agents (whether they are for-profit or not-for-profit) competing on a level playing field to among other things, avoid the costs incurred by SoundExchange as sections 114(g)(3-4) provide.

C. Unaffiliated copyright owners and performers

This Board justified its creation of a national monopoly, in part, by finding that the existence of "choice" among more than one Collective "creates a significant practical difficulty in resolving how copyright owners and performers who have not designated a Collective should receive their royalty distributions."¹⁶ However, it is plausible that the Board could have determined that this issue was not clearly dealt with in the statute. "The power of an administrative agency to administer a congressionally created...program necessarily requires the...making of rules to fill any gap left...by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). The Board could have assigned responsibility for unaffiliated copyright owners and performers to SoundExchange (as the Librarian did in Webcaster I) as a reasonable accommodation that Congress might have sanctioned.

¹⁵ SoundExchange has already expressed its intention to deduct fees and costs from Royalties due the RLI Affiliates. See RLI Exhibit 5 (Letter from John Simson to Ronald Gertz, dated July 9, 2003).

¹⁶ Decision at page 76.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 ("...if the statute is silent or ambiguous with respect to a specific issue, the question...is whether the agency's answer is based on a permissible construction of the statute."). What this Board cannot do is adopt a national monopoly model that is contrary to law in order to close a possible gap in the statute with respect to unaffiliated copyright owners and performers.

D. The Proportionate division of fees

Neither is the fact that services may need to determine the proportionate division of fees among copyright owners or their common agents a justification for this Board's designation of a sole Collective. Congress again specifically adopted competition as the means to resolve such issues when it assigned to any copyright owners and any transmission services the ability to negotiate the proportionate division of fees among copyright owners and performers and authorized transmission services to themselves designate common agents to perform such functions. Again, this Board cannot substitute its judgment for the clearly expressed choice of Congress (in sections 112(e) and 114(e)) to allow the parties to work out the allocation of payments among common agents in a competitive marketplace.

E. DARPA

This Board is charged with implementing reasonable regulations consistent with the Congressional intent to create a competitive marketplace by ensuring that common agents have equal access to statements of account, payments and records of use that allow them to compete on a level playing field. For this Board to deny RLI and its Affiliates timely access to payment, statements of account and records of use of sound recordings

directly from licensees, or in the alternative, to force RLI to receive payment and such data, if at all, "in second position" from SoundExchange creates a hierarchy of second class common agents that is simply not supported in the law.

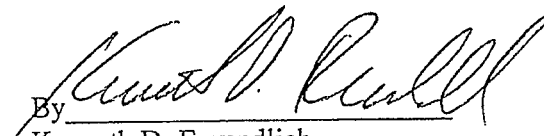
CONCLUSION

This Board does not have the authority to substitute its judgment for that of Congress by deeming issues of competition and efficiency "irrelevant" and imposing instead, a national monopoly on copyright owners and performers who choose not to be represented by the Collective this board has designated. For the foregoing reasons, RLI respectfully requests that the Board rehear the issue of whether there should be a single Collective and correct its Decision by either eliminating the notion of a "single" Collective or making it clear that under whatever system the Board sets up, the RLI Affiliates will be entitled to receive "gross" monies, statements of account and records of use of sound recordings on the same basis as its competitor SoundExchange.

Additionally, because this ruling raises serious anti-competitive issues and involves statutory provisions granting limited anti-trust immunity, the requirements for which may not have been met, we respectfully request that the Board seek the views of the Anti-Trust Division of the Department of Justice.

Dated: March 15, 2007

Respectfully submitted,

By 
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Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
WASHINGTON, D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN
SOUND RECORDINGS AND EPHEMERAL
RECORDINGS

) Docket No. 2005-1 CRB DTRA
)
)
)
)
)
)

MOTION FOR REHEARING

The Small Commercial Webcasters (individually, an "SCW"),¹ by their attorneys and pursuant to 37 CFR §§ 353.1-353.2, hereby submit a Motion for Rehearing of the Determination of Rates and Terms ("Board Decision") in the captioned matter. Rehearing is necessary insofar as, *inter alia*, the Board erred in failing to appreciate the need for a royalty rate for SCWs that treats them as separate class from large webcasters. Specifically, the actions and/or refusals to act that were not supported by the record or were contrary to legal requirements, such that rehearing is necessary, include portions of the Board Decision that:

- refused to adopt a definition of "small webcaster" for purposes of determining royalty rates;
- established a minimum \$500-per-channel annual fee without adequately defining "channel" and in a manner at odds with the asserted purpose of the minimum annual fee; and
- required SCWs and others that have operated under a percentage-of-revenue royalty pending Board action, to pay a per-performance usage rate for periods predating the Board Decision, and not providing an alternative metric for the periods going forward.

With respect to all but the first of these determinations, the SCWs understand that other parties will also raise these issues as grounds for rehearing. Rather than reiterating these failings of the

¹ The Small Commercial Webcasters participated in the proceedings that resulted in the order for which rehearing is sought, and consist of AccuRadio, Inc.; Radioio; Digitally Imported Radio; Discombobulated, LLC; 3wk, LLC and Radio Paradise.

Board Decision at length, SCWs concur with and incorporate by reference the arguments of its co-movants on these points, and address them here solely to provide notice that these issues raise problems for the SCWs as well as for other webcasters. Given the ten page limit on this Motion, the SCWs would understand this to be more of a notice pleading, and hereby give notice that they are also affected by these other issues that will be raised by other parties. Accordingly, SCWs address at any length here only the remaining issue regarding the Board's failure to adopt a definition of "small webcaster."²

I. Refusal to Adopt a Definition of "Small Webcaster"

The Board improperly declined to adopt a royalty that reflects the SCWs' unique circumstances primarily because, it claimed, "there is no evidence in the record about how [to] delineate between small ... and large webcasters," and not due to lack of evidence needed to set a willing-SCW/willing-seller rate. Board Decision at 19. In actuality, the SCWs proffered evidence sufficient to support a "small webcaster" definition for use in establishing a royalty unique to that class of entities. Testimony offered by SCWs stated that entities eligible for categorization as "small webcasters" are those "either ... owned by individuals (as opposed to being a subsidiary of a much larger corporation) or" are "small public compan[ies]" that in either case "are not controlled or affiliated with" larger media conglomerates.³ Unlike large webcasters, where audio services represent but a tiny proportion of their overall Internet presence and online revenues, small webcasters focus almost exclusively on providing online audio services that predominantly account for whatever revenues the SCW earns. Hanson WDT at 2.

² The SCWs, by filing this pleading, do not in any way waive any rights to raise other issues that may, more appropriately, be raised on appeal following the publication of the decision in the Federal Register.

³ Hanson WDT at 2. The SCWs use here the same citation conventions as the Board. See Board Decision at 8 n.1.

Placing these criteria in a practical terms, one of the fundamental indicia of whether a company qualified as a "small webcaster" is whether it engages in "pure" webcasting, *i.e.*, relies principally on webcasting for revenue. This eliminates "portal" websites such as Yahoo! AOL, and others. These entities engage in webcasting as only a small part of an overall online business structure and have revenue streams from other online activities that dwarf those they receive from webcasting. The "purely webcasting" requirement also eliminates sites maintained by terrestrial broadcasters that simply simulcast online their primary business — *i.e.*, over-the-air content, which is their principal source of revenue — or that otherwise engage in webcasting only ancillary to the principal over-the-air line of business. The foregoing entities that do not qualify as "small webcasters" have a number of other business interests and revenue sources that can support payment of sound recording digital performance right royalties and that make their webcasting a secondary (or tertiary, etc.) venture that, if levied under a percentage-of-revenue royalty, would result in the royalty capturing proceeds from far more than webcasting.

Given that the royalty requested by the SCWs in this proceeding would capture a percentage of revenue of the entire revenue of the entity which elects the rate, the category of "small webcaster" is self-defining. Small webcasters would be those entities — and only those entities — willing to pay a percentage of their gross revenues as a royalty under the digital performance right compulsory license. *See* Hanson WDT at 18. Entities unwilling to pay a percentage of their gross revenues — which would occur only for those not engaged in "pure" webcasting since it would capture revenues from non-webcasting sources — would not qualify. Adopting such a single-criteria, self-selecting "small webcaster" definition (and a percentage-of-revenue rate that is non-confiscatory) would facilitate the Board's adoption of a royalty framework for small webcasters that reflects their unique status.

Docket No. 2005-1 CRB DTRA

**JOINT MOTION OF IBS AND WHRB (FM)
FOR PARTIAL RECONSIDERATION**

Pursuant to Section 803(c)(2) of the Copyright Act, as amended, Intercollegiate Broadcasting System, Inc., a non-profit association of some eight hundred of the 1300-1500 educationally affiliated webcasters, and Harvard Radio Broadcasting Co., Inc., the eleemosynary licensee of Station WHRB (FM), Cambridge, Massachusetts, respectfully move jointly for reconsideration of two parts of the Judges' rate determination dated March 2, 2007, that impact the small, educationally affiliated, non-commercial webcasters in particular. Specifically, movants seek --

(i) modification of the Judges' adoption of Section 380.1(b) (legal compliance) in light of their interlocutory decision to defer consideration of amendment of the record-keeping and reporting requirements to the collateral rulemaking proceeding, Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, Docket No. RM 2002-1D, and

(ii) clarification of what appears to be an inconsistency between the definitions of "aggregate tuning hours (ATH)" and "performance" in Section 380.2 (definitions) of the rules as adopted.

The two points have force by reason of perceived impacts peculiar to the situations of many of the small, educationally affiliated webcasters under the rate structure in new Section 380.3(a)(2) (non-commercial webcasters).

I. THE JUDGES SHOULD ALLEVIATE THE ADVERSE COMBINATIONAL IMPACT ON SMALL, EDUCATIONALLY AFFILIATED WEBCASTERS OF SECTION 803.1(b) AND THE INTERIM RECORD-KEEPING AND REPORTING REQUIREMENTS.

The determination's adoption of Section 803.1(b) and the Judge's interlocutory procedural decision to defer consideration of the record-keeping and reporting requirements in light of the new non-commercial rate structure, produce a combined effect that severely impacts most of the small, educationally affiliated webcasters. This motion seeks alleviation of that particular combinational effect that threatens the continued operation of many such webcasters and the entry of new especially high-school-based webcasters. Specifically, the joint movants request the Judges to rule, pending the adoption of final rules, to provide that Section 380.1(b) is satisfied by the under-cap non-commercial webcasters' using best efforts to comply with the interim rules. This would be consistent with the Determination's declarations under Point V(B)(4)(b)(i) (late fee for statements of accounts) at 90 that "the burden is upon the Service to provide as complete and error-free a statement as possible" and excusing "inconsequential good-faith omissions or errors". This would also be consistent with the Board's prior agreement "that the law does not allow any services to avoid *altogether* reporting their use of sound recordings

under the statutory licenses” in footnote 4 its opinion of October 3, 2006, in Docket No. RM 2005-2, 71 Fed. Reg. 59010, 59012 (emphasis supplied).

In their order herein of September 8, 2006, denying the Radiobroadcasters’ motion for clarification, etc., the Judges did not strike the evidence already in this record concerning recordkeeping. Rather in that order they ruled consistently with IBS and WHRB (FM)’s partial opposition, filed August 25, 2006, that the evidence received herein “aids the Board’s understanding of the collections/payment administration process” in Docket No. RM 2005-2. Point V(B)(4)(d)(i) of the instant Determination at 97 recites that “such testimony was allowed to remain in the record as evidence, if any, of the relative costs to the Services ... associated with recordkeeping.”

As the Determination notes at the outset of Point V(B)(4)(d)(i), at 97, subsequent to the closing of the record and the issuance of the Determination herein, the Judges issued an Interim Final Rule in Docket No. RM 2005-2, 71 Fed. Reg. 59010 (October 6, 2006), codified as 37 C.F.R., Part 370.

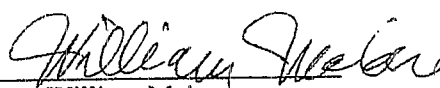
The Judges deferred consideration of record-keeping and reporting costs generally to Docket No. RM 2005-2 on the ground that the Board’s “ability to ... adjust the costs of recordkeeping is far more direct” in that context than this rate determination proceeding and is more properly handled there.” The Board had indicated that, “because our recordkeeping regulations are interim and not final, there is ample opportunity to again address the Services’ costs in a future rulemaking.” Determination, Point V(B)(4)(d)(i) at 98.

In addition, the Judges should clarify Section 380.1(a) to eliminate the perverse result in effective fees of the inconsistency in subsections (a) and (i) in excluding non-subject digital music.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

HARVARD RADIO BROADCASTING CO., INC.

by 
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March 19, 2007

Attachment: Affidavit of Capt. Kass.

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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C. 20554

DECLARATION OF FREDERICK J. KASS

I am the same Frederick J. Kass whose written direct testimony was earlier submitted to the Board and who testified before the Board as a witness on behalf of the Intercollegiate Broadcasting System, Inc. I submit this declaration in support of the Joint Motion of IBS and WHRB (FM) for reconsideration of the decision determining rates. Absent reconsideration the Board's decision to defer any modification of the interim record-keeping and reporting requirements to align them with the rules adopted in the rate determination decision will adversely impact the ability of the smaller, under-cap, non-commercial, educationally affiliated, webcasters to continue, or to commence, webcasting.

For these smaller educationally affiliated webcasters to immediately come into compliance with the combination of the interim final rules and Section 380.1(b) would be impossible. Unlike the commercial webcasters, whose largely unattended operations are built around automated programming and logging, the smaller, educationally affiliated webcasters are manually programmed - often on-the-fly, and the solo announcers for such webcasts do not have the capability of programming and recording the four data elements sought by SoundExchange for each performance. Logging on a year-round basis, such as contemplated by the rules, is simply not practical for such operations thinly

staffed by a limited number of volunteers with heavy competing academic demands on their time. By and large these webcasters are simply not in a position to command the ability-level and quantity of volunteer-hours for recording and reporting. As a practical matter, compliance requires an automated audio programming system with a database of music. Unlike most commercial simulcasters with tightly constricted playlists, these small webcasters typically draw on a broad range of eclectic music, which it would not be practicable for them to key into a database. In addition, computation of ATIs requires a dedicated server capable of capturing fine-grained data, but much of that data is not available to these small webcasters because they don't own or control the servers which they use.

The prospects are particularly grim for the webcasters and prospective webcasters operating in high schools. They are a rapidly growing "hot bed" of educational webcasting. High school webcasters constitutes over thirty percent of the membership of IBS. As I testified, IBS regularly holds regional meetings of its member-stations. After ~~November~~ IBS' regional meeting in Boston in ~~December~~ - well after the time for taking evidence in this proceeding was past -- I was surprised to find that for the first time over fifty percent of the registrants were from high schools!

Based on my familiarity with student broadcasting and webcasting operations, gained over nearly five decades, it is plain that a large percentage of the 90,000 high schools in the country, as well as many webcasting operations at small colleges, would be foreclosed from complying with the rules that were designed for an incompatible operational model on a quite different scale. As a result, America's sons and daughters

at these institutions would be deprived of the educational experience that is important to their careers and to the country. A generation of our youth that must compete globally in a digital world would be denied the educational opportunity to experiment with digital communication, webcasting techniques, management, etc., using the catalyst of musical performances, incidental to that educational mission.

I hereby swear under the penalties of perjury that the foregoing statements of fact are true and correct to the best of my knowledge and belief.


Frederick J. Kass

Pittsburgh, Pennsylvania
March 18, 2007

Certificate of Service

I hereby certify that I have caused to be dispatched by e-mail and mail copies of the foregoing Joint Motion of IBS and WHRB (FM) for Partial Reconsideration to the following persons:

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Educational Media Foundation


William Malone

Washington, D.C.
March 19, 2007

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MAR 19 2007

Copyright Royalty Board

UNITED STATES COPYRIGHT ROYALTY JUDGES

In The Matter Of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2005-1 CRB DRTA

MOTION FOR REHEARING OF THE DIGITAL MEDIA ASSOCIATION

The Digital Media Association and its member companies, including Yahoo! Inc., AOL LLC, and Live365.com (collectively "DiMA"), respectfully request rehearing of the Copyright Royalty Judges March 2, 2007 Determination of Rates and Terms (the "Decision") (on certain limited issues). The consequences to DiMA of the Judges' determination to increase the prior usage-based royalty by 250% over the course of the 2006-2010 statutory license term, while rejecting a revenue-based fee alternative at the licensee's option, are truly catastrophic. DiMA thus expects (and fully reserves its rights) to file an appeal to challenge the erroneous – and surely industry-stifling – determination of the Judges on multiple grounds beyond the scope of this motion. This motion addresses three limited issues that require immediate rehearing in order to avoid plainly erroneous results and serious imminent harm to DiMA member companies that may not have been foreseen by the Judges. Namely, (i) clarification of the meaning of the "per station"/"per channel" minimum fee; (ii) the elimination of an aggregate-tuning-hour (ATH) royalty metric; and (iii) the erroneous adoption of Professor Pelcovits' "interactivity adjustment."

I. THE COPYRIGHT ROYALTY JUDGES SHOULD ORDER REHEARING TO CONSIDER AND CLARIFY THE MEANING OF THE "PER STATION" / "PER CHANNEL" COMPONENT OF THEIR MINIMUM FEE DETERMINATION

First, DiMA seeks clarification of what is comprehended by the "per station" / "per channel" verbiage of the Decision as it applies to certain marketplace circumstances.

Depending on the Judges' determination of that issue, DiMA seeks a stay of implementation of the determination pending DiMA's exhaustion of its appeal to the D.C. Circuit Court of Appeals.

DiMA believes it was error for the Judges to set a minimum fee of \$500 per station/channel on an "uncapped" basis (directly contrary to the \$2,500 per licensee cap set forth under the prior rate structure, see 37 C.F.R. 262.3(d)(2)). As the Judges are aware, a variety of statutory webcasting offerings are available in the marketplace. The immediate problem prompting this portion of DiMA's rehearing motion relates to webcasting services that enable users to create or access many different types of programming that, under this definition, could each be considered to be a "station" or "channel" subject to the \$500 minimum fee. Individual services can – and do – offer many thousands (or even millions) of examples of this type of programming, including: (a) playlists inspired by the works of given artists ("artist-based programming") or based to some extent upon preferences expressed by a listener ("customized radio"); or (b) an aggregation of individual stations/channels consisting largely of "hobbyist" or other small webcasters ("aggregators"). To the extent the Decision were to be construed as requiring a \$500 annual minimum fee for *each* such individual program (payable in advance, or as early as May 15, 2007, for year-2007 minimum fees), it would require a single statutory licensee to pay so-called "minimum" annual fees of dozens of *millions* of dollars (or more).

DiMA does not believe that this situation was foreseen or intended by the Judges.

A. The \$500 Per-Channel Minimum Fee Would Produce Egregiously Unfair Results for Many Services

1. Artist-Based Programming and Customized Radio

The trial record reflects that many webcast services offer their users artist-based programming, whereby users can identify an individual artist (or artists) and the service will then provide a (statutorily-compliant) playlist of songs inspired by and/or similar in style to those of

the selected artists. See Griffin Tr. 5/2/06 at 84:13-18; Roback WDT, Ex. 1 at 3, ¶ 8. In these circumstances, there is arguably a separate "station" of this type corresponding to *thousands* of different artists whose works are available on the licensee's service; indeed, there are upwards of 100,000 such artist-based programs available on a single webcasting service.¹ If each such example of artist-based programming was deemed a separate "station" for purposes of computing the minimum fee owed by a service under the Decision, the result would be an astronomical minimum annual fee in the multi-million-dollar range (literally \$50 million for a service offering with 100,000 artist-based program options).

The record also reflected that certain webcast services offer customized radio, for which a computer algorithm generates a statutorily-compliant playlist after receiving some degree of input from a user of the service. LAUNCHcast is one example of such a service discussed during the hearing (see Roback WDT at ¶ 11, Ex. 1 at ¶¶ 10-13), where users have created literally millions of such customized "stations" (in addition to the 200 or so preprogrammed genre- and theme-based stations offered on the rest of the service).² Other DiMA members, such as Pandora, also operate services which include upwards of 100,000 algorithmic "stations" generated after receiving initial input from Pandora users regarding their musical preferences; and Pandora already pays among the highest royalties to SoundExchange under the statutory

¹ As DIMA would demonstrate upon rehearing by way of example, DiMA member RealNetworks provides users access to over 100,000 preprogrammed artist-based radio channels within its webcast service. Currently RealNetworks pays a minimum fee of \$2500.

² Mr. Roback also testified that certain of the record labels claim that Yahoo!'s user-influenced programming is "interactive" and therefore falls outside the scope of the Section 114 statutory license – and in fact BMG is pursuing litigation against Yahoo! on this issue. Roback Tr. 6/21/06 at 85-88. However, other SoundExchange members accept that Yahoo!'s user-influenced programming is appropriately licensed under Section 114 and Yahoo! pays these members, through SoundExchange, the statutory rate. Roback Tr. 11/09/06 at 126-28. So long as some of SoundExchange's members accept statutory fees for this programming, the minimum fee issue is implicated in respect of this type of programming.

license. See Serv. Reb. Ex. 36 (list of SoundExchange licensees and their payments). If each channel requested by a user (through specification of artists, genres, moods, etc.) was deemed a separate "station" for minimum fee purposes under the Decision, the resultant minimum annual fee could literally be in the hundreds of millions of dollars. It is inconceivable (and certainly not justifiable) that the Judges intended this consequence.

2. Aggregators

The record also reflects that certain particular webcast services – Live365 being perhaps the most well known example – aggregate small "hobbyists" and terrestrial radio stations numbering in the thousands or even tens of thousands. In the case of Live365, if each of its 10,000+ stations (see Lam WDT at 4; Porter WDT at 4) was considered a separate "station" for minimum fee purposes, the result would be a minimum annual fee of \$5 million – a fee almost four times higher than its royalty obligations would be under the Judges' per-performance royalty determination (and one that would render Live365's business wholly uneconomic).

B. These Potential "Minimum" Fees Are at Odds with the CRJs' Own Statements About Adopting a "Low" Minimum Fee to Cover SoundExchange's Administrative Costs.

Under an expansive interpretation of "channel" or "station" that would sweep in the many versions of artist-based programming and customized radio, as well as aggregators, the so-called "minimum" fees that these webcast services would have to pay would be staggering (and would vastly exceed the royalty obligations due under the Judges' primary usage-based metric). It is self-evident (though DiMA would proffer further evidence on rehearing) that if such an interpretation were to stand, the result would force several of the largest webcasters (which are among SoundExchange's largest webcast-royalty payors) to shut down their webcast services. DiMA respectfully requests clarification that such a result was not what the Judges intended – as it is at odds with certain of the CRJs' own statements in the Decision.

Specifically, the Judges in explaining their minimum fee determination observed that this "\$500 minimum per channel or station payable in advance is a substantially smaller amount" in comparison to the "minimum fees [contained in SoundExchange's] benchmark marketplace agreements." Decision at 48. In stark contrast to such observation, however, the \$500 per channel minimum fee, unless clarified on rehearing, could trigger "minimum" fees that would utterly dwarf the very benchmark agreements to which the Judges referred.³

Further, as noted in footnote 3, the Judges' minimum fee determination was ostensibly rooted in SoundExchange's actual administrative costs. In the case of webcasters offering artist-based programming and customized radio, or aggregators such as Live365, it is undisputed (and could be supplemented on rehearing) that the *webcasting service* aggregates its data and reports to SoundExchange on a consolidated basis across all stations and programming comprising the service; the number of stations is not even part of the calculations or data fields provided to SoundExchange. There is no evidence to warrant a minimum fee of \$500 per station/channel to account for additional administrative costs as if each service reported to SoundExchange separately for each station, because the service is only submitting one report.

For the foregoing reasons and in light of the manifest unfairness that would result were the \$500 per-channel minimum fee not clarified upon rehearing (so it is limited, as it has been, to \$2500), DiMA respectfully requests a rehearing and clarification of this aspect of the Judges'

³ Moreover, the minimum fee/advances in the benchmark agreements, as the record makes clear, were included as an alternate form of payment for, and protection against, non-revenue-earning services that use a lot of music but would pay very little under a percentage-of-revenue metric. See Kenswil WDT at 8; Eisenberg WDT at 16; see also Report at 24-25, and n.13 (describing possibility of underpayment under a percent-of-revenue calculation). Since the Judges have not adopted such a percent-of-revenue metric, but instead have adopted a per-play metric under which such services will be forced to pay for what they play, the need for such significant advances is in large part mooted, with the primary purpose of the minimum fee being to cover SoundExchange's administrative costs. Report at 24-25, 47-48.

Decision. At a minimum, DiMA requests that the Judges stay implementation of their minimum fee determination pending DiMA's exhaustion of its appeal to the D.C. Circuit Court of Appeals.

II. THE JUDGES SHOULD GRANT REHEARING TO RECONSIDER THE POSSIBILITY OF AN ATH PAYMENT METRIC ALTERNATIVE, AT LEAST WITH RESPECT TO RETROACTIVE ROYALTY PAYMENTS AND UNTIL EXHAUSTION OF DIMA'S APPEAL TO THE D.C. CIRCUIT

DiMA seeks a rehearing and reconsideration of the Judges' implicit rejection of the ATH metric for usage-based royalty payments; and, depending on the Judges' determination of that issue, DiMA seeks, at a minimum, a ruling that any payments due for retroactive time periods and during the pendency of DiMA's appeal may be calculated on an ATH basis (albeit consistent with the "economics" of the Judges' Decision, as described more fully below).

A. The Adoption of an Exclusive Per-Play Royalty Metric Unfairly Harms Services That Have Tracked, Reported and Paid Royalties For Several Years Based On An ATH Measurement

As the record indicates, the pre-existing statutory license rate structure (established based upon the 2003 agreement between DiMA and SoundExchange) provided for the ability of services to compute usage-based royalties *either* based on a per-performance metric (0.0762¢ per performance) *or* an ATH metric (1.17¢), at the licensee's option. See, e.g., Potter WDT ¶¶ 7; 37 C.F.R. 262.3(a)(1)(i)-(ii), (2)(i)-(ii). In response, most webcasters set up their tracking and reporting systems to compute payments based on ATH, and have continued to maintain their records and pay SoundExchange in this fashion to the present, including during the "interim" period since January 1, 2006. See Roback WDT ¶¶ 15, 17, 21-22; Winston WDT ¶¶ 14, 26. The decision to continue paying in this fashion was validated by the fact that the commercial parties to the present proceeding – including both SoundExchange itself and DiMA – included an ATH payment option in their initial rate proposals to the CRB. The services continued to track

and report based on ATH expecting that, whatever the rates determined by the Judges, they would be able to pay based on ATH.

It was not until its rebuttal case that SoundExchange introduced a rate proposal that lacked an ATH option for calculating usage-based payments (providing, instead, for both a revenue-based metric and a usage-based metric, the latter based solely on a per-performance calculation). At this point, it was too late for the DiMA participants to counter SoundExchange's changed usage-based proposal or adduce evidence as to: the usage-based reporting practices of DiMA members; their reliance on (and financial investment in) ATH-based reporting; and the unfairness of eliminating an ATH-based reporting option for a usage-based royalty metric. On rehearing, DiMA would proffer evidence that: (i) a number of services have not tracked and do not retain data from the "Retroactive Period" (i.e., January 2006 – March 2007) sufficient to calculate usage-based payments on a per-performance (as opposed to an ATH) basis; and (ii) that even for those services that maintained performance data, it is unlikely that they would be able to calculate the precise amount due under the per-performance structure articulated by the Judges – and, moreover, the burden and cost of seeking to reconstruct records and compute amounts due on a per-performance basis would be substantial. DiMA further submits (and would demonstrate upon rehearing) that converting to a per-performance metric for calculating usage-based royalty payments for the going-forward period (April 2007-forward) will require substantial time and monetary investment on the part of many webcasters.

B. A Simple, Fair Solution Exists Consistent with the Judges' Decision

The Judges' overriding goal of establishing a usage-based compensation structure (at increasing rates over the statutory license term) can be accomplished *without* requiring that Services incur the costs and burdens described above. DiMA submits that the Judges should reconsider the issue of how their desired usage-based royalty may be calculated, both with

respect to the Retroactive Period and the going-forward statutory license term, through the use of an ATH measurement – an option the Judges did not explicitly address in the Decision. Were the Judges to grant a rehearing on this issue, DiMA would establish that the principle of usage-based royalty accounting adopted by the Judges can be honored with an ATH option without creating the burdens and difficulties that inhere in a per-performance calculation, and while fully implementing the quantitative usage-based rate increases contemplated by the Decision.

As the Judges will recall, the prior usage-based royalty for commercial webcasters was expressed as an option between .0762¢ per performance or 1.17¢ per ATH, the latter being equivalent to (and based upon the general industry practice among webcasters of) an average of 15 tracks played per hour. The per-performance rates determined by the Judges for the 2006-2010 statutory term reflect the following increases over the prior per-performance rate:

2006: $1.05 \times$ prior per-performance rate ($.08 \div .0762$)
2007: $1.44 \times$ prior per-performance rate ($.11 \div .0762$)
2008: $1.84 \times$ prior per-performance rate ($.14 \div .0762$)
2009: $2.36 \times$ prior per-performance rate ($.18 \div .0762$)
2010: $2.49 \times$ prior per-performance rate ($.19 \div .0762$)

These new per-play rates can be implemented, while continuing to permit webcasters to calculate a usage-based royalty on an ATH basis, by simply adjusting the prior ATH rate of 1.17¢-per-hour by the same multiples:

2006: 1.23¢ per ATH (1.17×1.05)	2009: 2.76¢ per ATH (1.17×2.36)
2007: 1.68¢ per ATH (1.17×1.44)	2010: 2.91¢ per ATH (1.17×2.49)
2008: 2.15¢ per ATH (1.17×1.84)	

Although DiMA vigorously disputes and will challenge on appeal these new extraordinarily high rates, such an approach would preserve the economic benefit of the new higher rates for SoundExchange, while relieving the services of the substantial and unnecessary burdens and costs associated with a conversion to a strict per-performance metric.

Even if the Judges are not persuaded to establish this alternate method of calculating usage-based fees for the entirety of the statutory license term, DiMA urges the Judges – at a minimum – to provide for this mechanism of calculating amounts due for the Retroactive Period and the duration of the appeal process herein (which would give the webcasters an opportunity to develop the systems necessary to report and pay on a per-performance basis should neither the Judges nor the Court of Appeals grant DiMA its requested relief). Surely, the hardship to webcasters associated with having to seek to re-purpose data and/or invest in technology to enable strict per-performance accounting/payment for the Retroactive Period and the immediate short-term future is substantial; meanwhile, there is no countervailing economic hardship to SoundExchange, since the magnitude of royalty increases compared to the prior per-performance rates would be accommodated by the mechanism discussed above.

This approach also accords with the past practice of the Copyright Office when faced with a situation requiring the retroactive application of new requirements. In 2004, when establishing new regulations for notice and recordkeeping under the section 112 and 114 compulsory licenses, the Copyright Office recognized that it would impose an “unfair burden” to require the “services to report information from the historic period.” Instead, it was determined that the “data already provided by the preexisting subscription services to SoundExchange” was a reasonable proxy for the new reporting standard. See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 69 Fed. Reg. 58261 (Sept. 30, 2004).⁴ It is no less appropriate here to avoid “unfair burden” to the webcasters and to use the ATH metric (adjusted upward as explained above) as a reasonable “proxy” for a usage-based royalty.

⁴ SoundExchange supported this approach and noted that it was “the best solution for a bad situation - i.e., a situation in which services using the statutory license had not been required to retain data on use of sound recordings.” 69 Fed. Reg. at 58261.

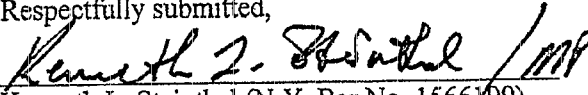
For the foregoing reasons, rehearing should be granted to consider an ATH-based alternative payment structure for the usage-based royalties determined by the CRB. Upon rehearing: (i) the Judges should establish an ATH-based alternative consistent with the "economics" of the Decision both for the Retroactive Period and the remainder of the statutory license term; and (ii) at a minimum, such relief should be granted for the Retroactive Period and a transition period during the duration of DiMA's appeal to the D.C. Circuit Court of Appeals.

III. THE JUDGES SHOULD REHEAR AND RECONSIDER THE VALIDITY OF PROFESSOR PELCOVITS' INTERACTIVITY ADJUSTMENT

DiMA also seeks relief in the form of the Judges' reconsideration of the validity of the "interactivity" adjustment made by Prof. Pelcovits and adopted by the Judges (see Decision at 32, 39), notwithstanding the directly contrary evidence offered by the services during trial – evidence that has since been corroborated and adopted by *another of SoundExchange's own expert witnesses* in the 2006-1 CRB DSTRA proceeding filed a mere month after rebuttal statements were filed in this proceeding. DiMA hereby incorporates by reference and adopts Section I of the Radio Broadcasters' Motion for Rehearing, which addresses this issue.

March 17, 2007

Respectfully submitted,

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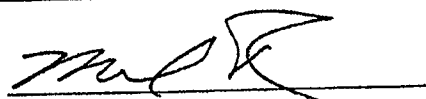
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CERTIFICATE OF SERVICE

I hereby certify that copies of MOTION FOR REHEARING OF THE DIGITAL MEDIA ASSOCIATION were served on March 17, 2007 by electronic mail and by first class mail on following parties:

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Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

IN THE MATTER OF:

DIGITAL PERFORMANCE RIGHT
IN SOUND RECORDINGS AND
EPHEMERAL RECORDINGS

Docket No. 2005-1 CRB DTRA

RECEIVED

APR 02 2007

Copyright Royalty Board

**BROADCASTERS' SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION FOR REHEARING**

Radio Broadcasters¹ ("Broadcasters") respectfully submit this supplemental brief in support of their March 19, 2007 Motion for Rehearing of the Copyright Royalty Judges' March 2, 2007 Determination of Rates and Terms (the "Decision"), pursuant to the Copyright Royalty Judges' March 20, 2007 Order on Motions for Rehearing (the "March 20 Order").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The motion for rehearing submitted by Broadcasters demonstrated that rehearing is warranted in this case. *See* Broadcasters' Motion for Rehearing (Mar. 19, 2007) ("Broadcasters' Motion"). That Motion was, by rule, limited to ten pages. The Judges invited further written argument on the issues raised in the parties' motions in the March 20 Order. This supplemental memorandum: (1) discusses the appropriate standard for a grant of rehearing; and (2) expands upon the necessarily abbreviated presentation concerning the erroneous interactivity adjustment

¹ Radio Broadcasters are Bonneville International Corp., Clear Channel Communications, Inc., Susquehanna Radio Corp. and the National Religious Broadcasters Music License Committee. In addition, the National Religious Broadcasters Noncommercial Music License Committee has joined in support of Broadcasters' Motion for Rehearing, joins in this Supplemental Memorandum and is included within the term "Broadcasters" in this Brief. All other defined terms in Broadcasters' Motion apply in this Supplemental Memorandum.

offered by SoundExchange's expert, Dr. Pelcovits, and relied upon in the Decision.

Broadcasters refer the Judges to Broadcasters' Motion for its discussion of: (1) SoundExchange's abandonment of its flawed interactivity model in the more recent SDARS case; and (2) the necessity of using ATH for the calculation of license fees.

As shown below and in Broadcasters' Motion, rehearing is justified in this case because the Decision is erroneous. Specifically:

- The Decision fails to address or account for the fact that Dr. Pelcovits' 55% adjustment for the difference between the value of interactive and non-interactive services is mathematically impossible given Dr. Pelcovits' own assumptions and the undisputed testimony concerning the characteristics of the relevant prices and license fees in the interactive and non-interactive service markets.
- Dr. Pelcovits' testimony that the difference between the subscription price and license fee in the non-interactive market should equal the difference between the subscription price and license fee in the interactive market -- coupled with Dr. Pelcovits' central assumption that the ratio of the license fee to the subscription price in the two markets will be the same -- necessarily means that the subscription prices and license fees for interactive services must equal the subscription prices and license fees for non-interactive services. In other words, according to Dr. Pelcovits' model, interactivity has no value. This is known to be false and is flatly contradicted by Dr. Pelcovits himself. Thus, Dr. Pelcovits' assumptions must be false, and his model must fall.
- After rebuttal evidence was submitted in this case, SoundExchange itself abandoned Dr. Pelcovits and his 55% interactivity adjustment in favor of a radically different interactivity adjustment advanced by Dr. Janusz Ordover in the SDARS Case (in which SoundExchange is seeking multiple billions of dollars in fees from satellite digital audio radio services) for exactly the same purpose as in this case.
- Dr. Ordover recognizes a much greater difference in the value of interactivity in the license fees charged for interactive and non-interactive services than the 55% adjustment relied upon by Dr. Pelcovits and the Decision.
- The Ordover interactivity adjustment, if used in place of the Pelcovits interactivity adjustment, would result in radically lower license fees than those adopted in the Decision.

In addition, as discussed in Broadcasters' Motion, Broadcasters believe that the Decision contemplates that services may use commercially reasonable, good faith approaches, including

the use of aggregate tuning hours, to calculate the license fee due under the per-performance metric. If this were not contemplated, Broadcasters would not be able to compute and pay fees under the per-performance metric, and the Decision would be clearly erroneous and without evidentiary support in the record.

ARGUMENT

I. REHEARING IS JUSTIFIED IN THIS CASE DUE TO ERROR.

The Copyright Royalty Judges recently adopted a permissive standard for granting rehearing: "A motion for rehearing may be filed by any participant in the relevant proceeding. The Copyright Royalty Judges may grant rehearing upon a showing that any aspect of the determination may be erroneous." 37 C.F.R. § 351.3 (effective Sept. 11, 2006) (emphasis added).² Given the abbreviated procedure for seeking rehearing, the Judges' rules do not require a showing at this stage that the determination is in fact erroneous—only that it may be—in order to justify a rehearing.

In this case, rehearing is justified because the Decision failed to address the mathematical impossibility of the model relied upon by SoundExchange to support the license fees adopted by the Judges. Broadcasters and DiMA presented this point in their Joint Proposed Findings of Fact, ¶¶ 146-47 (Dec. 12, 2006) ("Joint PFF").

Further, as detailed in Broadcasters' Motion, new facts surfaced after rebuttal evidence was submitted in this case. Specifically, in a later proceeding, SoundExchange abandoned the

² This standard was relaxed from the standard previously adopted in 2005, which limited rehearing only to "exceptional cases" and cautioned that rehearing "should not be sought merely to reargue a rate or distribution level determination that falls within the zone of reasonableness established by the record." See 37 C.F.R. § 353.1 (2005). In any event, the errors presented herein, and by DiMA in its Motion for Rehearing, rise to the level of exceptional and would justify rehearing even under the pre-existing regulation. Mathematical impossibility and the abandonment by a party of an approach adopted in the Decision in a subsequent case are both exceptional circumstances. Similarly, adoption of a commercially unmanageable or unreasonable fee metric that was not presented by the prevailing party in time to permit opposing testimony also is exceptional.

adjustment relied upon in this proceeding in favor of an adjustment that, if applied here, would result in far lower fees. The adoption of a method that is based on mathematically impossible assumptions, and that was abandoned by the proponent in another proceeding before the Judges, clearly is error.

Finally, SoundExchange removed the express ATH-based alternative from its fee proposal only upon the submission of its rebuttal case, after it was too late for Broadcasters to demonstrate the commercial impossibility of counting each and every performance. Presumably, SoundExchange did not intend to propose an impossible fee that had never been used by any radio simulcaster, and it clearly would be error if the fee adopted in the Decision were intended to prohibit the use of commercially reasonable means of counting performances, such as ATH.

II. METHODOLOGICAL FLAWS IN DR. PELCOVITS' INTERACTIVITY ADJUSTMENT JUSTIFY REHEARING.

Dr. Pelcovits arrived at his conclusion that non-interactive services would pay fees equal to 55% of the fees paid by interactive services based on a model that purports to account for the value of interactivity. In the Decision, the Judges found that:

In these ultimate consumer markets, music is delivered to consumers in a similar fashion, except that, as the names suggest, in the *interactive* case the choice of music that is delivered is usually influenced by the ultimate consumer, while in the non-interactive case the consumer usually plays a more passive role. Pelcovits WDT at 5-15. But this difference is accounted for in Dr. Pelcovits' analysis. In order to make the benchmark interactive market more comparable to the non-interactive market, Dr. Pelcovits adjusts the benchmark by the added value associated with the interactivity characteristic. Pelcovits WDT at 37-41. In short, the Copyright Royalty Judges find the Pelcovits benchmark to be of the comparable type that the Copyright Act invites us to consider.

Decision at 32. This finding formed the foundation of the Decision.

The Pelcovits paradigm was based on several assumptions. First, according to Dr. Pelcovits, the derived demand curve (which plots the license fee that would prevail at each

quantity of supply) is parallel to the demand curve (which plots the consumer price that would prevail at each quantity). This means that the non-license fee costs (plus a reasonable return) will be the same along the entire range of supply. Second, Dr. Pelcovits assumed that the distance between the demand curve and derived demand curve – i.e., the difference between the subscription price and license fee at any given quantity – is the same for the two types of services. Joint PFF ¶ 142. These two characteristics of the two markets were confirmed by the other economists that testified in this proceeding, Dr. Brynjolfsson and Dr. Jaffe. *Id.*

The critical assumption relied upon by Dr. Pelcovits in making his adjustment for interactivity was a third assumption – which was hotly disputed by Dr. Jaffe – that the ratio of license fee to subscription price for interactive, on-demand streaming is equal to the ratio of license fee to subscription price for non-interactive webcasting. Joint PFF ¶ 136; Pelcovits WDT ¶ 41 (applying the interactive ratio of license fee to price to obtain his proposed non-interactive license fee).

As shown below, however, this last assumption leads to a mathematically and realistically impossible result. Coupled with the other undisputed characteristics of the markets, Dr. Pelcovits' final assumption of equal ratios between license fee and subscription price in the two markets leads inexorably to the conclusion that the license fees and subscription prices must be the same in both the interactive and non-interactive markets. See Joint PFF ¶¶ 146-47. In other words, if Dr. Pelcovits' key assumption were correct, there would be no value to interactivity. This conclusion is exactly opposite of Dr. Pelcovits' conclusion, common sense, and other undisputed evidence in the case, all of which establish that interactivity has substantial value. In other words, Dr. Pelcovits' critical final assumption cannot be correct, and his model must fail.

A. The Pelcovits Model Results in the Conclusion that the License Fees in the Interactive and Non-Interactive Markets Are the Same.

The inaccuracy of Dr. Pelcovits' assumption that the ratio between license fee and subscription price are the same in both the interactive and non-interactive markets is easily shown as a matter of common sense by a real-life example, and may be proven mathematically with somewhat greater complexity. Assume, for the purposes of discussion, that the difference between the license fee and subscription price in the interactive market were \$5 and that the ratio between license fee and subscription price in that market were $1/6$. There is only one pair of numbers that can satisfy these conditions—a \$1 license fee and \$6 subscription price.³ A \$3 fee and \$8 price, for example, would yield a \$5 difference, but the ratio $3/8$ (0.375) is significantly greater than $1/6$ (0.167). Holding the difference constant, but increasing the license fee, steadily increases the ratio towards 1. Holding the difference constant, but decreasing the license fee, steadily decreases the ratio away from $1/6$ towards 0. For example, a \$.50 fee and \$5.50 price also does not yield a $1/6$ ratio, either—the ratio is $1/11$ (0.091). For the license fee and subscription price in the non-interactive market to have a difference of \$5 and a ratio of $1/6$, therefore, they would also need to be \$1 and \$6, respectively—the exact same fee and price as in the interactive market.

This principle may be generalized and proven mathematically. Dr. Pelcovits assumes that the ratios of license fee to subscription price for both interactive on-demand streaming and non-interactive webcasting are equal. So, defining the license fee as "F" and the subscription price as "P," the equality of the ratio of F to P in the interactive ("i") and non-interactive ("n") markets may be shown by the following equation:

³ A license fee of -\$1 and a subscription price of -\$6 would also satisfy the conditions, but could not exist in the marketplace. Accordingly, we will limit this discussion to positive values.

$$\frac{F_n}{P_n} = \frac{F_i}{P_i}$$

Multiplying both sides of the equation by P_n yields:

$$F_n = \frac{F_i P_n}{P_i}$$

Second, Dr. Pelcovits assumes (and the testimony supports the contention) that the difference between subscription price and license fee will be the same in both the interactive and non-interactive markets, which may be shown by the following equation:

$$P_n - F_n = P_i - F_i$$

Regrouping of this equation to solve for F_n leads to:

$$F_n = P_n - P_i + F_i$$

Setting the two regrouped equations above as equal (because both equal F_n):

$$\frac{F_i P_n}{P_i} = P_n - P_i + F_i$$

Subtracting F_i from both sides yields:

$$\left(\frac{F_i P_n}{P_i} \right) - F_i = P_n - P_i$$

Multiplying both sides by P_i results in:

$$F_i P_n - F_i P_i = P_i (P_n - P_i)$$

Extracting F_i from the left side and regrouping yields:

$$F_i (P_n - P_i) = P_i (P_n - P_i)$$

This can only be true if one of the following is true:

$$F_i = P_i \text{ or } P_n = P_i$$

The former cannot be true. If the license fee were equal to the subscription price in the interactive market, there would be no service operating in that market, as there would be no room for any other costs or profit margin. Thus, the equation on the right must be correct, proving that, given the characteristics assumed by Dr. Pelcovits, the subscription prices in both the interactive and non-interactive markets must be the same. Because Dr. Pelcovits also assumed that the ratio of F_i to P_i is the same as the ratio of F_n to P_n ($\frac{F_n}{P_n} = \frac{F_i}{P_i}$), setting P_n equal to P_i means:

$$F_i = F_n$$

Thus, the license fees in the interactive and non-interactive markets would be the same.

The same result may be generalized and proven yet another way. Starting from Dr. Pelcovits' two assumptions that there is a single, given ratio (R) between license fee (F) and subscription price (P), and a single given difference (D) between subscription price and license fee, one can describe the relationships by two linear equations with two variables, F and P. Such a pair of equations can always be solved to give a unique value of F and a unique value of P. In other words, for any difference and ratio seen in the interactive benchmark market, there is only one pair of license fee and subscription price that will yield that difference and ratio. For the license fee and subscription price in the non-interactive market to have the same difference and ratio, the license fee and subscription price must be the same in the non-interactive market as they are in the interactive market.

To illustrate the first "ratio" equation mathematically, the license fee divided by the subscription price is equal to the ratio "R," as follows:

$$\frac{F}{P} = R, \text{ which cross-multiplying results in } F = RP.$$

Under the second "difference" equation, the subscription price less the license fee is equal to the difference "D":

$$P - F = D; \text{ thus } P = D + F.$$

Substituting $D+F$ for P in the first "ratio" equation yields:

$$F = R(D + F).$$

Regrouping the right side of this equation to $RD + RF$ and subtracting RF from both sides yields:

$$F - RF = RD.$$

Regrouping the left and dividing both sides by $(1-R)$ yields:

$$F = \frac{RD}{(1-R)}$$

Because R (the ratio between license fee and subscription price) and the D (the difference between subscription price and license fee) are given, there is a unique value for F , which in turn (going back to the second "difference" equation above, $P=D+F$) yields a unique value for P .

These two proofs, along with the common sense example presented above, demonstrate that under Dr. Pelcovits' assumptions, the subscription prices in the interactive and non-interactive markets would be equal. So, too, would the license fees in the two markets.

B. The Inexorable Result of Dr. Pelcovits' Assumptions Condemns His Model and Demonstrates that His Critical Assumption Cannot Be Correct.

The conclusion that necessarily follows from Dr. Pelcovits' model is that interactivity has no value. This conclusion, however, is exactly the opposite of what Dr. Pelcovits testified – indeed, he testified that interactivity has substantial value – and arrived at the conclusion that non-interactive services should pay fees equal to 55% of the fees paid by interactive services. Moreover, such a result would be contrary to the undisputed evidence in the case that interactivity has significant value. Thus, Dr. Pelcovits' model is based on inherently flawed assumptions; it cannot be reasonably relied upon. Allowing that model to form the basis for the Decision clearly is error.

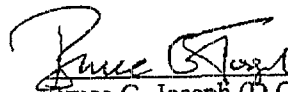
After Dr. Pelcovits was cross-examined and the flaws in his model were exposed, SoundExchange submitted expert testimony in the SDARS Case that also purports to establish a value for interactivity. Rather than using Dr. Pelcovits' 55% ratio derived from the assumptions discussed above, SoundExchange's new expert, Dr. Ordovery, adopted an entirely different approach and argued for a very different value of interactivity in that case. Dr. Ordovery's interactivity adjustment was based on actual license fees charged by the record companies, and does not depend on the assumption that the ratio between fee and price in the two markets is the same. At minimum, Dr. Ordovery's interactivity adjustment should be applied here, and the fees reached in the Decision should be reduced by multiplying those fees by the ratio of Dr. Ordovery's interactivity adjustment.

CONCLUSION

Dr. Pelcovits ignored the mathematical consequence of his assumptions to reach a result inconsistent with these assumptions and inconsistent with reality. As shown above, Dr. Pelcovits' assumptions necessarily lead to the conclusion that the license fees and subscription

prices in the interactive and non-interactive markets would be the same – in stark contradiction to his overall conclusion (and the experience of the marketplace) that there is substantial value to interactivity. A model based on demonstrably faulty assumptions cannot reasonably be relied upon. Further, the party advancing the model has now advanced a second, inconsistent model, in a later proceeding. Broadcasters have more than shown that the Decision “may be erroneous” under the permissive rehearing standard of 37 C.F.R. § 351.3. Broadcasters’ Motion for Rehearing should be granted, and the Judges should reconsider their findings.

Respectfully submitted,



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April 2, 2007

Counsel for Radio Broadcasters and the NRBNMLC

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2007, the foregoing Supplemental Memorandum in Support of Broadcasters' Motion for Rehearing was served by e-mail and by overnight courier on the following parties:

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UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2005-1 CRB DTRA

ORDER DENYING MOTIONS FOR REHEARING

On March 2, 2007, the Copyright Royalty Judges issued a Determination of Rates and Terms in this matter ("Initial Determination"). Pursuant to 17 U.S.C. § 803(c)(2) and 37 C.F.R. Part 353, the parties in the proceeding filed various motions for rehearing, reconsideration or clarification.¹ On March 20, 2007, the Judges requested that the parties respond to the motions that had been filed to determine the positions of each party on each of the issues raised in these motions and file written arguments to support those positions. Order on Motions for Rehearing. The parties filed various responses per our request.² Having reviewed all motions, responses to those motions, and written arguments, the Judges now deny all such motions. Nevertheless, as discussed below, the Judges have determined that certain areas of the Initial Determination warrant clarification.

The standard for reviewing motions for rehearing is set forth in 17 U.S.C. § 803(c)(2)(A), which states that the Judges may, in exceptional cases, upon a motion of a participant in a proceeding, order a rehearing after the determination in the proceeding is issued, on such matters as the Judges deem to be appropriate. Such exceptional cases require the movant to show that an aspect of the determination is erroneous, without evidentiary support, or contrary to legal requirements. See 37 C.F.R. §§ 353.1 and 353.2. The parties made no such showing. Moreover, as we stated in our May 3, 2006 Order Denying SoundExchange's Motion to Reconsider the Board's Order Requiring, in Part, the Production of Certain Income Tax Returns, "[m]otions for reconsideration must be subject to a strict standard in order to dissuade repetitive arguments on issues that have already been fully considered by the Board." Such motions should be granted only where (1) there has been an intervening change in controlling law; (2) new evidence is

¹ Motions were filed by Digital Media Association ("DiMA"), Intercollegiate Broadcasting System, Inc. ("IBS") (filed jointly with WHRB), National Public Radio ("NPR"), Radio Broadcasters, Royalty Logic, Inc., Small Commercial Webcasters, SoundExchange, Inc., and WHRB (filed jointly with IBS). In its motion, NPR requests that the Judges grant a rehearing, or, in the alternative, that we "stay the application of the aggregate tuning hour threshold and per-performance aspects of the Decision until NPR exhausts its appellate remedies." NPR Motion at 2. In addition, Collegiate Broadcasters, Inc. ("CBI") filed a notice of joinder notifying the Judges that it was joining the Radio Broadcasters' Motion for Rehearing, the Joint Motion of IBS and WHRB for Partial Reconsideration and the Motion for Rehearing of Digital Media Association.

² We received responses from CBI, DiMA, IBS (joint response with WHRB), NPR, Radio Broadcasters, Small Commercial Webcasters, SoundExchange, and WHRB (joint with IBS).

available; or (3) there is a need to correct a clear error or prevent manifest injustice. *Regency Communications Inc. v. Cleartel Communications, Inc.*, 212 F. Supp.2d 1, 3 (D. D.C. 2002). It is also appropriate to consider these standards in reviewing motions for rehearing.

The parties that request a rehearing in this proceeding do so based on categories (2) and (3). We find, however, that none of the moving parties have made a sufficient showing of new evidence or a clear error or manifest injustice that would warrant a rehearing. To the contrary, with the exceptions discussed below, most of the parties' arguments in support of a rehearing or reconsideration merely restate arguments that were made or evidence that was presented during the proceeding. While some parties purport to offer new evidence that was not presented during the proceeding, we are unconvinced that this evidence was in fact newly discovered after the proceeding. Indeed, it appears that all evidence discussed in the motions had either been discovered during the proceeding or could have been discovered during the proceeding, with reasonable diligence. Therefore, we cannot grant the parties' motion for rehearing based on new evidence. *See Frederick S. Wyle v. Texaco*, 764 F.2d 604, 609 (9th Cir. 1985) (affirming the district court's denial of a motion for reconsideration based on the district court's determination that the movant failed to meet its obligations to show "not only that [purportedly new evidence] was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing."). Motions for rehearing do not support a change of tactics for a party to present a new theory or evidence after the trial is concluded. *See Good Luck Nursing Home Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) ("a party that...has not presented known facts helpful to its cause when it had the chance cannot ordinarily avail itself on [Federal Rule of Civil Procedure 60(b) permitting relief from judgment based on a previously undisclosed fact] after an adverse judgment has been handed down").

In the absence of an adequate showing for new evidence, the parties' arguments in their respective motions amount to nothing more than a rehash of the arguments that the Judges considered in the Initial Determination. As such, the motions do not present the type of exceptional case that would warrant a rehearing or reconsideration. *See Messina v. Krakower*, 439 F.3d 755, 759 (D.C. Cir. 2006) (motion to vacate a judgment that did nothing more than rely on the same arguments made prior to entry of the judgment was properly denied). Therefore, we deny the parties' motions for rehearing or reconsideration.

Moreover, certain parties request that the Judges withdraw and/or modify the Aggregate Tuning Hours ("ATH") threshold and per-play rate structure, applicable to the limited number of public radio stations that may exceed the ATH threshold, because of their purported inability to track both ATH and the number of compensable sound recording performances that occur in excess of the ATH threshold. Motion for Rehearing of National Public Radio, Its Member Stations, and All Corporation for Public Broadcasting-Qualified Public Radio Stations. We deem these claims to have been waived because the parties failed to assert such claims during the proceeding in their

proposed findings of fact and conclusions of law. *See* Initial Determination at 85 and 37 C.F.R. § 351.14(b) ("A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party").

Additionally, certain parties request relief from the recordkeeping and reporting requirements established in the Initial Determination (*see, e.g.*, Joint Motion of IBS and WHRB (FM) for Partial Reconsideration, and CBI's Memorandum in Support of Motion for Rehearing). These requests are not germane to this proceeding and will be addressed in a future proceeding. *See* Initial Determination at 98.

Other parties request that the Judges stay implementation of certain of the rates and terms established in the Initial Determination until all administrative appeals and judicial review are complete. *See* Motions of DiMA, NPR, and SCW. Section 804(b)(3) of the Copyright Act states in relevant part that "[p]roceedings under this chapter shall be commenced...to determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of eligible nonsubscription transmission services and new subscription services, to be effective for the period beginning on January 1, 2006, and ending on December 31, 2010." 17 U.S.C. § 804(b)(3). Moreover, Section 803(c)(2)(E)(ii) of the Copyright Act states that "[t]he pendency of a motion for a rehearing under this paragraph shall not relieve persons obligated to make royalty payments who would be affected by the determination on that motion from providing the statements of account and any reports of use, to the extent required, and paying the royalties required under the relevant determination or regulations." 17 U.S.C. § 803(c)(2)(E)(ii). Finally, Section 803(c)(2)(E)(iii) of the Copyright Act states that "[n]otwithstanding clause (ii), whenever royalties described in clause (ii) are paid to a person other than the Copyright Office, the entity designated by the [Judges] to which such royalties are paid by the copyright user...shall, within 60 days after the motion for rehearing is resolved or, if the motion is granted, within 60 days after the rehearing is concluded, return any excess amounts previously paid to the extent necessary to comply with the final determination of royalty rates by the [Judges]. Any underpayment of royalties resulting from a rehearing shall be paid within the same period." 17 U.S.C. § 803(c)(2)(E)(iii). As these sections of the Copyright Act indicate, Congress, not the Judges, determined the effective dates for the royalty rates and terms the Judges established under Copyright Act Sections 114 and 112. Moreover, Congress determined that these rates would go into effect, notwithstanding any pending motions for rehearing. Finally, Congress set forth the remedy that would apply should those rates later be determined to result in an overpayment or underpayment of royalties. The provisions of these sections are clear and we will follow the statute. As a result, the motions for a stay are **DENIED**.

POINTS OF CLARIFICATION

However, in the course of making their supporting and opposing arguments regarding the various motions denied hereinabove, the parties raise two issues that merit clarification.

First, DiMA and Broadcasters ask for clarification as to whether the per performance usage fee structure adopted by the Judges in their Initial Determination contemplates the continued availability to the Services of an option to estimate usage through the application of ATH measures as permitted under the prior fee regime. See 37 C.F.R. § 262.3 (a)(1)(ii). The short answer is that the Initial Determination does not contemplate such an option as a permanent part of the fee structure, and the law and the trial record do not support a rehearing on the issue of establishing such a permanent option. Nevertheless, the Judges recognize that a smooth transition from the prior fee regime to the new fee structure adopted by the Judges in their Initial Determination may be aided by permitting the limited use of an ATH calculation option. Such a transition option enhances the ability of some Services to effectuate speedy payments and, in so doing, improves the ability of copyright owners to more quickly obtain monies due. In short, such a transition measure is reasonably calculated to facilitate a smooth, speedy transition to the new fee structure adopted by the Judges in their Initial Determination. Therefore, the Judges hereby clarify that the usage fee structure established in the Judges' Final Determination offers the continued use of an ATH option for *timely* payment of fees due for the years 2006 and 2007. For ease of transition, the Judges begin with the prior fee regime and increase the ATH usage equivalent fees from that structure by the same percentage by which per performance rates under our Final Determination increase over the prior fee regime's per performance rates (i.e., by 4.98% in 2006 and by 44.35% in 2007).³ The following ATH usage rate calculation *options* will be available for the transition period of 2006 and 2007:

	Other Programming	Broadcast Simulcast Programming	Non-Music Programming
Prior Fees	\$0.0117 per ATH	\$0.0088 per ATH	\$0.0008 per ATH
2006	\$0.0123 per ATH	\$0.0092 per ATH	\$0.0011 per ATH
2007	\$0.0169 per ATH	\$0.0127 per ATH	\$0.0014 per ATH


where "Non-Music Programming" is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; "Broadcast Simulcast

³ This approach retains the sound recordings per hour assumptions underlying the previous fee regime for the transition period. However, the Services and the copyright owners agreed that those assumptions would govern the prior regime. Furthermore, while these assumptions may exhibit some change over the course of a full licensing period, it is reasonable to continue to utilize those assumptions for the limited period of time that demarcates the transition period (i.e., 2006-2007) in the interest of assuring copyright owners of the expeditious payment of fees they are due from all the Services.

Programming” is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and “Other Programming” is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

Second, SoundExchange asks for clarification as to whether the phrase “Internet transmissions” where that phrase appears in the implementing regulations for the Judges’ Initial Determination (e.g., at § 380.3 of the Judges’ implementing regulations) is more accurately represented by the phrase “digital audio transmissions.” SoundExchange requests a technical correction to reflect adoption of the latter terminology. NPR and DiMA do not object to this clarification. NPR’s Memorandum in Response to the Copyright Royalty Judges’ March 20, 2007 Order On Motions for Rehearing and Submission of DiMA in Response to the Copyright Royalty Judges’ March 20, 2007 Order on Motions for Rehearing. Section 114(j)(5) of the Copyright Act defines the term “digital audio transmission” without reference to the Internet. 17 U.S.C. § 114(j)(5). Therefore, the Judges hereby clarify their Initial Determination and related regulations by replacing the phrase “Internet transmissions” where that phrase appears in the implementing regulations for the Judges’ Initial Determination by the phrase “digital audio transmissions” in the implementing regulations for the Judges’ Final Determination.

SO ORDERED.


James Scott Sledge
Chief Copyright Royalty Judge

DATED: April 16, 2007

This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 18, 2007.

Waverly W. Gregory, Jr.

Chief, Bridge Administration Branch, Fifth Coast Guard District.

[FR Doc. E7-10276 Filed 5-29-07; 8:45 am]

BILLING CODE 4910-15-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2005-1 CRB DTRA]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule: technical amendment.

SUMMARY: The Copyright Royalty Judges, on behalf of the Copyright Royalty Board of the Library of Congress, are making a technical amendment in the regulation regarding the royalty fees for the public performance of sound recordings and for ephemeral recordings under two statutory licenses to clarify the appropriate Aggregate Tuning Hour usage rate calculation option for the transition period of 2006 and 2007 for non-music programming.

EFFECTIVE DATE: May 30, 2007.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707-7658. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION: On May 1, 2007, the Copyright Royalty Judges ("Judges") announced their final determination of the rates and terms for two statutory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings, for the period beginning January 1, 2006, and ending on December 31, 2010. 72 FR 24084 (May 1, 2007). The Final Determination included a transition phase for 2006 and 2007 to use Aggregate Tuning Hours ("ATH") to estimate usage as permitted under the prior fee regime in order to facilitate a smooth transition to the fee structure adopted in the Final Determination. 72 FR 24086. Such ATH usage rate calculation options are set forth in § 380.3(a).

On May 8, 2007, Radio Broadcasters¹ requested the Judges to clarify whether the appropriate ATH usage rate calculation option available for the transition period of 2006 and 2007 was inadvertently misstated because the incorrect starting point was identified for the "prior fees" row for non-music programming (i.e., \$0.0008 instead of \$0.000762). None of the other parties in the proceeding filed any pleading about the request. The Judges considered the Radio Broadcasters' request under their authority in section 803(c)(4) of the Copyright Act, title 17 of the United States Code, which authorizes them to correct "any technical or clerical errors in the determination * * * that would frustrate the proper implementation of the determination" and requires them to distribute to the participants of the proceeding such correction and to publish the correction in the *Federal Register*.

After full consideration of the Radio Broadcasters' request, the Judges concluded that such clerical error indeed had been made. Consequently, in accordance with 17 U.S.C. 804(c)(4), the Judges issued an order to the participants in the proceeding acknowledging the clerical error and setting forth the corrected ATH usage rate calculation option available for non-music programming for the 2006-2007 transition period. See Order Regarding Broadcasters' Request for Clarification of the Final Determination of Rates and Terms, Docket No. 2005-1 CRB DTRA (May 21, 2007).

Moreover, as further required by 17 U.S.C. 803(c)(4), the Judges today are amending §§ 380.3(a)(1)(ii) and (a)(2)(iii) to reflect, as set forth in the May 21 Order, the correct ATH usage rate calculation option available for non-music programming for the transition period 2006-2007, which is as follows:

NON-MUSIC PROGRAMMING

Prior Fees	\$0.000762 per ATH.
2006	\$0.0008 per ATH.
2007	\$0.0011 per ATH.

This correction also applies to footnotes 33 and 55 in Sections IV.C.1.d.i. and IV.D.1., respectively, of the Final Determination.

Because this amendment is being made simply for the purpose of correcting a clerical error, the Judges find that there is good cause to make it effective immediately.

¹ Radio Broadcasters include Bonneville International Corp., Clear Channel Communications, Inc., Susquehanna Radio Corp., and The National Religious Broadcasters Music License Committee ("NRBMLC").

List of Subjects in 37 CFR Part 380

Copyright; Sound recordings.

Final Regulation

■ For the reasons set forth in the preamble, 37 CFR part 380 is amended as follows:

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

■ 1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f).

§ 380.3 [Amended]

■ 2. Section 380.3 is amended as follows:

- a. In paragraph (a)(1)(ii), by removing "\$0.0008" and adding "\$0.000762" in its place, by removing "\$0.0011" and adding "\$0.0008" in its place, and by removing "\$0.0014" and adding "\$0.0011" in its place; and
- b. In paragraph (a)(2)(iii), by removing "\$0.0008" and adding "\$0.000762" in its place, by removing "\$0.0011" and adding "\$0.0008" in its place, and by removing "\$0.0014" and adding "\$0.0011" in its place.

Dated: May 23, 2007.

James Scott Sledge,
Chief Copyright Royalty Judge.

[FR Doc. E7-10366 Filed 5-29-07; 8:45 am]

BILLING CODE 1410-72-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2007-0236; FRL-8315-9]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California State Implementation Plan (SIP). These revisions concern Oxides of Nitrogen (NO_x) emissions from Boilers, Steam Generators and Process Heaters (2.0 MMBtu/hr to 5.0 MMBtu/hr, and 0.075 MMBtu/hr to 2.0 MMBtu/hr); Dryers, Dehydrators, and Ovens; Natural Gas-Fired, Fan-Type



Federal Register

Monday,
July 8, 2002

Part III

Library of Congress

Copyright Office

37 CFR Part 261

Determination of Reasonable Rates and
Terms for the Digital Performance of
Sound Recordings and Ephemeral
Recordings; Final Rule

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 261

[Docket No. 2000-9 CARP DTRA 1&2]

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the determination of the reasonable rates and terms for two compulsory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings.

EFFECTIVE DATE: July 8, 2002.

ADDRESSES: The full text of the public version of the Copyright Arbitration Royalty Panel's report to the Librarian of Congress is available for inspection and copying during normal working hours in the Office of the General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE., Washington, DC 20540. The report is also posted on the Copyright Office website at http://www.copyright.gov/carp/webcasting_rates.html.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya Sandros, Senior Attorney, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

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I. Background

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRA"), Public Law 104-39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly their sound recordings by means of certain digital audio transmissions. Among the limitations on the performance right was the creation of a new compulsory license for nonexempt, noninteractive, digital

subscription transmissions. 17 U.S.C. 114(f).

The scope of this license was expanded in 1998 upon passage of the Digital Millennium Copyright Act of 1998 ("DMCA" or "Act"), Public Law 105-304, in order to allow a nonexempt eligible nonsubscription transmission¹ (the "webcasting license") and a nonexempt transmission by a preexisting satellite digital audio radio service to perform publicly a sound recording in accordance with the terms and rates of the statutory license. 17 U.S.C. 114(a). In addition to expanding the section 114 license, the DMCA also created a new statutory license for the making of an "ephemeral recording" of a sound recording by certain transmitting organizations (the "ephemeral recording license"). 17 U.S.C. 112(e). The new statutory license allows entities that transmit performances of sound recordings to business establishments, pursuant to the limitations set forth in section 114(d)(1)(C)(iv), to make an ephemeral recording of a sound recording for purposes of a later transmission. The new license also provides a means by which a transmitting entity with a statutory license under section 114(f) can make more than the one phonorecord permitted under the exemption set forth in section 112(a). 7 U.S.C. 112(e).

The statutory scheme for establishing reasonable terms and rates is the same for both of the new licenses. The terms and rates for the two new statutory licenses may be determined by voluntary agreement among the affected parties, or if necessary, through compulsory arbitration conducted pursuant to Chapter 8 of the Copyright Act.

In this case, interested parties were unable to negotiate an industry-wide agreement. Therefore, a Copyright Arbitration Royalty Panel ("CARP") was convened to consider proposals from interested parties and, based upon the written record created during this process, to recommend rates and terms for both the webcasting license and the ephemeral recording license.

¹ An "eligible nonsubscription transmission" is a noninteractive, digital audio transmission which, as the name implies, does not require a subscription for receiving the transmission. The transmission must also be made a part of a service that provides audio programming consisting in a whole or in part of performances of sound recordings; the purpose of which is to provide audio or entertainment programming, but not to sell, advertise, or promote particular goods or services.

II. The CARP Proceeding to Set Reasonable Rates and Terms

These proceedings began on November 27, 1998, when the Copyright Office announced a six-month voluntary negotiation period to set rates and terms for the webcasting license and the ephemeral recording license for the first license period covering October 28, 1998–December 31, 2000. 63 FR 6555 (November 27, 1998). During this period, the parties negotiated a number of private agreements in the marketplace, but no industry-wide agreement was reached. Consequently, in accordance with the procedural requirements, the Recording Industry Association of America, Inc. ("RIAA") petitioned the Copyright Office on July 23, 1999, to commence a CARP proceeding to set the rates and terms for these licenses. The Office responded by setting a schedule for the CARP proceeding. See 64 FR 52107 (Sept. 27, 1999).

However, the schedule proved unworkable for the parties. RIAA filed a motion with the Copyright Office on November 23, 1999, requesting a postponement of the date for filing direct cases. It argued that the Office should provide more time for the parties to prepare their cases in light of the complexity of the issues and the record number of new participants. The Office granted this request and held a meeting to clarify the procedural aspects of the proceeding, especially for the new participants, and to discuss a new schedule for the arbitration phase of the process. Order in Docket No. 99–6 CARP DTRA (dated December 22, 1999). In the meantime, the Office commenced the six-month negotiation period for the second license period, covering January 1, 2001–December 31, 2002. 66 FR 2194 (January 13, 2000). Ultimately, the Copyright Office consolidated these two proceedings into a single proceeding in which one CARP would set rates and terms for the two license periods for both the webcasting license and the ephemeral recording license. See Order in Docket Nos. 99–6 CARP DTRA and 2000–3 CARP DTRA 2 (December 4, 2000). The 180-day period for the consolidated proceeding began on July 30, 2001, and on February 20, 2002, the panel submitted its report (the "CARP Report" or "Report"), in which it proposed rates and terms to the Copyright Office. It is the decision of this Panel that is the basis for the Librarian's decision today.²

² Section 802 (e) of the Copyright Act requires the CARP to report its determination concerning the royalty fee to the Librarian of Congress 180 days after the initiation of a proceeding. In this particular

A. The Parties

The parties³ to this proceeding are: (i) The Webcasters,⁴ namely, BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corporation, Radio Active Media Partners, Inc.; RadioWave.com, Inc., Spinner Networks Inc. and XACT Radio Network LLC; (ii) the FCC-licensed radio Broadcasters,⁵ namely, Susquehanna Radio Corporation, Clear Channel Communications Inc., Entercom Communications Corporation, Infinity Broadcasting Corporation, and National Religious Broadcasters Music License Committee (collectively "the Broadcasters"); (iii) the Business Establishment Services,⁶ namely, DMX/AEI Music Inc. (also referred to as "Background Music Services"); (iv) American Federation of Television and Radio Artists ("AFTRA");⁷ (v) American Federation of Musicians of the United States and Canada

instance, the Panel submitted its report approximately three weeks later than anticipated under this provision due to a suspension of the proceedings during the period November 9, 2001, through December 2, 2001. The Copyright Office granted the suspension at the parties' request in order to allow them to engage in further settlement discussions. At the same time, the Office granted the Panel an additional period of time, commensurate with the suspension period, for hearing evidence and preparing its report. See Order, Docket No. 2000–9 CARP DTRA 1&2 (November 9, 2001). Additional details concerning the earlier procedural aspects of this proceeding are set forth in the CARP Report at pp. 10–18.

³ At the outset of the proceeding, Webcaster parties also included Coolink Broadcast Network, Everstream, Inc., Incanta, Inc., Launch Media, Inc., MusicMatch, Inc., Univision Online, and Westwind Media.com, Inc., which have since withdrawn or been dismissed from the proceeding. Late in the proceeding, National Public Radio ("NPR") reached a private settlement with RIAA and withdrew prior to the conclusion of the 180-day hearing period. Because RIAA, AFTRA, AFM, and AFIM propose the same rates and take similar positions on most issues, they are sometimes referred to collectively as "RIAA" or "Copyright Owners and Performers" for convenience. Similarly, Webcasters, Broadcasters, and the Business Establishment Services are sometimes referred to collectively as "the Services."

⁴ The Webcasters are Internet services that each employ a technology known as "streaming," but comprise a range of different business models and music programming.

⁵ The Broadcasters are commercial AM or FM radio stations that are licensed by the Federal Communications Commission ("FCC").

⁶ The Business Establishment Services, DMX/AEI Music, deliver sound recordings to business establishments for the enjoyment of the establishments' customers. See Knittel W.D.T. 4. DMX/AEI Music is the successor company resulting from a merger between AEI Music Network, Inc. ("AEI") and DMX Music, Inc. ("DMX").

⁷ AFTRA, the American Federation of Television and Radio Artists, is a national labor organization representing performers and newsmen. See Tr. 2830 (Himelfarb).

("AFM");⁸ (vi) Association For Independent Music ("AFIM");⁹ and (vii) Recording Industry Association of America, Inc. ("RIAA").¹⁰ Music Choice, a Business Establishment Service, was initially a party to this proceeding, but on March 26, 2001, it filed a motion to withdraw from the proceeding. Its motion was unopposed and, on May 9, 2001, its motion to withdraw was granted.

B. The Position of the Parties at the Commencement of the Proceeding

1. Rates Proposed by Copyright Owners

RIAA proposed rates derived from an analysis of 26 voluntarily negotiated agreements between itself and individual webcasters. RIAA claims that these agreements "involve the same buyer, the same seller, the same right, the same copyrighted works, the same time period and the same medium as those in the marketplace that the CARP must replicate." CARP Report at 26, citing RIAA PFFCL¹¹ (Introduction at 8). Based upon these agreements, RIAA proposed the following rates for DMCA compliant webcasting services:

(i) For basic "business to consumer" (B2C) webcasting services:

0.4c for each transmission of a sound recording to a single listener, or 15% of the service's gross revenues.

(ii) For "business to business" (B2B) webcasting services, where transmissions are made as part of a service that is syndicated to third-party websites:

0.5c for each transmission of a sound recording to a single listener

(iii) For "listener-influenced" webcasting services:

0.6c for each transmission of a sound recording to a single listener

(iv) Minimum fee (subject to certain qualifications): \$5,000 per webcasting service

⁸ AFM, the American Federation of Musicians, is a labor organization representing professional musicians. See Bradley W.D.T. 1.

⁹ AFIM, the Association For Independent Music, is a trade association representing independent record companies, wholesalers, distributors and retailers. See Tr. 2830 (Himelfarb).

¹⁰ RIAA is a trade association representing record companies, including the five "majors" and numerous "independent" labels.

¹¹ Hereinafter, references to proposed findings of fact and conclusions of law shall be cited as "OFFCK" preceded by the name of the party that submitted the filing followed by the paragraph number. References to written direct testimony shall be cited as "W.D.T." preceded by the last name of the witness and followed by a page number. References to written rebuttal testimony shall be cited as "W.R.T." preceded by the last name of the witness and followed by a page number. References to the transcript shall be cited as "TR." followed by the page number and the last name of the witness.

(v) Ephemeral license fee:

10% of each service's performance royalty fee payable under (i), (ii), or (iii).

For the section 112 license applicable to the business establishment services, the copyright owners proposed a rate set at 10% of gross revenues with a minimum fee of \$50,000 a year.

2. Rates Proposed by Services

Webcasters proposed per-performance and per-hour sound recording performance fees, based upon an economic model, that considered the aggregate fees paid to the three performance rights organizations (ASCAP, BMI, and SESAC) that license the public performances of musical works for radio programs that are broadcast over-the-air by FCC-licensed broadcasters, by 872 radio stations during 2000. From this model, the webcasters derived a per-song and a per-listener hour base rate of 0.02¢ per song and 0.3¢ per hour, respectively. These figures were then adjusted to account for a number of factors, including the promotional value gained by the record companies from the performance of their works. This adjustment resulted in a fee proposal of 0.014¢ per performance or 0.21¢ per hour.

At the end of the proceeding, Webcasters suggested in their proposed findings of fact and conclusions of law an alternative method for calculating royalty fees, namely, a percentage-of-revenue fee structure. Specifically, Webcasters proposed a fee of 3% of a webcaster's gross revenues for all services. The alternative proposal was made with the understanding that the service would be able to elect either option.

Webcasters proposed no additional fee for the making of ephemeral recordings and a minimum fee of \$250 per annum for each service operating under the section 114 license.

The Business Establishment Services who need only an ephemeral recording license proposed a flat rate of \$10,000 per year for each company.

C. The Panel's Determination of Reasonable Rates and a Minimum Fees

In this proceeding, the Panel had to establish rates and terms of payment for digital transmissions of sound recordings made by noninteractive, nonsubscription services and rates for the making of ephemeral phonorecords made pursuant to the section 112(e) license; either to facilitate those transmissions made or by business establishments which are otherwise exempt from the digital performance right.

The proposed rates are set forth in Appendix A of the CARP Report, which is posted on the Copyright Office website at: http://www.copyright.gov/carp/webcasting_rates_a.pdf.

The proposed terms of payment may be found in Appendix B of the CARP Report, which is posted on the Copyright Office website at: http://www.copyright.gov/carp/webcasting_rates_b.pdf.

III. The Librarian's Scope of Review of the Panel's Report

The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Pub. L. No. 103-198, 107 Stat. 2304, created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review that result in final orders: one by the Librarian of Congress (Librarian) and a second by the United States Court of Appeals for the District of Columbia Circuit. Section 802(f) of title 17 directs the Librarian on the recommendation of the Register of Copyrights either to accept the decision of the CARP, or to reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." 17 U.S.C. 802(f). If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals. 17 U.S.C. 802(g).

The review process has been thoroughly discussed in prior recommendations of the Register of Copyrights (Register) concerning rate adjustments and royalty distribution proceedings. See, e.g., *Distribution of 1990, 1991, and 1992 Cable Royalties*, 61 FR 55653 (1996); *Rate Adjustment for the Satellite Carrier Compulsory License*, 62 FR 55742 (October 28, 1997). Nevertheless, the discussion merits repetition because of its importance in reviewing each CARP decision.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP, "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency action is generally considered to be arbitrary when:

1. It relies on factors that Congress did not intend it to consider;
2. It fails to consider entirely an important aspect of the problem that it was solving;
3. It offers an explanation for its decision that runs counter to the evidence presented before it;
4. It issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;
5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and
6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983); *Celcom Communications Corp. v. FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp. v. FAA*, 758 F.2d 685 (D.C. Cir. 1985).

In reviewing the CARP's decision, the Librarian has been guided by these principles and the prior decisions of the District of Columbia Circuit in which the court applied the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) to the determinations of the former Copyright Royalty Tribunal (hereinafter "CRT or Tribunal"). See, e.g., *National Cable Tele. Ass'n v. CRT*, 724 F.2d 176 (D.C. Cir. 1983) (applying the Administrative Procedure Act's standard authorizing courts to set aside agency action found to be arbitrary, capricious, and abuse of discretion, or otherwise in accordance with law."); see also, *Recording Industry Ass'n of America v. CRT*, 662 F.2d 1, 7-9 (D.C. Cir. 1981); *Amusement and Music Operators Ass'n v. CRT*, 676 F.2d 1144, 1149-52 (7th Cir.), cert. denied, 459 U.S. 907 (1982); *National Ass'n of Broadcasters v. CRT*, 675 F.2d 367, 375 n. 8 (D.C. Cir. 1982).

Review of judicial decisions regarding Tribunal actions reveals a consistent theme; while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. See *National Ass'n of Broadcasters v. CRT*, 772 F.2d 922 (D.C. Cir. 1985), cert. denied, 475 U.S. 1035 (1986) (*NAB v. CRT*); *Christian Broadcasting Network v.*

CRT, 720 F.2d 1295 (D.C. Cir. 1983) (*Christian Broadcasting v. CRT*); *National Cable Television Ass'n v. CRT*, 689 F.2d 1077 (D.C. Cir. 1982) (*NCTA v. CRT*); *Recording Indus. Ass'n of America v. CRT*, 662 F.2d 1 (D.C. Cir. 1981) (*RIAA v. CRT*). As the D.C. Circuit succinctly noted:

We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully. * * *

Christian Broadcasting v. CRT, 720 F.2d at 1319 (D.C. Cir. 1983), quoting *NCTA v. CRT*, 689 F.2d at 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same "arbitrary" standard used by the courts to review the Tribunal, he must be presented by the CARP with a rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history of the Reform Act which notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103-286, at 13 (1993). This goal cannot be reached by "attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record." *Christian Broadcasting v. CRT*, 720 F.2d at 1319.

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination. 17 U.S.C. 802(f).

IV. The CARP Report: Review and Recommendation of the Register of Copyrights

The law gives the Register the responsibility to review the CARP report and make recommendations to the Librarian whether to adopt or reject the Panel's determination. In doing so, she reviews the Panel's report, the parties' post-panel submissions, and the record evidence.

After carefully considering the Panel's report and the record in this proceeding, the Register has concluded that the rates proposed by the Panel for use of the webcasting license do not reflect the rates that a willing buyer and willing seller would agree upon in the marketplace. Therefore, the Register has made a recommendation that the

Librarian reject the proposed rates (\$0.14 per performance for Internet-only transmissions and \$0.07 per performance for radio retransmissions) for the section 114 license and substitute his own determination (0.07c per performance for both types of transmissions), based upon the Panel's analysis of the hypothetical marketplace, and its reliance upon contractual agreements negotiated in the marketplace.

These changes necessitate an adjustment to the proposed rates for non-CPB, noncommercial broadcasters¹² for Internet-only transmissions as well. The adjusted rate for archived programming subsequently transmitted over the Internet, substituted programming and up to two side channels is 0.02c, reflecting a downward adjustment from the 0.05c rate proposed by the Panel. The new rate for all other transmissions made by non-CPB, noncommercial broadcasters is 0.07c per performance per listener. Using this methodology, the Register recommends that the Librarian also reject the Panel's determination of a rate for the making of ephemeral recordings by those Licensees operating under the webcasting license. Because the Panel had made an earlier determination not to consider 25 of the 26 contracts submitted by RIAA for the purpose of setting a rate for the webcasting license, it was arbitrary for the Panel to use these same rejected licenses to set the Ephemeral License Fee. See section IV.13 herein for discussion. Consequently, the Register proposes a downward adjustment—from 9% of the performance royalties paid to 8.8%—to the Ephemeral License Fee to remove the effect of the discarded licenses.

In determining the Ephemeral License Fee for Business Establishment Services operating under an exemption to the digital performance right, the CARP considered separate licenses negotiated in the marketplace between individual record companies and these services. Its reliance on these agreements as an adequate benchmark for purposes of setting the rate for the section 112 license was well-founded and supported by the record. Therefore, the Register recommends adopting the Panel's proposal of setting the Ephemeral License Fee for Business Establishment Services at 10% of the service's gross proceeds. However, the Register cannot support the Panel's recommendation to set the minimum fee applicable to these

¹² A non-CPB, noncommercial broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

services for its use of the ephemeral license at \$500 when clear evidence exists in the contractual agreements to establish a much higher range of values for setting the minimum fee. Consequently, the Register evaluated the contracts and proposed a minimum fee consistent with the record evidence. The result is a minimum fee of \$10,000 per license pro rated on a monthly basis.

Section 802(f) states that "[i]f the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 90-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be." During that 90-day period, the Register reviewed the Panel's report and made a recommendation to the Librarian to accept in part and reject in part the Panel's report, for the reasons cited herein. The Librarian accepted this recommendation and, on May 21, 2002, he issued an order rejecting the Panel's determination proposing rates and terms for the webcasting license and the ephemeral recording license. See Order, Docket No. 2000-9 CARP DTRA 1&2 (dated May 21, 2002).

The full review of the Register and her corresponding recommendations are presented herein. Within the limited scope of the Librarian's review of this proceeding, "the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it." Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55757 (1997), citing 61 FR 55663 (October 28, 1996) (Distribution of 1990, 1991 and 1992 Cable Royalties). Accordingly, the Register accepts the Panel's weighing of the evidence and will not question findings and conclusions which proceed directly from the arbitrators' consideration of factual evidence. The Register, however, may reject a finding of the Panel where it is clear that its determination is not supported by the evidence in the record.

A. Establishing Appropriate Rates

1. The "Willing Buyer/Willing Seller Standard"

Sections 112(e)(4) and 114(f)(2)(B), of title 17 of the U.S.C., provide that "the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," and enumerate two factors that the panel shall consider in making its decisions: (1) The effect of

the use of the sound recordings on the sale of phonorecords, and (2) the relative contributions made by both industries in bringing these works to the public. In applying this standard, the Panel determined that it was to consider the enumerated factors along with all other relevant factors identified by the parties, but that it was not to accord the listed factors special consideration. Report at 21; see also Final Rule and Order, Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP SRA, 62 FR 55742, 55746 (October 28, 1997).

Nevertheless, when the Panel considered the record evidence offered to establish a marketplace rate, it paid close attention to the two factors set forth in the statute. In analyzing the first factor, which focuses on the interplay between webcasting and sales of phonorecords, the panel found that the evidence offered during the proceeding was insufficient to demonstrate whether webcasting promoted or displaced sales of sound recordings. RIAA's evidence to demonstrate that performances of their sound recordings over the Internet displace record sales consisted of unsupported opinion testimony and consequently, the Panel afforded it no weight. Report at 33. Similarly, the Panel rejected the Webcasters' contention that webcasting promoted sales, affording little weight to its empirical studies. It concluded that the Sounddata survey¹³ was not useful for purposes of this proceeding because it focused on the promotional value of traditional radio broadcasts and not the promotional value of webcasting. *Id.* Likewise, the Panel rejected a study by Professor Michael Mazis¹⁴ because the

response rates in the survey study fell below generally acceptable standards. All in all, the evidence on either side was not persuasive. Consequently, the Panel concluded that, for the time period under consideration, "the net impact of Internet webcasting on record sales [was] indeterminate." *Id.* at 34.

Broadcasters, however, disagree with the Panel's conclusions. They argue that the Panel should have made an adjustment for the promotional value of the transmissions, noting that the statute singled out this factor for consideration when setting the rates. Broadcasters Petition at 38. They further contend that the record demonstrates that "the promotional value of radio play should be far and away the most significant factor in determining the fair market value of broadcasters simulcast rates." *Id.* at 39-40. But all the evidence cited in the record references the interrelationship between radio stations and record companies in the analog world. As noted above, the Panel considered the evidence but did not find it persuasive.

Where the Panel makes a decision based upon its weighing of the evidence, the Register will not disturb its findings and conclusions that proceed directly from the Panel's consideration of the factual evidence. Thus, the Register accepts the Panel's conclusion that performances of sound recordings over the Internet did not significantly stimulate record sales. More importantly, though, the Panel correctly found that promotional value is a factor to be considered in determining rates under the willing buyer/willing seller model, and does not constitute an additional standard or policy consideration to be used after rates are set to adjust a base rate upwards or downwards. Report at 21. Therefore, the effect of any promotional value attributable to a radio retransmission would already be reflected in the rates for these transmissions reached through arm's-length negotiations in the marketplace.

As for the second factor, the Panel found that both copyright owners and licensees made significant creative, technological and financial contributions. It concluded, however, that it was not necessary to gauge with specificity the value of these contributions in the case where actual agreements voluntarily negotiated in the marketplace existed, since such

that time spent listening to music programming versus non-music programming; and

d. the reasons why people visit radio station websites and the activities they engage in when they visit these sites. Mazis' W.D.T. at 1-2.

considerations, including any significant promotional value of the transmissions, would already have been factored into the agreed upon price. *Id.* at 35-36. This is not a contested finding.

It is also important at the outset of this review to distinguish the willing buyer/willing seller standard to be used in this proceeding from the standard that applies when setting rates for subscription services that operated under the section 114 license. They are not the same. Section 114(f)(1)(B), governing subscription services, requires a CARP to consider the objectives set forth in section 801(b)(1), as well as rates and terms for comparable types of digital audio transmission services established through voluntary negotiations. See Final Rule and Order, 63 FR 25394, 25399 (May 8, 1998). This standard for setting rates for the subscription services is policy-driven, whereas the standard for setting rates for nonsubscription services set forth in section 114(f)(2)(B) is strictly fair market value—willing buyer/willing seller. Thus, any argument that the two rates should be equal as a matter of law is without merit. See, e.g., Webcasters Petition at 4 (comparing rates set for preexisting subscription services under the policy driven standard with the proposed marketplace rates for nonsubscription services and inferring that the rates should be similar).

2. Hypothetical Marketplace/Actual Marketplace

To set rates based on a willing buyer/willing seller standard, the CARP first had to define the relevant marketplace in which such rates would be set. It determined, and the parties agreed, that the rates should be those that a willing buyer and willing seller would have agreed upon in a hypothetical marketplace that was not constrained by a compulsory license. The CARP then had to define the parameters of the marketplace: the buyers, the sellers, and the product.

In this configuration of the marketplace, the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies, and the product consists of a blanket license from each record company which allows use of that company's complete repertoire of sound recordings. Report at 24. Because of the diversity among the buyers and the sellers, the CARP noted that one would expect "a range of negotiated rates," and so interpreted the statutory standard as "the rates to which, absent special circumstances, most willing buyers and

¹³ Michael Fine is an expert witness for the Webcasters and Broadcasters. He was the chief executive officer to Sounddata, SoundScan and Broadcast Data Systems until December 31, 2000, and is now a management consultant to the firms operating these services. He analyzed data collected by these services to determine the promotional effect upon record sales from radio retransmissions and Internet-only transmissions and the displacement effect of record sales due to copying of sound recordings from Internet transmissions. Fine's W.D.T. at 1.

¹⁴ Professor Mazis is a Professor in the Kogod School of Business, American University, who testified on behalf of the Webcasters and Broadcasters. He designed a survey study to analyze usage patterns of people who listen to simulcast of a radio station's over-the-air broadcast programming and transmissions made by services transmitting solely over the Internet. Specifically, the study was designed to measure:

- a. The effect listening to transmissions over the Internet had on a listener's music purchases;
- b. the extent to which listeners to radio retransmissions are either listeners from the broadcaster's local market or non-local listeners;
- c. the amount of time spent listening to programming on the Internet and the proportion of

willing sellers would agree" in a competitive marketplace.¹⁵ *Id.* at 25.

The Services take issue with the Panel's analysis of the hypothetical marketplace. They argue that the willing sellers should be considered as a group of hypothetical "competing collectives each offering access to the range of sound recordings required by the Services," and not, as the Panel contends, viewed as individual record companies. Broadcasters Petition at 9; Webcasters Petition at 9-10. It is hard to see, however, how competition would be stimulated in a marketplace where every seller offers the exact same product and where more likely than not, the sellers would act in concert to extract monopolistic prices. Possibly sellers would choose to undercut each other, but at some point the price would stabilize. In any event, the Services failed to explain how such collectives would operate in a competitive marketplace. Consequently, the Register rejects the Webcasters' challenge to the Panel's definition on this point and adopts the Panel's characterization of the relevant marketplace, recognizing that for purposes of this proceeding, the major record companies are represented by a single entity, the RIAA.

Turning next to the actual marketplace in which RIAA negotiated agreements with individual services, the Services voice a number of objections to the Panel's decision to rely on the 26 voluntary agreements offered into evidence by RIAA. Specifically, the Services object to the use of the voluntary agreements because they fail to exhibit a range of negotiated rates among diverse buyers and sellers. Broadcasters Petition at 10; Webcasters Petition at 10. They also question the validity of relying on agreements negotiated during the early stages of a newly emerging industry, noting the Panel's admonition to approach such agreements with caution. Report at 47. The reason for the warning was Dr. Jaffe's¹⁶ stated concern that such licenses "may not reflect fully educated assessments of the nascent businesses" long-term prospects."

The Services also argue that the existence of the antitrust exemption in the statutory license gave RIAA an

unfair bargaining advantage over the Services because RIAA represented the five major record companies who together owned most of the works. They contend that RIAA used its superior market power to negotiate supra-competitive prices with Services who could not match either RIAA's power in the marketplace or its sophistication in negotiating contracts. Moreover, they utterly reject the Panel's determination that RIAA's perceived market power was tempered by the existence of the statutory license, which, for purposes of negotiating a fair rate for use of sound recordings, leveled the playing field. Webcasters Petition at 12.

Not surprisingly, RIAA agrees with the Panel on this issue. It maintains that the statutory license offers the Services two clear advantages which more than offset any perceived advantage the RIAA may have had in negotiating a voluntary agreement. First, the license eliminates the usual transaction costs associated with negotiating separate licenses with each of the copyright owners. Second, services may avoid litigation costs associated with setting the rates for a statutory license provided they choose not to participate in the CARP process. RIAA reply at 12.

In essence, both sides articulate valid positions which are supported by the record. RIAA is clearly an established market force with extensive resources and sophistication. In fact, the Panel found that when RIAA negotiated with less sophisticated buyers who could not wait for the outcome of this proceeding, the rates were above-market value, and therefore, not considered by this CARP. Report at 54-56. Nevertheless, it would make no sense for RIAA to take any other position in a marketplace negotiation. Sellers expect to make a profit and will extract from the market what they can, just as buyers will do everything in their power to get the product at the lowest possible price. These are the fundamental principles guiding marketplace negotiations.

Such negotiations, however, were few. For the most part, webcasters chose not to enter into negotiations for voluntary agreements, knowing that they could continue to operate and wait for the CARP to establish a rate. Such actions on the part of the users clearly impeded serious negotiations in the marketplace and support the CARP's observation that the statutory license had a countervailing effect on the negotiation process and limited the ability of RIAA to exert undue marketplace power. See Tr. 9075-77, 9490-94 (Marks) (explaining the difficulties of bringing webcasters to the negotiating table due to the statutory

license). Thus, the CARP could only consider negotiated rates for the rights covered by the statutory license that were contained in an agreement between RIAA and a Service with comparable resources and market power.

The only agreement that met these criteria was the Yahoo!¹⁷ agreement. The Panel found that both parties to that agreement entered into negotiations in good faith and on equal footing. Moreover, RIAA's negotiating advantage disappeared. RIAA could not extract super-competitive rates because Yahoo! brought comparable resources, sophistication, and market power to the negotiating table.

Moreover, Yahoo! could have continued to operate under the license and wait for the outcome of this proceeding. Yet, Yahoo!, unlike most of the other Services, did not take this course of action. It wanted a negotiated agreement so that it could fully develop its business model based on certainty as to the costs of the use of the sound recordings. Consequently, it had every incentive to negotiate a rate that reflected its perception of the value of the digital performance right in light of its needs and position in the marketplace. Had RIAA insisted upon a super competitive rate, Yahoo! could have walked away and waited for the CARP to set the rates. RIAA Reply at 13. Thus, it was not arbitrary for the Panel to consider the negotiated agreement between Yahoo! and RIAA. It met all the criteria identified by the CARP (discussed above) that characterized the hypothetical marketplace: Yahoo! was a DMCA-compliant Service; RIAA represented the interests of five independent record companies, and the license granted the same rights as those offered under the webcasting and the ephemeral recording licenses.

The Webcasters make one final argument concerning use of licenses negotiated in the marketplace. They fault the Panel for its reliance on a contract for which there was no prior marketplace precedent for setting a rate. Webcasters Petition at 15. Yet, that alone cannot be a reason to reject

¹⁷ Yahoo! is a streaming service which provides a retransmissions of AM/FM radio stations and programming from other webcaster sites. Report at 61. Yahoo! is also a global Internet communications, commerce and media company, offering comprehensive services to more than 200 million users each month. Content for its features like Yahoo! Finance, Yahoo! News, and Yahoo! Sports, are typically licensed from third parties. Mandelbrot W.D.T. ¶ 3-5.

The Panel was well aware of the many faces of Yahoo! Nevertheless, it found no reason to reject the Yahoo! agreement merely because it offered other business services. See Report at 76, in 53.

¹⁵ The panel used the same analysis for setting the rates for the ephemeral recording license because the statutory language defining the standard for setting rates for the ephemeral recording license is nearly identical to the standard set forth in section 114.

¹⁶ Adam Jaffe is a Professor of Economics at Brandeis University. He is also the Chair of the Department of Economics and the Chair of the University Intellectual Property Policy Committee. He testified on behalf of the Webcasters and the Broadcasters.

consideration of agreements negotiated in the marketplace, albeit at an early stage in the development of the industry. At some point, rates must be set. Such rates then become the baseline for future market negotiations. RIAA recognized an opportunity to participate in this initial phase and moved forward to negotiate contracts with users with the intention of using these contracts to indicate what a willing buyer would pay in the marketplace. However, that was easier said than done. As discussed above, most Webcasters chose not to enter into marketplace agreements, preferring to wait for the outcome of the CARP proceeding in the hope of getting a low rate. Clearly, such resistance to enter into good faith negotiations made it difficult for the copyright owners to gauge the market accurately and find out just what a willing buyer would be willing to pay for the right to transmit a sound recording over the Internet.

3. Benchmarks for Setting Market Rates: Voluntary Agreements vs. Musical Works Fees

The parties offer two very different methods for setting the webcasting rates. RIAA argued that the best evidence of the value of the digital performance right is the actual rates individual services agreed to pay for the right to transmit sound recordings over the Internet. In support of its position, it offered into evidence 26 separate agreements it had negotiated in the marketplace prior to the initiation of the CARP proceeding. The Services take a different approach. They dispute the validity of the contracts as a bases for marketplace rates and offer in their place a theoretical model (the "Jaffe model") predicated on the fees commercial broadcasters pay to use musical works in their over-the-air AM/FM broadcast programs.

The Jaffe model builds on the premise that in the hypothetical marketplace, copyright owners would license their digital performance rights and ephemeral recording rights at a rate no higher than the rates music publishers currently charge over-the-air radio broadcasters for the right to publicly perform their musical works.¹⁸ Report at 28, citing Webcasters PFFCL ¶¶ 276-78; Jaffe W.D.T. 16-19. To find the rate copyright owners would charge under this model, Webcasters calculated a per performance and a per hour rate by using the aggregate fees that 872 over-

the-air radio stations paid in 2000 to the performing rights organizations BMI, ASCAP, and SESAC.¹⁹ It combined the fee data with data on listening audiences obtained from Arbitron to generate an average fee paid by an over-the-air broadcaster per "listening hour." From this value, Webcasters calculated a per performance fee by dividing the "listener hour" fee by the average number of songs played per hour by music-intensive format stations. *Id.* These calculations yielded a per song fee of 0.02¢ or, in the alternative, a per listener hour fee of 0.22¢. For purposes of webcasting, these values were adjusted upward to reflect the fact that, on average, webcasters play 15 songs per hour, as compared to the 11 per-hour played on over-the-air radio. The webcaster per hour rate works out to be 0.3 instead of 0.2¢ per hour.

After carefully considering both approaches, the Panel chose to focus on the RIAA agreements. In rejecting Dr. Jaffe's theoretical model, the panel cited three reasons for its conclusion. First, the Panel expressed strong concern regarding the construct of the model, including: 1. The difficulty in identifying all the factors that must be considered in setting a price, and 2. The inherent error associated with predicated a prediction on a "string of assumptions," especially where the level of confidence in many of the assumptions is not high. Second, the Panel was wary of analogizing the market for the performance of musical works with the market for the performance of sound recordings, finding instead that the two marketplaces are distinct based upon the difference in cost and demand characteristics. And finally, the Panel determined that the Jaffe model was basically unreliable. It could not be used to predict accurately the amount of royalty fees owed to the performing rights societies by a particular radio station. It came to this conclusion after using the model to predict the royalty fees owed by a particular station and comparing that figure to the amount the radio station actually paid. For some radio stations, the model severely underestimated the amount owed to the performing rights societies, thus, drawing into serious question the reliability of the model. Report at 42.

¹⁸ BMI, Inc., American Society for Composers, Authors and Publishers, and SESAC, Inc. are performing rights organizations that represent songwriters, composers and music publishers in all genres of music. These societies offer licenses and collect and distribute royalty fees for the non-dramatic public performances of the copyrighted works of their members.

a. *Fees paid for use of musical works.* The Broadcasters and the Webcasters fault the Panel for disregarding the fees paid for musical works as a viable benchmark. Webcasters Petition at 15, 47. They maintain that Dr. Jaffe's analysis proves that the value of the performance of the sound recording is no higher than the value of the performance of the musical work. Webcasters argue that the fees for musical works constitute a valid benchmark because these rates are the result of transactions between willing buyers and willing sellers over a long period of time, in a marketplace that shares economic characteristics with the marketplace for sound recordings. Webcasters Petition at 48. The Broadcasters agree. They maintain that even under the willing buyer/willing seller standard, "the over-the-air musical works license experience * * * has resulted in fees 'to which most willing buyers and willing sellers [have] agree[d]' and constitute 'comparable agreements negotiated over a longer period, which ha[ve] withstood 'the test of time.' " Broadcasters Petition at 45-46, citing Report at 25, 47.

Broadcasters and Webcasters also object to the Panel's characterization of its proposed benchmark as merely a theoretical model. Webcasters Petition at 51. They maintain that Dr. Jaffe's model was much more than a theoretical model because it used actual data from the musical works marketplace to calculate an analogous rate for use of sound recordings in the digital marketplace. Consequently, these Services contend that the Panel gave inadequate consideration to their proposed benchmark and rejected the model out of hand because it was purported to be only a theoretical model based upon a number of untested assumptions. Broadcasters Petition at 18-19; Webcasters Petition at 18-20, 52.

Finally, the Services argue that the statute does not compel the Panel to consider only negotiated agreements. They also contend, that the reliance on the fees paid for use of the musical works in a prior CARP proceeding to establish rates for subscription services operating under the same license required the panel to give more consideration to the musical works benchmark. Broadcaster's Petition at 1-2; Webcasters Petition at 1-2, 15, 17, 47. Webcasters find support for this last argument in an Order of the Copyright Office issued in this proceeding, dated July 18, 2001.

In that order, the Office acknowledged that in 1998 it had adopted the rates paid for musical works fees as a relevant benchmark for setting rates for

¹⁹ A "musical work" is a musical composition, including any words accompanying the music. A "sound recording" is a work that results from the fixation of a series of musical, spoken, or other sounds, other than those accompanying a motion picture or other audiovisual work.

subscription services. It stated, however, that the evidence in that case did not support a conclusion that the value of the sound recording exceeded the value of the musical work. Moreover, and directly to the point, the Register's recommendation in the earlier proceeding concurred with the earlier Panel's determination that the musical works benchmark is NOT determinative of the marketplace value of the performance right in sound recordings. The relevant passage states: "The question, however, is whether this reference point (the musical works benchmark) is determinative of the marketplace value of the performance in sound recordings; and, as the Panel determined, the answer is no." 63 FR 25394, 25404 (May 8, 1998).

The July 18 Order went on to note that in the subscription service proceeding, "[h]ad there been record evidence to support the opposite conclusion, [namely, that the value of sound recordings exceeds the value of musical works], the outcome might have been different." This statement was an invitation to the parties to provide whatever evidence they could adduce in this proceeding to establish the value of the sound recording. It was not to be read as an absolute determination, that the value of the sound recording in a marketplace unconstrained by a compulsory license is less than the value of the underlying musical work. Instead, the Order stated that "the musical work fees benchmark identified in a previous rate adjustment proceeding as the upper limit on the value of the performance of a sound recording may or may not be adopted as the outer boundary of the 'zone of reasonableness' in this proceeding. This is a factual determination to be made by the CARP based upon its analysis of the record evidence in this proceeding."

It is also important to note that in the prior proceeding, the only reason the Register and the Librarian focused on the musical works benchmark was because it was the only evidence that remained probative after an analysis of the Panel's decision. Each of the other benchmarks possessed at least one fatal deficiency and, consequently, each was rejected as a reliable indicator of the value of the performance of a sound recording by a subscription service. Of equal importance is the fact that the musical works benchmark had never been fully developed in the record, nor had any party relied on it to any great extent in making its case to that Panel. Consequently, it was not arbitrary for the Panel to reject the Services' invitation to anchor its decision for setting rates for nonsubscription

services on the prior decision setting rates for preexisting subscription services.

Moreover, the Panel is not required to justify why the rates it ultimately recommended here are greater than the rates preexisting subscription services pay for use of the musical works. That is merely the result of the analysis of the written record before this Panel, and its decision flows naturally from its reliance upon contractual agreements negotiated in the relevant marketplace for the right at issue. This difference in the rates is also attributable to the different standards that govern each rate setting proceeding. As discussed previously in section IV.1, the standard for setting rates for subscription services is policy based and not dependent upon market rates. Consequently, it is more likely that the rates set under the different standards will vary markedly, especially when rates are being set for a new right in a nascent industry.

Nevertheless, the Register agrees with the Services on a number of theoretical points. Certainly, the Panel could have utilized Dr. Jaffe's model in making its decision, either alone or in conjunction with the voluntary agreements, provided that it considered the model's deficiencies, and made appropriate adjustments for the fact that the model required reliance on a string of assumptions to perform the conversion of a rate for the public performance of a musical work in an analog environment, into a comparable rate for the public performance of a sound recording in a digital format. *See AMOA v. CRT*, 676 F.2d 1144 (7th Cir. 1982). But the fact remains that it was not required by law to do so. The Panel was free to choose any of the benchmarks offered into the record or to rely on each of them to the degree they aided the Panel in reaching its decision. *See, e.g., Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting*, 43 FR 25068-69 (CRT found voluntary license between BMI, Inc., and the public broadcasters, Public Broadcasting System and National Public Radio, of no assistance in setting rates for use of ASCAP repertoire).

The Register also rejects the Services' contentions that the Panel failed to consider fully Dr. Jaffe's model. *See Webcasters Petition* at 20, 52. The Panel did consider Jaffe's model and concluded that it need not consider alternative benchmarks that are at best analogous when it had actual evidence of marketplace value of the performance of the sound recordings in the record. Report at 42. It also rejected the offer to utilize the model because the underlying assumptions were in many

instances questionable. For example, the Panel did not accept the assumptions that a percentage of revenue model could be converted accurately to a per performance metric, or that the buyers and sellers in the two marketplaces are analogous.

Broadcasters assert that they had established that the value of the musical work is higher than the comparable right for sound recording based on the fees paid for use of these works in movies and television programs. Broadcasters Petition at 24. In addition, they offered a study of the fees paid for these rights in twelve foreign countries where the Services claim these rights are valued more or less equally. *Id.* at 24, 49. Because the Panel failed to analyze this information, the Services argue, the Panel's rejection of the musical benchmark was arbitrary.

RIAA responds that the information offered on the fees paid for the public performance of sound recordings fails to establish that in these countries sound recordings are valued according to a "willing buyer/willing seller" standard. RIAA Reply at 20, fn 36. In fact, many of the countries surveyed evidently use an "equitable remuneration" standard, which courts have held not to be equivalent to a fair market value. Because it is not possible to ascertain whether any of the rates offered in the survey of foreign countries represented a fair market rate, or that the rights in these countries are equivalent to the rights under U.S. law, the Panel was not arbitrary in its decision to disregard this evidence. The Register also concludes that the Panel's decision not to consider master use and synchronization licenses for use of musical works and sound recordings in motion pictures and television was not arbitrary. At best, these licenses offered potential benchmarks for evaluating the digital performance right for sound recordings, and they may well have been useful had not actual evidence of marketplace value of the sound recordings existed. In any event, they did not represent better evidence than the voluntary agreements negotiated in the marketplace for the sound recording digital performance right.

b. *Voluntary agreements.* On the other hand, the Panel articulated two affirmative reasons for its focus on the negotiated agreements. First, the statute invites the CARP to consider rates and terms negotiated in the marketplace. Second, the Panel accepted the premise that the existence of actual marketplace agreements pertaining to the same rights for comparable services offers the best evidence of the going rate. Report at 43, citing Jaffe Tr. at 6618.

But in choosing this approach, the Panel did not accept the 26 voluntary agreements at face value. It evaluated the relative bargaining power of the buyers and sellers, scrutinized the negotiating strategy of the parties, considered the timing of the agreements, discounted any agreement that was not implemented, eliminated those where the Service paid little or no royalties or the Service went out of business, and evaluated the effect of a Service's immediate need for the license on the negotiated rate. See Report at 45-59.²⁰ Ultimately, it gave little weight to 25 of the 26 agreements for these reasons and because the record demonstrated that the rates in these licenses reflect above-marketplace rates due to the superior bargaining position of RIAA or the licensee's immediate need for a license due to unique circumstances. At best, the Panel concluded that the rates included in these agreements establish an upper limit on the price of the digital performance right, and where included, the right to make ephemeral copies. Report at 59.

RIAA objects to the Panel's decision to reject 25 of the 26 agreements on the grounds that the Panel's criticisms were overbroad. RIAA Petition at 34. Specifically, it claims that the Panel mischaracterized its agreement with *www.com/OnAir* ("OnAir"), arguing that this Licensee paid substantial royalties and its decision to enter into the agreement was not motivated by special circumstances as the CARP claimed. Id. at 31. This observation, however, is not sufficient to overcome the Panel's conclusion in regard to this agreement, especially in light of the testimony of RIAA's own expert witness, Dr. Nagle, who testified the Panel should give no consideration to any agreement with a licensee who cannot survive in the marketplace. Report at 24. Had OnAir continued to operate in the marketplace and renew its license with RIAA, the Panel might have given it more serious consideration. But again, it was not required to do so, especially when the Panel found more probative evidence in the record upon which to rely.

Likewise, RIAA objected to the Panel's decision not to give any weight to the MusicMusicMusic ("MMM") agreement, arguing in this case that the

Panel assumed MMM had renewed its agreement in 2001 for the same reasons that led it to accept a higher than market value rate in 1999. RIAA Petition at 32. Webcasters respond that RIAA misrepresents the facts of the renewal. They maintain that MMM renewed the agreement in 2001 based on "many of the same motivating factors" that led to the initial agreement, including its concerns about its long-term relationship with RIAA in other areas. Webcasters Reply at 29. Because the evidence supports a rationale for MMM to accept a higher than marketplace rate, it was not arbitrary for the Panel to decide not to adopt it as an adequate benchmark. The Panel need not rely on the MMM agreement when it had another agreement negotiated in the marketplace that did not suffer from the same perceived shortcomings.

Specifically, the Panel gave significant weight to the one remaining agreement negotiated—the RIAA-Yahoo! agreement—and used it as a starting point for setting the rates for the webcasting license and the ephemeral recordings license. The Panel found this agreement particularly reliable and probative because: (1) Yahoo! was a successful and sophisticated business which, to date, had made well over half of all DMCA-compliant performances; (2) it had comparable resources and bargaining power to those RIAA brought to the table; and (3) the agreement provided for different rates for different types of transmissions. See Report at 64-67; 70. While the first two reasons offer strong support for the Panel's decision to rely upon the Yahoo! agreement, the third reason is questionable in the context of the Yahoo! agreement because the different rates do not actually represent the parties' understanding of the value of the performance right for these types of transmissions. See discussion *infra*, section IV.5.

Webcasters, however, argue that the Panel's reliance on the Yahoo! agreement was fatal because it selected a single term out of a multifaceted contract. Webcasters at 22-23. Specifically, they maintain that the webcasting rate did not reflect merely the value of the sound recording, but an abundance of trade-offs that met the needs of RIAA and Yahoo!. Id. at 24. Webcasters make this argument because, in a prior CARP proceeding, the Register had refused to adopt a complicated partnership agreement that purportedly included a rate for the digital performance right as a benchmark for setting the statutory rate. See, *Rate Setting Proceeding for Subscription Services*, 63 FR 25394 (May 8, 1998).

Specifically, the Register concluded that "it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the [rate] provision would not exist but for the entire agreement." Id. at 25402.

The two agreements, however, are not analogous. The primary purpose of the Yahoo! agreement was to set a rate for use of sound recordings over the Internet. Thus, the noted trade-offs in this agreement were all directly tied to considerations relating to the value of the performance right, and did not affect its validity as a benchmark. Such was not the case with the subscription services agreement offered into evidence in the prior proceeding, where the performance right component was merely "one of eleven interdependent co-equal agreements which together constituted the partnership agreement between [Digital Cable Radio Associates ("DCR")] and the record companies." Id.

Along these same lines, the Services challenge the Panel's dependence upon a single contract negotiated between a single seller (RIAA) and a single buyer (Yahoo!), especially in light of the Panel's construct of the hypothetical marketplace. Broadcasters Petition at 14; Live365 Petition at 5; Webcasters Petition at 9; 14. These parties argue that under 17 U.S.C. 114(f)(2)(B), the Panel had discretion to consider negotiated agreements only when the agreements were for comparable types of services in comparable circumstances. Webcasters, including Live365, maintain that Yahoo! had a unique position among webcasters and argue that it was manifestly arbitrary for the Panel to set rates based solely on the rates paid by this one webcaster which by its own admissions was not similarly situated with other webcasters. Live365 Petition at 11; Webcasters Petition at 27. Specifically, they contend that Yahoo! had little concern about getting a reasonable rate for Internet-only transmissions so long as the rate for RR transmissions was favorable and it could continue to grow in this arena. Webcasters note that Yahoo!'s main business was the retransmission of radio re-broadcasts, and that over 90% of all transmissions made by Yahoo! fall within this category. Id. at 28. Consequently, Webcasters maintain that the rates set for Internet-only transmissions in the Yahoo! agreement cannot be fairly applicable to Webcasters at large. Id. at 29.

Broadcasters have other complaints with the Panel's approach. First, they object to the use of the Yahoo! contract to set rates for broadcasters when the buyer in that case was not a broadcaster

²⁰ The Panel also considered, and ultimately rejected three offers of corroborating evidence made by RIAA in support of its position that all 26 agreements should be used in setting the royalty rates: (1) License agreements for making [material redacted subject to Protective Order]; (2) prior case law articulating a method for assessing damages in patent infringement cases; and (3) a pricing strategy analysis.

but a third-party aggregator—a completely different type of business. Second, they fault the Panel for its failure to follow its own dictate to proceed cautiously when viewing contracts negotiated in a nascent industry for newly created rights. Broadcaster Petition at 14. Similarly, Webcasters fault the Panel for relying exclusively on the Yahoo! agreement because it offers only a single, uniform rate for each type of transmission, in contrast to the “range of rates,” involving “diverse buyers and sellers,” that the Panel identified as the hallmark of a willing buyer/willing seller marketplace.” Webcasters Petition at 14. Webcasters also contend that the Yahoo! agreement should not have been considered because it, like the Lomasoft-RIAA agreement, had not been renewed. Webcasters Petition at 41.

Moreover, Live365 questions the Panel’s reliance on the Yahoo! contract when it had rejected use of a second similar agreement between MusicMatch (“MM”) and RIAA because MM had accepted higher than marketplace rates for nearly identical reasons to those that account for the inflation in the Yahoo! rates. MM had wished to settle litigation with RIAA and it received a benefit from the inclusion of a Most Favored Nations (MFN) clause in the contract. Yet, in spite of the similarities, the Panel relied on the Yahoo! agreement and disregarded the second one. Such disparate treatment of similarly situated services is arguably arbitrary. Live365 Petition at 13. A closer examination of the agreements, however, reveals a significant difference between the two contracts which allowed the Panel to disregard the MM agreement for further consideration. Most importantly, the MM agreement contained a MFN clause that [material redacted subject to a protective order]. The Panel reasoned that this provision undermined the usefulness of the agreement to establish a marketplace rate because [material redacted subject to a protective order]. Report at 56–57. Such was not the case with the Yahoo! agreement since the MFN clause only allowed Yahoo! to receive a partial benefit commensurate with [material redacted subject to a protective order]. Report at 62.

The Register concurs and agrees with the Panel’s observation that it would be unsound to establish a rate for the statutory license using a rate that itself is subject to change based on the outcome of this proceeding.

The Register also finds the other arguments by the parties unavailing. In spite of their objections, the Services’ own expert, Dr. Jaffe, agreed in principle with the Panel’s approach. In his

testimony, he acknowledged that voluntary agreements between a willing buyer and a willing seller would constitute the best evidence of reasonable marketplace value if such agreements were between parties comparable to those using the webcasting license. Tr. 6618 (Jaffe). The Services’ argument, of course, is that the Yahoo! agreement is not a comparable agreement for purposes of setting rates for all webcasters, and this appears to be a valid point. Yahoo!’s business model is somewhat unique. Unlike webcasters that create their own programming, Yahoo! merely offers programming by AM/FM radio stations and other webcasters.

Nevertheless, RIAA offers record evidence that contradicts the Webcasters’ assertion that Yahoo! is not a comparable service for purposes of this proceeding, noting that many webcasters affirmatively stated that Yahoo! is a competitor. Moreover, RIAA asserts that the number of the performances made by Yahoo! on its Internet-only channels is roughly equivalent to the number of performances made by the other webcasters in this proceeding and, therefore, Yahoo!’s interest in getting a reasonable rate for its Internet-only stations should be comparable to those of the Webcasters in this proceeding. RIAA reply at 33–34.

Because Yahoo! is engaged in both types of transmissions, it is reasonable to accept this agreement as a basis for setting rates for both types of transmissions. Yahoo! has developed a significant business presence in the marketplace for Internet-only transmissions and understands the marketing and business of Internet-only webcasters. Consequently, allegations that Yahoo! has only a de minimis interest in the webcasting field and is thus less interested in getting a reasonable rate for the right to make digital transmissions are without merit. The question, however, is whether each rate in the Yahoo! agreement reflects the actual value of the particular transmission or whether one must consider both rates in concert to understand the valuation process. For a more detailed discussion on this point, see section IV.5 *infra*.

4. Alternative Methodology: Percentage-of-Revenue

The Panel also carefully considered and rejected a percentage-of-revenue model for assessing fees and determined that a per performance metric was preferable to a percentage-of-revenue model. A key reason for rejecting the percentage-of-revenue approach was the

Panel’s determination that a per performance fee is directly tied to the right being licensed. The Panel also found that it was difficult to establish the proper percentage because business models varied widely in the industry, such that some services made extensive music offerings while others made minimal use of the sound recordings. Report at 37. The final reason and perhaps the most critical one for rejecting this model was the fact that many webcasters generate little revenue under their current business models. As the Panel noted, copyright owners should not be “forced to allow extensive use of their property with little or no compensation.” *Id.*, citing H.R. Rep. 105–796, at 85–86. Thus, it seemed illogical to set a rate for the statutory license on a percentage-of-revenue basis when in fact a large proportion of the services admit they generate very little revenue, and, therefore, would generate meager royalties even for substantial uses of copyrighted works. Moreover, it is highly unlikely that a willing seller, who negotiates an agreement in the marketplace, would agree to a payment model which itself could not provide adequate compensation for the use of its sound recordings.

Nevertheless, Webcasters and Live365 assert that the Panel acted arbitrarily when it failed to provide a revenue-based royalty option. Webcasters at 54. They maintain that both sides advocated adoption of a percentage-of-revenue option, see RIAA PFFCL, Appendix C; Webcasters PFFCL ¶¶ 283–296, and that it was arbitrary for the Panel to refuse to adopt this approach. See Live365 Petition at 10; see also pg. 11, fn 6. Webcasters also assert that they had made clear that in the event the Panel rejected Jaffe’s model, a revenue-based alternative license proposal would be necessary to avoid putting certain webcasters out of business. Webcasters Petition at 56, 60. Moreover, Webcasters reject the Panel’s conclusion that the Services’ revenue-based fee proposal was untimely. *Id.* at 57–60. They maintain that under § 251.43(d) they were allowed to revise their claim or their requested rate “at any time during the proceeding up to the filing of the proposed findings of fact and conclusions of law,” and that the Panel had no authority to alter this provision by order under § 251.50.²¹

²¹ Section 251.50 of the 37 CFR provides that:

In accordance with 5 U.S.C., subchapter II, a Copyright Arbitration Royalty Panel may issue rulings or orders, either on its own motion or that of an interested party, necessary to the resolution of issues contained in the proceeding before it. Provided, that no such rules or orders shall amend,

Continued

In reply, RIAA notes that the Webcasters cite no evidence for their assertion that they reasonably believed the Panel would offer a percentage-of-revenue option and counters their timeliness argument by setting forth the timeline regarding the parties' submissions concerning the rates. RIAA Reply at 62. Evidently at the request of the Webcasters, the Panel issued an order setting November 2 as the deadline for submitting revised or new rate proposals, so that parties were fully aware of each other's position and could style their findings of fact and conclusions of law accordingly. Consequently, the Panel found that the Services' later submission including a proposed rate based on percentage-of-revenue in their PFFCL was untimely. Report at 31, citing Order of November 3, 2001.

After considering the arguments now advanced by the Services concerning the Panel's authority to require final submissions on rates prior to the filing of the PFFCLs, the Register finds that the Panel acted in a lawful manner and within its authority. As RIAA points out in its reply, the Panel has authority pursuant to 37 CFR 251.42 to waive or suspend any procedural rule in this proceeding, including the time by which parties must make final submissions regarding proposed rates. What the Panel cannot do is engage in a rulemaking proceeding to amend, supplement, or supersede any of the rules and regulations governing the CARP procedures. See 37 CFR 251.7. Moreover, the language in § 251.43 is somewhat ambiguous as to when a party can make its final rate proposal, lending itself to two interpretations. For this reason alone, it was prudent for the Panel to issue an order clarifying the application of the rule for purposes of this proceeding. In fact, Webcasters had asked for this ruling and cannot be heard at the end of the process to argue against a ruling that they sought and to which they never objected. Consequently, the Panel was not arbitrary when it found the Webcasters' request for a percentage-of-revenue fee structure untimely.

Moreover, the Panel was not arbitrary for failing to adopt a percentage-of-revenues model merely because some parties voiced an expectation that the Panel would offer such a model as an alternative means of payment. This complaint of unmet expectations is not a substantive argument for finding the Panel's decision arbitrary and,

consequently, it will not be considered further.

On the other hand, Live365 does make a substantive argument concerning the Panel's decision not to adopt a percentage-of-revenue model. It notes that the current marketplace uses two types of rate structures, a revenue based model and a performance rate structure, and that the revenue based model is better for start-up and smaller webcasters. Live365 Petition at 8. In fact, Live365 points out that many of the agreements that RIAA negotiated with webcasters incorporated this model. Moreover, Live365 maintains that it was arbitrary for the Panel to propose rates that "had the effect of rendering sound recordings substantially more valuable than musical works, even though the CARP acknowledged that it was rendering no opinion on this issue." Live365 Petition at 5, 14-15. In its opinion, this result was arbitrary based upon Yahoo!'s stated perception that the value of the performance right for the musical work is comparable to the value of the performance right for the sound recording. Finally, Live365 argues that rates based upon mere perception, as those negotiated in the Yahoo! agreement, are by their very nature arbitrary and should be disregarded. *Id.* at 15.

RIAA refutes the Services' claim that the Panel was arbitrary because it failed to offer a percentage-of-revenue model. It argues that the record supports the Panel's conclusion that a percentage-of-revenue model would have been difficult to implement because Services use sound recordings to different degrees—a position taken by the Webcasters' own witness. Specifically, Jaffe questioned the appropriateness of using a percentage-of-revenue model where those percentages were based on the economics driving over-the-air broadcasts. RIAA Reply Petition at 52, citing Tr. 6487, 6488, 12582 (Jaffe). Jaffe also acknowledged that it was difficult to assess what the revenue base should be for such a model given the variation of the business models utilized by the webcasters. RIAA also notes that section 114(f)(2)(B) requires the Panel to consider the quantity and nature of the use of the sound recording and argues that a per performance metric automatically accounts for the amount of use by the various services. RIAA Reply at 59.

RIAA also argues that a basic percentage-of-revenue fee structure would frustrate the purpose of the law because it would deny copyright owners fair compensation for use of their works in those situations where a service generates little or no revenue. Certainly,

the record contains evidence that a number of webcasters do not expect or intend to earn revenues from their webcasts, see Report at 37; see, e.g., Live365 Petition at 7, maintaining that their use is designed primarily to maintain their over-the-air audience. Because certain Services take this approach, when RIAA did consider using a percentage-of-revenue model, it included a substantial minimum fee proposal in conjunction with the percentage of fee proposal to address the problems associated with low revenue generating businesses. Specifically, the RIAA proposal required that a Service pay either 15% of revenues or \$5,000 per \$100,000 of a webcasters' operating costs, whichever is greater. RIAA Reply at 61. In this way, RIAA sought to avoid the anomaly of allowing a business unfettered use of the sound recordings without reasonable compensation to the copyright owners. *Id.* at 54, 61. This formulation, however, would not have given the webcasters the relief they seek through the adoption of a rate based on a percentage-of-revenues. In fact, under RIAA's percentage-of-revenue formulation, many webcasters, including Live365, would have paid more than they will under the Panel's per performance rate structure.

The Register finds that the Panel's decision not to set a percentage-of-revenue fee option was not arbitrary in light of the record evidence. First, it is clear that the Services' primary position was to seek adoption of a fee based upon performances and not a percentage-of-revenue. Indeed, Dr. Jaffe's model proposed a fee model based on listener hours or number of listener songs, and not a rate based upon percentage-of-revenues, because a royalty based upon actual performances would be directly tied to the nature of the right being licensed. Report at 37; Jaffe W.R.T. at 31. Moreover, because they took this position, Services argued for a low minimum rate that would only cover administrative costs and not the value of the performances themselves—an approach the CARP adopted in its Report.

Moreover, the statute does not require the CARP to offer alternative fee structures, and the Services should not have expected the Panel to do so, especially when the Webcasters never advanced a percentage-of-revenues option in their own case. In fact, there is no precedent in the statutory licensing scheme anywhere in the Copyright Act that would support alternative rates for the same right. Clearly, it cannot be arbitrary for the Panel to choose not to deviate from the

supplement or supersede the rules and regulations contained in this subchapter. See § 251.7.

longstanding practice of establishing only one rate schedule for a license.

5. The Yahoo! Rates—Evidence of a Unitary Marketplace Value

The starting point for setting the rates for the webcasting license is the Yahoo! agreement. In that agreement, rates were set for two different time periods. For the initial time period covering the first 1.5 billion performances, Yahoo! agreed to pay one lump sum of \$1.25 million. From this information, the Panel calculated a "blended," per performance rate of 0.083¢. This value represents the actual price that Yahoo! paid for each of the first 1.5 billion transmissions without regard to which type of service made the transmission. For the second time period, Yahoo! and RIAA agreed to a differential rate structure. One rate was set for performances in radio retransmissions (RR) (0.05¢ per performance) and another rate was set for transmissions in Internet-only (IO) programming (0.2¢ per performance). These rates were first used in early 2000 and do not apply to the first 1.5 billion performances.

However, the CARP did not accept these differentiated rates at face value. The Panel engaged in a far-ranging inquiry to determine how the parties established the negotiated rates. What it found was that Yahoo! agreed to a higher rate for the IO transmissions in exchange for a lower rate for the RR because this arrangement addressed specific concerns of both parties. In particular, RIAA wished to establish a marketplace precedent for IO transmissions in line with rates it had negotiated in earlier agreements, while Yahoo! sought to negotiate rates which, in the aggregate, yielded a rate it could accept. Consequently, the Panel found the rate for the IO transmissions to be artificially high and, conversely, the rates for the RR to be artificially low. For this reason, it made a downward adjustment to the IO rates and an upward adjustment to the RR rates.

Before making this adjustment, though, the Panel had to consider whether it was reasonable to establish separate rates for the two categories of transmissions. In reaching its decision, the Panel considered two facts, the fact that the Yahoo! agreement provided for two separate rates, and the fact that all parties agreed that performances of sound recordings in over-the-air radio broadcasts promote the sale of records. Report at 74. Based on this finding, the Panel concluded that a willing buyer and a willing seller would agree that the value of the performance right for RR would be considerably lower than for IO transmissions. Moreover, it attributed

the existence of the rate differential in the Yahoo! agreement to the promotional value enjoyed by the copyright owners from the performance of the sound recordings by broadcasters in their over-the-air programs, and not to promotional value attributable to transmissions made over the Internet. Report at 74–75. Specifically, the Panel found that, "to the extent that Internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional effect is any less." Report at 75.

This finding, however, did not prompt the Panel to make any further adjustment for promotional value, finding instead that the differential rates in the Yahoo! agreement already reflect "marketplace assessment of the various promotion and substitution effects, along with a myriad of other factors." Report at 87. Primary among these factors were the Most Favored Nations (MFN) clause²² and the cost savings to Yahoo! in avoiding CARP litigation. The Panel reasoned that Yahoo! was willing to accept somewhat inflated royalty rates in exchange for the costs it saved by not participating in the CARP proceeding, and for the MFN clause which had some indeterminate value for Yahoo!.

RIAA disagrees with the Panel's analysis and these findings. As an initial matter, it maintains that there was no record evidence to support a separate rate for commercial broadcasters. RIAA Broadcaster PFOF 24–52. Second, it argues that the Panel adopted a two-tier rate structure for RR and IO transmissions based on the different rates in the Yahoo! agreement, and its mistaken view of the significance of an exemption in the law for a retransmission of a radio station's broadcast transmission within a 150 mile radius of the radio broadcast transmitter in setting the rate for radio retransmissions.²³ See 17 U.S.C. 114(d)(1)(B).

Although RIAA maintains that in its negotiations with Yahoo! it had argued that the value of the radio retransmission should not be based on the location of the original radio broadcast transmitter, it claims that it

²² The MFN clause in the Yahoo! agreement is discussed in detail in section IV.3, pg. 27.

²³ Section 114(d)(1)(B)(i) of the Copyright Act provides an exemption from the digital performance right for "a retransmission of a nonsubscription broadcast transmission: Provided, That in the case of a retransmission of a radio station's broadcast transmission—(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter."

was nervous about the application of the 150-mile radius exemption to retransmissions made by third-party aggregators, like Yahoo!. Consequently, RIAA maintains that it agreed to a lower rate for radio retransmissions, knowing that its arguments for not exempting these transmissions were weak, and because Yahoo! agreed to pay for each transmission without regard to the exemption. The resulting adjustment for the 150-mile exemption consisted of a reduction to the base rate, 0.2¢, and reflects the fact that about 70% of all radio retransmissions fall within the 150-mile zone.²⁴ In addition, RIAA agreed to a further reduction to compensate Yahoo! for any "competitive disadvantage" it faced if commercial broadcasters were found to be totally exempt from the digital performance right under a separate exemption.²⁵

The Panel, however, did not credit RIAA's explanation and concluded that this concern over the exemptions, especially the 150-mile exemption, had no bearing on Yahoo!'s negotiations. The Panel steadfastly maintained throughout its report that Yahoo!'s only aim in the negotiation process was to achieve a rate that translated into an acceptable overall level of payment, and that it did not concern itself with the legal consequences of the 150-mile exemption. Report at 66–67. Thus, the Panel characterized RIAA's arguments in regard to the 150-mile exemption to be nothing more than a "red herring" and without effect in the negotiation process. *Id.* at 85. Consequently, the Panel found that Yahoo! willingly granted RIAA's request for the "whereas clause," relating to the transmissions within the 150-mile radius, because it

²⁴ At the insistence of RIAA, the Yahoo! agreement includes a "whereas" clause which states that approximately 70 percent of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station.

²⁵ Section 114(d)(1)(A) exempts a "nonsubscription broadcast transmission." Following a lengthy rulemaking proceeding to determine the scope of this exemption, the Copyright Office concluded that the exemption applies only to over-the-air broadcast transmissions and does not include radio retransmissions made over the Internet. 65 FR 77292, December 11, 2000. This decision was upheld when challenged in the United States District Court for the Eastern District of Pennsylvania. See *Bonneville Int'l, et al. v. Peters*, 153 Supp. 2d 763 (E.D. Pa. 2001). The case is now on appeal to the United States Court of Appeals, Third Circuit.

However, during the negotiation period and prior to the Copyright Office's rulemaking decision and the court's decision, Yahoo! had argued that it would be at a competitive disadvantage if the courts adopted the broadcasters' interpretation of section 114(d)(1)(A) and found all transmissions made by FCC-licensed broadcasters (those made over-the-air and those made over the Internet) to be exempt from the digital performance right.

cost Yahoo! nothing. Yahoo!'s perception of the clause, however, did not alter the significance of the "whereas clause" to RIAA, who wanted the provision included in the agreement because it would allow RIAA to argue before this CARP that the 0.05¢ rate for radio retransmissions represents a real rate of 0.2¢, which was discounted to account for the legal uncertainties at the time of the negotiation. Report at 67.

Webcasters had problems with the Panel's analysis, too. It found fault with the Panel's approach to setting rates for webcasting based on the rates in the Yahoo! agreement. Webcasters object to the methodology used by the Panel in calculating the proposed rates, especially the use of an inflated rate as a starting point for setting the rates for IO transmissions. Moreover, they contest the use of any rate for IO transmissions contained in the Yahoo! agreement because Yahoo! had less interest in negotiating a favorable rate for these transmissions, which constituted only 10% of its business. Webcasters Petition at 30-40. Instead, Webcasters argue that Yahoo! agreed to the 0.2¢ rate for IO transmissions only because it obtained a significantly lower rate for its radio retransmissions, and that any number of possible combinations of rates could have been set to achieve Yahoo!'s targeted rate. Because of this, Webcasters argue that the endpoints settled upon in the agreement were patently arbitrary. The Register concurs with the Webcasters' analysis on this point and finds that the Panel's use of the IO rate was arbitrary because of the IO rate, which, in and of itself, did not reflect what the willing buyers and willing sellers had agreed to in the Yahoo! deal.

Another flaw in the Panel's reasoning, according to Webcasters, was its reliance on the 0.083¢ "blended rate" as the lower end of the acceptable range of IO rates. They argue that this rate should not even be considered because it was never negotiated as a performance rate at all. This observation, however, overlooks the fact that Yahoo! actually paid this rate for 1.5 billion performances without regard to the nature of the performances. The fact that the rate was not negotiated as a separate rate for Internet-only transmissions does not diminish its usefulness for purposes of this proceeding. As the Panel asserted throughout this proceeding, it is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the marketplace.

The question, however, is whether the rates in the Yahoo! agreement represent distinct valuations of Internet-only transmissions and radio

retransmissions. Ultimately, the Register concludes that they do not and, therefore, the Panel's reliance on these specific rates for IO transmissions and radio retransmissions as a tool for setting the statutory rates is arbitrary. The fundamental flaw in the Panel's analysis, though, is not its acceptance of the Yahoo! agreement as a starting point. Rather, it is the Panel's determination that the differential rate structure reflects a true distinction in value between Internet-only transmissions and radio retransmissions based upon the promotional value to the record companies and performers due to airplay of their music by local radio stations. The Panel reached this conclusion in spite of the fact that nothing in the record indicates that the parties considered the promotional value of radio retransmissions over the Internet when they negotiated these rates.

RIAA maintains, and the Broadcasters concur, that no evidence exists to support the Panel's determination that Yahoo! and RIAA considered and made adjustments for the promotional value of radio retransmissions. RIAA Reply at 48; Broadcasters Petition at 39. In fact, the Broadcasters argue that it was "'patently' arbitrary for the Panel to conclude that promotional value was a 'likely influence' on Yahoo!'s RR rate when the record evidence showed that neither party had ever suggested anything of the kind." Broadcasters Petition at 39. The Register agrees and finds that the Panel's reliance on promotional value to justify the price differential for IO transmissions and radio retransmissions was arbitrary. The Panel's speculative conclusion that "this factor was likely considered by RIAA and Yahoo!, and is evidently reflected in the resulting difference between RR and IO negotiated rates," only serves to undermine the validity of the Panel's final analysis on this point. See Report at 75.

Moreover, the Panel's own earlier findings with regard to the studies offered to show that the Internet has a promotional effect contradicts its later finding concerning the promotional effect derived from radio retransmissions over the Internet. After considering the two studies offered into evidence by the Services, the Panel categorically stated that it "could not conclude with any confidence whether any webcasting service causes a net substitution or net promotion of the sales of phonorecords, or in any way significantly affects the copyright owners' revenue streams." Report at 33-34. It noted that "the Soundata survey presented by Mr. Fine evinced a net

promotional effect of radio broadcasts, but said little about the net promotional effect of the Internet—and nothing about the net promotional effect of webcasting." Id. at 33. It went on to say that "for the time period this CARP is addressing, the net impact of Internet webcasting on record sales is indeterminate. Id. at 34. These observations do not support a conclusion that radio retransmissions have a greater impact than IO transmissions on record sales or that either form of transmission has any impact on record sales.

However, the CARP did conclude that "to the extent promotional value influences the rates that willing buyers and willing sellers would agree to, it will be reflected in the agreements that result from those negotiations." Id. But therein lies the problem. As discussed above, RIAA and Yahoo! did not consider promotional value when negotiating the Yahoo! agreement, therefore, its effect cannot be reflected in the IO and RR rates set forth in the Yahoo! agreement.

However, rejection of the CARP's conclusion on this point does not nullify the usefulness of the Yahoo! agreement. The Register accepts the Panel's determination that the Yahoo! agreement yields valuable information about the marketplace rate for transmissions of sound recordings over the Internet, and is a suitable benchmark for setting rates for all the reasons discussed in section IV.3, *supra*. Moreover, a careful review of the record supports the Panel's further finding that in effect, the real agreement between Yahoo! and RIAA was for a single, unitary rate for the digital performance of a sound recording and not the two separate rates set forth in the agreement—rates, which the Panel found were artificially high (for IO transmissions) and low (for RR).

The Register accepts the CARP's conclusion that the differential rate structure was developed to effectuate particular objectives of the parties, distinct and apart from establishing an actual valuation of the performances. Specifically, the Panel found that RIAA obtained an artificially high IO rate in an attempt to protect its targeted valuation of IO transmissions for use in this proceeding and Yahoo! received an "effective rate" it could accept. Because the record evidence supports this finding, Report at 65, referring to Tr. 11256-57; 11281 (Mandelbrot); Panel Rebuttal Hearing Exhibit 1 at 4; Tr. 11279-81, 11395-96 (Mandelbrot); Tr. 10237-38 (Marks), it was not arbitrary for the Panel to reach this conclusion. Report at 64-65 (noting that "Yahoo!'s

primary concern, as characterized by its negotiator, was to negotiate a license agreement under which it would pay 'the lowest amount possible', that "Yahoo! was willing to accept a higher IO rate in exchange for a lower RR rate in order to achieve the lowest overall effective rate for all its transmissions" (emphasis added), and that Yahoo! was pleased to achieve the lowest possible overall rate." (noting that "the bottom line" combined rate was of paramount importance to Yahoo!). Report at 74. Moreover, Yahoo! maintains that it would not have paid the 0.2 cent rate for the IO transmissions but for the rate it received for radio retransmissions because the two rates, when considered together, yielded an acceptable "effective rate" for all transmissions. The testimony of David Mandelbrot, the Yahoo! representative, is particularly informative on this point.

Question: When you entered into the agreement with the RIAA, just looking at the 0.2 cents per performance rate for Internet-only broadcasting, you didn't consider that an unfair rate, did you?

Answer: Mandelbrot: We considered it a higher rate than we would have paid if we were just negotiating an Internet-only rate. I would say we did not consider it an unfair rate in the totality of the entire agreement, which was that we were getting the 0.05 cent rate for the radio retransmissions.

Mandelbrot Tr. at 11347-11348. This statement supports a finding that Yahoo!, the willing buyer in this case, did not accept the stated IO rate as an accurate reflection of what it would be willing to pay for the right to make those transmissions.

There is also scant evidence to indicate that Yahoo! gave any serious consideration to the effect of the 150-mile exemption for certain radio retransmissions when negotiating the IO and RR rates. Mandelbrot maintained that the exemptions were of little significance to Yahoo!, since it was "looking to use whatever [it] could to get as low a rate as possible." Id. at 11381; see also 11331 (Mandelbrot admits using the ambiguities in the law, even though they thought the arguments in their favor were weak, solely for the purpose of getting "an effective rate that we could live with"). Again it is clear that Yahoo!'s focus was the negotiation of a rate at the lowest possible level that would allow it to conduct business without concerns about copyright violations.

Where such determinations are based on the testimony and evidence found in the record, the Register and the Librarian must accept the Panel's weighing of the evidence and its

determination regarding the credibility of a witness. Likewise, the Register and the Librarian may not question findings and conclusions that proceed directly from the arbitrators' consideration of factual evidence in the record. In this instance, the Panel credited Mandelbrot's testimony and his characterization of the negotiation process, specifically concluding that his testimony was credible, and that Yahoo! understood the argument based on the 150-mile exemption had no significant impact on the rates ultimately negotiated.²⁶ Report at 67. Consequently, we must accept the Panel's assessment on this point, which leads to the conclusion that the "effective rate" achieved through the unique rate structure represents the value these parties placed on the performance of a sound recording, without regard to origin of or the entity making the transmission.

Based upon a modification to the Panel's approach for calculating rates for making transmissions of sound recordings under statutory license that accepts as much of the Panel's reasoning as possible, the base rate for each performance is 0.07¢ (rounded to the nearest hundredth). The methodology for calculating this rate is presented and discussed in full in section IV.B.

6. Are Rates Based on the Yahoo! Agreement Indicative of Marketplace Rates?

Many webcasters, including Live365, maintain that the proposed rates derived from the Yahoo! rates do not reflect what a willing buyer would pay in the marketplace for the right to make these transmissions. Live365 maintains that the Panel incorrectly analyzed the evidence in the record. First, it notes that the Panel itself found that many of the rates in the voluntary agreements

²⁶ The Register finds that RIAA's explanation for the rate structure is equally plausible. Certainly, at the time the Yahoo! agreement was being negotiated, the application of the general exemption for a nonsubscription broadcast transmission, 17 U.S.C. 114(d)(1)(A), and the more specialized exemption for radio retransmissions within 150 miles of the radio broadcast transmitter, 17 U.S.C. 114(d)(1)(B)(i), was in dispute. Thus, it would have been totally rational for the parties to fashion a rate structure that accounted for possibly exempt transmissions. It would have been logical to achieve this end by discounting the unitary rate to reflect the number of exempt transmissions which, in this case, was approximately 70% of all the radio retransmissions.

However, it is not for the Register or the Librarian to choose between two equally plausible explanations of the facts. The law requires that the Librarian accept the Panel's determination unless its conclusions are unsupported by the record. Thus, having found record support for the Panel's conclusion that the 150-mile exemption played no role in the final determination of the negotiated rates, we must accept its finding on this point.

were prohibitively high, including a revenue-based royalty set at 15% of a webcaster's gross revenue. Live 365 Petition at 16. It then argues that it was arbitrary for the Panel to make this finding and then propose rates that exceed the rates it deemed to be excessive, and more than the market could bear. Id. To make its point, Live365 uses the Panel's per performance rate and calculates how much certain services would pay for the digital performance right and translates that amount into a percentage of revenue metric. In each of the cited examples, the amount to be paid based on the proposed per performance rate (as expressed as a percentage of revenues) is considerably higher than that that would be required under any of the percentage-of-revenue models proposed by any party at any time. For example, under the Panel's proposed rates, one service would purportedly pay 21% of its gross revenue, a figure which is considerably higher than the 15% of gross revenues contained in many of the voluntary agreements ultimately rejected by the Panel. Based on this observation, Live365 contends that the Panel's proposal runs counter to the evidence and, therefore, it is arbitrary. Id. at 18.

Moreover, Live365 argues that the Panel failed to account for relevant market factors, including how much a webcaster can pay. Id. at 19. Webcasters voice similar concerns, arguing that the adoption of a per performance rate will cause ruin to many webcasters who to date have yet to generate a viable income stream. Webcasters Petition at 60. In place of this structure, webcasters assert that a percentage-of-revenue model must be adopted in order to address the economic situation facing small, independent webcasters. They maintain that those Services that entered into voluntary agreements based on a percentage-of-revenue will remain in business while those operating under the statutory license with its per performance royalties will not. Webcasters Petition at 62-63. In the eyes of the Webcasters, such a result reflects unexplained disparate treatment of similarly situated parties, and requires an adjustment to eliminate this unjust and arbitrary result. Webcasters also argue that the Panel failed to articulate a rational basis for failing to offer an alternative rate structure based on percentage-of-revenue.

In addition, Live365 argues, as do the Broadcasters, that Yahoo! is a substantially different type of business from small start-up webcasters who would be unwilling to pay the same rates as Yahoo! for the use of sound

recordings. Thus, it contends that the Yahoo! rates do not reflect what these buyers would be willing to pay in the marketplace. The implication is that these businesses have expended significant monies on start-up costs, including software, infrastructure development, and bandwidth, and having not yet established substantial revenue streams would be unable or unwilling to pay the same rates. Live365 Petition at 7, 11. Moreover, Live365 argues that the rates set by the Panel thwart Congressional intent "by making Internet performances of sound recordings economically unviable for many webcasters." Live365 Petition at 21.

RIAA takes exception with the Webcasters and Live365 on these issues. It analyzes how much certain webcasters and Live365 pay, as a percentage-of-revenue, for sales and marketing cost, personnel cost and bandwidth. The results show that a company's costs for these services can amount to more than 100 times the amount of a company's revenue, whereas the projected costs of the royalties for transmitting sound recordings for the same time period are no more than 2 times the amount of a company's revenue. RIAA Reply at 57. In all cases, these costs reflect the start up nature of the industry, and not the ultimate make or break point of the business. Thus, a proposed fee that results in royalty payments above the current revenue stream for a webcaster is not atypical or unexpected. Certainly, if that were the measure of the value of these services, then the costs for employment, hardware, and marketing—so essential to establishing and maintaining the business—must also be viewed as excessive and above the fair market value for each of these services. Clearly, that is not the case, nor can one rationally conclude that it should be the case.

Moreover, RIAA notes that the courts have historically upheld rates set by the CRT, even when users have argued that the rates would cause the business to cease certain operations. Where the intent of Congress is to set a rate at fair market value, as in this proceeding, the Panel is not required to consider potential failure of those businesses that cannot compete in the marketplace. See *National Cable Television Ass'n. v. CRT*, 724 F.2d 176 (D.C. Cir. 1983) (holding that rates set at fair market value were proper even though cable operators argued that the rates were prohibitively high and would cause them to cease transmission of the distant signals at issue.).

The law requires only that the Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

7. Should a Different Rate be Established for Commercial Broadcasters Streaming Their Own AM/FM Programming?

Although RIAA had argued that the rate for commercial broadcasters should be the same as the rate for Internet-only webcasters, the Panel did not agree. It did agree, however, that the rate for commercial broadcasters should be the same as the rate adopted for radio retransmissions and that these rates should be based on the Yahoo! agreement.

It noted that the Yahoo! agreement established rates for retransmissions of the same types of radio station signals as those directly streamed by commercial broadcasters. Consequently, it put the burden of proof on the broadcasters to present evidence to distinguish between the direct transmission of their programs over the Internet and the retransmission of the same programming made by a third-party. Broadcasters were unable to offer any compelling evidence on this point. Thus, in the end, the Panel was unable to distinguish between commercial broadcasters and radio retransmissions, stating that "the record was utterly devoid of evidence implying a *higher* rate [for commercial broadcasters] and *insufficient* [evidence] to warrant a lower rate." Report at 84–85. (emphasis in the original).

Nevertheless, Broadcasters are troubled by the Panel's use of the Yahoo! agreement to set rates for broadcasters for two main reasons. First, they argue that Yahoo! represents a substantially different type of business. Second, they maintain that the Panel must make affirmative findings that the businesses are comparable before applying the same rates to both Services. Broadcasters Petition at 26–27.

Indeed, Yahoo! offers a plethora of services, making available hundreds of radio stations, local television stations, video networks, concerts, CD listening programs, Internet-only music channels and educational and entertainment video programs. Id. at 28. Nevertheless, an examination of the record clearly

shows that both business models are fundamentally comparable in at least one all-important way: they simulcast AM/FM programs over the Internet to anyone anywhere in the world who chooses to listen. Even accepting the fact that Broadcasters say their fundamental business is to provide programming to their local audiences, the potential for reaching a wider audience cannot be denied. Given that the record indicates that 70% of Yahoo!'s radio retransmissions are to listeners within 150 miles of the originating radio station's transmitter, Yahoo!'s business with respect to radio retransmissions seems to be very similar. Moreover, the fact that Yahoo! offers many additional services is not relevant to this proceeding because the Yahoo! agreement only addressed the rates Yahoo! paid for streaming sound recordings over the Internet. Had the contract been tied to other services offered by Yahoo!, it might well have been inappropriate to use this contract in this context. That is not the case and so it was not arbitrary for the Panel to rely on the Yahoo! contract to set the rate for broadcasters who stream their own programming over the Internet.

Commercial broadcasters then take another approach and argue that they never would have agreed to the rates that Yahoo! paid because their purposes for streaming differ from Yahoo!'s purposes. Commercial broadcasters assert that they began streaming in order to have a presence "in the online world, to maintain the local radio brand, and as a convenience to their regular over-the-air listeners." Broadcasters Petition at 29. They then note that many commercial broadcasters have already ceased streaming because of an increase in costs. They cite this fact as evidence of their assertion that they would only be willing to pay a significantly lower rate than a third-party aggregator like Yahoo! See Broadcasters Petition at 31, fn 25 (offering examples of decisions made by radio stations to cease their streaming operations because of bandwidth fees and dispute over royalty fees between AFTRA and the advertising agencies). They also cite the testimony of David Mandelbrot, who testified that Yahoo! feared broadcasters would be unwilling to absorb the rates Yahoo! negotiated for streaming AM/FM programming. Id. at 32. Based upon this evidence, the Broadcasters and Live365 conclude that the Panel acted in an arbitrary manner in setting the rates that will put many services out of business. Live365 Petition at 15, 18.

However, the Panel did consider the differences between the two business models, speculating that it was entirely

possible that the cost to stream AM/FM programming would be lower for broadcasters than for third-party aggregators like Yahoo! Id. at 84–85. Had Broadcasters made that argument or similar ones to show that Yahoo! received greater value from its streaming activities, the Panel may well have set a lower rate for Broadcasters who stream their own programming. Id. at 85. But as the Panel observed, it cannot make adjustments based on mere speculation. So when the Panel found no record evidence to distinguish these services, it had no reason to offer a separate rate for commercial broadcasters who stream their own AM/FM signal over the Internet. Id. at 84.

Moreover, RIAA points out that Yahoo! never even tried to pass along the costs of the transmissions to the radio stations. Thus, no determination could be made as to whether the broadcasters would have accepted the rate and paid it, or rejected it out of hand. RIAA Reply at 45. RIAA's observation is persuasive, as is the Panel's general observation that the record did not contain any evidence to support a different rate for commercial broadcasters. Thus, the Panel's decision not to set a different rate for commercial broadcasters was not arbitrary.

For these reasons, the Register accepts the Panel's decision not to differentiate between simulcasts made by commercial broadcasters and simulcasts of the same programming made by a third-party aggregator. Accordingly, the rate for commercial broadcasters streaming their over-the-air radio programs on the Internet is the unitary rate gleaned from the Yahoo! agreement.

8. Methodology for Calculating the Statutory Rates for the Webcasting License

a. *Calculation of the unitary rate.* In section IV.5, the Register rejected the Panel's determination that the Yahoo! agreement provided a basis for establishing different rates for Internet-only transmissions and radio retransmissions. Instead, a determination was made that the Yahoo! agreement justified only a single rate applicable to all transmissions, without regard to the source of the transmission. To calculate this unitary rate, it is necessary to determine what Yahoo! paid for the initial 1.5 billion performances, based on the lump sum payment, and what it expected to pay for transmissions after that time.

The first calculation was actually done by the Panel based upon Yahoo!'s agreement to pay RIAA \$1.25 million for the first 1.5 billion transmissions made by Yahoo!. It divided the amount paid

by the number of performances (\$1.25 million/1.5 billion performances) to get a "blended" rate of 0.083¢ per performance. Report at 63. To determine the "effective rate" for the second period, a calculation must be made to account for the differential IO and RR rates, 0.2¢ and 0.05¢, respectively, set forth in the agreement and the relative proportion of Internet-only transmissions to radio retransmissions. This is a simple arithmetic calculation and one that Yahoo! had already performed in order to gauge the actual costs of the performances under the differentiated rate structure. This calculation yielded an "effective" or "blended" rate of 0.065¢ per performance based upon Yahoo!'s expectation that 90% of its transmissions would continue to be radio retransmissions with the remaining 10% being Internet-only transmissions $[(9 \times 0.05¢) + (1 \times 0.2¢)]/10$. Report at 63, citing Tr. 11279, 11292 (Mandelbrot), Panel Rebuttal Hearing Exhibit 1 at 7.

Now the question is how to reconcile these values to determine the unitary rate. Although an argument can be made for adopting either value, it makes more sense to use both values and take the average of the two. In this way, the final unitary rate captures the actual value of the performances made in the initial period (for which Yahoo! paid a lump sum for the first 1.5 billion performances) and the projected value of the transmissions at the agreed upon rates for the remainder of the license period; and it falls within the range of acknowledged values of these transmissions. Courts have long acknowledged that rate setting is not an exact science, and all that is necessary is that the rates lie within a "zone of reasonableness." See *National Cable Television Assoc. Inc. v. CRT*, 724 F.2d 176, 182 (D.C. Cir. 1983) ("Ratemaking generally 'is an intensely practical affair. The Tribunal's work particularly, in both ratemaking and royalty distributions, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a 'zone of reasonableness'"). Thus, the record here supports a "zone of reasonableness" between 0.083¢ and 0.065¢.

Accordingly, the Register recommends that the rate for making an eligible nonsubscription transmission of a sound recording over the Internet under section 114 be set at 0.07 cents per performance, per listener, the midpoint of the "zone of reasonableness."

Determination of this rate, however, is not necessarily the end of the rate-setting process. Webcasters had argued for a downward adjustment to the rates proposed by the Panel to compensate for litigation cost savings and added value due to MFN clause. Such arguments apply with equal force to the unitary rate proposed by the Register. Webcasters Petition at 42–43. The Webcasters' argument is well taken and, based on the record evidence, it is reasonable to assume that the rates in the Yahoo! agreement are slightly higher to account for these two factors. See Report at 68–69. However, there is a problem in making an adjustment to the proposed rate where the record contains no information quantifying the added value of the factors that purportedly resulted in inflated rates. See Report at 29 (discussing lack of record evidence quantifying value of any factor, other than promotional value, that allegedly influenced the negotiated rates). The potential (but apparently unquantifiable) added value attributable to these 2 factors might present a problem if the Register were proposing a rate at the high end of the 0.065¢–0.083¢ range, but because the Register is recommending a rate in middle of the "zone of reasonableness," it is safe to conclude that the recommended rate falls into that zone of reasonableness even taking these factors into account.

Similarly, Broadcasters argued for a downward adjustment of the simulcast rate to account for the promotional value associated with over-the-air broadcasts. Broadcasters Petition at 41. The record, however, does not support this suggestion. Indeed, the Panel did acknowledge that over-the-air radio retransmissions had promotional value, but it concluded that "the net impact of Internet webcasting on record sales is indeterminate." Report at 34. This is not to say that webcasting, including simulcasting of over-the-air radio programming, has no promotional value. It only means that the record companies gain similar benefits from both types of transmissions. Consequently, no adjustment is necessary.

b. *The 150-mile exemption.* Under section 114(d)(1)(B)(I), any retransmission of a nonsubscription broadcast transmission is exempt, as a matter of law, from the digital performance right, provided that "the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter." During the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainty regarding this

provision and whether it applied to transmissions made over the Internet. See discussion above, section IV.a.5.

As noted above (section IV.a.5.), in its Petition, RIAA argued that during the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainty regarding this provision and whether it applied to transmissions made over the Internet. RIAA argued that because of this uncertainty, it had been willing to agree to a lower radio retransmission rate. In fact, RIAA pointed out that its chief negotiator had advised its negotiating committee that RIAA's arguments against application of the 150-mile exemption to a retransmitter such as Yahoo! "are not particularly strong." RIAA Petition at 20.

Confronted with the assertions made in RIAA's petition which indicated that RIAA itself had had considerable doubts on the subject at the time of the negotiations, the Register felt compelled to determine whether radio retransmissions over the Internet to recipients within 150 miles of the radio transmitter are, in fact, eligible for the section 114(d)(1)(B) exemption.²⁷ The Register issued an order on June 5, 2002, asking the parties to brief two legal questions concerning the 150-mile exemption. The first question asked whether a retransmission over the Internet of a radio station's broadcast transmission to a recipient located within 150 miles of the site of the radio broadcast transmitter is an exempt transmission pursuant to 17 U.S.C. 114(d)(1)(B). The second question then queried whether the exemption would still apply to radio retransmissions made within the 150-mile radius by a Licensee, in the case where that same service is simultaneously retransmitting the radio station's broadcast transmission of one or more recipients, located more than 150 miles from the site of the radio broadcaster's transmitter.

Section 114 could be read as allowing a Licensee to take advantage of the exemption for all Internet retransmissions of a radio broadcast to recipients within a 150 mile radius of that radio station's transmitter. The

statutory language, however, does not make clear whether that same Licensee would retain the benefit of the exemption for those transmissions if additional retransmissions of the radio broadcast signal were also made "willfully" or "repeatedly" outside the 150-mile radius.

A critical piece in the analysis is the meaning of the word "retransmission." Each retransmission of a radio signal over the Internet may be viewed as a discrete, point-to-point transaction to be considered on its own merit without reference to further retransmissions made by the Licensee. Alternatively, the reference to "willful and repeated" may require consideration of each retransmission, together with all other retransmissions, made by the Licensee to multiple listeners over a period of time, both inside and outside the 150-mile radius.

Having considered the parties' responses, the statutory language and its relationship to section 112, the Register now concludes that the exemption is not applicable to radio retransmissions made over the Internet. While Copyright Owners and Performers offer many arguments in support of their position that radio retransmissions within 150 miles of the radio station's transmitter are not exempt, and while Broadcasters offer many arguments to the contrary, the critical piece of the analysis—and the argument that the Register finds persuasive—is found in the text of section 112(e). This section provides a statutory license for making ephemeral recordings only to "a transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f)." 17 U.S.C. 112(e)(1).

The statutory license for ephemeral recordings in section 112(e) was enacted as part of the same section of the DMCA—section 104—that expanded the section 114 statutory license to include webcasting. The purpose of this ephemeral recording statutory license was to enable business establishment services and services using the new section 114 statutory license for webcasting to make the ephemeral recordings they need to make in order to facilitate their licensed transmissions, and in recognition of the fact that the exemption in section 112(a) permitting the making of a single ephemeral recording might not be adequate. See H.R. Rep. 105-796, at 89-90.

Congress expressly provided in the DMCA amendments that business establishment services operating under

the section 114(d)(1)(C)(iv) exemption are eligible for the section 112(e) statutory license for ephemeral recordings in order to facilitate Internet transmissions by business transmission services. Congress's failure to do the same for services operating under the section 114(d)(1)(B) exemption demonstrates that Congress did not contemplate that that exemption would be available to services making retransmissions via the Internet.

Moreover, if section 114(d)(1)(B) were interpreted as providing an exemption for a radio retransmission over the Internet, when that retransmission is to a recipient located within 150 miles of the radio station's transmitter, the Licensee could not make ephemeral recordings to facilitate such an exempt retransmission. This interpretation would put the Licensee in the illogical position of having a right to retransmit the radio signal, but no means of accomplishing the retransmission without negotiating private licenses to make ephemeral recordings to facilitate the exempt transmissions. At the same time, the Licensee could operate under a statutory license for making the ephemeral recordings to facilitate its non-exempt transmissions beyond the 150-mile radius made pursuant to the section 114(f) statutory license. As RIAA points out in its response to the June 5 Order: "Such a result is inconsistent with one of the purposes of the DMCA statutory licenses to create efficient licensing mechanisms for copyright owners and webcasters," citing H.R. Rep. 105-796, at 79-80 (1998). Consequently, the better interpretation of the section 114(d)(1)(B) exemption is to consider all retransmissions of a Licensee in the aggregate, which logically means that no Internet retransmissions are exempt under section 114(d)(1)(B).

Based on the interplay between sections 112 and 114, the better interpretation of the law is that the exemption does not apply to radio retransmissions made over the Internet.²⁸

²⁸ Copyright Owners argue that the Copyright Office had already decided this issue twice before: (1) In its decision in a rulemaking announced December 11, 2000 that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A), Public Performance of Sound Recordings: Definition of a Service, 65 FR 77292; and (2) In an Order issued July 16, 2001, in which the Office stated that the "Panel must use the 'willing seller/willing buyer' standard to set rates for all non-interactive, nonsubscription transmissions made under the section 114 license, including those within 150 miles of the broadcaster's transmitter." (Emphasis added.) The Register made no such decision on either occasion.

²⁷ If the Register had concluded that Internet retransmissions to recipients located within the 150-mile radius are exempt, she most likely would have recommended an adjustment of the 0.07% per performance rate as applied to radio retransmissions to take into account the record evidence that approximately 70% of radio retransmissions are to recipients located within 150 miles of the radio transmitter. The result would have been a radio retransmission rate of .02% per performance, and correspondingly lower rates for radio retransmissions by non-CPB, noncommercial broadcasters.

9. Rates for Other Webcasting Services and Programming

a. *Business to business webcasting services.* Some Services provide specialized Internet radio-like stations to businesses rather than directly to consumers. These business-to-business webcasting services (B2B) are in many respects analogous to business establishment music services²⁹ and can provide programming customized to the demographics of the customers of a particular business. Report at 78. For this reason, RIAA had proposed setting a higher rate for business to business webcasting services than for business to consumer (B2C) services. The Panel, however, rejected this suggestion, finding that the evidence did not support a higher rate for B2B services. It found that most of the agreements for such services had rates near or below the predominant rate set for standard Internet-only transmissions. Report at 79. Thus, the Panel concluded that it had "found insufficient evidence to support a separate rate for syndicator services", and set the rate accordingly at 0.14¢ per performance, just as it had for Internet-only performances. Id.

RIAA argues for a premium rate for these Services, because they syndicate their programming through third-party non-entertainment websites. RIAA maintains that these transmissions are outside the scope of the webcasting license, and consequently, services should pay a premium when they make transmissions through non-entertainment websites. RIAA Petition at 50–52. In response, Webcasters argue

The scope of section 114(d)(1)(B) was not at issue in the December 2000 rulemaking on the status of broadcasters. Likewise, the July 16 Order was in response to Copyright Owners' Motion for Declaratory Ruling Concerning Statutory Standard, in which Copyright Owners argued that one of the Services' witnesses was "in effect" arguing for "an exemption for AM/FM Webcasts within the 150-mile area." However, the testimony in question actually was arguing only that in determining the radio retransmission rate, the CARP should take into account that no royalty is payable on non-Internet radio retransmissions within the 150-mile radius because of the promotional value those retransmissions have on record sales. The witness asserted that because "local distribution of exactly the same material via the Internet has identical economic effects," the Panel should exclude from its calculations "recipients of those transmissions who lie within 150 miles of the station's transmitter." Fisher Testimony at ¶ 52. In their opposition to the motion, the Services made no argument that Internet retransmissions are exempt under section 114(d)(1)(B), and the Office made no ruling with respect to the exemption. Thus, until the responses to the June 5, 2002 order were filed, the issue had never been joined, much less decided, on whether radio retransmissions within the 150-mile radius are exempt, and the issue had never been decided.

²⁹ See footnote 6, *supra*, for a description of a Business Establishment Service.

that the "value of the performance does not change merely because of the technology of the webcaster or the fact that the sound recording is heard when it is accessed at a third-party website rather than the originating webcaster's website." Webcasters Reply at 57. Moreover, they maintain that RIAA offered no evidence to demonstrate that these transmissions should be valued at a higher rate. In fact, the record indicates the opposite. Most of the RIAA voluntary agreements which permit the licensee to distribute its webcasts to third-party websites contain no premium for this practice. Id. at 59.

Thus, based on the weight of the evidence, it was not arbitrary for the Panel to conclude that a separate rate should not be set for syndication services. The Panel is responsible for weighing the evidence and so long as the record supports its decision, the Register will not second-guess the Panel's finding of fact. Nevertheless, this determination does not end the inquiry. RIAA correctly cites section 114(j)(6) of the Copyright Act for the proposition that an eligible nonsubscription transmission does not include those made by a service whose primary purpose is to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events. Thus, in any given case a determination would have to be made to ascertain whether such transmissions are covered under the statutory license. This proceeding, however, is not the appropriate vehicle for such a fact-specific determination. If a court determines that the transmissions made by a particular business-to-business service fall outside the scope of the webcasting license, then those transmissions are acts of copyright infringement unless the service obtains licenses from the copyright owners. In such cases, an infringement action would be the appropriate course of action, rather than the imposition of a premium rate for such transmissions as suggested by RIAA. No rate—premium or otherwise—can be set for a transmission that does not comply with the terms of the license.

b. *Listener-influenced services.* There was also much discussion about listener-influenced services that allow the listener some control over the programming through on-line ratings and skip-through features. RIAA's position first and foremost is that these services do not qualify for the webcasting license. However, RIAA also proposed a much higher rate for these services in the event the Panel discerned a need to set a separate rate

for these services. Again, the Panel found no record support for setting a separate and higher rate for listener-influenced services. It rejected the agreements between RIAA and non-DMCA compliant services because the rates in those agreements were for rights beyond those granted under the statutory license. Nor could the Panel discern from the record evidence which services would be subject to the basic webcasting rate as distinguished from the rate for listener-influenced services. Consequently, the Panel decided "that so long as a service complies with, and is deemed eligible for the statutory license, it should not pay a separate rate based upon listener influence." Report at 81.

The Register finds the Panel's analysis to be consistent with the law, and thus accepts the Panel's decision not to set a separate rate for transmissions which might not come within the scope of the license. Again, if transmissions made by a listener-influenced service are determined to be outside the scope of the statutory license, the proper course of action would be for the parties to negotiate a voluntary agreement for these transmissions, or for the copyright owner to file a copyright infringement suit against the service. The Panel has no authority to propose a rate for any transmission which cannot be made lawfully under the statutory license.

c. *Other types of transmissions.* A broadcaster may stream three different types of programming in addition to a simulcast of its AM/FM radio signal: (1) "Archived" (previously aired) radio programming; (2) "side channels" (Internet-only programming); and (3) "substituted programming" (programming that replaces over-the-air programming that has not been licensed for simulcast over the Internet). The question for the Panel was whether such programming is the same or substantially similar to radio retransmissions or Internet-only programming.

In making its decision, the Panel first considered the definition of a "radio retransmission performance." It found that the record failed to provide a coherent and workable definition, rejecting both the definition set forth in the Yahoo! agreement and the one that was included in the defunct settlement agreement between RIAA and the commercial broadcasters. Instead, it adopted the definition of the term provided by Congress in the statute which defines the term as "a further transmission of an initial transmission * * * if it is simultaneous with the initial transmission." See 17 U.S.C. 114(j)(12). Based on this definition, the

Panel concluded that a transmission made as part of archived programming, side channels or substituted programming was something other than a radio retransmission and, therefore, not entitled to the lower rate proposed for radio retransmissions. Instead, it agreed with RIAA that the programming was essentially the same as Internet-only programming, and without any record evidence to substantiate a different rate, should be subject to the 0.14¢ IO rate.

Broadcasters do not contest the Panel's determination with respect to side channels, and they recommend that the Librarian provide that the side channel rate be set at the webcaster rate expressly without prejudice to reconsideration in a subsequent CARP proceeding. Broadcasters Petition at 56. They do, however, object to the imposition of the rate for IO transmissions on the performances of sound recordings made during the transmission of an archived program or a substituted program. *Id.* at 55. Broadcasters' arguments no longer have any relevance under the statutory rate structure proposed by the Register, which proposes a single, unitary rate for all transmission. This fact in conjunction with the Panel's observation that the Yahoo! agreement did not differentiate or even recognize these alternative categories supports a determination that no separate rate should be set for these transmissions.

10. Rates for Transmissions Made by Non-CPB, Noncommercial Stations

National Public Radio ("NPR") and the National Religious Broadcasters Music License Committee ("NRBMLC") were the only two representatives of non-commercial stations participating in this proceeding. NPR reached a private settlement with the Copyright Owners during the proceeding and withdrew. In considering what the rate should be for the stations represented by NRBMLC and any other noncommercial station operating under the statutory license, the panel first considered past CARP decisions involving the statutory licenses. It found that a prior CARP had considered and distinguished commercial stations and noncommercial stations on the basis of their financial resources, noting that noncommercial stations depend upon funding from the government, business, and viewers, whereas commercial broadcasters generate a revenue stream through advertising. Report at 89, citing CARP report adopted by Librarian on September 18, 1998, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823.

Moreover, the earlier Panel determined that a rate set for a commercial station is an inappropriate benchmark to use when setting a rate for the same right for noncommercial stations because of these economic differences between these businesses. Specifically, it acknowledged that use of a rate set for a commercial broadcaster would overstate the market value of the performance for a noncommercial station.

Next, the Panel examined RIAA's approach, which focused on the amount the performing rights organizations ("PROs") were awarded in the 1998 Noncommercial Education Broadcasting Rate Adjustment Proceeding for use of their works by noncommercial stations. It adduced that they received $\frac{1}{3}$ the amount of the fees paid by the commercial stations. Based on this precedent, RIAA offered the noncommercial stations a rate that corresponds to $\frac{1}{3}$ the rate to be paid by commercial broadcasters.³⁰ The Panel, finding no other evidence in the record to support a different rate, adopted the RIAA proposal for radio retransmissions, and proposed a rate of 0.02¢ per-performance (one-third of the 0.07¢ per performance rate, rounded to the nearest hundredth of a cent) for these transmissions only. Just as with the commercial broadcasters, the Panel found that archived programming subsequently transmitted over the Internet, transmissions of substituted programming, and transmissions of side channels constitute a transmission more akin to an Internet-only event. Consequently, it proposed a per performance rate for noncommercial broadcasters of 0.05¢ (one-third the rate paid by commercial broadcasters and webcasters for IO transmissions) for each sound recording included in these transmissions. This rate, however, is meant to apply only to the first two side channels—in order to avoid the possibility of a noncommercial broadcaster gaining a competitive advantage over the commercial broadcasters and webcasters who

initiate Internet-only programs and do so at a higher cost.

Non-CPB broadcasters argue in their petition to set aside the CARP report, that the Panel failed to set the appropriate rates in two ways. They contend that the Panel ignored the record evidence which clearly established that the noncommercial stations are fundamentally different from commercial broadcasters and webcasters, and less viable economically, thus requiring the Panel to establish a lower rate for these stations. They also dispute, like the Webcasters and the commercial broadcasters, the Panel's decision to reject, as a benchmark, the amount of royalty fees these services pay for the use of the underlying musical works in an analog market under a separate compulsory license. Non-CPB Petition at 4. They then calculate a ratio between what a commercial broadcast station pays for use of the musical works in the analog world and what on average the non-CPB stations pay in the same market, based on an estimation of the number of stations, and the amount of royalties the stations paid for use of musical works in their over-the-air broadcasts. From these calculations, they suggest that a noncommercial broadcaster, on average, pays only $\frac{1}{34}$ th the amount of royalties that a commercial station pays for use of the same musical works and argue for a rate equal to $\frac{1}{34}$ th the amount that commercial broadcasters will pay. Alternatively, they request a flat rate of \$100 per station, see Non-CPB, Noncommercial Broadcasters Reply Petition at 5, and argue that in no case should the rate exceed $\frac{1}{3}$ the rate adopted for commercial broadcasters. Non-CPB, Noncommercial Broadcasters Petition at 9.

NRBMLC also turned to the rates for the statutory noncommercial broadcasting license and argued that the rates for the webcasting license should be based upon the rates currently paid to performing rights organizations for use of the musical works in over-the-air programs under this license. The Panel rejected this proposal on a number of grounds. First, it noted that those rates were the subject of prior settlements which stated that the negotiated rates for the noncommercial license were to have no precedential value for future rate setting proceedings for the noncommercial license. In light of this term, the Panel found the rates for the statutory noncommercial license had no relevance to the current proceeding. Not only were the rates for a totally different right, but they apparently have no precedential value for considering

³⁰ RIAA stated that "the Noncommercial Broadcasters should pay the same royalty rates that apply to Webcasters and commercial broadcasters, which are based on a benchmark derived from marketplace agreements for the same and closely related rights." RIAA PFFCL concerning the Broadcaster Royalty Rate (Jan. 25, 2002) at ¶ 44; but see, Reply of Copyright Owners and Performers to Non-CPB Entities (Dec. 18, 2001) at 3 ("Copyright Owners are willing to accept a rate for Noncommercial Broadcasters that is no less than one-third of the rate paid for commercial broadcasters.").

future statutory noncommercial rates for use of the musical works. Report at 90. Second, the panel considered rates proposed by Dr. Murdoch, the expert witness for NPR, who at the request of the Panel made an attempt to identify an appropriate rate for noncommercial stations based on the fees currently paid to the PROs. Although she complied with the request of the Panel, she expressed severe reservations about her own conclusions, citing numerous problems with her own calculations. Report at 91. For these reasons, the Panel rejected Murdoch's proposed rates.

RIAA supports the Panel's decision, noting that the non-CPB, noncommercial broadcasters failed to offer any differential rate for this type of service in its direct case or an expert witness who could support their ultimate request for a \$100 flat rate. The only witness who testified on behalf of this group was Joe Davis, who works for a commercial broadcaster, and had only anecdotal information concerning noncommercial stations. Because of his lack of expertise in this area, the Panel did not credit his testimony. Such action on the part of the panel is not arbitrary.

Nor was it arbitrary for the Panel to decide not to rely on the statutory rates set for use of the musical works by noncommercial broadcasters. The arbitrators rejected the non-CPB, commercial broadcasters' request to look to these rates because the agreements, at the insistence of the parties to the agreements, are not even considered precedent for setting future rates for the use of the musical works. If anything, it would be arbitrary to rely on these values as a benchmark for setting rates for a completely different category of works when they had no acknowledged value for readjusting the rates for the works to which they do apply. Had the Panel wished to use these rates, it needed at the very least an opportunity to examine the circumstances surrounding the adoption of the "no precedent" clause. It would have also required record evidence to substantiate such bold assertions on the part of the users as the notion that these rates were set at a rate higher than what would have been negotiated in the marketplace. Non-CPB Broadcasters Reply Petition at 7; RIAA Reply at 11. Because of these infirmities, the Register finds the Panel did not act arbitrarily in rejecting the rates set for the section 118 license as a benchmark.

Thus, in the end, the Panel accepted RIAA's proposal to set the rate for noncommercial broadcasters at one-third the rate established for commercial

broadcasters. The Panel also provided a separate rate for archived programming subsequently transmitted over the Internet, substituted programming and up to 2 side channels set at one-third the rate established for Internet-only transmissions. The Panel made this adjustment based on its determination that a noncommercial broadcaster should not be subject to commercial rates when streaming programming consistent with the educational mission of the station, over the Internet. Report at 94. However, the Panel imposed a limitation on the use of this reduced rate for Internet-only transmissions to avoid the possibility that a non-CPB broadcaster could use its unique position to essentially become a commercial webcaster.

The Register accepts the Panel's methodology for setting the rate for noncommercial broadcasters. The rates proposed by the Panel, however, must be adjusted to reflect the Register's recommendation to set a unitary rate for both commercial broadcasters and webcasters. Using the proposed base rate of 0.07¢ and reducing this value by two-thirds, the adjusted rate for non-CPB, noncommercial broadcasters is 0.02¢ (one-third of 0.07¢, the base rate for all transmissions, rounded to the nearest hundredth) per performance, per listener. This rate shall apply to a simultaneous retransmission of the non-CPB, noncommercial over-the-air radio programming, archiving programming subsequently transmitted over the Internet, substituted programming, and up to two side channels. The rate for all other Internet-only transmissions is 0.07¢.

One last disputed issue raised by the non-CPB, noncommercial broadcasters is the imposition of the same \$500 minimum fee that the CARP set for all other licensees. They argue that a \$500 minimum fee far exceeds any reasonable rate that should be imposed on this category of users in light of the financial considerations that distinguish them from the other services. Non-CPB Broadcasters Reply Petition at 10. In support of this position, the users cite Dr. Murdoch's testimony to illustrate that the Internet license for use of SESAC's repertoire is less than \$100. But this is not the total amount that a noncommercial station would pay; it would also have to pay fees to BMI and ASCAP in order to license all the works included in the sound recordings covered by the section 114 license. The minimal amount that a webcaster must pay to cover the combined works administered by the three PROs is \$673, more than the proposed minimum rate to operate under the section 114 license.

Webcasters PFFCL ¶ 363. In any event, the Panel set the rate at \$500 to cover administrative costs to the copyright owners and access to the sound recordings. It was not arbitrary to impose a minimum fee on the Non-CPB, noncommercial broadcasters that merely covers costs for these rudimentary purposes nor can it be deemed excessive in light of what these entities pay the PROs for the public performance of musical works.

11. Consideration of Request for Diminished Rates and Long Song Surcharge

RIAA requested a surcharge for songs longer than five minutes. RIAA PFFCL ¶ 210. Its request was denied because the Panel did not find that such a charge was included in most of the relevant license agreements. Report at 105. RIAA, however, argues that the Panel misread the Yahoo! agreement. RIAA Petition at 42. It notes that Yahoo! could estimate the number of performances it made by multiplying its listening hours by a fixed number of performances and that when it did so, the record companies received compensation for [material redacted subject to a protective order] performances, even though Yahoo! may have only played, for example, 5 12-minute classical recordings in an hour. *Id.* The Yahoo! agreement, however, does not require that it employ the estimation methodology; it merely states that Yahoo! may make this calculation. Thus, there was no probative evidence that the marketplace valued a classical sound recording, or similar sound recordings of longer than average duration, at a different rate. Consequently, it was not arbitrary for the Panel to reject RIAA's suggestion to impose a "long song" surcharge. In any event, it is highly likely that this concern will be addressed for the time period to which these rates apply, since most services will be using the estimation formula for calculating the number of performances which assumes 15 performances for each aggregate tuning hour.³¹ See section IV.11, *infra*.

On the other side, webcasters asked that there be no royalty fee for songs that are less than thirty seconds long, citing technology problems or the use of song-skip functions. Webcasters Petition at 71. The Panel disagreed and saw no

³¹ Nevertheless, RIAA has raised a valid point and future CARPs should carefully consider how to value performances of longer recordings, such as classical music, to ensure that the copyright owner is fully compensated. That being said, no party should assume that a particular approach to the problem is being advocated by the Register for adoption by a future CARP.

need to make any adjustment. It noted that the use of the blended rate from which it calculated the proposed rates was itself based upon figures which already took into account problem performances that had occurred during the initial period. This adjustment was expressly made for the first 1.5 billion transmissions only. Report at 106-107. The Panel chose not to make a similar adjustment for subsequent performances because the Yahoo! agreement did not provide for such an adjustment.

Likewise, the Panel determined that the use of the skip function provides a benefit to webcasters and it saw no need to penalize copyright owners for the benefit that flowed to the users through a conscious use of a function provided by the service. Moreover, none of the negotiated agreements provided for any reduction in rate for skipped songs. Report at 107. Consequently, the Panel did not provide a lower rate or exemption for truncated performances resulting from use of the skip song function.

The Webcasters object to the Panel's conclusion, maintaining that the Panel failed to adequately explain its decision and consider relevant evidence. See Webcasters Petition at 71. They contend that the Panel should have given more weight to three of the 26 agreements, which provided an exemption for performances less than thirty seconds in duration. Such action, would itself, have been arbitrary. Clearly, the Panel could not rely on these agreements when it had already disregarded them for purposes of establishing the royalty rates.

Moreover, RIAA makes a number of arguments in support of the Panel's decision. First, it notes that the performance of even a portion of a sound recording without a license is an infringement of a copyright owner's rights. As such, there is no *a priori* reason for making 30-seconds-or-fewer performances exempt from royalty obligations. Second, RIAA cites 17 U.S.C. 114(h)(2)(B) to demonstrate that Congress recognized the value of performances of limited duration and the right to license such performances. Specifically, this section exempts copyright owners licensing public performances of sound recordings from the requirement to make these sound recordings available on no less favorable terms or conditions to all bona fide entities, when they are licensing promotional performances of up to 45 seconds in duration. RIAA Reply at 71-75. These arguments support the Panel's decision not to exempt performances of thirty seconds or less, and as such, its

decision is neither arbitrary nor contrary to law.

The Panel did, however, grant the users an exemption for incidental performances, citing the existence of a similar term in the Yahoo! agreement as the basis for its decision. Specifically, the Panel "exclude[d] transmissions or retransmissions that make no more than incidental use of sound recordings, including but not limited to, certain performances of brief musical transitions, brief performances during news, talk and sports programming, commercial jingles, and certain background music." Report at 108. This is not a disputed provision.

With the agreement of the parties, the Panel also exempted performances of sound recordings made pursuant to a private license agreement. *Id.*

The Register notes, however, that the Webcasters' concerns regarding the Panel's determination not to grant its request to impose no royalty on songs less than 30 seconds in duration are ameliorated for the current licensing period. Under the proposed terms of payment, a service may estimate the number of performances for purposes of determining the extent of copyright liability on an "Aggregate Tuning Hour" basis, which calculates payment on the basis of 15 performances per hour.³² This approach alleviates a Licensee's obligation to account for and pay for each performance, including those that are less than 30 seconds in duration.

12. Methodology for Estimating the Number of Performances

Until each service can account for each performance, and is required to do so, there is a need for a methodology that will allow a service to make a reasonable estimate of the number of performances. Accordingly, the Panel proposes the following procedure:

For the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee may estimate its total number of performances if the actual number is not available. Such

³² The Webcasters had advocated the use of "Aggregated Tuning Hours" as a way to address their concerns regarding the Panel's decision not to provide a lower rate for partial performances. Webcasters Petition at 71-72. Their argument, however, is not the bases for the Register's recommendation to provide for use of the estimation methodology throughout the license period.

The Register is proposing this course of action in the short term merely to address separate concerns of the Register regarding the logistics involved in reporting the number of performances of sound recordings. This recommendation on the part of the Register should in no way be construed as undermining the Panel's decision that transmissions of sound recordings of less than 30 seconds are compensable.

estimation shall be based on multiplying the licensee's total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of retransmissions of AM and FM radio stations reasonably classified as news, business, talk or sports stations, and 12 performances per hour in the case of all other AM and FM radio stations).

Report at 110.

The Broadcasters object to the Panel's formulation for estimating the number of performances, arguing that for many program formats, e.g., news, business, talk, or sports stations, the estimate would likely significantly overstate the use of music by these stations. Broadcasters Petition at 57. However, they do not offer an alternative methodology for calculating these performances. Moreover, a mere likelihood of overstating the values in some cases is not enough to undo the Panel's formulation.

Likewise, Webcasters argue that the 30-day cutoff period for using the methodology for estimating the number of performances is arbitrary because there is no record support for this determination. Webcasters Petition at 72. Instead, they propose allowing the Services to employ this methodology through the remainder of the current licensing period, which ends December 31, 2002, since it will be used, in any event, by most Services for purposes of calculating their liability for their past usage of the sound recordings. *Id.*

What is troubling about this provision is the Panel's determination to require a full accounting of each performance beginning 30 days after the effective date of the order setting the rates and terms. The Report documents that many services are not currently equipped to track or accurately account for each performance, and the Register agrees. In fact, until the issuance of final rules regarding Records of Use, there are no requirements for tracking these performances. Because the Office has yet to establish just how a service will account for its use of the sound recordings, the Register determines that the proposed timeframe for requiring a strict accounting is arbitrary. Instead, the rule shall require that a Service begin accounting for each performance in accordance with the rules and regulations regarding Records of Use 30 days after the effective date of final rules. These rules shall determine what information needs to be calculated to determine which sound recordings have been performed, how many of such performances occurred, and when and how often such information shall be collected by the Services. Meanwhile, interim rules are being promulgated that

will, for the immediate future, impose more modest reporting requirements on Services.

In the meantime, for the remainder of the period covered by this proceeding (i.e., through December 31, 2002), Services may estimate the number of performances in accordance with the Panel's formulation. While this is not the perfect solution, it represents a reasonable approximation of the number of performances. And in those cases where a Service believes the formulation overestimates the use of the sound recordings, it has the option of actually counting the number of performances and calculating the royalties accordingly. Certainly, it cannot be seriously argued that a Service would be unduly burdened by undertaking this task. Conversely, if after accounting for each of the performances in the programs which are allowed to use the one performance per hour estimate, the Service finds its programming performs more sound recordings than the approximation, a Service benefits from use of the Panel's methodology.

13. Discount for Promotion and Security

RIAA proposed a 25% discount to any service that includes promotional and security features beyond those required under either the webcasting license or the ephemeral recording license. Because that proposal would exceed the scope of the terms set forth in the law, the Panel declined RIAA's invitation to provide for such discounts within the context of the statutory license. Report at 110. It is clear that the Panel may reject such a proposal, as it did here, because the statutory license does not expressly require that such a rate be established. No party contested the Panel's determination on this issue. Therefore, the Register sees no reason to question the Panel's decision.

14. Ephemeral Recordings for Services Operating Under the Section 114 License

A transmitting organization entitled to make transmissions of sound recordings under the webcasting license may also make a single ephemeral copy of each work to facilitate the transmission under an exemption in the law or it may make multiple copies of these works pursuant to a statutory license. See 17 U.S.C. 112(a) and (e), respectively. In addition to setting rates and terms for the webcasting license, the Panel in this proceeding had the responsibility for setting the rates for the ephemeral recordings. The Office combined these section 112 and section 114 proceedings because the licenses are interrelated and

the beneficiaries of the license, just as the users, are in most instances the same for both the webcasting license and the ephemeral recording license. However, there is one group of users of the ephemeral recording license that is exempt from the digital performance right—services which provide transmissions to a business establishment for use by the business establishment within the normal course of its business ("business establishment services").³³ 17 U.S.C. 114(d)(1)(C)(iv).

During the proceeding, the Services argued that these "ephemeral" copies have no economic value apart from the value of the performance they facilitate. Webcasters Petition at 67; Broadcasters Petition at 50. In support of this position, the Services cite with approval a Copyright Office Report which stated that the Office found no rationale for "the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value, and are made solely to enable another use that is permitted under a separate license." Report at 98, citing U.S. Copyright Office, DMCA Section 104 Report at 114, fn 434 (August 2001). The Panel also contended that experts on both sides took this view. Webcasters Petition at 66, citing Jaffe W.D.T. 52-54; Tr. at 6556; Tr. at 2632 (Nagle). Had there been nothing more, the Panel might have agreed with the Services and adopted the Office's position. In construing the statute, however, the Panel found that Congress did not share the Copyright Office's view. Instead, the Panel found that Congress required that a rate be set for the making of ephemeral copies in accordance with the willing buyer/willing seller standard.³⁴ Report at 98-99.

The Panel utilized the same approach in setting rates for the ephemeral

³³ Business establishment services deliver sound recordings to business establishments for the enjoyment of the establishments' customers. Two such services, AEI, Music Network, Inc. and DMX Music, Inc., participated in these proceedings. These companies merged into a single company during the course of this proceeding. AEI/DMX provides music to more than 120,000 businesses, including Pottery Barn, Abercrombie & Fitch, Red Lobster, and Nordstrom. The rate setting process as it pertains to the business establishment services is discussed in Section IV.14.

³⁴ The Panel and the Services note that the Register has adopted a policy position regarding the making of ephemeral recordings which attributes no economic value to the making of such recordings when "made solely to enable another use that is permitted under a separate compulsory license." U.S. Copyright Office, DMCA Section 104 Report at 144, fn 434. (August 2001). This statement was made in a different context and has no relevance to the current proceeding. The task of the Register in this proceeding is to determine whether the Panel's determination is arbitrary or contrary to law without regard to the Office's own views on how the law should read to implement policy objectives.

recording license as it had in setting the rates for the webcasting license. Report at 104. It first examined the 26 RIAA agreements for evidence that market participants paid a fee to make ephemeral copies and how much they paid. Of the 26 agreements, fifteen did not contain any rate for the ephemeral license and did not purport to convey this right; two used a percentage of overall revenues; eight used a percentage (calculable to 10%) of the performance royalty fees paid; and one paid a flat rate per use of the license for a year (calculable to 8.8% of the performance royalty fees paid). Id. From this, the Panel identified a range of rates between 8.8% and 10% of the performance fees paid.³⁵ It then chose to place significant weight on the 8.8% value because it was derived from the information in the Yahoo! agreement to which the Panel has given considerable weight throughout this proceeding. Id. However, the Panel did not rely solely on the Yahoo! agreement in this instance, choosing instead to give minimal weight to the eight other agreements that set the ephemeral rate at 10% of the performance rate, and so rounded the 8.8% value up to 9.0%. Id. Both Webcasters and Broadcasters filed Petitions to Modify in which they object to the Panel's approach to setting the ephemeral rate. They argue that the evidence supports their position that the ephemeral copies have no independent economic value apart from the performances they facilitate. In the alternative, they maintain that the value of the ephemeral copies is included in the royalty fee for the performance of the sound recording. Consequently, they contend that the appropriate way to set the ephemeral rate would be to determine the economic value of the ephemeral copies and reduce the performance rate by that amount. Webcasters Petition at 67; Broadcasters Petition at 51.

Moreover, the Services disagree with the Panel's use and analysis of the voluntary agreements for setting this rate. Specifically, they cite the lack of an ephemeral rate in 15 of the 26 agreements, even though it is clear that these recordings are necessary to effectuate a performance, as evidence of RIAA's view that the making of ephemeral copies had only a *de minimis*

³⁵ Most of the original 26 license agreements did not grant the right to make ephemeral copies, either because the Service did not realize it needed this right or because the Service had assumed the negotiated rate covered all rights needed to make the digital transmissions. However, that trend did not continue. Licenses that were renewed expressly granted the right to make ephemeral copies for a fee. Report at 58, fn 39.

value. Broadcasters Petition at 52. For this reason, webcasters and broadcasters argue that RIAA placed little value on these copies and implicitly acknowledged that the value of these recordings is at best de minimis. They then criticize the Panel's methodology, asserting that the calculation of the ephemeral rate based upon the rates derived from the Yahoo! agreement for a per performance model, totally ignored the fact that Yahoo! agreed to pay a flat fee once it began making payments on a per performance basis, without regard to the number of performances. Webcasters Petition at 69; Broadcasters Petition at 53. Finally, Webcasters object to any use of the non-Yahoo! agreements in calculating this rate because the Panel had already found these agreements to be unreliable for purposes of setting the marketplace rates. Similarly, the Broadcasters question the Panel's reliance on eight of the agreements that it had rejected earlier as "unreliable benchmarks." Id. at 54.

The non-CPB, noncommercial broadcasters adopt the objections to ephemeral recording rate put forth by the commercial broadcasters. Noncommercial Broadcasters Petition at 11.

On the other hand, RIAA supports the Panel's determination in general, noting that the CARP relied primarily on the Yahoo! agreement to calculate the ephemeral rate for webcasters. It maintains, however, that the Panel should have afforded the 25 voluntary agreements more weight and set the rate at 10% of the performance rate in deference to the fact that many RIAA licensees had agreed to a negotiated or effective ephemeral rate of 10%. RIAA Reply at 68. RIAA also challenges the Services' complaints in general, noting that in spite of all the objections to the Panel's determination, the Services fail to offer any evidence regarding an alternative rate.

The Panel's approach in setting the ephemeral rate was not arbitrary. It calculated the rate based on the fees Yahoo! actually paid to RIAA for the right to make ephemeral reproductions. Use of the Yahoo! agreement for this purpose was perfectly logical, and consistent with the general approach taken by the Panel in determining rates for webcasting. What causes concern, however, is the Panel's reliance, even to a small degree, on the ephemeral rates set forth in eight of the 25 voluntary agreements it had previously repudiated. Such action is arbitrary unless the Panel can offer a clear explanation for its actions. It did not do so and, in fact, it stated that its review

of the 26 licenses "reveals an inconsistent, rather than a consistent, pattern." Report at 100. Moreover, the Panel conceded that these agreements "do not represent evidence which establishes RIAA's proposed rate." Id. at 104. Nevertheless, the Panel granted "very modest effect" to those agreements which have ephemeral rates around 10% to justify its decision to round the 8.8% effective rate up to 9%. Considering those agreements is clearly arbitrary and, consequently, to the extent the Panel gave any weight to any license agreement other than the Yahoo! agreement, it acted in an arbitrary manner. Accordingly, the rate for the ephemeral license for licensees operating under section 114 should be set at 8.8% of the performance rate.

15. Minimum Fees

The Panel established a minimum fee of \$500 for each licensee for use of the webcasting license and the ephemeral recording license. These rates are in line with those negotiated by RIAA and the 26 services with which it reached an agreement. The Panel determined that RIAA would not have negotiated a minimum fee that failed to cover at least its administrative costs and the value of access to all the works up to the cost of the minimum fee. Report at 95. The adoption of the \$500 minimum, however, is predicated on the adoption of a per performance rate and not a percentage-of-revenues. The Panel implied that had it decided to adopt a percentage-of-revenue model, the minimum fee would have been more substantial because the Panel would have had to consider more carefully the impact of start-up services with little revenue. Report at 95.

Because the minimum rate is calculated to cover at least the administrative costs of the copyright owners in administering the license and access to the sound recordings, the Panel applied the rate to all webcasting services and made it payable as a non-refundable advance against future royalty fees to be paid during that year, due upon the first monthly payment of each year. Moreover, the Panel offered no proration of the fee, making it due in full for any calendar year in which a service operates under the statutory license. Report at 96.

RIAA objects to the low value for the minimum fee set by the Panel because it fails to take into account the broad range of rates established in the licenses RIAA negotiated in the marketplace.³⁶

³⁶ According to RIAA, a \$5,000 minimum fee is the typical amount paid by users in the marketplace, without regard to whether the

Moreover, as a policy matter, RIAA contends that use of the lowest value set forth in a single agreement discourages copyright owners from adopting a low minimum fee in a single instance to accommodate special circumstances for a particular service. RIAA Petition at 44-45. Finally, RIAA faults the Panel for justifying its choice by comparing the \$500 minimum fee to the amount that the Services pay the performing rights organizations (PROs) under a blanket license. RIAA rejects this rationale on two fronts. First, the minimum fee does not approximate the amounts that are paid to the PROs, and second, use of the musical works benchmark has been found by the CARP to be an inappropriate measure for establishing fees in this proceeding.

In response, Broadcasters first note that RIAA never disputed the Panel's understanding for the existence of a minimum fee, or claimed that a higher fee is necessary to achieve the stated purposes of the minimum fee. Namely, the minimum fee is meant to cover the costs of incremental licensing, i.e., the cost to the license administrator of adding another license to the system without regard to the number of performances made by the Licensee, see Webcasters PFFCL ¶ 361, and access to the entire repertoire of sound recordings. Broadcasters Reply at 12-13; Webcasters Reply at 52-53. Moreover, they claim that the minimum fee is in line with the fees paid to the performing rights organizations which can serve as a benchmark for the minimum because "they serve the same purposes that the CARP identified in setting the minimum fees for the statutory license at issue." Broadcasters Reply at 14; Webcasters Reply at 52, 55. The Services, however, do not blindly accept the Panel's proposed fee, arguing first that the record supports a much lower minimum fee. They also strenuously object to RIAA's request for a \$5,000 minimum, arguing that such a high minimum would be confiscatory for most users of the license, especially for those radio stations that play little featured music. Broadcasters Reply at 16; Webcasters Reply at 56.

None of these arguments compel the Librarian to reject the proposed \$500 minimum. The Panel set a minimum rate to accomplish two purposes, and none of the parties argue that the \$500 fee falls outside the "zone of reasonableness" for such rates. If anything, the fee may be viewed as too low, if one takes into account the

royalties are paid on a percentage of revenue base or in accordance with a per performance metric. RIAA Petition at 43.

minimum amounts paid to the performing rights organizations for the blanket license for performing musical works. Together each Service must pay, at the very least, a total of \$673 to the three performing rights organizations to cover access to the musical works for use over the Internet and the incremental cost of licensing—the very purposes for which the minimum fee is being set in this proceeding.

Whether to utilize the musical works benchmark was a decision for the Panel and it chose not to do so. This approach was not arbitrary. As it had done throughout this proceeding, the Panel could choose, as it did, to rely on agreements negotiated in the marketplace between willing buyers and willing sellers. Moreover, the Panel could propose any rate consistent with the agreements so long as the proposed rate would cover costs for administering the license and access to the works.³⁷ For this reason, the Panel examined the agreements offered into evidence by the RIAA and chose the lowest value that RIAA had accepted in a prior agreement. It did so because it assumed that an entity would not agree to a minimum rate that would result in a loss. Had RIAA truly believed that the \$500 minimum fee was inadequate to cover at least the administrative costs and the value of access, the Panel reasoned that it would have required a higher fee. This approach is not arbitrary and, consequently, the proposed minimum fee is adopted for the period covered by this proceeding.

16. Ephemeral Recordings for Business Establishment Services ("BES")

a. *Rates for use of the statutory license.* Business establishment services are well-established businesses, which have offered their services for many years. Among the established businesses in this group are AEI Music Network, Inc.,³⁸ DMX Music, Inc., Muzak, Inc., PlayNetwork, Inc. and Radio Programming and Management Inc. Two of the old guard, AEI and DMX, and one new service, Music Choice, participated in this proceeding. At an early stage of this proceeding, but after filing a direct case, Music Choice withdrew from the proceeding.

³⁷ Had the Panel recommended a royalty based on a percentage-of-revenues, its recommended minimum fee also would have had to serve the function of ensuring that copyright owners receive adequate compensation in cases where a service makes substantial use of copyrighted works but generates little or no revenue.

³⁸ AEI and DMX were separate business entities at the beginning of this proceeding. During the course of this proceeding, they merged into a single company.

Of the services offered by AEI and DMX only those services that transmit musical programs to their customers via cable or satellite in a digital format are eligible for the ephemeral recording license. The Panel referred to this aspect of the business as the "broadcast model" of the service. Through this process, these services make hundreds of thousands, if not millions, of copies of the sound recordings. The law allows these services to perform sound recordings publicly by means of a digital transmission under an exemption in section 114.³⁹ However, Congress did not exempt these services from copyright liability when making copies of these works in the normal course of their business. Rather, Congress created a statutory license to cover the making of ephemeral recordings by these services. In its proposed findings of fact and conclusions of law, DMX and AEI proposed a flat fee of \$10,000 per year⁴⁰ for each company for the making of buffer and cache copies, but argued in the alternative for a zero rate. See DMX/AEI PFFCL ¶ 44. In support of the alternative position, DMX/AEI argued that Congress had only envisioned a minimal rate to compensate the copyright owners for the use of ephemeral copies. It also cited the Copyright Office's Section 104 DMCA Study for the proposition that ephemeral recordings have no independent economic value apart from its use to facilitate transmissions. However, as RIAA points out, these businesses have always paid for such copies. Report at 115–116, citing RIAA Reply to DMX/AEI PFFCL ¶¶ 8–12. RIAA asked that rate be set at 10% of gross revenues with a minimum fee of \$50,000 a year and asked the Panel to

³⁹ Section 114(d)(1)(iv) provides that:

(d) Limitations on Exclusive Right.—Notwithstanding the provisions of section 106(6)—
(1) Exempt transmissions and retransmission.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(C) a transmission that comes within any of the following categories—
(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the second recording performance complement. Nothing in this clause shall limit the scope of the exemption. Nothing in this clause shall limit the scope of the exemption in Clause (ii).

⁴⁰ At the beginning of this proceeding, DMX and AEI each filed a separate direct cause in which each company proposed a flat rate of \$25,000 for each year (prorated for the October–December 1998 period) covered by these proceedings for use of the section 112 license. Knittel W.D.T. 19; Troxel W.D.T. 15.

refrain from setting rates tailored to the needs of specific companies. RIAA made the later request because AEI/DMX asserted that its digital database is already covered by preexisting licenses and therefore, it does not need an ephemeral license in order to make these phonorecords. Consequently, AEI/DMX asked the Panel to set a rate to cover only the cache and buffer copies it needed to facilitate its transmissions and to exclude the value of the database copies when setting the rate for the ephemeral license. In fact, AEI/DMX contends that it was arbitrary for the Panel to set a rate "for all ephemeral copies which may be utilized in the operation of a broadcast service" when it had received evidence for setting a rate only for buffer and cache copies. DMX/AEI Petition at 4. It also maintains that the statute contemplates that the Panel set rates according to the needs and desires of the parties. Id. at 8–10.

RIAA disagreed with this approach, asking the panel to establish a technology-neutral rate to cover the making of all copies that a business establishment service may need to make under the license. It also proposed that the CARP rely on license agreements between the copyright owners and Business Establishment Services when fashioning the appropriate rate and not the 26 voluntary licenses considered when setting the webcasting rates.

As an initial matter, the Panel had first to decide which copies and how many are covered by the ephemeral recording license. This is a necessary step in the process, because the statutory license allows a transmitting organization to make and retain no more than a single phonorecord of a sound recording, except as provided "under the terms and conditions as negotiated or arbitrated under the statutory license." Section-by-section analysis of the H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, Committee Print, Serial No. 6, 105th Cong., 2d Sess., p. 61.

Thus, the Panel considered and ultimately rejected DMX/AEI's request for a rate that only covered certain types of ephemeral copies. It did so in large part because it determined that Congress had "intended to create blanket licenses which would afford each licensee all the rights necessary to operate such a service," and noted that in this case, that would include "the right to make any and all ephemeral copies utilized in a broadcast background music service." Report at 118. This interpretation of the law is consistent with the purpose of the section 112 license.

In creating the ephemeral recording license, Congress sought to provide a

a means to voice their concerns. See AFM/AFTRA PFFCL concerning terms ¶ 9 (noting that designation of RLI as the agent for unaffiliated copyright owners would have the undesirable effect of forcing these non-members "into an agency relationship with an entity that not only is not governed by Copyright Owners and Performers, but also is not even required to obtain their guidance and input regarding policies, procedures or distribution methodologies.").

For all the foregoing reasons, the Register concludes that the CARP was not arbitrary in designating SoundExchange as the agent for unaffiliated copyright owners. Of the four factors considered by the Panel, each weighs in favor of SoundExchange. Of course, any Copyright Owner or Performer can affirmatively choose RLI to act on its behalf as a Designated Agent.

c. *Gross proceeds.* As discussed earlier, the Panel proposed the adoption of a rate for Business Establishment Services making ephemeral recordings under section 112 at 10% of gross proceeds. The Panel recognized the necessity of also formulating a definition of "gross proceeds" in order to make the rate workable. To meet this need, it opted to incorporate, with minor modifications to accommodate the section 112 license, the definition used in many of the background music agreements even though the definition is less than clear on its face as to what constitutes gross proceeds. The lack of specificity, however, did not trouble the Panel because it expected the parties to adopt the understandings within the industry developed during the normal course of dealings.

RIAA does not share the Panel's view. It objects to the proposed definition of "gross proceeds," arguing that the provision fails utterly to define the term in any meaningful way. It also contends that it is arbitrary to rely on industry practices to flesh out the industry's understanding of the term when no record evidence exists about these practices. To remedy this situation, RIAA proposes that the Librarian adopt the definition of "gross proceeds" for a Business Establishment Service that is set forth in the agreement between SoundExchange and MusicMusicMusic ("MMM"). RIAA Exhibit No. 60A. RIAA asserts that this is the only record evidence on this point. RIAA petition at 52-54.

DMX/AEI rejects RIAA's suggestion that the Librarian adopt a definition from an agreement with MMM, "an unsophisticated licensee, who by its own admission is unlikely to pay any significant royalties pursuant to the

agreement." DMX/AEI Reply at 3. RIAA's proposed definition of "gross proceeds" would include fees generated by equipment rental, maintenance services, advertising of all kinds, and revenues payable to a licensee from any source in connection with the licensee's background music service. Id. at 5. DMX/AEI argues that such a definition is utterly contrary to the normal practice of using proceeds derived solely from the delivery of copyrighted sound recordings to business establishments.

As a general principle, terms pertaining to a statutory license must be defined with specificity. At first blush, the proposed definition of "gross proceeds" does not appear to meet this standard, merely reciting that a Business Establishment Service must pay a sum equal to ten percent of the licensee's gross proceeds derived from use of the musical programs that are attributable to copyrighted recordings. However, record evidence suggests the definition may be as simple as the CARP's characterization of the term. Barry Knittel,⁴⁷ in discussing the promotional funds established for the benefit of the record companies from gross proceeds, stated that the money placed into these accounts comes from the company's gross revenues, and that these revenues are generated from all the billings for music. Tr. 8384 (Knittel). This statement suggests that the determination of what constitutes "gross revenues" is not a mystery and that it is merely the amount the Business Establishment Services receive from their customers for use of the music. This approach, however, does not necessarily appear to capture in-kind payments of goods, free advertising or other similar payments for use of the license. See RIAA Petition at 54.

Consequently, the Register proposes to expand on the CARP's approach and adopt a definition of "gross proceeds" which clarifies that "gross proceeds" shall include all fees and payments from any source, including those made in kind, derived from the use of copyrighted sound recordings to facilitate the transmission of the sound recording pursuant to the section 112 license. See RIAA Exhibit No. 60A DR. (Second Webcasting Performance and Webcasting and Business Establishment Ephemeral Recording License Agreement). The Register finds it necessary to expand upon the proposed definition to avoid any confusion on this point and not as a means to capture additional revenue streams not

contemplated by the Panel or by the parties to such agreements. Because the record fails to enumerate the types of revenue that may be received in kind, the Register finds it unwise to include even an illustrative list when there is little evidence of what specific types of revenues should be considered in the calculation of "gross proceeds." Thus, the definition of "gross proceeds" shall be as follows:

"Gross proceeds" shall mean all fees and payments, including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(c) for the sole purpose of facilitating a transmission to the public a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

2. Terms Not Disputed by the Parties

a. *Limitation of Liability.* One of the terms proposed by the Parties and adopted by the CARP was that "A Designated Agent shall have no liability for payments made in accordance with this subsection with respect to disputes between or among recipients." The Parties explained that the purpose of this provision was to "mak[e] clear that so long as a Designated Agent complies with the requirements adopted by the Copyright Office for distributing royalties, then a beneficiary of statutory royalties cannot sue such Designated Agent for payments made in accordance with Copyright Office regulations. Any dispute among recipients should be resolved among themselves."

The Register understands the desire of SoundExchange and RLI to insulate themselves from liability in cases where Copyright Owners or Performers dispute the Designated Agent's allocation of royalties. The Copyright Office's experience with distribution proceedings for the statutory licenses for which royalties are initially paid to the Copyright Office provides ample evidence that individual copyright owners and performers often believe they are being paid less than their fair share of statutory license royalties, and it is natural for a Designated Agent to wish to avoid having to defend against such claims.

Moreover, as has become apparent in the course of the pending rulemaking proceeding relating to notice and recordkeeping for the use of sound recordings under the statutory licenses, the information that Licensees will be providing to the Designated Agents about which (and how many) sound recordings they have performed will be far from perfect, and the Designated Agents necessarily will have to make

⁴⁷ Barry Knittel, formerly President of AEI Music Markets—Worldwide is now DMX/AEI's Senior Vice President of Business Affairs Worldwide.

difficult judgments in determining how to allocate royalties. If the Designated Agents had comprehensive information identifying each and every performance transmitted by a Licensee, and each and every Copyright Owner and Performer for each performance, in theory they could pay each Copyright Owner and Performer his or her precise share of royalties. In the real world—or at least for the remainder of the period for which this proceeding is setting rates and terms—some Copyright Owners and Performers inevitably will receive less than their precise share of the royalty pool, and others will receive more than their precise share. The Designated Agents should not be held to an impossibly high standard of care.

Unfortunately, neither the CARP nor the Librarian have the power to excuse a Designated Agent (or, for that matter, anyone else) from liability for a breach of a legal obligation. If a Designated Agent has in fact wrongfully withheld or underpaid royalties to a Copyright Owner or Performer, the law may provide a remedy to the Copyright Owner or Performer.

Although the Librarian cannot excuse the Designated Agents from potential liability, he can adopt terms that provide a mechanism that will make claims by disgruntled Copyright Owners or Performers less likely, or at least less viable. The Register therefore recommends that in place of the ultra vires provision excusing the Designated Agents from any liability, the Librarian provide that the Designated Agents must submit to the Copyright Office a detailed description of their methodology for distributing royalty payments to nonmembers. This information will be made available to the public, and any Copyright Owner or Performer who believes the methodology is unfair will have an opportunity to raise an objection with the Designated Agent prior to the distribution, thereby giving the Designated Agent the opportunity to address the problem before the Copyright Owner or Performer has suffered any alleged harm. This provision is modeled on a provision proposed by the parties to the previous CARP proceeding to establish rates and terms for noninteractive subscription services under section 114. See proposed 37 CFR 260.3(e), in Notice of Proposed Rulemaking, Determination of Reasonable Rates and Terms for the Public Performance of Sound

Recordings, 66 FR 38226, 38228 (July 23, 2001).⁴⁸

The Register also proposes that the Librarian adopt a term that provides a Designated Agent with an optional mechanism pursuant to which the Designated Agent may request that the Register provide a written opinion stating whether the Agent's methodology for distributing royalty payments to nonmembers meets the requirements of the terms for distribution set forth in the implementing regulations. Although such an opinion by the Register would not be binding on a court evaluating a claim against a Designated Agent, it can be assumed that a court would find the opinion of the Register persuasive.

The Register anticipates that under this scheme, a Designated Agent that acts conscientiously and in good faith in the distribution of royalties will not be found liable to a Copyright Owner or Performer who is dissatisfied with his or her share of the distribution.

b. *Deductions from Royalties for Designated Agent's Costs.* The parties had proposed, and the CARP agreed, that Designated Agents be permitted to deduct from the royalties paid to Copyright Owners and Performers "reasonable costs incurred in the licensing, collection and distribution of the royalties paid by Licensees * * * and a reasonable charge for administration." The Register recommends that the provision permitting deductions for costs incurred in licensing be removed from this provision. See § 261.4(i). Although a Designated Agent may happen to engage in licensing activities, licensing per se is not among the responsibilities of a Designated Agent under the terms of the statutory license. The purpose of the Designated Agent is to receive and distribute the statutory royalty fees. There is no justification for permitting a Designated Agent to deduct costs incurred in licensing activity from the statutory royalties, and the CARP's acquiescence in this term was therefore arbitrary.

There was also a suggestion in testimony presented to the CARP that it would be proper for a Designated Agent to deduct from statutory royalties its costs incurred as a participant in a CARP proceeding. Tr. 11891–11893 (Williams). Nothing in § 261.4(i), including the references to "reasonable costs incurred in the collection and distribution of the royalties paid by Licensees," can properly be construed

⁴⁸ A similar provision is recommended with respect to the methodology for allocating royalties among Designated Agents.

as permitting a Designated Agent to deduct from the royalty pool any costs of participating in a CARP proceeding. Such activity is beyond the scope of collection and distribution of royalties. Of course, Copyright Owners and Performers may enter into agreements with a Designated Agent permitting such deductions, but a Designated Agent may not make such deductions from royalties due to unaffiliated Copyright Owners and Performers or those who have simply designated a Designated Agent without specifically agreeing to permit such deductions.⁴⁹

c. *Ephemeral Recording.* The Register recommends that a definition of "Ephemeral Recording" be added to the definitions. This definition incorporates by reference the requirements set forth in section 112(e).

In a related provision, the Register has harmonized the language of §§ 261.3(b) and (c) and makes clear that beneficiaries of the statutory license for ephemeral recordings may make any number of ephemeral recordings so long as they are made for the sole purpose of facilitating the statutory licensees permitted transmissions of performances of sound recordings. The regulatory text proposed by the parties and accepted by the Panel provided that for Business Establishment Services, the section 112 royalty shall be paid "[f]or the making of unlimited numbers of ephemeral recordings in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv)," (emphasis added), but that for webcasters, the section 112 royalty shall be paid "[f]or the making of all ephemeral recordings required to facilitate their internet transmissions."

A literal reading of section 112(e) might lead to the conclusion that the ephemeral recording statutory license permits only the making of a single ephemeral recording, but the statute qualifies that provision by stating "(unless the terms and conditions of the statutory license allow for more)," and the legislative history makes clear that the terms established by the Librarian in this proceeding may include terms permitting the making of additional

⁴⁹ The Register is also troubled by the parties permitting a Designated Agent to deduct "a reasonable charge for administration" which is included "to permit a for-profit Designated Agent to make a reasonable profit on royalty collection and distribution on top of the direct expenses that may be incurred in licensing, collection and distribution." Appendix B, p. B–13. But in light of the parties' acceptance and the CARP's adoption of a procedure permitting multiple Designated Agents, including a for-profit Designated Agent, the Register reluctantly cannot conclude that the provision is arbitrary.

ephemeral recordings. H.R.Rep. 105-796, at 89. Therefore, it is appropriate that the terms make clear that statutory licensees may make more than one ephemeral recording to accomplish the purposes of the statutory license.

The reference to "all" ephemeral recordings "required" to facilitate webcasters' transmissions, and the reference to "unlimited" recordings for Business Establishment Services "operation", are arguably inconsistent with each other and somewhat ambiguous. To clarify that the scope of the section-112 statutory license is similar for both types of service, and to more accurately reflect the appropriate scope of that license, the Register recommends that the regulatory language provide, in the case of webcasters, "[f]or the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording," and in the case of Business Establishment Services, "[f]or the making of any number of ephemeral recordings in the operation of a service pursuant to the Business Establishment exemption." (Emphasis added).

d. *Definition of "Listener"*. The definitions of "Aggregate Tuning Hours" and "Performance" both include references to a "listener" or to "listeners." It is not clear from the text of these definitions whether each person who is hearing a performance is a "listener" even if all the persons hearing the performance are listening to the same machine or device (e.g., two or more persons listening to a performance rendered on a single computer). Clearly the intent is that all persons listening to a performance on a single machine or device constitute, collectively, a single "listener," because "listener" is used here to assist in defining what constitutes a single performance. Indeed, it would be difficult to implement an interpretation that counted all individuals in such circumstances as separate "listeners." Accordingly, the Register recommends including a definition that provides that if more than one person are listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

e. *Timing of Payment by Receiving Agent to Designated Agent*. The terms proposed by the Parties and accepted by the CARP included a provision requiring that the Receiving Agent pay a Designated Agent its share of any royalty payments received from a Licensee within 20 days after the day on which the Licensee's payment is due. While the Register recognizes that such a provision would, in principle, be unobjectionable, she concludes that

under current conditions it is administratively unfeasible.

As the parties recognized in their commentary on this provision, "The parties do not know either the payment methodology that will be used to calculate royalties or the types of information that will be reported by Licensees. Such determinations cannot be made before the conclusion of this proceeding and the Notice and Recordkeeping Proceeding." Appendix B, p. B-10. However, they assumed that the Receiving Agent and the Designated Agent could agree on a "reasonable allocation method" even in the absence of any firm data.

The Register is skeptical. It is apparent at this point in the rulemaking on notice and recordkeeping that obtaining accurate reports of Licensees' use of sound recordings will be difficult, particularly during the first few months. Moreover, the initial reports of use will require reporting on less than a monthly basis, making it impossible in many instances for the Receiving Agent to make any determination whatsoever as to a Designated Agent's allocated share during at least the first month or two in which royalties are paid. Reports on past use of sound recordings (i.e., from October 28, 1998, to the present) will present an even more formidable challenge. It is difficult to imagine that 20 days after the Receiving Agent has received the first royalty payments from Licensees, the Receiving Agent and the Designated Agent will have any reliable information from which they can ascertain how the proceeds should be allocated. The Register therefore recommends that the proposed requirement that payment be made within 20 days of the day on which the Licensee's payment is due be replaced by a requirement that the payment be made "as expeditiously as is reasonably possible," a more flexible term that recognizes the difficulty in establishing a specific deadline. The Register cautions that during the first few months of operation of the system of reporting and or royalty payment, "expeditious" payment under the circumstances may be a matter of many weeks, if not months.

It can reasonably be expected that for future periods governed by future CARPs or negotiated agreements, more stringent requirements of prompt payment will be appropriate. But it must be recognized that in this initial, transitional period, delays will be inevitable.

f. *Allocation of Royalties among Designated Agents and Among Copyright Owners and Performers*. The terms proposed by the Parties and

accepted by the Panel provide that the Receiving Agent allocate royalty payments to Designated Agents "on a reasonable basis to be agreed among the Receiving Agent and the Designated Agents," and that the Designated Agents distribute royalty payments "on a reasonable basis that values all performances by a Licensee equally." The Panel accepted these terms, but observed that a "determination of how royalty payments should be apportioned between the Designated Agents cannot be made until the parties know the rate structure adopted by the CARP (in the first instance) and the Librarian of Congress (on review) and the outcome of the Notice and Recordkeeping Proceeding." Appendix B, at p. B-10. Similarly, the Panel remarked that "The terms do not specifically provide how a Designated Agent should allocate royalties among parties entitled to receive such royalties because such allocation will depend upon the rate structure adopted by the CARP (in the first instance) and by the Librarian of Congress (on review) and may be affected by the types of reporting requirements that are adopted by the Copyright Office in the Notice and Record-keeping Proceeding for eligible nonsubscription transmissions and business establishment services." *Id.*, p. B-12.

The Register recommends that the provisions for allocation of royalty payments among Designated Agents and for allocation of royalties among parties entitled to receive such royalties be clarified, making explicit the relationship between the notice and recordkeeping regulations and the allocation of royalties. Each of these provisions should provide that the method of allocation shall be based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances.

The Register has some trepidation about the provision in § 261.4(a), proposed by the Parties and recommended by the CARP, that provides that apportionment among Designated Agents "shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Receiving Agent and the Designated Agents." (Emphasis added). The regulation does not provide what happens in the event that the Receiving Agent and the Designated Agents cannot agree on an allocation methodology. One could recommend a provision that gives the ultimate decisionmaking power to one of the parties or to a third party, but instead,

the Register proposes the addition of § 261.4(l), which would simply provide that in the event of a stalemate, "either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute."

g. *Choice of Designated Agent by Performers.* A literal reading of the terms recommended by the Panel would permit a Copyright Owner to select the Designated Agent of its choice, but would require a Performer to accept the Designated Agent selected by the Copyright Owner; and the Panel's report appears to agree with this interpretation. Report at 132. However, the Report does not articulate any reason for the decision to deprive Performers of the same right to choose that is given to Copyright Owners, and the commentary in Appendix B is silent as well.

As the Panel acknowledged, "Copyright owners and performers, on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates" Report at 132 (emphasis added). The Register agrees. It was arbitrary to permit Copyright Owners to make an election that Performers are not permitted to make. The Register can conceive of no reason why Performers should not be given the same choice. Accordingly, the Register recommends that § 261.4 be amended to provide that a Copyright Owner or a Performer may make such an election. See § 261.4(c) of the recommended regulatory text.

The Register has also inserted a housekeeping amendment to provide that for administrative convenience, a Copyright Owner's or Performer's designation of a Designated Agent shall not be effective until 30 days have passed.

h. *Performers' Right to Audit.* The terms proposed by the Parties and accepted by the CARP provided that a Copyright Owner may conduct an audit of a Designated Agent. These provisions also include safeguards to ensure that a Designated Agent is not subjected to more than one audit in a calendar year.

However, the terms do not provide that Performers have a similar right to conduct an audit of a Designated Agent, despite the fact that Performers, like Copyright Owners, depend upon the Designated Agent to make fair and timely royalty payments. The Parties' commentary in Appendix B states that audit rights are limited to Copyright Owners "rather than the entire universe

of Copyright Owners and Performers, which could number in the tens of thousands." Appendix B at p. B-24. The commentary suggests that it would be impracticable for a Designated Agent to be subject to audit from individual Performers. Apart from reproducing the Parties' commentary, the Panel offered no observations on this point.

The Register fails to understand how it would be "impracticable" to permit Performers, who depend on a Designated Agent for their royalty payments, to initiate an audit of the Designated Agent when the Copyright Owners may do so. The Designated Agent is given sufficient protection by virtue of the provision that it can be subject to only a single audit in a calendar year, by the provision that the party requesting the audit must bear the presumably considerable costs of the audit, and by the provision that any audit "shall be binding on all Copyright Owners and Performers."⁵⁰ The Register, therefore, recommends that the audit provisions be amended to permit not only Copyright Owners, but also Performers, to initiate an audit.

i. *Effective date.* Section 114(f)(4)(C) states that payments in arrears for the performance of sound recordings prior to the setting of a royalty rate are due on a date certain in the month following the month in which the rate is set. The effective date of the rates, however, is not necessarily the date of publication in the *Federal Register*. The Librarian has often set the effective date of a rate several months after the initial announcement of the decision. See *Determination of Reasonable Rates and Terms for Subscription Services*, 63 FR 25394 (May 8, 1998) (setting the effective date for the rate for subscription services three weeks after the date of publication of the final order in the *Federal Register*); *Rate Adjustment for the Satellite Carrier Compulsory License*, 62 FR 55742 (October 28, 1997) (announcing an effective date of January 1, 1998, set to coincide with the next filing period of the statements of account).

Section 802(g) provides that the effective date of the new rates is "as set forth in the decision." 17 U.S.C. 802(g). The Register has interpreted the term "decision" to mean the decision of the

⁵⁰ It is noteworthy that although the Parties were unwilling to give Performers a right to initiate an audit, they did not hesitate to provide that Performers will be bound by an audit initiated by a Copyright Owner.

Librarian, since section 802(g) only refers to the decision of the Librarian. Thus, this provision has been interpreted as providing the Librarian with discretion in setting the effective date. Moreover, the courts have held that an agency normally retains considerable discretion to choose an effective date, where, as here, the statute authorizing agency action fails to specify a timetable for effectiveness of decisions. *RIAA v. CRT*, 662 F.2d 1, 14 (D.C. Cir. 1981).

In setting an effective date, the Register has considered the impact of the rate on the Licensees and the administrative burden on the Office in promulgating regulations to insure effective administration of the license. Clearly, there will be a burden on many Licensees who, by law, are required to make full payment of all royalties owed for transmissions made since the effective date of the DMCA, October 28, 1998, on or before the 20th day of the month next succeeding the month in which the royalty rate is set. Moreover, the Copyright Office is in the midst of promulgating rules governing records of use that will be used to make distribution of royalty fees in accordance with the terms of payment.

Consequently, the Register proposes an effective date of September 1, 2002, which will require the Licensees to make full payment of the arrears on October 20, 2002. Payment for the month of September shall be due on or before November 14, 2002, the forty-fifth (45th) day after the end of the month on which the rate becomes effective, in accordance with the term proposed by the parties and adopted by the CARP. Similarly, all subsequent payments shall be due on the 45th after the end of each month for which royalties are owed. This payment schedule provides the Licensees with additional time to make the initial payment and any necessary adjustments in their business operations to meet their copyright obligation.

V. Conclusion

Having fully analyzed the record in this proceeding, the submissions of the parties, the Register of Copyrights recommends that the Librarian adopt the statutory rates for the transmission of a sound recording pursuant to section 114, and the making of ephemeral phonorecords pursuant to section 112(e), as set forth below:

SUMMARY OF ROYALTY RATES FOR SECTION 114(F)(2) AND 112(E) STATUTORY LICENSES

Type of DMCA—Complaint service	Performance fee (per performance)	Ephemeral license fees
1. Webcaster and Commercial Broadcaster: All Internet transmissions, including simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07¢	8.8% of Performance Fees Due.
2. Non-CPB, Non-Commercial Broadcaster:		
(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.02¢	8.8% of Performance Fees Due.
(b) Other internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station.	0.02¢	8.8% of Performance Fees Due.
(c) Transmissions on any other side channels	0.07¢	8.8% of Performance Fees Due.
3. Business Establishment Service: For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. 114(d)(1)(C)(iv).	Statutorily Exempt	10% of Gross Proceeds.
4. Minimum Fee:		
(a) Webcasters, commercial broadcasters, and non-CPB, non-commercial broadcasters.	\$500 per year for each licensee.	
(b) Business Establishment Services		\$10,000

In addition, the Register recommends that the Librarian adopt the terms of payment proposed by the CARP, as modified in the recommendation, and set September 1, 2002, as the effective date for the statutory rates and the terms of payment.

VI. The Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter to set rates and terms for Licensees making certain digital performances of sound recordings under section 114(d)(2) and those making ephemeral recordings under section 112(e), the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing the new royalty rates and terms of payment for the sections 112 and 114 statutory licenses.

List of Subjects in 37 CFR Part 261

Copyright, Digital audio transmissions, Performance right, Recordings.

Final Regulation

In consideration of the foregoing, part 261 of 37 CFR is added to read to as follows:

PART 261—RATES AND TERMS FOR ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Sec.

261.1 General.

261.2 Definitions.

261.3 Royalty fees for public performance of sound recordings and for ephemeral recordings.

261.4 Terms for making payment of royalty fees and statements of account.

261.5 Confidential information.

261.6 Verification of statements of account.

261.7 Verification of royalty payments.

261.8 Unclaimed funds.

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

§ 261.1 General.

(a) This part 261 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of ephemeral recordings by certain Licensees in accordance with the provisions of 17 U.S.C. 112(e).

(b) Licensees relying upon the statutory license set forth in 17 U.S.C. 114 shall comply with the requirements of that section and the rates and terms of this part.

(c) Licensees relying upon the statutory license set forth in 17 U.S.C. 112 shall comply with the requirements of that section and the rates and terms of this part.

(d) Notwithstanding the schedule of rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services within the scope of 17 U.S.C. 112 and 114 concerning eligible nonsubscription transmissions shall apply in lieu of the rates and terms of this part.

§ 261.2 Definitions.

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

Aggregate Tuning Hours mean the total hours of programming that the Licensee has transmitted over the Internet during the relevant period to all end users within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. Likewise, if one listener listened to a service for 10 hours, the service's Aggregate Tuning Hours would equal 10.

Business Establishment Service is a Licensee that is entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that obtains a compulsory license under 17 U.S.C. 112(e) to make ephemeral recordings for the sole purpose of facilitating those exempt transmissions.

Commercial Broadcaster is a Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission to make over-the-air broadcasts, other than a CPB-Affiliated or Non-CPB-Affiliated, Non-Commercial Broadcaster.

Copyright Owner is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

Designated Agent is the agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part from the Receiving

Agent. The Designated Agent shall make further distribution of those royalty payments to Copyright Owners and Performers that have been identified in § 261.4(c).

Ephemeral Recording is a phonorecord created solely for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) or under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Gross proceeds mean all fees and payments, as used in § 261.3(d), including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

Licensee is: (1) A person or entity that has obtained a compulsory license under 17 U.S.C. 112 or 114 and the implementing regulations therefor to make eligible non-subscription transmissions and ephemeral recordings, or

(2) A person or entity entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that has obtained a compulsory license under 17 U.S.C. 112 to make ephemeral recordings.

Listener is a recipient of a transmission of a public performance of a sound recording made by a Licensee or a Business Establishment Service. However, if more than one person is listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

Non-CPB, Non-Commercial Broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g. the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained license from the copyright owner of such sound recording; and

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

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

Performer means the respective independent administrators identified in 17 U.S.C. 114(g)(2)(A) and (B) and the parties identified in 17 U.S.C. 114(g)(2)(C).

Receiving Agent is the agent designated by the Librarian of Congress for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to Designated Agents, and that has been identified as such in § 261.4(b). The Receiving Agent may also be a Designated Agent.

Side channel is a channel on the Web Site of a Commercial Broadcaster or a Non-CPB, Non-Commercial Broadcaster, which channel transmits eligible non-subscription transmissions that are not simultaneously transmitted over-the-air by the Licensee.

Webcaster is a Licensee, other than a Commercial Broadcaster, Non-CPB, Non-Commercial Broadcaster or Business Establishment Service, that makes eligible non-subscription transmissions of digital audio programming over the Internet through a Web Site.

Web Site is a site located on the World Wide Web that can be located by an end user through a principal Uniform Resource Locator (a "URL"), e.g., www.xxxxx.com.

§ 261.3 Royalty fees for public performances of sound recordings and for ephemeral recordings.

(a) For the period October 28, 1998, through December 31, 2002, royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114(d)(2), and the making of ephemeral recordings

pursuant to 17 U.S.C. 112(e) shall be as follows:

(1) Webcaster and Commercial Broadcaster Performance Royalty. For all Internet transmissions, including simultaneous Internet retransmissions of over-the-air AM or FM radio broadcasts, a Webcaster and a Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(2) Non-CPB, Non-Commercial Broadcaster Performance Royalty.

(i) For simultaneous Internet retransmissions of over-the-air AM or FM broadcasts by the same radio station, a non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.02¢ per performance.

(ii) For other Internet transmissions, including up to two side channels of programming consistent with the mission of the station, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.02¢ per performance.

(iii) For Internet transmissions on other side channels of programming, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(b) Estimate of Performance. Until December 31, 2002, a Webcaster, Commercial Broadcaster, or Non-CPB, Non-Commercial Broadcaster may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of transmissions or retransmissions of radio station programming reasonably classified as news, business, talk or sports, and 12 performances per hour in the case of transmissions or retransmissions of all other radio station programming).

(c) Webcaster and Broadcaster Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording, each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster shall pay a section 112(e) royalty equal to 8.8% of their total performance royalty.

(d) Business Establishment Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings in the operation of a service pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv), a Business Establishment Service shall pay a section 112(e) ephemeral recording royalty equal to ten percent (10%) of the Licensee's annual gross

proceeds derived from the use in such service of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program,

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(e) Minimum fee. (1) Each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster licensed to make eligible digital transmissions and/or ephemeral recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall pay a minimum fee of \$500 for each calendar year, or part thereof, in which it makes such transmissions or recordings.

(2) Each Business Establishment Service licensed to make ephemeral recordings pursuant to a license under 17 U.S.C. 112(e) shall pay a minimum fee of \$10,000 for each calendar year, or part thereof, in which it makes such recordings.

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

(a) A Licensee shall make the royalty payments due under § 261.3 to the Receiving Agent. If there are more than one Designated Agent representing Copyright Owners or Performers entitled to receive any portion of the royalties paid by the Licensee, the Receiving Agent shall apportion the royalty payments among Designated Agents using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such apportionment shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Receiving Agent and the Designated Agents. Within 30 days of adoption of a methodology for apportioning royalties among Designated Agents, the Receiving Agent shall provide the Register of Copyrights with a detailed description of that methodology.

(b) Until such time as a new designation is made, SoundExchange, an unincorporated division of the Recording Industry Association of America, Inc., is designated as the Receiving Agent to receive statements of account and royalty payments from Licensees. Until such time as a new

designation is made, Royalty Logic, Inc. and SoundExchange are designated as Designated Agents to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners.

(c) SoundExchange is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners, except when a Copyright Owner or Performer has notified SoundExchange in writing of an election to receive royalties from a particular Designated Agent. With respect to any royalty payment received by the Receiving Agent from a Licensee, a designation by a Copyright Owner or Performer of a particular Designated Agent must be made no later than thirty days prior to the receipt by the Receiving Agent of that royalty payment.

(d) Commencing September 1, 2002, a Licensee shall make any payments due, under § 261.3 to the Receiving Agent by the forty-fifth (45th) day after the end of each month for that month. Concurrently with the delivery of payment to the Receiving Agent, a Licensee shall deliver to each Designated Agent a copy of the statement of account for such payment. A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Receiving Agent after the due date. Late fees shall accrue from the due date until payment is received by the Receiving Agent.

(e) A Licensee shall make any payments due under § 261.3 for transmissions made between October 28, 1998, and August 31, 2002, to the Receiving Agent by October 20, 2002.

(f) A Licensee shall submit a monthly statement of account for accompanying royalty payments on a form prepared by the Receiving Agent after full consultation with all Designated Agents. The form shall be made available to the Licensee by the Receiving Agent. A statement of account shall include only such information as is necessary to calculate the accompanying royalty payment. Additional information beyond that which is sufficient to calculate the royalty payments to be paid shall not be required to be included on the statement of account.

(g) The Receiving Agent shall make payments of the allocable share of any royalty payment received from any Licensee under this section to the Designated Agent(s) as expeditiously as

is reasonably possible following receipt of the Licensee's royalty payment and statement of account as well as the Licensee's Report of Use of Sound Recordings under Statutory License for the period to which the royalty payment and statement of account pertain, with such allocation to be made on the basis determined as set forth in paragraph (a) of this section. The Receiving Agent and the Designated Agent shall agree on a reasonable basis on the sharing on a pro-rata basis of any incremental costs directly associated with the allocation method. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and a Designated Agent for each calendar year no later than 180 days following the end of each calendar year.

(h) The Designated Agent shall distribute royalty payments on a reasonable basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances; Provided, however, that Copyright Owners and Performers who have designated a particular Designated Agent may agree to allocate their shares of the royalty payments among themselves on an alternative basis.

(i)(1) A Designated Agent shall provide to the Register of Copyrights:

(i) A detailed description of its methodology for distributing royalty payments to Copyright Owners and Performers who have not agreed to an alternative basis for allocating their share of royalty payments (hereinafter, "non-members"), and any amendments thereto, within 30 days of adoption and no later than 60 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that the Designated Agent receives from a non-member concerning the distribution of royalty payments, within 30 days of receiving such written complaint; and

(iii) The final disposition by the Designated Agent of any complaint specified by paragraph (i)(1)(ii) of this section, within 60 days of such disposition.

(2) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Agent's methodology for distributing royalty payments to non-members meets the requirements of this section.

(j) A Designated Agent shall distribute such royalty payments directly to the Copyright Owners and Performers, according to the percentages set forth in 17 U.S.C. 114(g)(2), if such Copyright

Owners and Performers provide the Designated Agent with adequate information necessary to identify the correct recipient for such payments. However, Performers and Copyright Owners may jointly agree with a Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties to Performers and Copyright Owners consistent with the percentages in 17 U.S.C. 114(g)(2).

(k) A Designated Agent may deduct from the royalties paid to Copyright Owners and Performers reasonable costs incurred in the collection and distribution of the royalties paid by Licensees under § 261.3, and a reasonable charge for administration.

(l) In the event a Designated Agent and a Receiving Agent cannot agree upon a methodology for apportioning royalties pursuant to paragraph (a) of this section, either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute.

§ 261.5 Confidential information.

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

(b) Confidential Information shall not include documents or information that at the time of delivery to the Receiving Agent or a Designated Agent are public knowledge. The Receiving Agent or a Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) In no event shall the Receiving Agent or Designated Agent(s) use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that the Designated Agent may report Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any Licensee or group of Licensees cannot directly or indirectly be ascertained or reasonably approximated. All reported aggregated Confidential Information from Licensees within a class of Licensees shall concurrently be made available to all Licensees then in such class. As used in this paragraph, the phrase, "class of Licensees" means all Licensees paying fees pursuant to § 261.4(a).

(d) Except as provided in paragraph (c) of this section and as required by law, access to Confidential Information shall be limited to, and in the case of paragraphs (d)(3) and (d)(4) of this section shall be provided upon request, subject to resolution of any relevance or burdensomeness concerns and reimbursement of reasonable costs directly incurred in responding to such request, to:

(1) Those employees, agents, consultants and independent contractors of the Receiving Agent or a Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records;

(2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Receiving Agent or a Designated Agent with respect to the verification of a Licensee's statement of account pursuant to § 261.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty payments pursuant to § 261.7;

(3) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. 114(f)(2) and 112(e), under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(4) In connection with *bona fide* royalty disputes or claims by or among Licensees, the Receiving Agent, Copyright Owners, Performers or the Designated Agent(s), under an appropriate confidentiality agreement or protective order, attorneys, consultants and other authorized agents of the parties to the dispute, arbitration panels or the courts.

(e) The Receiving Agent or Designated Agent(s) and any person identified in paragraph (d) of this section shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Receiving Agent or Designated Agent(s) or person.

(f) Books and records of a Licensee, the Receiving Agent and of a Designated Agent relating to the payment,

collection, and distribution of royalty payments shall be kept for a period of not less than three (3) years.

§ 261.6 Verification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by the Designated Agent.

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

(c) *Notice of intent to audit.* A Designated Agent must submit a notice of intent to audit a particular Licensee with the Copyright Office, which shall publish in the *Federal Register* a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Designated Agent's notice. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Designated Agents, and all Copyright Owners and Performers.

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

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

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

Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Designated Agent requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Licensee shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Licensee and more than \$5,000.00.

§ 261.7 Verification of royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification by any Copyright Owner or Performer of royalty payments made by a Designated Agent; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and a Designated Agent have agreed as to proper verification methods.

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

(c) *Notice of intent to audit.* A Copyright Owner or Performer must submit a notice of intent to audit a particular Designated Agent with the Copyright Office, which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within thirty (30) days of

the filing of the notice. The notification of intent to audit shall be served at the same time on the Designated Agent to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

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

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

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

(g) *Costs of the verification procedure.* The Copyright Owner or Performer

requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Designated Agent shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Designated Agent and more than \$5,000.00.

§ 261.8 Unclaimed funds.

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of three (3) years from the date of payment. No claim to such payment shall be valid after the expiration of the three (3) year period. After the expiration of this period, the unclaimed funds of the Designated Agent may first be applied to the costs directly attributable to the administration of the royalty payments due such unidentified Copyright Owners and Performers and shall thereafter be allocated on a pro rata basis among the Designated Agents(s) to be used to offset such Designated Agent(s) other costs of collection and distribution of the royalty fees.

Dated: June 20, 2002.

Marybeth Peters,
Register of Copyrights.

James H. Billington,
The Librarian of Congress.

[FR Doc. 02-16730 Filed 7-5-02; 8:45 am]

BILLING CODE 1410-33-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Parts 350 and 351

[Docket No. RM 2005-1]

Procedural Regulations for the
Copyright Royalty BoardAGENCY: Copyright Royalty Board,
Library of Congress.

ACTION: Technical correction.

SUMMARY: This document corrects two errors and makes a technical correction in a final rule document published in the *Federal Register* on September 11, 2006, regarding amendments made to the procedural regulations of the Copyright Royalty Board.

EFFECTIVE DATE: September 11, 2006.

FOR FURTHER INFORMATION CONTACT: Gina Giuffreda, Attorney-Advisor, or Abioye E. Oyewole, CRB Program Specialist. Telephone: (202) 707-7658. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION: On September 11, 2006, the Copyright Royalty Judges, on behalf of the Copyright Royalty Board, adopted amendments to the procedural regulations governing the practices and procedures of the Copyright Royalty Judges in royalty rate and distribution proceedings. 71 FR 53325 (September 11, 2006). However, in two instances, the proper amendatory instruction was inadvertently omitted. Specifically, in § 350.4, the Judges revised the heading for paragraph (e); while the revised text was printed, there was no corresponding amendatory instruction. The same error occurred with regard to the revision of the paragraph heading for § 351.10(c). This document corrects these errors.

In addition, the Judges are making a technical correction to § 351.4(b)(1) by removing the phrase "to be presented in the direct statement" so that the sentence reads less awkwardly.

List of Subjects

37 CFR Part 350

Administrative practice and
procedure, Copyright, Lawyers.

37 CFR Part 351

Administrative practice and
procedure, Copyright.

■ For the reasons set forth in the preamble, 37 CFR parts 350 and 351 are corrected as follows:

PART 350—GENERAL
ADMINISTRATIVE PROVISIONS

■ 1. The authority citation for part 350 continues to read as follows:

Authority: 17 U.S.C. 803.

■ 2. Section 350.4 is corrected by revising the paragraph heading for paragraph (e) to read as follows:

§ 350.4 Filing and service.

* * * * *

(e) *Subscription*— * * *

* * * * *

PART 351—PROCEEDINGS

■ 3. The authority citation for part 351 continues to read as follows:

Authority: 17 U.S.C. 803, 805.

§ 351.4 [Amended].

■ 4. Section 351.4 is corrected by removing from paragraph (b)(1) the phrase "to be presented in the direct statement".

■ 5. Section 351.10 is corrected by revising the paragraph heading for paragraph (c) to read as follows:

§ 351.10 Evidence.

* * * * *

(c) *Exhibits*— * * *

* * * * *

Dated: October 3, 2006.

James Scott Sledge,
Chief Copyright Royalty Judge.

[FR Doc. E6-16584 Filed 10-5-06; 8:45 am]

BILLING CODE 1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 370

[Docket No. RM 2005-2]

Notice and Recordkeeping for Use of
Sound Recordings Under Statutory
LicenseAGENCY: Copyright Royalty Board,
Library of Congress.

ACTION: Interim final rule.

SUMMARY: The Copyright Royalty Judges, on behalf of the Copyright Royalty Board, are issuing interim regulations for the delivery and format of reports of use of sound recordings for the statutory licenses set forth in sections 112 and 114 of the Copyright Act.

EFFECTIVE DATE: October 6, 2006.

FOR FURTHER INFORMATION CONTACT: Gina Giuffreda, Attorney-Advisor, or Abioye

Oyewole, CRB Program Specialist.
Telephone (202) 707-7658. Telefax
(202) 252-3423.

SUPPLEMENTARY INFORMATION:

I. Background

Today's Interim Regulations complete the second half of the proceeding, begun by the Librarian of Congress and the Copyright Office and now entrusted to the Copyright Royalty Board ("Board"), to establish notice and recordkeeping requirements for digital audio services utilizing the statutory licenses set forth in sections 112 and 114 of the Copyright Act. The first half of the proceeding prescribed interim regulations for the filing of notices of intention to use the section 112 and/or 114 licenses, as required by section 112(e)(7)(A) and section 114(f)(4)(B), respectively, and interim regulations for the elements of data that comprise a report of use. See 69 FR 11515 (March 1, 2004). With the issuance of today's regulations, digital audio services that have been maintaining reports of use since April 1, 2004¹ will now be able to deliver those and future reports to copyright owners for their use in distributing royalty fees collected under the section 112 and 114 licenses.

The matter of reports of use of sound recordings under the section 112 and 114 licenses has been contentious.² The Copyright Office first began the proceeding by issuing a Notice of Proposed Rulemaking ("NPRM"), 67 FR 5761 (February 7, 2002), and then, on May 10, 2002, held a public meeting to facilitate discussion as to the data to be included in a report of use, the frequency of the recordkeeping, and the manner and format for delivery to copyright owners. Persons representing copyright owners, users, and performers appeared and offered their opinions and criticisms of the NPRM and offered suggestions as to the amount of information necessary to distribute royalties collected under the section 112

¹ The Copyright Office also issued a final rule addressing reports of use under the section 112 and 114 licenses for the period October 28, 1998 through March 31, 2004. 69 FR 58261 (September 30, 2004). The Office determined that reports of use submitted by preexisting subscription services during that time period should serve as a proxy for reports from nonsubscription services, the satellite digital audio radio services, business establishment services and new types of subscription services. Consequently, the Interim Regulations issued on March 11, 2004 regarding notice and content of a report of use, and today's Interim Regulations regarding the format and delivery of a report of use, do not apply to the October 28, 1998 to March 31, 2004 period.

² In sharp contrast, the requirements for submitting a notice of intention to use the statutory licenses drew few public comments or criticisms and the Copyright Office had little trouble adopting regulations. See 69 FR at 11526.

and 114 licenses. The May 2002 meeting revealed persistent differences as to the scope of the regulations, as well as the details for creating and delivering databases of reports of use.

Subsequent to the May 10, 2002, meeting, the Copyright Office announced transitional requirements for creating reports of use because it had become clear that many services availing themselves of the statutory licenses were not keeping track of any of the sound recordings they were performing. See 67 FR 59573 (September 23, 2002). The transitional provisions were replaced by the Interim Regulations, announced almost two years later, where the Copyright Office prescribed the requirements for filing a notice of intention to use the statutory licenses, and the categories of data that comprised a report of use of a sound recording. 69 FR 11515 (March 11, 2004). The Office also made another important decision in the Interim Regulations; namely, the frequency of reporting reports of use. Although the Office announced that year-round census reporting of use of sound recordings would likely be the standard in the future, as a transitional measure, it "determined that, at this stage, it is best to require periodic reporting of sound recording performances." 69 FR at 11526. Reports of use would be required for two periods of seven consecutive days during each calendar quarter of the year. The first reporting period began on April 1, 2004, meaning that, since that time, services using the section 112 and 114 licenses have been required to create reports of use in anticipation of regulations prescribing the format in which the reports are to be delivered to copyright owners and the details of making the deliveries.

With the first part of the regulations governing recordkeeping completed (data required and frequency of reporting), the Copyright Office turned to the task of establishing format and delivery requirements. However, on November 30, 2004, the President signed into law the Copyright Royalty and Distribution Reform Act of 2004 ("Reform Act"), Public Law 108-419, 118 Stat. 2341. The Reform Act, among other things, transferred the authority for prescribing notice and recordkeeping regulations for sections 112 and 114 from the Librarian and the Copyright Office to the Copyright Royalty Judges and the Board. The Reform Act went into effect on May 31, 2005, after the Office published a Notice of Proposed Rulemaking on April 27, 2005 proposing regulations for the format and delivery of reports of use. 70 FR 21704 (April 27, 2005). The Office received

public comments on the proposals and delivered them to the Board.

When the May 31, 2005 effective date of the Reform Act arrived, full-time appointments of the Copyright Royalty Judges had not been made. The Librarian appointed an Interim Chief Copyright Royalty Judge who, on July 27, 2005, published a Supplemental Request for Comments ("Supplemental Request") in the Federal Register. 70 FR 43364 (July 27, 2005). The Supplemental Request posed a series of questions regarding format and delivery requirements since the comments submitted in response to the Office's April 27 notice made it clear that there were deep divisions of opinion. Now that the Board has full-time Judges, and the issues involved in format and delivery are fully presented, it is time to complete the Interim Regulations.

II. This Proceeding

As described above, the regulatory process to create recordkeeping regulations has been a lengthy one. The Librarian of Congress and the Copyright Office have invested considerable time in fashioning regulations up to this point and, absent controversies on the requirements for format and delivery of reports of use, would have completed this rulemaking. Even though jurisdiction for adopting notice and recordkeeping rules now lies solely with the Board, it is not the Board's intention in today's Interim Regulations to revisit the rules the Librarian and Office adopted. Rather, the Board will monitor the operation of these regulations, as well as the ones adopted today, and will request public comment in the future as to the need for amendment or improvement prior to adopting final regulations. The goal of today's Interim Regulations is to establish format and delivery requirements so that royalty payments to copyright owners pursuant to the section 112 and 114 licenses may be made from April 1, 2004 forward based upon actual data of the sound recordings transmitted by digital audio services. The completion of the recordkeeping Interim Regulations means that all services must deliver reports of use from the period beginning April 1, 2004, and SoundExchange must process these reports of use and distribute the royalties.

Because it is the Board, and not the Copyright Office, that is promulgating today's Interim Regulations, it is necessary to place them in Chapter III of title 37 of the Code of Federal Regulations. As noted above, authority for notice and recordkeeping regulations now rests solely with the Board. In the interest of placing all regulations related

to notice and recordkeeping under the section 112 and 114 licenses within the same part number in the CFR, the Board is also today replicating the notice and recordkeeping provisions currently located in part 270 of title 37³ in part 370 of the Board's regulations. It is anticipated that the Copyright Office will repeal in the near future part 270 of its regulations.

III. Format and Delivery

A. Format

Establishing the format in which a report of use is delivered to copyright owners requires consideration of competing interests. On the one hand, it is evident that digital audio services maintain data that include the content of a report of use in a wide variety of formats dependent on their resources and individual choices.⁴ On the other hand, given the considerable volume of data to be reported, data must be delivered to copyright owners in a form that can be processed and used to make royalty payments. Sections 112(e)(4) and 114(f)(4)(A) both contain the word "reasonable" with respect to the adoption of regulations, and the commenters have expressed different points of view as to the meaning of "reasonable." Digital audio services generally are of the view that "reasonable" means the least costly to them, while copyright owners, represented principally by SoundExchange,⁵ opine that "reasonable" means the submission of data most compatible to their use. Mindful of these cost and efficiency concerns raised by both the services and the copyright owners, the Board identifies a workable minimum or baseline for data reporting that satisfies the required reporting responsibilities of the services without imposing unreasonable processing burdens or obstacles on the copyright owners. The Board is of the view that regulations that establish the baseline requirements for formatting and delivering a report of use—i.e. that satisfy the basic

³ Chapter II of title 37 contains the regulations of the Copyright Office.

⁴ The Board is also aware of the likelihood that a significant number of services have chosen not to maintain any reports of use at all, despite the March 11, 2004 Interim Regulation's requirement that they do so beginning with the April 1, 2004 calendar quarter. See 69 FR at 11526. The Board agrees with the Copyright Office's view that the law does not allow any services to avoid altogether reporting their use of sound recordings under the statutory licenses, id. at 11521, format considerations notwithstanding.

⁵ Royalty Logic, Inc., which seeks to be an alternative distribution agent to SoundExchange, has also filed comments throughout this proceeding.

requirements necessary to deliver data that can be used to make payments collected under the statutory licenses—are reasonable as contemplated by the statute. This conclusion is supported by noting that copyright owners and services are always free to negotiate different format and delivery requirements that suit their particular needs and situations, and the Board is aware that such negotiations have taken place. *See*, Comments of the Digital Media Association at 1 (August 26, 2005).

Before addressing specifics regarding the format of a report of use, the Board expresses the following. First, the Board rejects permitting the submission of paper or hard copy reports of use. *See*, e.g., Comments of Harvard Radio Broadcasting Co. at 3–4 (May 27, 2005). While perhaps an inexpensive way for certain services to provide reports of use, hard copies create considerable expense for copyright owners to interpret and process thereby rendering them of little value. Second, the Board rejects the argument that the format regulations should be crafted in such a way as to allow a wide array of different electronic formats. This position, advocated principally by radio broadcasters,⁶ fails to account for the Board's stated goal in today's Interim Regulations which is to establish baseline format requirements. Further, the Board is highly skeptical that SoundExchange's data processing system is compatible with a variety of formats and radio broadcasters have failed to provide evidence—other than argument of counsel—that demonstrates any likelihood of compatibility.

Finally, the Board concludes that there is not currently available a recognized standard data processing format that can be adopted in lieu of the system proposed by SoundExchange. Radio broadcasters mention software owned by companies such as BDS and Mediabase but provide no details as to its cost, operation or availability. Joint Comments of Radio Broadcasters at 17 (August 26, 2005). Spacialaudio offers that its product, SAM Broadcaster, is capable of generating reports of use for SoundExchange. Comments of Spacialaudio.com at 2 (August 31, 2005). However, review of the product Web site reveals that SAM Broadcaster is a "professional DJ system with the ability to stream audio over the internet to listeners across the world" and is not by itself a data processing system. *See*,

<http://www.spacialaudio.com/products/sambroadcaster/>. The Board cannot adopt format requirements devoid of any nexus to a proven data processing system in the hopes that one or more will eventually become available. To do so would frustrate the already long overdue delivery of reports of use and further deny copyright owners their ability to claim royalties under the section 112 and 114 statutory licenses.

1. Spreadsheets

The April 27, 2005 NPRM proposed that commercially available spreadsheets, such as Microsoft's Excel and Corel's Quattro Pro, could be used to facilitate the creation of reports of use, provided that they are converted to ASCII (American Standard Code for Information Exchange) format prior to delivery. SoundExchange was directed to provide a template on its Web site for the Microsoft and Corel products along with instructions for conversion. Technical support in creating and delivering spreadsheet reports of use was the responsibility of each service reporting data. 70 FR at 21706.

Harvard Radio Broadcasting Company ("Harvard") and Collegiate Broadcasters, Inc. ("CBI") argue that the use of spreadsheets is unreasonable because a computer must be purchased, along with the Microsoft or Corel software, to create spreadsheets. Comments of Harvard at 9–10; Comments of CBI at 10–11.⁷ They also argue that the thousands of hours required to create reports of use in spreadsheet format cannot be justified, particularly given the limited resources of educational radio stations. *Id.* The Board is not persuaded by these arguments. First, the Board questions whether educational stations that exercise the option of spreadsheets must purchase a computer devoted solely to that purpose, and cannot use an existing computer or obtain a used one. Even if a new desktop computer is required, the Board finds it disingenuous to argue that purchasing a computer at an educational institution is unreasonable, particularly where it is standard practice for many colleges and universities across the United States to require that each student possess a computer as part of their enrollment. Likewise, the record does not support the premise that completing reports of use in spreadsheet format will require

⁷ Radio broadcasters submit that it is unlikely that they will avail themselves of the spreadsheet option and "likely will seek an automated solution that will enable them to generate electronic ASCII files directly from their music scheduling programs." Joint Comments of Radio Broadcasters at 14 (August 26, 2005).

thousands of hours. At present, reports of use need only be compiled for two seven consecutive day periods per calendar quarter, not year round as submitted in Harvard's estimates.

The Board is also not persuaded that conversion of spreadsheets into ASCII format presents an unreasonable burden upon digital audio services. SoundExchange, Inc. and Royalty Logic, Inc. demonstrate that the conversion process using the Microsoft or Corel software is simple and straightforward. *See*, Comments of SoundExchange, Inc. at 21 (August 26, 2005); Comments of Royalty Logic, Inc. at 2 (August 31, 2005). SoundExchange has also developed with Microsoft a macro that facilitates the spreadsheet conversion⁸ and is in the process of developing a similar macro with Corel. SoundExchange is directed to complete that negotiation with Corel and post the result on its Web site. The Board remains of the view that each service using a spreadsheet to prepare a report of use is responsible for any technical expertise necessary to complete the task.

2. Files With Headers

Three issues drew considerable public comment with respect to the proposal for permitting data files to be submitted with headers. Broadcasters objected to the first six lines of a file with headers arguing that the information requested was already contained in either the report of use itself or the notice of intention to obtain the section 112 and 114 licenses, and therefore would unnecessarily increase their labor costs. Joint Comments of Radio Broadcasters at 27–28 (August 26, 2005); Comments of Collegiate Broadcasters, Inc. at 16 (August 31, 2005). There was also considerable debate over the order of the date identification appearing in a file header, which also appears in a file name. Services uniformly favored the standard year, month, day (YYYYMMDD), while SoundExchange favored day, month, year (DDMMYYYY) principally on the ground that its current software recognizes only this convention. Comments of SoundExchange, Inc. at 24–25 (August 26, 2005). Finally, services argued that they should have their choice in identifying the text indicator and field delimiter used in a data file accompanying the header. *See*, e.g., Comments of Harvard Radio Broadcasting Company at 19 (August 26, 2005); Comments of the National

⁸ Harvard admits that it is "very impressed" with the Microsoft spreadsheet's ability to convert to ASCII, and estimates no more than one hour per conversion. Comments of Harvard Radio Broadcasting Company at 11 (August 26, 2005).

⁶ Comments of the National Religious Broadcasters Music License Committee and Salem Communications Corp. (May 27, 2005); Joint Comments of Radio Broadcasters (August 26, 2005).

Religious Broadcasters Music Licensing Committee and Salem Communications Corp. at 1–2 (May 27, 2005).

The Board is not persuaded that the redundancy of information sought in a file with headers is unduly burdensome. Services are not required to provide their data files with headers, and thereby may avoid any perceived burdens associated with supplying the data required in the first six lines. Likewise, services objecting to the required order of data to be provided in a file with headers may elect to provide their data without headers.

The Board is persuaded that the date convention YYYYMMDD is the most widely adopted and therefore is adopting it for files with headers as well as file names. The Board is also allowing services to choose the text indicator and field delimiter that they are using in a file with headers, but is clarifying that the symbols chosen must be unique and never found in the report's data content. It is the responsibility of the services to comply with this requirement.

3. Files Without Headers

Services challenge two provisions of the April 27, 2005 NPRM's proposals for files without headers. First, certain services submit that text fields should accommodate both upper and lower case characters. Comments of Harvard Radio Broadcasting Company at 22 (August 26, 2005); Joint Comments of Radio Broadcasters at 33 (August 26, 2005). Second, the services generally favor the use of abbreviations within data fields. Harvard, recognizing that abbreviations within the music industry are not standard and therefore might present data interpretation difficulties, proposes that SoundExchange be required to periodically publish its database so that services can enter the database and use the identifiers that SoundExchange assigns to specific bits of data (such as song title, artist name, etc.). Comments of Harvard Radio Broadcasting Company at 24–28 (August 26, 2005). 3WK L.L.C. opposes accessing the SoundExchange database believing the practice would be financially and physically prohibitive to a small company like itself. Comments of 3WK L.L.C. at 3 (August 31, 2005).

The Board accepts the first proposal but not the second. Accepting data in both upper and lower case characters is not an unusual convention and SoundExchange can adjust its software to accommodate both. The Board is not allowing, however, the use of abbreviations in data fields. There are no accepted standards for abbreviating artists' names, song titles, album titles,

etc., thereby requiring data processors to analyze each data component containing an abbreviation in an effort to correctly identify it. This is likely to present considerable delays in data processing, as well as raise costs. Reply comments of SoundExchange, Inc. at 24 (September 16, 2005). Radio broadcasters' argument that SoundExchange's software can solve efficiency and cost problems through "fuzzy matching" is neither convincing nor supported by evidence. The Board also does not believe that Harvard's suggestion of a publicly provided database will, at least at this time, solve the problem. Services already complain that entering data for reports of use is too costly. Requiring them to access a database of millions of sound recordings in an effort to secure identifiers for the songs they have performed will likely add considerably to their costs. See Comments of 3WK L.L.C. at 3 (August 31, 2005). As time passes, and reports of use continue to be provided, it is possible that a metadata database may provide a solution to the matter of abbreviations, as well as other issues presented in this proceeding. The Board will continue to monitor the matter as part of its continuing oversight of the regulations governing reports of use.

B. Delivery

The proposed rules set forth in the April 27, 2005 NPRM prescribe that data contained in a report of use maybe delivered by File Transfer Protocol (FTP), e-mail, CD-ROM, or floppy diskette to a single address (SoundExchange). Services urge the Board to require that SoundExchange establish a Web site for receipt of data, and Royalty Logic, Inc. ("RLI") requests that it receive all reports of use in addition to SoundExchange.

SoundExchange vigorously objects to the expense that it would incur to create and maintain a Web site, citing testimony of Shane Sleighter whom SoundExchange offers as an expert in business software development. Mr. Sleighter states that creation of a Web site that will permit users to complete their reports of use via the site could cost anywhere between \$100,000 to \$950,000, depending upon the functions that it would perform. Comments of SoundExchange, Inc. at Tab A–7. Mr. Sleighter estimates that a Web site designed solely to receive existing reports of use would cost approximately \$50,000, again depending upon functionality. *Id.* at Tab A–8. The services urge the mandatory creation of a SoundExchange Web site not because they are dissatisfied with the other delivery methods offered in the

proposed rules, nor that they are altogether inadequate, but rather because they view a SoundExchange Web site as an opportunity to shift the burden of organizing their data files. Joint Comments of Radio Broadcasters at 21 (August 26, 2005); Comments of Collegiate Broadcasters, Inc. at 13 (August 31, 2005); Comments of Harvard Radio Broadcasting Company at 15 (August 26, 2005); Comments of Radioio, Inc. at 5–7 (August 29, 2005). In keeping with the Board's stated goal of adopting baseline requirements in these rules, the Board is disinclined to add a fifth delivery method at this time. The Board will continue to monitor the delivery process and will explore the possibility and the need for a SoundExchange Web site prior to adopting final regulations.

With respect to the matter of delivery of reports of use to RLI, arguments are offered pro and con as to whether RLI has standing to receive reports of use and broadcasters express concerns about the costs associated with delivering reports of use to multiple entities. The Board does not consider today's rulemaking the proper forum to determine RLI's or other copyright owners groups' standing to receive reports of use. As of today's publication of Interim Regulations, only SoundExchange is a recognized receiving agent for royalties generated under the section 112 and 114 licenses and, therefore, these regulations provide for delivery of reports of use to SoundExchange. However, during the period that these Interim Regulations are in effect and absent any future adjustment to these regulations by the Board, if other parties receive the same designation as "collectives", then SoundExchange is required to forward copies of reports of use to all other such "collectives".

List of Subjects in 37 CFR Part 370

Copyright, Sound recordings.

Interim Regulation

■ For the reasons set forth in the preamble, Chapter III of Title 37 of the Code of Federal Regulations is amended by adding new Subchapter D to read as follows:

⁹ RLI is currently seeking such designation in the Board's section 112 and 114 rate adjustment proceeding for subscription, nonsubscription and new services. Docket No. 2005–1 CRB DTRA.

Subchapter D—Notice and Recordkeeping Requirements for Statutory Licenses

PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

Sec.

370.1 Notice of use of sound recordings under statutory license.

370.2 Reports of use of sound recordings under statutory license for preexisting subscription services.

370.3 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

370.4 Reports of use of sound recordings under statutory license prior to April 1, 2004.

370.5 Designated collection and distribution organizations for reports of use of sound recordings under statutory license.

Authority: 17 U.S.C. 112(e)(4), 114(f)(4)(A).

§ 370.1 Notice of use of sound recordings under statutory license.

(a) *General.* This section prescribes rules under which copyright owners shall receive notice of use of their sound recordings when used under either section 112(e) or 114(d)(2) of title 17, United States Code, or both.

(b) *Definitions.* (1) A *Notice of Use of Sound Recordings under Statutory License* is a written notice to sound recording copyright owners of the use of their works under section 112(e) or 114(d)(2) of title 17, United States Code, or both, and is required under this section to be filed by a Service in the Copyright Office.

(2) A *Service* is an entity engaged in either the digital transmission of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code or both. For purposes of this section, the definition of a Service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). A Service may be further characterized as either a preexisting subscription service, preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service, business establishment service or a combination of those:

(i) A *preexisting subscription service* is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, and was in existence and making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(ii) A *preexisting satellite digital audio radio service* is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

(iii) A *nonsubscription transmission service* is a service that makes noninteractive nonsubscription digital audio transmission that are not exempt under section 114(d)(1) of title 17 of the United States Code and are made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(iv) A *new subscription service* is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.

(v) A *business establishment service* is a service that makes ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code and is exempt under section 114(d)(1)(C)(iv) of title 17 of the United States Code.

(c) *Forms and content.* A Notice of Use of Sound Recordings Under Statutory License shall be prepared on a form that may be obtained from the Copyright Office Web site or from the Licensing Division, and shall include the following information:

(1) The full legal name of the Service that is either commencing digital transmissions of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both.

(2) The full address, including a specific number and street name or rural route, of the place of business of the Service. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(3) The telephone number and facsimile number of the Service.

(4) Information on how to gain access to the online Web site or homepage of the Service, or where information may be posted under this section concerning the use of sound recordings under statutory license.

(5) Identification of each license under which the Service intends to operate, including identification of each of the following categories under which the Service will be making digital transmissions of sound recordings: preexisting subscription service, preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service or business establishment service.

(6) The date or expected date of the initial digital transmission of a sound recording to be made under the section 114 statutory license and/or the date or the expected date of the initial use of the section 112(e) license for the purpose of making ephemeral phonorecords of the sound recordings.

(7) Identification of any amendments required by paragraph (f) of this section.

(d) *Signature.* The Notice shall include the signature of the appropriate officer or representative of the Service that is either transmitting the sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Notice and by the date of the signature.

(e) *Filing notices; fees.* The original and three copies shall be filed with the Licensing Division of the Copyright Office and shall be accompanied by the filing fee set forth in § 201.3(c) of this title. Notices shall be placed in the public records of the Licensing Division. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557-6400.

(1) A Service that, prior to April 12, 2004, has already commenced making digital transmissions of sound recordings pursuant to section 114(d)(2)

of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code, or both, and that has already filed an Initial Notice of Digital Transmission of Sound Recordings Under Statutory License, and that intends to continue to make digital transmissions or ephemeral phonorecords following July 1, 2004, shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office no later than July 1, 2004.

(2) A Service that, on or after July 1, 2004, commences making digital transmissions and ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of the sound recording and prior to the first digital transmission of the sound recording.

(3) A Service that, on or after July 1, 2004, commences making only ephemeral phonorecords of sound recordings, shall file a Notice of Use of Sound Recordings under Statutory License with the Licensing Division of the Copyright Office prior to the making of the first ephemeral phonorecord of a sound recording under the statutory license.

(f) *Amendment.* A Service shall file a new Notice of Use of Sound Recordings under Statutory License within 45 days after any of the information contained in the Notice on file has changed, and shall indicate in the space provided by the Copyright Office that the Notice is an amended filing. The Licensing Division shall retain copies of all prior Notices filed by the Service.

§ 370.2 Reports of use of sound recordings under statutory license for preexisting subscription services.

(a) *General.* This section prescribes the rules for the maintenance and delivery of reports of use for sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by preexisting subscription services.

(b) *Definitions.* (1) A *Collective* is a collection and distribution organization that is designated under the statutory license by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f), prior to the effective date of the Copyright Royalty and Distribution Reform Act of 2004, or by determination

of the Copyright Royalty Judges under section 114(f)(1)(B) or section 114(f)(1)(C)(ii).

(2) A *Report of Use of Sound Recordings Under Statutory License* is the report of use required under this section to be provided by a Service transmitting sound recordings and making ephemeral phonorecords therewith under statutory licenses.

(3) A *Service* is a preexisting subscription service, as defined in 17 U.S.C. 114(j)(11).

(c) *Service.* Reports of Use shall be served upon Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated under the statutory license by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f), prior to the effective date of the Copyright Royalty and Distribution Reform Act of 2004, or by determination of the Copyright Royalty Judges under section 114(f)(1)(B) or section 114(f)(1)(C)(ii). Reports of Use shall be served, by certified or registered mail, or by other means if agreed upon by the respective preexisting subscription service and Collective, on or before the forty-fifth day after the close of each month.

(d) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a preexisting subscription service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. Preexisting subscription services shall post their Reports of Use online on or before the forty-fifth day after the close of each month, and make them available to all sound recording copyright owners for a period of 90 days. Preexisting subscription services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. Preexisting subscription services may predicate provision of a password upon:

(1) Information relating to identity, location and status as a sound recording copyright owner; and

(2) A "click-wrap" agreement not to use information in the Report of Use for purposes other than royalty collection, royalty distribution, and determining compliance with statutory license requirements, without the express consent of the preexisting subscription service providing the Report of Use.

(e) *Content.* A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include a preexisting subscription service's "Intended Playlists" for each channel and each day of the reported month. The "Intended Playlists" shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

- (1) The name of the preexisting subscription service or entity;
- (2) The channel;
- (3) The sound recording title;
- (4) The featured recording artist, group, or orchestra;
- (5) The retail album title (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the preexisting subscription service for purchase of the sound recording);
- (6) The marketing label of the commercially available album or other product on which the sound recording is found;
- (7) The catalog number;
- (8) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;
- (9) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;
- (10) The date of transmission; and
- (11) The time of transmission.

(f) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the preexisting subscription service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the preexisting subscription service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(g) *Format.* Reports of Use should be provided on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, and should conform as closely as possible to the following specifications:

- (1) ASCII delimited format, using pipe characters as delimiter, with no headers or footers;
- (2) Carats should surround strings;
- (3) No carats should surround dates and numbers;

(4) Dates should be indicated by: MM/DD/YYYY;

(5) Times should be based on a 24-hour clock: HH:MM:SS;

(6) A carriage return should be at the end of each line; and

(7) All data for one record should be on a single line.

(h) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the preexisting subscription service providing the Report of Use.

(i) *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use. For reporting periods from February 1, 1996, through August 31, 1998, the preexisting subscription service shall serve upon all designated Collectives and retain for a period of three years from the date of transmission reports of use indicating which sound recordings were performed and the number of times each recording was performed, but is not required to produce full Reports of Use or Intended Playlists for those periods.

§ 370.3 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

(a) *General.* This section prescribes rules for the maintenance and delivery of reports of use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services.

(b) *Definitions.* (1) *Aggregate Tuning Hours* are the total hours of programming that a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service has transmitted during the reporting period identified in paragraph (c)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of eligible nonsubscription service, preexisting satellite digital audio radio service, new

subscription service or business establishment service transmissions, less the actual running time of any sound recordings for which the service has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a nonsubscription transmission service transmitted one hour of programming to 10 simultaneous listeners, the nonsubscription transmission service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the nonsubscription transmission service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a nonsubscription transmission service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the nonsubscription transmission service's Aggregate Tuning Hours would equal 10.

(2) An *AM/FM Webcast* is a transmission made by an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2).

(3) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses by decision of a Copyright Arbitration Royalty Panel under section 112(e)(4), section 112(e)(6), section 114(f)(1)(B), section 114(f)(1)(C)(ii), section 114(f)(2)(B), or section 114(f)(2)(C)(ii), or by an order of the Librarian of Congress pursuant to 17 U.S.C. 802(f), prior to the effective date of the Copyright Royalty and Distribution Reform Act of 2004, or by determination of the Copyright Royalty Judges under section 112(e)(4), section 112(e)(6), section 114(f)(1)(B), section 114(f)(1)(C)(ii), section 114(f)(2)(B), or section 114(f)(2)(C)(ii).

(4) A *new subscription service* is defined in § 370.1(b)(2)(iv).

(5) A *nonsubscription transmission service* is defined in § 370.1(b)(2)(iii).

(6) A *preexisting satellite digital audio radio service* is defined in § 370.1(b)(2)(ii).

(7) A *business establishment service* is defined in § 370.1(b)(2)(v).

(8) A *performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (e.g., the delivery of any

portion of a single track from a compact disc to one Listener) but excluding the following:

(i) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

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

(iii) An incidental performance that both:

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

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

(9) *Play frequency* is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the two-week reporting period, then the play frequency is one. If the sound recording is transmitted 10 times during the two-week reporting period, then the play frequency is 10.

(10) A *Report of Use* is a report required under this section to be provided by a nonsubscription transmission service and new subscription service that is transmitting sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code, or both.

(c) *Report of Use—* (1) *Separate reports not required.* A nonsubscription transmission service, preexisting satellite digital audio radio service or a new subscription service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code and makes ephemeral phonorecords of sound recordings

pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code need not maintain a separate Report of Use for each statutory license during the relevant reporting periods.

(2) *Content.* For a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (c)(3) of this section:

(i) The name of the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service making the transmissions, including the name of the entity filing the Report of Use, if different;

(ii) The category transmission code for the category of transmission operated by the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service;

(A) For eligible nonsubscription transmissions other than broadcast simulcasts and transmissions of non-music programming;

(B) For eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming;

(C) For eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming;

(D) For eligible nonsubscription transmissions by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by §§ 261.3(a)(2)(i) and (ii) of this title;

(E) For eligible nonsubscription transmissions by a non-Corporation for Public Broadcasting noncommercial broadcaster making transmissions covered by § 261.3(a)(2)(iii) of this title;

(F) For eligible nonsubscription transmissions by a small webcaster operating under an agreement published in the Federal Register pursuant to the Small Webcaster Settlement Act;

(G) For eligible nonsubscription transmissions by a noncommercial

broadcaster operating under an agreement published in the Federal Register pursuant to the Small Webcaster Settlement Act;

(H) For transmissions other than broadcast simulcasts and transmissions of non-music programming made by an eligible new subscription service;

(I) For transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service;

(J) For transmissions of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible new subscription service; and

(K) For eligible transmissions by a business establishment service making ephemeral recordings;

(iii) The featured artist;

(iv) The sound recording title;

(v) The International Standard Recording Code (ISRC) or, alternatively to the ISRC, the

(A) Album title; and

(B) Marketing label;

(vi) The actual total performances of the sound recording during the reporting period or, alternatively, the

(A) Aggregate Tuning Hours;

(B) Channel or program name; and

(C) Play frequency.

(3) *Reporting period.* A Report of Use shall be prepared for a two-week period (two periods of 7 consecutive days) for each calendar quarter of the year. The two weeks need not be consecutive, but both weeks must be completely within the calendar quarter.

(4) *Signature.* Reports of Use shall include a signed statement by the appropriate officer or representative of the service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Report, and by the date of the signature.

(5) *Confidentiality.* Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, without consent of the service providing the Report of Use.

(6) *Documentation.* A Service shall, for a period of at least three years from the date of service or posting of a Report of Use, keep and retain a copy of the Report of Use.

(d) *Format and delivery—(1)*

Electronic format only. Reports of use must be maintained and delivered in

electronic format only, as prescribed in paragraphs (d)(2) through (8) of this section. A hard copy report of use is not permissible.

(2) *ASCII text file delivery; facilitation by provision of spreadsheet templates.* All report of use data files must be delivered in ASCII format. However, to facilitate such delivery, SoundExchange shall post and maintain on its Internet Web site a template for creating a report of use using Microsoft's Excel spreadsheet and Corel's Quattro Pro spreadsheet and instruction on how to convert such spreadsheets to ASCII text files that conform to the format specifications set forth below. Further, technical support and cost associated with the use of spreadsheets is the responsibility of the service submitting the report of use.

(3) *Delivery mechanism.* The data contained in a report of use may be delivered by File Transfer Protocol (FTP), e-mail, CD-ROM, or floppy diskette according to the following specifications:

(i) A service delivering a report of use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall, by no later than December 5, 2006, post on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.

(ii) A service delivering a report of use via e-mail shall append the report as an attachment to the e-mail. The main body of the e-mail shall identify:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iii) A service delivering a report of use via CD-ROM must compress the reporting data to fit onto a single CD-ROM per reporting period. Each CD-ROM shall be submitted with a cover letter identifying:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and

(E) The name of the file attached.

(iv) A service delivering a report of use via floppy diskette must compress the reporting data to fit onto a single floppy diskette per reporting period. Each floppy diskette must measure 3.5 inches in diameter and be formatted using MS/DOS. Each floppy diskette shall be submitted with a cover letter identifying:

(A) The full name and address of the service;

(B) The contact person's name, telephone number and e-mail address;

(C) The start and end date of the reporting period;

(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, the counting of the rows should begin with row 1; and

(E) The name of the file attached.

(4) *Delivery address.* Reports of use shall be delivered to SoundExchange at the following address: SoundExchange, Inc., 1330 Connecticut Avenue, NW., #330, Washington, DC 20036; (Phone) (202) 828-0120; (Facsimile) (202) 833-2141; (E-mail) info@soundexchange.com.

SoundExchange shall forward electronic copies of these reports of use to all other collectives defined in this section.

(5) *File naming.* Each data file contained in a report of use must be given a name by the service followed by the start and end date of the reporting period. The start and end date must be separated by a dash and in the format of day, month and year (YYYYMMDD). Each file name must end with the file type extension of ".txt". (Example: *AcmeMusicCo20050101-20050331.txt*).

(6) *File type and compression.* (i) All data files must be in ASCII format.

(ii) A report of use must be compressed in one of the following zipped formats:

(A) .zip—generated using utilities such as WinZip and/or UNIX zip command;

(B) .Z—generated using UNIX compress command; or

(C) .gz—generated using UNIX gzip command.

Zipped files shall be named in the same fashion as described in paragraph (d)(5) of this section, except that such zipped files shall use the applicable file extension compression name described in this paragraph (d)(6).

(7) *Files with headers.* (i) If a service elects to submit files with headers, the following elements, in order, must occupy the first 14 rows of a report of use:

(A) Name of service;

(B) Name of contact person;

(C) Street address of the service;

(D) City, state and zip code of the service;

(E) Telephone number of the contact person;

(F) E-mail address of the contact person;

(G) Start of the reporting period (YYYYMMDD);

(H) End of the reporting period (YYYYMMDD);

(I) Report generation date (YYYYMMDD);

(J) Number of rows in data file, beginning with 15th row;

(K) Text indicator character;

(L) Field delimiter character;

(M) Blank line; and

(N) Report headers (Featured Artist, Sound Recording Title, etc.).

(ii) Each of the rows described in paragraphs (d)(7)(i)(A) through (F) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (d)(7)(i)(G) through (I) of this section should not exceed eight alphanumeric characters.

(iii) Data text fields, as required by paragraph (c) of this section, begin on row 15 of a report of use with headers. A carriage return must be at the end of each row thereafter. Abbreviations within data fields are not permitted.

(iv) The text indicator character must be unique and must never be found in the report's data content.

(v) The field delimiter character must be unique and must never be found in the report's data content. Delimiters must be used even when certain elements are not being reported; in such case, the service must denote the blank data field with a delimiter in the order in which it would have appeared.

(8) *Files without headers.* If a service elects to submit files without headers, the following format requirements must be met:

(i) ASCII delimited format, using pipe (|) characters as delimiters, with no headers or footers;

(ii) Carats (^) should surround strings;

(iii) No carats (^) should surround dates and numbers;

(iv) A carriage return must be at the end of each line;

(v) All data for one record must be on a single line; and

(vi) Abbreviations within data fields are not permitted.

§ 370.4 Reports of use of sound recordings under statutory license prior to April 1, 2004.

(a) *General.* This section prescribes the rules which govern reports of use of sound recordings by nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, for the period from October 28, 1998, through March 31, 2004.

(b) *Reports of use.* Reports of use filed by preexisting subscription services for transmissions made under 17 U.S.C. 114(f) pursuant to § 370.2 for use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, for the period October 28, 1998, through March 31, 2004, shall serve as the reports of use for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services for their use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, for the period from October 28, 1998, through March 31, 2004.

(c) *Royalty Logic Inc.* If, in accordance with § 261.4(c) of this title, any Copyright Owners or Performers have provided timely notice to SoundExchange of an election to receive royalties from Royalty Logic, Inc. (RLI) as a Designated Agent for the period October 28, 1998, through December 31, 2002, or any portion thereof, SoundExchange shall provide to RLI copies of the Reports of Use described in paragraph (b) of this section for that period or the applicable portion thereof.

§ 370.5 Designated collection and distribution organizations for reports of use of sound recordings under statutory license.

(a) *General.* This section prescribes rules under which reports of use shall be collected and distributed under section 114(f) of title 17 of the United States Code, and under which reports of such use shall be kept and made available.

(b) *Definitions.* (1) A *Collective* is a collection and distribution organization that is designated under the statutory license by decision of a Copyright Arbitration Royalty Panel under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian of Congress pursuant to 17 U.S.C. 802(f), prior to the effective date of the Copyright Royalty and Distribution Reform Act of 2004, or by determination of the Copyright

Royalty Judges under section

114(f)(1)(B) or section 114(f)(1)(C)(ii).

(2) A Service is an entity engaged in the digital transmission of sound recordings pursuant to section 114(f) of title 17 of the United States Code.

(c) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a "Notice of Designation as Collective under Statutory License," which shall be identified as such by prominent caption or heading, and shall contain the following information:

(1) The Collective name, address, telephone number and facsimile number;

(2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and

(3) Information on how to gain access to the online Web site or home page of the Collective, where information may be posted under this part concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557-6400.

(d) *Annual Report.* The Collective will post and make available online, for the duration of one year, an Annual Report on how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses.

(e) *Inspection of Reports of Use by copyright owners.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner, and the copyright owner's written agreement not to utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use. The Collective shall render its best efforts to locate copyright owners in order to make available reports of use, and such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.

(f) *Confidentiality.* Copyright owners, their agents, and Collectives shall not disseminate information in the Reports

of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

(g) *Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Copyright Office, and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such Service with information identifying the copyright owners it has served.

Dated: October 3, 2006.

James Scott Sledge,

Chief Copyright Royalty Judge.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 001005281-0369-02; I.D. 091306A]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Closure

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS closes the commercial fishery for king mackerel in the exclusive economic zone (EEZ) in the western zone of the Gulf of Mexico. This closure is necessary to protect the Gulf king mackerel resource.

DATES: The closure is effective 12 noon, local time, October 6, 2006, through June 30, 2007.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, 727-824-5305, fax: 727-824-5308, e-mail: Steve.Branstetter@noaa.gov.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic fish (king mackerel, Spanish mackerel, cero, cobia, little tunny, and, in the Gulf of Mexico only, dolphin and bluefish) is managed under the Fishery Management Plan for the Coastal

Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Based on the Councils' recommended total allowable catch and the allocation ratios in the FMP, NMFS implemented a commercial quota for the Gulf of Mexico migratory group of king mackerel in the western zone of 1.01 million lb (0.46 million kg) (66 FR 17368, March 30, 2001).

Under 50 CFR 622.43(a), NMFS is required to close any segment of the king mackerel commercial fishery when its quota has been reached, or is projected to be reached, by filing a notification at the Office of the Federal Register. NMFS has determined the commercial quota of 1.01 million lb (0.46 million kg) for Gulf group king mackerel in the western zone will be reached by October 6, 2006.

Accordingly, the commercial fishery for Gulf group king mackerel in the western zone is closed effective 12:00 noon, local time, October 6, 2006, through June 30, 2007, the end of the fishing year. The boundary between the eastern and western zones is 87°31'06" W. long., which is a line directly south from the Alabama/Florida boundary.

Except for a person aboard a charter vessel or headboat, during the closure, no person aboard a vessel for which a commercial permit for king mackerel has been issued may fish for or retain Gulf group king mackerel in the EEZ in the closed zones or subzones. A person aboard a vessel that has a valid charter vessel/headboat permit for coastal migratory pelagic fish may continue to retain king mackerel in or from the closed zones or subzones under the bag and possession limits set forth in 50 CFR 622.39(c)(1)(ii) and (c)(2), provided the vessel is operating as a charter vessel or headboat. A charter vessel or headboat that also has a commercial king mackerel permit is considered to be operating as a charter vessel or headboat when it carries a passenger who pays a fee or when there are more than three persons aboard, including operator and crew.

During the closure, king mackerel from the closed zones or subzones taken in the EEZ, including those harvested under the bag and possession limits, may not be purchased or sold. This prohibition does not apply to trade in king mackerel from the closed zones or subzones that were harvested, landed

CERTIFICATE OF SERVICE

I hereby certify that one copy of the Joint Appendix was served on

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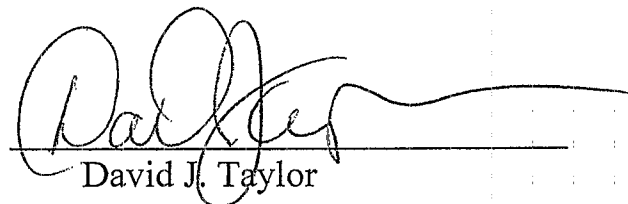
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