PUBLIC VERSION

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**

RADIO BROADCASTERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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December 15, 2006

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Bradley WDT	Harold Ray Bradley	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 10
Brooke WDT	Jonatha Brooke	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 11
Bryan WDT	Stephen Bryan	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 7
Brynjolfsson WDT	Erik Brynjolfsson	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 3
Brynjolfsson WRT	Erik Brynjolfsson	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 3
Chambers WDT	Lester Chambers	Written Direct	Royalty Logic's Written Direct Statement
Ciongoli WRT	Charles Ciongoli	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 5
Coryell WDT	Roger Coryell	Written Direct	Radio Broadcasters' Written Direct Statement, Vol. 2 Tab 2
DiMA's Fee Proposal	N/A	Fee Proposal	DiMA's Written Direct Statement, Vol. 1 Tab B
Eisenberg WDT	Mark Eisenberg	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 5
Eisenberg WRT	Mark Eisenberg	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 4
Fancher WDT	J. Donald Fancher	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab C
Fancher WRT	J. Donald Fancher	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony,

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Fine 2001 WDT	Michael Fine	Designated Written	Radio Broadcasters' Written Direct Statement, Vol. 5
2001 Tr. – (Fine)	Michael Fine	Designated Oral	Radio Broadcasters' Written Direct Statement, Vol. 5
Fink WDT	Cathy Fink	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 12
Fisher 2001 WDT	William W. Fisher, III	Designated Written	Radio Broadcasters' Written Direct Statement, Vol. 5
Fisher 2001 WRT	William W. Fisher, III	Designated Written	DiMA's Written Direct Statement, Vol. 4 Tab P
2001 Tr. – (Fisher)	William W. Fisher, III	Designated Oral	Radio Broadcasters' Written Direct Statement, Vol. 5; DiMA's Written Direct Statement, Vol. 6 Tab LL
Frank WDT	Jay Frank	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab G
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Gertz WDT	Ronald H. Gertz	Written Direct	Royalty Logic's Written Direct Statement
Ghuneim WDT	Mark Ghuneim	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 17
Griffin WDT	James Griffin	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 1
Griffin WRT	James Griffin	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 1
Halyburton WDT	Dan Halyburton	Written Direct	Radio Broadcasters' Written Direct Statement, Vol. 2 Tab 1
Hanson WDT	Kurt Hanson	Written Direct	AccuRadio, et al.'s Written Direct

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Hauth WDT	Russell R. Hauth	Written Direct	Radio Broadcasters' Written Direct Statement, Vol. 2 Tab 4
Iglauer WDT	Bruce Iglauer	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 13
Isquith WDT	Jack Isquith	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab I
Isquith WRT	Jack Isquith	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony, Tab G
Jaffe WDT	Adam B. Jaffe	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab B
Jaffe WRT	Adam B. Jaffe	Written Rebuttal	DiMA's Written Direct Statement, Witness Testimony, Tab A
Jaffe NPR WRT	Adam B. Jaffe	Written Rebuttal	NPR's Written Rebuttal Statement
Jaffe 2001 WDT	Adam B. Jaffe	Designated Written	Radio Broadcasters' Written Direct Statement, Vol. 4
Jaffe 2001 WRT	Adam B. Jaffe	Designated Written	Radio Broadcasters' Written Direct Statement, Vol. 4
2001 Tr. – (Jaffe)	Adam B. Jaffe	Designated Oral	Radio Broadcasters' Written Direct Statement, Vol. 4
Johnson WDT	Eric Johnson	Written Direct	National Religious Broadcasters Noncommercial Music License Committee Written Direct Statement
Johnson WRT	Eric Johnson	Written Rebuttal	National Religious Broadcasters Music License Committee Written Rebuttal Statement
Kass WDT	Frederick Kass	Written Direct	Intercollegiate Broadcasting System, Inc.'s Written Direct Statement

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Kenswil WDT	Lawrence Kenswil	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 6
Kessler WDT	Barrie Kessler	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 18
Kessler WRT	Barrie Kessler	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 8
Krieger WRT	Nancy Krieger	Written Rebuttal	Radio Broadcasters' Written Rebuttal Statement, Vol. 1
Kushner WDT	Michael Kushner	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 9
Lam WDT	N. Mark Lam	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab K
Lam WRT	N. Mark Lam	Writtten Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony, Tab H
Lawrence WDT	Donald Lawrence	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 14
Koz WDT	Dave Koz	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 15
Lee WRT	Thomas F. Lee	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 7
Levin WRT	Eugene Levin	Written Rebuttal	Radio Broadcasters' Written Rebuttal Statement, Vol. 1
Mandelbrot 2001 WDT	David Mandelbrot	Designated Written	Radio Broadcasters' Written Direct Statement, Vol. 5
2001 Tr. – (Mandelbrot)	David Mandelbrot	Designated Oral	Radio Broadcasters' Written Direct Statement, Vol. 5
Meehan WRT	Keith Meehan	Written Rebuttal	Radio Broadcasters' Written Rebuttal Statement, Vol. 1
Nebel WRT	Roger J. Nebel	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony,

Citation Format	Witness Name	Type of Testimony	Location of Testimony
			Tab C
NRBNMLC's Fee Proposal	N/A	Fee Proposal	National Religious Broadcasters Noncommercial License Committee Written Direct Statement
Papish WDT	Michael Papish	Written Direct	Harvard Radio Broadcasting's Written Direct Statement
Parsons WDT	Brian Parsons	Written Direct	Radio Broadcasters' Written Direct Statement, Vol. 2 Tab 5
Parsons WRT	Brian Parsons	Written Rebuttal	Radio Broadcasters' Written Rebuttal Statement, Vol. 1
Pelcovits WDT	Michael Pelcovits	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 4
Pelcovits WRT	Michael Pelcovits	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 2
Porter WDT	David Porter	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab J
Potter WDT	Jonathan Potter	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab A
Price WDT	Jeff Price	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 19
Radio Broadcasters' Fee Proposal	N/A	Fee Proposal	Radio Broadcasters' Written Direct Statement, Vol. 1 Tab B
Rahn WDT	David W. Rahn	Written Direct	SBR Creative Media's Written Direct Statement
Roback WDT	Robert D. Roback	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab F
Roback WRT	Robert D. Roback	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony, Tab D

Citation Format	Witness Name	Type of Testimony	Location of Testimony
Robedee WDT	William C. Robedee	Written Direct	Collegiate Broadcasters, Inc.'s Written Direct Statement
Ronning/Lipset WDT	Eric Ronning and Andy Lipset	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab D
Rowland WRT	Tom Rowland	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 6
Silber WDT	Fred Silber	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab L
Silber WRT	Fred Silber	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony, Tab I
Simson WDT	John Simson	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 2
Stern WDT	Kenneth Stern	Written Direct	NPR's Written Direct Statement
SoundExchange's Fee Proposal	N/A	Fee Proposal	SoundExchange's Written Direct Statement, Vol. 1 Tab B
Ulman WDT	Karyn Ulman	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab E
Wheeler WRT	Simon Wheeler	Written Rebuttal	SoundExchange's Written Rebuttal Statement, Vol. 2 Tab 9
Willer WDT	Joel R. Willer	Written Direct	Collegiate Broadcasters, Inc.'s Written Direct Statement
Winston WDT	Christine Winston	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab H
Winston WRT	Christine Winston	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony, Tab F
Zittrain 2001 WDT	Jonathan Zittrain	Designated Written	Radio Broadcasters' Written Direct Statement, Vol. 5
Zittrain 2001 WRT	Jonathan Zittrain	Designated Written	DiMA's Written Direct Statement, Vol. 4 Tab Q

Citation Format	Witness Name	Type of Testimony	Location of Testimony
2001 Tr. – (Zittrain)	Jonathan Zittrain	Designated Oral	Radio Broadcasters' Written Direct Statement, Vol. 5; DiMA's Written Direct Statement, Vol. 6 Tab MM

PROPOSED FINDINGS OF FACT

I. INTRODUCTION AND OVERVIEW

1. Radio Broadcasters[1] respectfully offer the following Proposed Findings of Fact and Conclusions of Law to address issues specific to their simulcasting activities ("AM/FM Streaming" or "simulcasting"). Broadcasters have joined with the Digital Media Association (DiMA) and its participant members in submitting Joint Proposed Findings of Fact and Conclusions of Law on issues common to both groups (the "Joint Services Proposed Findings and Conclusions").[2]

2. The license fee that a willing buyer would pay a willing seller in a competitive market for a sound recording performance license to engage in AM/FM Streaming would be influenced by a multitude of factors unique and specific to simulcasting. AM/FM Streaming is the simultaneous transmission over the Internet of broadcast programming. It has all of the content and characteristics of the broadcast programming and is directed to the same audience.[3] Based on those factors, the Copyright Royalty Judges should adopt Radio Broadcasters' fee proposal.

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[1] Radio Broadcasters are Bonneville International Corp., Clear Channel Communications, Inc., Susquehanna Radio Corp. and the National Religious Broadcasters Music License Committee. Radio Broadcasters are described in Part II of this document.

[2] The Joint Services Proposed Findings and Conclusions are hereby incorporated herein by reference. References to proposed findings of fact in the Joint Services document are cited herein as "JPFF," and references to proposed conclusions of law in the Joint Services document are cited herein as "JPCL." Citations to proposed findings of fact from this document are cited herein as "PFF," while citations to proposed conclusions of law from this document are cited herein as "PCL."

[3] The only exception is for some commercials that must be removed as a result of contractual issues. *See* PFF ¶ 19.

3. Congress has long recognized the unique, mutually beneficial relationship between the radio industry and the record companies and its artists. Record companies provide music, which may be performed without royalty obligation by the radio industry; the record companies and artists receive free promotion of their sound recording product. The essence of this historical relationship for the radio industry is the right to perform sound recordings for free. *See infra,* Part III.

4. The enormous promotional benefit conferred on record companies and artists by radio airplay cannot seriously be disputed and must be taken into account in setting the license fee for AM/FM Streaming in this proceeding.

- Witnesses from all parties admit this value; the conduct of the record companies confirms it.

- There is no stronger testament to the value of radio airplay to the record companies than the hundreds of millions of dollars spent each year by the them in pursuit of it. If radio airplay did not pay, the record companies would not expend that money.

- However, the law prohibits the record companies from paying broadcasters for this value. Thus, while broadcasters benefit to some extent, they do not receive nearly the value that they confer.

- The promotional value to the record companies of AM/FM Streaming is, listener-for-listener, at least as great as the promotional value of over-the-air broadcasts. Among other things, streaming must be accompanied by artist,

title and album information, which allows potential buyers to know what to buy. Moreover, the fact that streaming is received at computers, instead of over the radio, permits buyers to act immediately.

- SoundExchange witnesses attempt to argue that webcasting is not promotional for a number of reasons (e.g., the lack of coordination with other marketing efforts, the lack of repetition, the breadth of playlists). Whatever the validity of those arguments with respect to webcasting, they actually help demonstrate the promotional value of AM/FM Streaming, which, like over the air broadcasting, is tied to broader promotional efforts, features narrow playlists and the same repetition found over the air, and includes the same endorsements of trusted on-air personnel, which the record companies find so valuable.

- There is no evidence that AM/FM Streaming substitutes or displaces sales of sound recordings.

5. The evidence presented in this case demonstrates that in a truly competitive market, unconstrained by the strictures of law, the willing buyers would be the record companies and the willing sellers would be broadcasters. This reality cannot be ignored in assessing the license fee that would prevail in a competitive market. Indeed, it would pervade willing buyer/willing seller negotiations; the Copyright Act requires it to be taken into account in setting the license fee in this proceeding. *See* 17 U.S.C. § 114(f)(2)(B)(i).

6. Radio broadcasters make all of the technological contribution to, and bear all of the costs and risks of, providing AM/FM Streaming. Licensing the stream costs the record companies nothing. *Infra*, Part V.A. Further, when it comes to the creative contribution to the final product, the contribution of broadcasters in creating a package of compelling audio entertainment is at least equal to the contribution of the record companies in their sound recordings. Broadcasters present a coherent artistic product that must engage the audience and capture its interest and attention, using on-air personality, selecting just the right mix of talk, information, conversations with listeners, contests, and music, to keep people coming back for more. *Infra,* Part V.B.

7. In a competitive market, numerous factors show that the sound recording license fee for AM/FM Streaming would be different from, and lower than, the fee for Internet only webcasting. Each of the factors discussed below would be factored into a competitive market fee between a willing buyer and a willing seller. *Infra* Part VI.

- Broadcasters can reach their audience through another means that does not require the payment of any sound recording performance fee.

- The promotional value of AM/FM Streaming to the record companies and artists cannot be denied and, for the reasons discussed above, it exceeds the promotional value of Internet only webcasting. There is no risk of substitution. Record company documents in evidence confirm that AM/FM Streaming is on the far end of the promotion/substitution spectrum. Serv. Exs. 41, 42.

- Performances of sound recordings play a smaller part in the overall value of programming on AM/FM Streaming than on Internet only webcasting, which is essentially all music.

- Hour for hour, fewer sound recordings are performed even on music-oriented AM/FM Streaming than on Internet only webcasts.

- These differences are reflected in the different fees paid for the musical work performance rights for streaming.

8. SoundExchange has presented a case directed entirely at Internet only webcasting. Its fee models are premised entirely on Internet only webcasting. *Infra,* Part VII. SoundExchange does nothing to account or adjust for the fundamental differences between AM/FM Streaming and Internet only webcasting. For that reason alone, its fee proposal must be rejected for AM/FM Streaming.

9. Radio Broadcasters would not agree to a fee based on a greater of formula or a percentage of revenue. *Infra,* Parts VIII & IX. Simply put, the right to make public performances of sound recordings is not what drives AM/FM Streaming revenue. TA fee based on revenue would, thus, compensate the record companies for value they do not create and would make them a partner in the upside of the business with no risk on the downside. This is recognized in the flat-fee agreements negotiated between the radio industry and the musical works performing rights organizations. Moreover, such a fee fails to account for the difference in levels of music use among services, and even among different radio stations.

10. In a competitive market, a willing seller's compensation would not be based on the income generated by the buyer. Nevertheless, in light of SoundExchange's arguments, it is important to recognize that AM/FM Streaming is not El Dorado. *Infra,* Part X. Radio Broadcasters that tried lost significant sums of money at streaming during the period of the CARP fee. They should not be made to suffer the same fate in the next five years.

11. Radio Broadcasters' proposal for a flat per-station fee, in the amounts proposed, is the fee structure that would be established in a competitive market between willing buyers and willing sellers. *Infra*, Parts XI & XII. It should be adopted.

II. RADIO BROADCASTERS AND AM/FM STREAMING

12. Radio Broadcasters in this proceeding are in the radio business. Their primary business is broadcasting over the air to listeners who receive the signal via traditional radios. Halyburton WDT ¶ 4; Coryell WDT ¶ 9; Parsons WDT ¶ 4; 7/26/06 Tr. 104:5-12 (Halyburton); 7/27/06 Tr. 27:18-28:16, 176:11-18 (Coryell)[4]. The primary source of revenue for Radio Broadcasters is the sale of advertising as part of their over-the-air programming. 7/26/06 Tr. 20:14-21:11 (Halyburton); 7/27/06 Tr. 33:22-35:6 (Coryell).

13. The Radio Broadcasters participating in this proceeding are described in brief as follows:

[4] For the Copyright Royalty Judges' convenience, Radio Broadcasters are submitting herewith an Index of Witness Testimony by Citation Format, which identifies where in the record cited sources may be found. *See supra* pp. viii-xiv.

14. **Bonneville International Corp.** is a communications company that, as of July 2006, owned and operated 22 radio stations in the Chicago, Phoenix, Salt Lake City, San Francisco, St. Louis, and Washington, DC markets. Coryell WDT ¶ 6; RBX 7; 7/27/06 Tr. 13:6-16:7 (Coryell). As of that time, all of Bonneville's radio stations were streaming their content over the Internet except KMVP in Phoenix. Coryell WDT ¶ 6; 7/27/06 Tr. 16:8-17:2 (Coryell).

15. **Clear Channel Communications, Inc.** owned and operated 1,274 radio stations in 101 markets throughout the United States as of July 2006, making it the largest operator of radio stations in the nation. Parsons WDT ¶ 4; RBX 21; 7/31/06 Tr. 9:18-20 (Parsons). Every Clear Channel station operates an Internet website, 7/31/06 Tr. 10:19-11:1 (Parsons), and as of July 2006, 583 Clear Channel stations were simulcasting their radio programming on the Internet. 7/31/06 Tr. 13:19-14:3 (Parsons).

16. **The National Religious Broadcasters Music License Committee (NRBMLC)** represents religious, mixed-talk, and limited-music-formatted radio stations in music licensing matters. Hauth WDT ¶ 2; 7/27/06 Tr. 280:21-281:12; 282:10 - 22 (Hauth). The primary goal of the NRBMLC is to assure that stations with formats that use less music than music-formatted stations pay licensing fees that are fairly related to the limited amount of music they use. Hauth WDT ¶ 2; 7/27/06 Tr. 281:13-282:6 (Hauth). Some, but not all, members of the NRBMLC either have engaged in simulcast streaming or plan to do so in the future. Hauth WDT ¶ 5; 7/27/06 Tr. 284:13-17 (Hauth).

17. **Susquehanna Radio Corp.** owned and operated 27 radio stations as of July 2006, in the Atlanta, Cincinnati, Dallas, Houston, Indianapolis, Kansas City, San

Francisco, and York (Pennsylvania) markets. Halyburton WDT ¶ 7; 7/26/06 Tr. 16:9-17:12 (Halyburton). As of that time, 24 of Susquehanna's stations operated their own websites, and streamed their over-the-air programming on the Internet. The other three stations are terrestrial simulcasts of other Susquehanna stations, so the programming is exactly the same. Halyburton WDT ¶ 8; 7/26/06 Tr. 23:12-24:13 (Halyburton); RBX 1. In May 2006, Susquehanna was bought by another radio group, Cumulus Media Partners, but it continues to exist as a separate entity. 7/26/06 Tr. 9:6-13 (Halyburton).

18. While Radio Broadcasters own stations in multiple markets, broadcast radio is fundamentally a local business. Because of the geographic limitations of terrestrial radio signals, each radio station necessarily focuses on maximizing advertising revenues and radio listenership in its local area. Halyburton WDT ¶ 10; Coryell WDT ¶¶ 13, 16; Parsons WDT ¶ 13; 5/2/06 Tr. 56:9-22 (Griffin); 7/27/06 Tr. 27:18-29:6; 267:9-268:1 (Coryell). Although the Internet makes simulcast streams available over a wide geographic area, Radio Broadcasters have found that their Internet audiences are overwhelmingly local to the community where the terrestrial radio station is located. Halyburton WDT ¶¶ 10-11; Coryell WDT ¶¶ 12-13, 16; Parsons WDT ¶¶ 1(D), 11; RBX 8; RBX 9; 7/26/06 Tr. 34:4-35:9 (Halyburton); 7/27/06 Tr. 32:12-33:7, 39:10-47:6 (Coryell); 7/31/06 Tr. 45:6-47:2 (Parsons). As a result, advertising revenue for the streaming operations of Radio Broadcasters comes overwhelmingly from local, not national, sales. Halyburton WDT ¶ 10; Coryell WDT ¶ 15; 7/26/06 Tr. 35:1-35:9 (Halyburton); 7/27/06 Tr. 37:14-38:6, 87:1 - 17 (Coryell).

19. Simulcast streaming is an exact simultaneous transmission of over-the-air programming. Halyburton WDT ¶ 8; Parsons WDT ¶ 11; 5/3/06 Tr. 166:13-17 (Griffin); 5/17/06 Tr. 239:9-240:4, 240:19-241:8 (Simson); 5/18/06 Tr. 203:20-204:12 (Brynjolfsson); 6/5/06 Tr. 195:5-196:4 (Bryan); 7/26/06 Tr. 28:9-20 (Halyburton); 7/27/06 Tr. 31:1-6, 32:6-33:7 (Coryell). The only exception is that in many cases, due to contractual issues surrounding the streaming of certain advertisements over the Internet, radio stations will replace the over-the-air advertisements with different advertisements that play exclusively on the Internet stream. Coryell WDT ¶¶ 7, 15, 35; Parsons WDT ¶¶ 18-19; 5/17/06 Tr. 239:20-240:4 (Simson); 6/5/06 Tr. 195:12-20 (Bryan); 7/26/06 Tr. 28:20-30:13, 174:19-180:11 (Halyburton); 7/27/06 Tr. 31:6-37:5, 83:16-84:12 (Coryell). The non-advertising content (including news, talk, music, and other features) that is streamed over the Internet, however, is a real-time duplicate of what is broadcast over the air. Simulcast streaming does not allow any level of listener interactivity. 5/17/06 Tr. 240:15-18 (Simson); 6/5/06 Tr. 233:13-22, 250:1 - 21 (Bryan).

20. Radio Broadcasters consider simulcast streaming to be essentially an adjunct to each station's local over-the-air business. Simulcast streaming provides an alternative means for stations to deliver their programming to their local audiences. Halyburton WDT ¶ 4; Coryell WDT ¶¶ 4, 9, 12, 16, 38; Parsons WDT ¶¶ 1(D), 10, 11; 7/26/06 Tr. 34:4-35:9, 51:20-52:17 (Halyburton). For example, listeners can hear their favorite station in places where, prior to the Internet, it was difficult, such as in office buildings and other areas with poor signal coverage. Halyburton WDT ¶¶ 5C, 12; Parsons WDT ¶ 11; 7/26/06 Tr. 52:11-17, 85:22-87:2 (Halyburton); 7/31/06 Tr. 39:22-40:13 (Parsons).

21. As discussed further below, most stations are still struggling to make simulcast streaming a viable business. Halyburton WDT ¶¶ 4, 13-24; Coryell WDT ¶¶ 17-38; Hauth WDT ¶ 5; Parsons WDT ¶¶ 21-23. Indeed, thousands of radio stations throughout the country do not engage in simulcast streaming at all, principally because they do not believe it would be financially wise. Halyburton WDT ¶¶ 5E, 22; Hauth WDT ¶¶ 5-6; Parsons WDT ¶¶ 7-9; RBX 4; 7/26/06 Tr. 40:19-41:9; 54:9-56:9 (Halyburton); 7/27/06 Tr. 285:13-286:5 (Hauth); 8/2/06 Tr. 125:12-19 (Robedee); Brynjolfsson WRT at 23 (Radio-Location analysis showing large number of stations still not streaming).

22. Simulcast streaming is likely to remain an ancillary aspect of local radio operations for the foreseeable future, as the revenue potential for simulcast streaming is negligible in comparison to that of the stations' terrestrial broadcast operations. Halyburton WDT ¶ 24; Coryell WDT ¶¶ 4, 10; 7/26/06 Tr. 113:14-19 (Halyburton); 7/27/06 Tr. 33:8-21, 164:8 - 21 (Coryell). Simulcast streaming audiences are still tiny compared to over-the-air audiences. Halyburton WDT ¶ 15; Coryell WDT ¶ 19; Parsons WDT ¶ 10; 7/26/06 Tr. 36:6-9, 98:21-99:2 (Halyburton). These small audiences make selling advertising for simulcast streaming very difficult, and the result is low streaming ad prices and low sell-out rates. Halyburton WDT ¶¶15-17; Coryell WDT ¶¶ 4, 19, 21; Parsons WDT ¶ 20; 7/26/06 Tr. 37:8-38:21 (Halyburton); 7/27/06 Tr. 88:20-91:1, 92:2-93:5 (Coryell).

23. In general, streaming ads are sold by the same sales representatives who sell over-the-air ads, and they focus on the latter because they are worth more both to the

station and to the ad salesperson (in the form of commission). Halyburton WDT ¶¶ 9, 16; Coryell WDT ¶ 20; 7/26/06 Tr. 35:22-36:6 (Halyburton); 7/27/06 Tr. 84:13-86:22, 91:2-92:9 (Coryell); 7/31/06 Tr. 42:1-4 (Parsons). Some simulcasters have entered into agreements with streaming advertising sales agencies such as NetRadio Sales and Ronning Lipset Radio in an attempt to create better demand and prices for streaming advertising by aggregating audiences. This experiment, however, has not proven to be financially successful. Halyburton WDT ¶ 15; 7/26/06 Tr. 42:22-43:21 (Halyburton); 7/27/06 Tr. 38:8-39:9 (Coryell); *see also* 7/31/06 Tr. 241:19-242:5, 253:8-21 (Parsons) (discussing Ronning Lipset and how its sales for Clear Channel are on a different basis – a spot basis – than the CPM sales of the major webcasters). The revenues Radio Broadcasters earn through streaming are a very small fraction of the revenues earned by their principal over-the-air business. Halyburton WDT ¶¶ 13, 15; Coryell WDT ¶¶ 22-23; Parsons WDT ¶ 20; 6/26/06 Tr. 157:17-158:3 (Ronning). The fact that audiences are too small to attract significant advertising revenue means that simulcast streaming will remain a minor adjunct to the local radio station's over-the-air business for the foreseeable future.

III. HISTORY OF RADIO'S RELATIONSHIP WITH THE SOUND RECORDING PERFORMANCE RIGHT

A. CONGRESS HAS RESISTED GRANTING A BROAD SOUND RECORDING PERFORMANCE RIGHT IN ORDER TO PROTECT THE LONG-STANDING, MUTUALLY BENEFICIAL RELATIONSHIP BETWEEN RADIO BROADCASTERS AND THE RECORD INDUSTRY.

24. In valuing the sound recording performance right, the Copyright Royalty Judges should keep in mind the history and evolution of that right, for clues that history

might provide to help shape the competitive fair market value of the right. As described in more detail in the Joint Services Proposed Findings and Conclusions, the accretion of sound recording copyright protection has been gradual and limited. Much of the reason for that gradual evolution has been Congress's recognition of (i) the unique relationship between radio broadcasters and the record industry, and (ii) the extraordinary promotional value to the record companies of radio air play.

25. Since the advent of radio in the 1920s, Radio Broadcasters and the recording industry have enjoyed a mutually beneficial relationship: record companies provide free music and the right to perform that music without compensation, and radio stations give the record companies free promotion in the form of public performances of sound recordings.

26. There is a recognition of benefit to both sides, and no right to seek direct compensation. Record companies do not have a right to charge for performances; radio broadcasters do not have a right to be paid for the promotional benefit they confer. Nevertheless, experience has shown that in the marketplace, the greater value is being conferred by the broadcasters on the record companies. The record companies do not have to provide CDs to broadcasters, but they do. *See* PFF ¶ 53. Moreover, as shown in Part IV.A.3, *infra*, the record companies spend hundreds of millions of dollars each year to convince broadcasters to play their music.

27. Congress, recognizing this balance in the face of continuous pressure from the recording industry for a performance right, has been careful to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the

longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." S. Rep. No. 104-128, at 13-17 (1995) (hereinafter, "1995 Senate Report"). In particular, Congress has recognized that the recording industry reaps huge promotional benefits from the exposure given its recordings by Radio Broadcasters and that the granting of a public performance right could alter that relationship to the detriment of both industries. *See* Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, House Comm. on the Judiciary, Performance Rights in Sound Recordings, at 54-55 (Comm. Print 1978); 1995 Senate Report at 14-15; Fisher 2001 WDT ¶ 17. Thus, Congress repeatedly took pains to ensure that the grant of copyright protection to sound recordings did not affect the symbiotic relationship between the radio broadcasters and the record industry.

28. When Congress first afforded limited copyright protection to sound recordings in 1971, it expressly decided <u>not</u> to grant any public performance right in sound recordings. *See* H.R. Rep. No. 92-487, at 3 (1971); S. Rep. No. 92-72, at 3 (1971). Again, during the comprehensive revision of the Copyright Act in 1976, Congress again considered, and rejected, a sound recording performance right. *See* S. Rep. No. 94-73, at 87-88 (1975); H.R. Rep. No. 94-1476, at 106 (1976). *See also* S. Rep. No. 93-983, at 225-26 (1974) ("The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure upon the promotion efforts of broadcasters.")

B. THE DIGITAL PERFORMANCE RIGHT ACT OF 1995 RECOGNIZED THE NEED TO PROTECT RADIO BROADCASTERS' RELATIONSHIP WITH THE RECORD INDUSTRY.

29. When Congress first created a limited public performance right for sound recordings in the Digital Performance Right Act ("DPRA") of 1995, the accompanying Senate Report made clear that the right "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries." 1995 Senate Report, at 15; H. Rep. No. 104-274, at 12 (1995) ("1995 House Report"). As the Senate Judiciary Committee observed:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music.

1995 Senate Report, at 15 (emphasis added); 1995 House Report, at 12. The Senate Report thus confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings." *Id.* (emphasis added).

30. Consistent with this longstanding commitment, the DPRA expressly exempted from sound recording performance right liability nonsubscription, non-interactive transmissions, including "broadcasting and related transmissions." 1995 Senate Report, at 17 (emphasis added); Pub. L. No. 10-439, § 3. Thus, in 1995, Radio Broadcasters did not have to pay royalties to sound recording copyright holders for either their broadcast or Internet transmissions.

31. In explaining its refusal to impose new burdens on Radio Broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings. Specifically, radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill FCC licensing conditions; (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats." 1995 Senate Report, at 15. Each of the enumerated features is characteristic of the programming of Radio Broadcasters regardless of whether the transmission is disseminated over the air or streamed via the Internet.

C. THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 CANNOT BE INTERPRETED TO HAVE CHANGED CONGRESS'S INTENT TO PROTECT RADIO BROADCASTERS' RELATIONSHIP WITH THE RECORD INDUSTRY.

32. In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA"), eliminating some of the DPRA's exemptions and expanding the types of transmissions that would need and be eligible for a statutory license, including AM/FM Streaming. The relevant DMCA amendments were inspired by and directed to "a remarkable proliferation of music services offering digital transmissions of sound recordings to the public," primarily via the Internet. *See Staff of House Comm. on the Judiciary, 105th Cong.,* at 50 (Comm. Print 1998). "In particular," the House Manager reported, "services commonly known as 'webcasters' have begun offering the public multiple highly-themed genre channels of sound recordings on a nonsubscription basis."

Id. As used in the legislative history, the term "webcaster" referred to "services" originating on the Internet and offering "a diverse range of programming," often "customized" to an individual user's preferences, *id.*, not Radio Broadcasters simulcasting their content on the Internet.

33. In fact, in contrast to the DPRA, which was comprehensive legislation with all of the affected interests represented, including the radio industry, the recording industry, the cable industry, songwriters, recording artists, and consumers,[5] the DMCA amendments were fundamentally a behind-the-scenes, closed-door deal to address issues between only two interests: Internet-only webcasters and the RIAA. *See, e.g.*, Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 166-68 (1999) (noting that the Section 114 amendments regarding digital performance right in sound recordings were a "last minute" addition to the DMCA resulting from "negotiations between copyright owners and digital transmission services"); *id.* at 167 (describing "webcasting" as transmissions that "originate on the

[5] *See, e.g.*, Digital Performance Right in Sound Recordings Act of 1995, H.R. 1506, 141 Cong. Rec. H10098 (daily ed. Oct. 17, 1995) (statement of Rep. Moorhead) ("I would like to congratulate the parties of interest for working together and coming up with what I believe is a good, solid piece of legislation, that's both good for the industry and good for the American consumer. . . . I am not aware of any opposition to this legislation. It has the support of the American Federation of Musicians, the American Federation of Television and Radio Artists, the record industries, the songwriters, the radio and TV broadcast industry, and the administration."); Digital Performance Right in Sound Recordings Act of 1995, 141 Cong. Rec. 1194S, S11948 (daily ed. Aug. 8, 1995) (statement of Sen. Hatch) ("We were unable to achieve passage of S. 1421 in the 103d Congress, but, because of the discussions and negotiations held throughout the past 2 years, we are able to present to this body a bill that accommodates the legitimate interests of everyone involved in the music licensing, distribution, and performance systems."); *id.* at S11959 (statement of Sen. Feinstein) ("Senator Hatch and I first introduced a version of this bill in the 103d Congress. Since that time, we have heard from literally hundreds of interested parties from all affected sides. We have had input from broadcasters, cable companies, consumers, songwriters, music publishers, artists, record companies, and more. Many of those affected by the legislation have had suggestions on how to make it better and more responsive to the marketplace. I would like to commend Senator Hatch and his staff and thank them for working so hard with us to assure that all of the legitimate concerns with the original legislation were so thoughtfully addressed.").

Internet"); B. Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4 (Sept. 1998) (describing the version of the amendments to Section 114(d) passed by the House, as being "negotiated" and "drafted" by DiMA and RIAA, at the suggestion of the Register of Copyrights, "days, and perhaps hours" prior to passage).

34. Thus, nothing in the DMCA was intended to affect, and nothing can reasonably be construed as affecting, the DPRA's objectives of (i) protecting the broadcasting industry and its ability to deliver public-interest-oriented programming to the general public without burdening the industry with an additional copyright fee, and (ii) preserving the mutually beneficial relationship that existed between record companies and broadcasters. And nothing in the fact that over-the-air broadcasts are also being streamed over the Internet diminishes these long-recognized benefits.

35. In sum, the legislative history of the DPRA and DMCA clearly demonstrates a legislative intent to preserve the mutually beneficial relationship between the broadcasting and recording industries that springs from the enormous promotional value to the record companies and artists that radio airplay generates. This historical background should frame the CRJs' determination of the royalty rates applicable to Radio Broadcasters in this proceeding.

IV. THE ENORMOUS PROMOTIONAL VALUE OF AM/FM STREAMING TO ARTISTS AND RECORD COMPANIES WOULD PERVADE A COMPETITIVE MARKET AND MUST BE ACCOUNTED FOR BY A SUBSTANTIALLY REDUCED SOUND RECORDING PERFORMANCE ROYALTY FEE.

36. As discussed above, Congress has long recognized that radio airplay is highly promotional of the sale of sound recordings. It has steadfastly refused to grant a

public performance right and has repeatedly explained that the reason is the existence of an essentially fair exchange—free performance in exchange for free promotion. *See* Part III, *supra*; JPCL Part I.

37. The record evidence permits no serious dispute about the reliance of the recording industry on radio airplay, on the lengths the record companies go to secure that airplay, or about the benefits conferred by radio airplay. This is confirmed by the radio broadcaster witnesses, the record industry fact and expert witnesses and by the evidence of the enormous resources expended by the recording industry to secure that airplay. *See supra* Part IV.A.

38. AM/FM Streaming provides every bit as much promotional benefit, listener for listener, as over the air broadcasting. The performances are the same and are made at the same time, the DJ endorsements are the same, the familiarity of the listener with the radio station's brand and reputation is the same, and the coordination with other marketing activities is the same. *See supra* Part IV.B.

39. SoundExchange does not attempt to contradict this. Notably, SoundExchange did not present testimony from a single promotions executive in any record company. Instead, SoundExchange presented a parade of major label lawyers and e-business executives, with no experience in how records are promoted, to parrot the party line about how "webcasting" is not promotional. But even the SoundExchange party line confirms that, whatever may be said about Internet-only webcasting, AM/FM Streaming is every bit as promotional as over-the-air radio airplay. *See supra* Part IV.C.

40. As a matter of economics, a copyright owner receives compensation, or value, for granting a public performance license primarily in two ways – direct payment for the license, and through other benefits that are received from the granting of the license. Jaffe 2001 WDT ¶ 54. By far the most significant of these other benefits is the promotional benefit that performances have in influencing the sale of sound recordings. *See* 6/26/06 Tr. 56:11-57:21 (Jaffe). This value would influence what a willing buyer would pay a willing seller in a competitive market.

41. Congress has defined the basic parameters of the promotional value of radio air play—as a result of the promotional benefit conferred by radio airplay, broadcasters do not pay for the right to make performances. *See* JPCL Part I.

42. As a matter of law, the Copyright Royalty Judges must take the promotional value of AM/FM Streaming into account in setting a sound recording royalty fee for that streaming. 17 U.S.C. §§ 112(e)(4)(A), 114(f)(2)(B); *see* JPCL Part II.B.1.a.

A. THE RECORD IS REPLETE WITH EVIDENCE DEMONSTRATING THAT OVER-THE-AIR RADIO HAS SIGNIFICANT PROMOTIONAL VALUE.

43. There is no serious disagreement that broadcast radio performances are a significant driving force in the sale of sound recordings. "It is a universal truth in the music industry that radio airplay of music has a powerful promotional effect on the sale of sound recordings – the more a song is played on the radio, the greater the sales of recordings that include that song." Fine WDT ¶ 9a; Fine Tr. 5717. This is confirmed both by what the witnesses in this proceeding said and by the undisputed evidence of the record companies' conduct and expenditures.

1. Witnesses Testifying on Behalf of SoundExchange and Broadcasters Agree that Radio Air Play "Is Crucial" to the Success of the Recording Industry and its Artists.

44. SoundExchange's own witnesses concede that over-the-air radio airplay is an absolute necessity to the success of a song, and therefore sales of a song. As Atlantic's Senior Vice President of Business and Legal Affairs Michael Kushner said, "for pop and urban artists ... radio is crucial, very important." 6/12/06 Tr. 30:6-7 (Kushner). Mr. Kushner further stated that "terrestrial radio play remains the best predictor of success for any given artist." Kushner WDT at 10.

45. Other SoundExchange witnesses agreed with the importance of radio air play to record company and artist success. James Griffin reaffirmed his prior testimony that "radio was necessary to success in the record business" and further attested that, today, "radio air play promotes the sale of sound recordings." 5/3/06 Tr. 208:9-209:2 (Griffin); *accord* 6/6/06 Tr. 24:4-15 (Ghuneim) (promotional campaigns should ideally include a terrestrial radio play); 5/18/06 Tr. 214:16-215:4 (Iglauer) (asserting that "radio has value"); *see generally* Servs. Ex. 60 (article relied upon by SoundExchange's Dr. Pelcovits, 5/16/06 Tr. 34:13-18, stating "Many of those who buy albums do so because they heard the album (or selections from it) on the radio or saw the artist in concert.").

46. The broadcaster and other services witnesses emphasized the importance of radio play in influencing the success of songs and artists and consequently in boosting album sales.

a. Bonneville's Roger Coryell testified that "[t]he way that [record company promotional departments] sell records, and one of the

most important ways that they have sold records for years, and this is still the case, is by getting those records played on the radio, where people can hear them, fall in love with that song, and go out and buy the record." 7/27/06 Tr. 62:20-63:10 (Coryell).

b. Susquehanna's Dan Halyburton testified that "[r]ecord labels rely heavily on radio airplay to expose consumers to new music and new artists and to promote record sales. . . . Every record label in the music business depends on radio airplay to expose consumers to new music and to fuel record sales. The exposure generated by radio play boosts album sales, increases the sales of concert tickets and artist promotional materials and contributes to the creation of new 'stars' in the marketplace." Halyburton WDT ¶ 33; *accord* 7/26/06 Tr. 62:11-22 (Halyburton) ("We know that when radio stations play these songs over the air ... substantial popularity results from that airplay, that people go out and buy records."); 7/26/06 Tr. 63:13-20 (Halyburton) (record industry does a lot to encourage radio stations to play songs on the air because they make a lot of money from sales as a result and it helps build the career of their artists).

c. As Brian Parsons of Clear Channel testified, "[i]t is common knowledge in the radio industry that radio airplay has a direct impact on record sales and that record labels thus are eager to

achieve maximum radio exposure for their artists." Parsons WDT ¶ 32.

d. Jack Isquith of AOL described how, in a former job with an artist management firm, his job was "trying to make sure that our artists got the most radio airplay that they possibly could" because "[i]t sells records, grows careers." 6/27/06 Tr. 10:10-20 (Isquith); *id.* at 13:4-16 (describing radio air play as "the single most important factor in the promotion and sale of albums."); *accord* Frank WDT ¶ 4 (as "acknowledged by everyone in the music industry: radio play drives record sales and in turn record company revenues.").

47. The promotional value of radio stems from the unassailable proposition that people generally do not buy music they have never heard. *See* 5/3/06 Tr. 209:3-210:3 (Griffin) ("If they're unaware of it, it's unlikely they'll purchase it."); 6/6/06 Tr. 99:12-21 (Ghuneim) (a person who has heard a song is more likely to purchase the song than a person who has not heard the song); Coryell WDT ¶ 39 ("People do not want to buy music they have not heard."); Fine Tr. 5717 ("The more a sound [recording] is played on the radio, the greater the sales of recordings that include that song. You can just equate this to anything that you see out in the marketplace today. Go away from the music business. The whole idea when you market a product is one, create awareness, create trial and then have a usage. And you can't sell anything until you make people aware of it.").

48. Terrestrial radio offers unique promotional benefits. As Sony-BMG witness Mark Eisenberg stated, one reason that terrestrial radio is so important is because [[ ]] 5/11/06 Tr. 302:10-15 (Eisenberg), and [[ ]] *Id.* 300:5-13; *see* Serv. Ex. 42, at 2 (describing promotional benefits of radio and simulcasting). Independent label executive Bruce Iglauer also emphasized the value and importance of having a song repeatedly played on radio. "[I]t's repeated impressions that cause people to remember a piece of music, and then hopefully buy it." 5/18/06 Tr. 150:13-15 (Iglauer); *accord* 6/7/06 Tr. 249:9-19 (Kenswil) (stating that Universal's "promotions efforts frequently are directed to increasing the number of spins [air play] on radio.").

49. In addition to repetition, radio provides an overall experience that promotes sound recordings. Many radio DJs establish loyal followings and exert a strong influence over their listeners such that when they talk with passion about a new song or artist it can drive the popularity of that song or artist. 7/26/06 Tr. 31:13-32:14, 63:21-64:16 (Halyburton). SoundExchange's witness Mark Ghuneim explained how "DJ personal endorsement-type things" such as "I love that song. These guys are coming to town next week" serve to "personalize the record" for the audience. 6/6/06 Tr. 93:9-94:11 (Ghuneim); *see id.,* 94:12-95:2 (promotional benefit of "front and back" DJ announcements discussing the song or the band).

50. The record also includes examples of the promotional value of radio.

a. Bruce Iglauer, the President of Alligator Records, described how when KRSH, a radio station in Santa Rosa, California played a song by one of Alligator's new artists, that area had the highest number of sales of that album in the country. 5/18/06 Tr. 154:22-155:8 (Iglauer). Indeed, the success of Alligator Records is a direct result of Mr. Iglauer's efforts in promoting his artists' music to terrestrial radio stations. 5/18/06 Tr. 213:5-215:4 (Iglauer).

b. Radio is credited with bolstering the success of some of the world's best known artists. 5/18/06 Tr. 153:1-13 (Iglauer) (describing how over-the-air play is responsible for helping B.B. King become one of the best-known blues artists in the world). Radio stations played B.B. King's single "The Thrill Is Gone" constantly after its release and it became his best known song, moving BB. King "from being a middle level artist to a top level artist." *Id.*

c. Radio is also responsible for boosting sales for lesser-known artists. For example, WXPN, a radio station in Philadelphia, made Jonatha Brooke's album "Angel in the House" a featured album of the week, during which time the radio station played the album numerous times and provided promotional plugs for the album, all of which helped boost Ms. Brooke's sales. 5/17/06 Tr. 158:17-160:16 (Brooke).

2. The Record Companies' Own Conduct Provides Further Evidence of the Value to the Record Companies Conferred by Radio Air Play.

51. The enormous promotional benefits to the record companies of radio air play are reflected in the evidence of the record industry's own conduct in attempting to secure it. The record companies actively promote their sound recordings to terrestrial radio and encourage radio stations to play their sound recordings for the purpose of increasing sales. 6/7/06 Tr. 244:19-245:8, 265:9-14 (Kenswil) (the ultimate goal of promotion to terrestrial radio stations is to increase the sale of sound recordings); 6/5/06 Tr. 186:10-18 (Bryan) (Warner promotes to radio and the goal is to increase sales); Jaffe WDT at 43 ("Record companies have long recognized the promotional value inherent in traditional, over-the-air radio play and have worked with terrestrial radio stations to promote new artists and new albums.").

52. Indeed, record labels have established entire departments devoted exclusively to securing radio air play. 6/7/06 Tr. 251:13-252:21 (Kenswil) (in addition to hiring outside promoters to promote to radio, Universal has multiple in-house departments [devoted] to promoting the air play of its recordings on radio"; and each of Universal's major label subgroups has at least one radio promotions department and in some cases more than one, with national and regional staffs); Kushner WDT at 9; 6/12/06 Tr. 124:5-13, 126:1-11, 136:1921 (Kushner) (stating that Atlantic has multiple radio promotion departments); 5/11/06 Tr. 189:16-18 (Eisenberg) [[

]]; 6/5/06 Tr. 253:18-22 (Bryan) (Warner has radio promotion departments that work with radio companies).

53. Broadcaster witnesses also testified to the extensive efforts made by the record companies to encourage radio airplay. *See e.g.*, 7/26/06 Tr. 62:5-11 (Halyburton) ("[T]here's clearly a longstanding history of promotional activity on the part of the record companies to try to influence radio to play songs on the radio . . . it's a very serious effort on the part of the record industry"). For example, Roger Coryell stated that "[m]usic directors receive phone calls every day from record company staffers trying to convince them to play a given song, trying to convince them to play a given song more frequently." 7/27/06 Tr. 62:15-19 (Coryell). "To encourage radio airplay, record labels provide recorded music *gratis* to radio stations as a matter of course . . . and frequently offer live performances, artist interviews, and appearances at other station events." Halyburton WDT ¶ 35; *see also* 7/26/06 Tr. 64:17-65:21 (Halyburton) (record labels provide concert tickets, conduct special contests and may even fly the music director to another city to see a new artist); Coryell WDT ¶ 39 (record labels advertise in "tipsheets" directed to broadcasters and provide free CDs, artist visits, concert tickets and other promotional giveaways); Parsons WDT ¶ 32 ("Record companies send thousands of free CDs to encourage stations to play their music and promote their artists by offering live over-the-air performances, artist interviews, appearances at station events and other artists access."); 7/27/06 Tr. 63:15-64:17 (Coryell) (testifying that record labels send radio stations CDs, provide CDs to be given away to listeners, provide free concert tickets, give away trips and advertise in trade publications targeted to radio broadcasters). Record labels also provide samples of artists' music, news clips and downloadable interviews for stations to make available to their listeners on their websites. Halyburton WDT ¶ 39.

3. Record Companies Spend Huge Sums to Encourage Radio Broadcasters to Perform their Recordings.

54. The financial evidence provided by SoundExchange in discovery, coupled with the testimony of Michael Kushner of the Atlantic Record Group, demonstrates the importance of terrestrial radio to the record companies and the enormous resources that the record companies expend to obtain radio airplay. SoundExchange presented Mr. Kushner "to describe the record business," Kushner WDT at 1, and produced financial information related to promotion from Mr. Kushner's record label—Atlantic Recording Group—a sub-label of Warner Music Group. *See* RBX 34 at 5-6; Kushner WDT at 2. SoundExchange declared that Atlantic was "a reasonably representative record label." RBX 34 at 5.[6] Atlantic's share of all U.S. physical album sales was 4.63 percent in the fourth quarter of 2004 (the period for which this information was provided by SoundExchange). Kushner WDT at 4.

55. SoundExchange's hand-picked "representative" label, Atlantic, spent [[ ]] on promotional activities related to terrestrial radio in 2004, the year selected by SoundExchange as a representative period. RBX 34 at 6. Atlantic spent an additional [[ ]] on independent promotion "to assist with radio promotion." *Id.* Mr. Kushner described independent promoters as "consultants hired for the purpose of helping us strategize how to achieve airplay" for Atlantic recordings. 6/12/06 Tr. 139:4-13 (Kushner).

[6] SoundExchange successfully resisted efforts by Radio Broadcasters and DiMA to obtain information about promotion to terrestrial radio from the other major labels SoundExchange's Consolidated Oppositions to (1) Motion to Compel Discovery Relating to Promotional Value of Airplay and (2) Supplemented Motion to Compel Production of Documents Relating to "Payola" (March 15, 2006).

56. Atlantic also has its own in-house "Radio Promotion Department, which is responsible for attempting to secure airplay on terrestrial radio for Atlantic's new releases." RBX 34 at 5-6; 6/12/06 Tr. 124:5-9 (Kushner) (job of the radio promotion staff "is to get Atlantic music played on radio stations"). In other words, the "Radio Promotion Department is responsible for ensuring that our artist's music has the chance to be heard, in the hopes that once it is heard, the audience will respond, airplay will increase, and consumers will be motivated to purchase the artist's album." Kushner WDT at 9. Atlantic's goal is to have its recordings "stay on the radio for as long as possible." 6/12/06 Tr. 125:16-126:11 (Kushner). It is instructive that one of the goals Mr. Kushner identified of securing airplay is to increase additional airplay, which is a candid acknowledgment of the value of airplay itself.

57. Calling the Radio Promotion Department a mere "Department" understates its significance. In fact, Mr. Kushner testified that Atlantic operates multiple radio promotion departments, including two for pop and rock music and two for urban music. 6/12/06 Tr. 136:19-137:20 (Kushner). Atlantic directly employs [[ ]] individuals in its Radio Promotion Department. RBX 34 at 6. This is fully [[ ]] of Atlantic's total work force of 220 employees. Kushner WDT at 3.

58. Atlantic's total overhead in fiscal year 2005 was [[ ]]. Kushner WDT at 3. This did not include the out-of-pocket marketing costs described above. *Id.* Rather, it includes costs associated with the company's own employees, including salaries and the other expenses connected to human resources, including specifically employees involved in marketing activities, which in turn includes the Radio

Promotion Department. 6/12/06 Tr. 143:1-144:8; 145:4-146:9 (Kushner). And, as another major label finance officer explained, "The extent of [overhead] costs is largely driven by the number of personnel involved in an operation." Ciongoli WRT at 8.

59. If it is assumed that the Radio Promotion Department's overhead expense is proportional to its size, it accounts for another roughly [[ ]] in overhead costs. If it is conservatively assumed that radio promotion employees account for at least [[ ]] of Atlantic's overhead, the overhead costs attributable to radio promotion would still be [[ ]].

60. Based on the foregoing (and rounding down), it can conservatively be concluded that Atlantic spends at least [[ ]] on promotional activities directed to causing the airplay of its recordings on terrestrial radio.

61. Given Atlantic's share of the industry and accepting it as representative, this means that the industry spends more than [[ ]] each year in promotional activities directed to causing the airplay of its recordings on terrestrial radio.[7]

62. If the net promotional value of radio airplay did not exceed these hundreds of millions of dollars in costs, the record companies would not incur these costs. *See* 5/16/06 Tr. 204:17-21, 71:14-72:2 (Pelcovits).

63. These funds are not paid to radio broadcasters. They could not be under the law, without risk of significant liability. *See* 47 U.S.C. §§ 317, 508 (prohibiting undisclosed receipt of valuable consideration by radio station or employee in order to

[7] [[ ]]

influence music played on the air); http://www.oag.state.ny.us/press/2006/mar/ Entercom.pdf (Complaint brought by New York Attorney General against broadcaster alleging fraud and deceptive practices for allowing record companies to influence what is played on their stations through direct payment or in-kind contributions, despite disclosure); 7/26/06 Tr. 65:3-16 (Halyburton). Although some of the direct expenditures confer some value on broadcasters (e.g., CDs, concert tickets and the like), for the most part, they do not. The great majority of the expenditures represent the costs of informing the broadcasters about recordings and attempting to persuade them to play the recordings—in a word, advertising. *See* PFF ¶ 56; 6/12/06 Tr. 138:13-139:3 (Kushner) (discussing advertising in *Billboard* magazine and in tip sheets); RBX 34 at 6 (e.g., discussing the virtue of new releases with the radio station, providing detailed research information about specific tracks, providing information regarding airplay on other stations, money paid to independent promoters, expenditures for personnel in Atlantic's Radio Promotion Department).

64. It goes without saying that the record companies would not spend large sums of money to encourage radio stations to play their recordings unless they believed it was worth it to them in increased sales or other revenues. *See* 5/16/06 Tr. 204:17-21; 71:14-72:2 (Pelcovits).

65. In other words, it is reasonable to conclude that radio airplay confers at least [[ ]] in value to the record companies in their most important market – *i.e.*, the market for the sale of recordings.

66. This value may be compared directly to the amounts paid by the radio industry to the music industry for the right to make public performances of musical works on radio (including simulcasting). The total radio industry payment to ASCAP and BMI for 2006 is about $418 million. *See* RBX 5, RBX 6. Adding a 5 percent allowance for SESAC, which controls about 4 percent of the music on radio, *see* PFF ¶ 299, would increase this amount to roughly $440 million.

67. The record demonstrates that musical works copyright owners receive promotional benefit from performances equal to roughly 1/5 of the value conferred on the sound recording copyright owners from the sale of CDs and downloads. *Compare* Pelcovits WDT at 51 (presenting analysis based on "margin on a CD is $5.60"), *with* 6/12/06 Tr. 156:12-157:1 (discussing mechanical rate of 9.1 cents per song for an album, limited to songs per album) *and* 6/12/06 Tr. 156:12-157:1 (Kushner) (stating that Atlantic might pay the rate of 9.1 cents per song for an album, but limit that rate to 11 songs per album) *and* 11/30/06 Tr. 15:11-19 (Eisenberg) (stating that the mechanical royalty rate is 9.1 for both physical and digital copies of songs); *see* 5/4/06 Tr. 66:11-17 (Simson) (record labels receive approximately 70 cents for each downloaded $.99 song, and in turn have to pay the publisher a share of 9.1 cents out of the 70 cents received, which nets the record label 60.9 cents); Eisenberg WDT at 26-27 (Sony-BMG receives roughly [[ ]] cents per song for downloads). Taking 1/5 of [[ ]] means that the musical works copyright owners would receive approximately [[ ]] in promotional value.

68. In other words, the promotional benefits to sound recording copyright owners of radio airplay alone [[ ]] the total value obtained by the musical works copyright owners from the sum of cash payments for the performance right and promotional benefit from radio air play. It may be concluded that listener-for-listener, the record companies and artists already come out ahead [[

]]

B. THE PROMOTIONAL VALUE OF AM/FM STREAMING IS AT LEAST AS GREAT AS THE PROMOTIONAL VALUE OF OVER-THE-AIR RADIO.

69. AM/FM Streaming provides record companies with all of the promotional benefits of over-the-air play. 7/26/06 Tr. 66:17-67:8, 190:9-12 (Halyburton) (the recording industry and artists receive "all of the benefits" when a song played over-the-air is continued to the stream. "It's exactly the same thing, so they get all the same benefit, all the same promotional value from that Internet stream."). As Roger Coryell stated regarding streamed radio performances, "<u>the exact same music and DJ talk and endorsements are streamed and played over the air at the exact same time</u>." Coryell WDT ¶ 40; 7/27/06 Tr. 65:16-66:2 (Coryell); *accord* Fine Tr. 5718:9-15 ("Listening to Internet music streaming is functionally very similar to listening to over-the-air radio and therefore can be expected to have a similar promotional effect on the sale of sound recordings. The more a song is streamed over the Internet, the greater the sales of recordings that include that song."). Fine 2001 WDT ¶9.

70. Record company executive Stephen Bryan agreed that a radio simulcast is the same as the over-the-air transmission and contains the same programming as the

terrestrial broadcast. 6/5/06 Tr. 195:5-196:4 (Bryan); Parsons WDT ¶ 11 ("Simulcasting merely transmits the over-the-air broadcast over the Internet."). Indeed, most radio stream listeners use the Internet stream interchangeably with the over-the-air transmission itself and the radio station's website and over-the-air presence form part of an overall listening experience. 7/27/06 Tr. 243:1-13 (Hauth) (the stream is part of the overall listening experience); Parsons WDT ¶ 11 (AM/FM Streaming is designed to cater to the local market and to serve the local over-the-air audience better).

71. Even the record companies acknowledge the promotional benefits of AM/FM Streaming compared to other types of streaming services. For example, [[

]] Servs. Ex. 41 ([[

]]); *see also* Servs. Ex. 42 [[

]].

72. If anything, AM/FM Streaming provides promotional benefits to record companies that exceed the promotional benefits provided by over-the-air radio. First, the stream must carry artist and title information for simultaneous display on the player that enables the listener to identify the recording so he can purchase it if he likes it. *See*

17 U.S.C. § 114(d)(2)(C)(ix). This identification requirement enhances promotional value by ensuring that an Internet listener always knows the information that he or she would need to buy the sound recording – over-the-air radio does not provide the same consistent identification. 7/26/06 Tr. 67:9-22 (Halyburton) (stating that the Internet stream identifies the title and song name, but this information is not always announced over-the-air); Fisher Tr. 3853-54. Indeed, Clear Channel and Bonneville radio station websites post recent playlists so that listeners can go to the website long after a song is played and find information about the song and artist, and then purchase the song. Parsons WDT ¶ 34; 7/27/06 Tr. 68:1-69:2 (Coryell).

73. Radio station websites generally also provide additional affirmative promotions for various songs and artists, such as providing links to in-depth biographical and discography information on artists whose songs are playing, direct links to artist websites, cover art, music news, reviews, and countdowns, concert information and give-always, and both written and audio artist interviews. Parsons WDT ¶ 34; 7/26/06 Tr. 68:1-7 (Halyburton) (stating that radio station websites provide features about artists and band as well as contests, polls and "other activities conducted on the website that add further promotional value to the songs"); Halyburton WDT ¶¶ 38-39 (radio station websites provide information about artists, songs and new releases, feature pages with local concert information or tour dates for particular artists and have pages devoted to featured artists). Radio station websites may also include samples of artists' music, news clips, downloadable interviews and direct links to artists' websites. Halyburton WDT ¶ 39.

74. In addition, because stream listeners are at a computer, they have an opportunity to purchase the recording immediately by visiting an online retailer or, where available, by using a "buy button." *See e.g.*, 7/27/06 Tr. 66:14-67:2 (Coryell) ("there's a little more promotional benefit to the stream listener because that stream listener, unlike a terrestrial radio station listener, has the opportunity at the moment that they are hearing a given new song to purchase that song"); 5/08/06 Tr. 200:15-201:21 (Brynjolfsson) (discussing power of advertising directed to someone at computer who connects instantly).

75. Radio station websites often provide "buy buttons" or links to retail sites where listeners can purchase music, providing important additional promotional benefits compared to the over-the-air broadcast. 7/27/06 Tr. 66:14-67:2 (Coryell) ("there's a little more promotional benefit to the stream listener because that stream listener, unlike a terrestrial radio station listener, has the opportunity at the moment that they are hearing a given new song to purchase that song"); Coryell WDT ¶ 41-43; Parsons WDT ¶ 33 ("Clear Channel's radio station websites provide direct links to retail websites where listeners can purchase music instantaneously."). Bonneville stations KOIT and KMAX introduced music download stores from which users can select a song from the station's play list that day or use the play list as a starting point to search for similar songs. 7/27/06 Tr. 73:14-75:4 (Coryell); Coryell WDT ¶ 43. These were a very new feature in October, 2005. 7/27/06 Tr. 75:15-16 (Coryell). The KOIT and KMAX websites feature a scrolling display across the top of each web page showing the name of the song currently playing and a button that says "Buy It." 7/27/06 Tr. 74:16-75:4 (Coryell); RBX 12. Such buttons facilitate impulse music purchases by providing a direct link to a page

on an e-commerce website from which the particular album being played can be purchased, as well as other albums by the same artist. *See* Parsons WDT ¶ 33 ("simulcasting enables on-the-spot purchase by listeners who hear a song they like").

76. For example, Bonneville station KDFC sells music through its online store and had total sales of $98,580 in 2004 and just under $120,000 in 2005. 7/27/06 Tr. 69:21-72:19 (Coryell); RBX 11; Coryell WDT ¶ 42. Shortly after Bonneville stations KOIT and KMAX began to offer music for sale through their websites, listeners spent an average of $5.25 on downloadable songs per order through KOIT and $13.00 per order through KMAX. 7/27/06 Tr. 75:17-77:8 (Coryell). Even so, evidence of such purchases directly through radio station website "buy buttons" fails to capture the many purchases which, although influenced by exposure through a streaming service, were consummated via a different on-line retail outlet unaffiliated with the streaming service or a "brick-and-mortar" record store. *See* Servs. Ex. 62 (noting that people who listen to streams purchase the greatest number of CDs).

77. Even the record company witnesses recognize the promotional benefits of providing direct links to retail outlets where listeners can purchase music that they hear on the Internet. For example, Alligator Records, an independent record company, provides a jukebox on its website where visitors can listen to songs on-demand. 5/18/06 Tr. 202:6-203:5 (Iglauer). The website also provides a "buy button" next to the songs to entice visitors to purchase the songs they hear on the jukebox. 5/18/06 Tr. 205:1-7; Servs. Ex. 110.

C. SOUNDEXCHANGE DOES NOT SERIOUSLY DISPUTE THE PROMOTIONAL VALUE OF RADIO OR OF AM/FM STREAMING

78. In light of the fortune expended by record companies to get their music on radio, SoundExchange and the record companies do not make a serious attempt to dispute the promotional value of radio. Despite the massive size of the major labels' radio promotion departments, *see* PFF ¶¶ 52, 56-57, obvious importance to their core business, and obvious relevance to this proceeding, SoundExchange did not present a single executive involved in major label radio promotion with first-hand knowledge who could tell it like it is. Rather, they offered two active lawyers (Eisenberg and Kushner), and two e-business executives, one of whom is a lapsed lawyer (Kenswil and Bryan), and one accountant (Ciongoli). *See* Eisenberg WDT at 1-2; Kushner WDT at 1; Kenswil WDT at 1; Bryan WDT at 1; Ciongoli WRT at 1 (discussing their qualifications).

79. Those SoundExchange witnesses who discussed promotion stuck to the script—spins are not promotional, you need a coordinated program, and DJ support. *See, e.g.*, 6/5/06 Tr. 186:22-187:13 (Brynjolfsson) (discussing radio as "part of a broad . . . promotional marketing plan."); Pelcovits WDT at 49; 5/18/06 Tr. 146:5-16 (Brynjolfsson) (discussing whole coordinated campaign); 6/06/06 Tr. 29:4-11 (Ghuneim) (discussing coordinated promotion); *but cf.* 6/7/06 Tr. 249:9-19 (Kenswil) ("Universal promotions efforts frequently are directed to increasing the number of spins on radio.").

80. But whatever the validity of this position vis-à-vis Internet-only webcasting (and its validity is questionable), *AM/FM Streaming offers everything that the SoundExchange witnesses said was important to promotion*: The timing of the

performance, the context in which the performance is made, the DJ support and endorsement, and the value of the radio station brand, are all exactly the same on AM/FM Streaming as on the over-the-air broadcast. 7/26/06 Tr. 67:1-8, 190:9-12 (Halyburton) (the same value [of over-the-air play] is conferred to Internet streaming); Coryell WDT ¶40 ("the exact same music and DJ talk and endorsements are streamed and played over the air at the exact same time."). In other words, the AM/FM stream is every bit as much as the coordinated program as the over-the-air broadcast, with exactly the same impact.

81. SoundExchange also offers the broad opinion of Dr. Pelcovits, who relies upon a single academic article to express doubts about the promotional value of radio airplay. *See* Pelcovits WDT at 48-49; Pelcovits WRT at 18 (attaching article as SX Ex. 227 DP). Whatever else he is, Dr. Pelcovits is no expert on record promotion or the effect of radio on record sales. Moreover, a single article, pulled from the literature, with no opportunity to examine its underlying data and methodology or to cross-examine the author, deserves no weight, if it is admissible for the matter asserted at all.

82. In any event, the article does not even attempt to analyze radio promotion or record sales in the present day United States. Instead, it first examines the distant past (*i.e.,* the 1920s and '30s), when technology, radio and the recording industry, the use and presentation of music on radio – not to mention society and the alternatives available to consumers – were very different than they are today, with no control for these differences, and only passing recognition of somewhat significant intervening events such as the Great Depression and the advent of television. It then examines Great Britain

in the late 20th century, with no control for differences between the U.S. and U.K. *See* SX Ex. 227 DP.

83. Dr. Pelcovits also argues that, while radio play may sell individual recordings, that "does not mean that, overall, radio play increases the sale of recorded music." Pelcovits WDT at 49. Again, Dr. Pelcovits has no qualifications to opine on this issue. To the extent he does, he acknowledged on cross-examination that "from the standpoint of an individual record company, its concern would be with whether the airplay of its records increased their sales," not on the overall impact on the recording industry. 5/15/06 Tr. 208:16-209:11 (Pelcovits). Of course, under the applicable statutory standard here, the issue is not what effect radio promotion has on the overall sales of sound recordings. Rather, the relevant question is how it would affect competing willing sellers. Where there is competition among record companies, the record companies' own conduct is the best evidence of that.

D. DR. BRYNJOLFSSON'S SUGGESTION THAT MARKET DEALS CAN BETTER ACCOMMODATE AM/FM STREAMING'S PROMOTIONAL VALUE THAN A RATE ADJUSTMENT IGNORES REALITY AND THE LAW.

84. Dr. Brynjolfsson suggests that webcasters and record companies can sit down together and make deals to accommodate the promotional value of webcasting. Brynjolfsson WDT at 55; Brynjolfsson WRT at 38. He testified that he contemplated a world in which the record companies could offer T-shirts, discounts or other consideration. 11/21/06 Tr. 209:11-210:3 (Brynjolfsson).

85. Dr. Brynjolfsson's ideal world is defective for at least two reasons. First, it ignores the statutory mandate of section 114, which obligates the Copyright Royalty

Judges to "base [their] decision" on factors including promotional value. 17 U.S.C. § 114(f)(2)B). Indeed, it is absurd to think that Congress intended in section 114 to cause record companies and radio stations to sit down and negotiate deals over what is played on the air (and thus in an AM/FM stream), in light of its consistent efforts to prohibit just such activity. *See* 47 U.S.C. §§ 317, 508 (prohibiting undisclosed receipt of valuable consideration by radio station or employee in order to influence music played on the air); *cf.* http://www.oag.state.ny.us/press/2006/mar/Entercom.pdf (Complaint brought by N.Y. Attorney General against broadcaster alleging fraud and deceptive practices for allowing record companies to influence what is played on their stations through direct payment or in-kind contributions, despite disclosure).

86. Second, Dr. Brynjolfsson conceded that he had not investigated whether, in the case of AM/FM Streaming, the law would permit such an exchange for consideration, in light of the fact that granting consideration for play on AM/FM Streaming would also affect what is played over the air. As Dr. Brynjolfsson testified "I don't know for sure. I think the complexity has to do with the over the air part which I think there are some laws about. I think that there is more flexibility for webcasting, but I haven't read all the relevant statutes in order to know exactly what part would be permissible and what part wouldn't be." 11/21/06 Tr. 213:19-214:7 (Brynjolfsson).

E. THERE IS NO EVIDENCE THAT AM/FM STREAMING DISPLACES RECORD SALES.

87. In contrast to this overwhelming evidence that AM/FM Streaming promotes record sales, there is no evidence to support any claim that AM/FM Streaming substitutes for record sales. Although some record company witnesses expressed vague

fears that Internet-only streaming might some day in the future displace record sales, they acknowledged that since AM/FM Streaming is identical to terrestrial radio, it creates no meaningful risks. Servs. Ex. 42 ([[

]]). 5/11/06 Tr. 302:16-304:6 (Eisenberg) (distinguishing between webcaster-originated programming and radio simulcasting from a substitutional standpoint).

88. Among other things, AM/FM Streaming contains all of the attributes of over-the-air radio that discourage copying, including commercials, news and weather, audio logos, and DJ segues. *See e.g.*, PFF ¶¶ 153, 182; 7/26/06 Tr. 175:4-13 (Halyburton) (the AM/FM stream contains commercial advertisements and public service announcements).

89. Additionally, the vast majority of AM/FM Streaming is not streamed to listeners at bitrates with anywhere near CD-quality sound. The sound quality of most AM/FM Streaming music is far inferior to the sound quality of a CD. 5/2/06 Tr. 278:6-279:10 (Griffin). As SoundExchange witness James Griffin explained, 128 kilobites per second (kbps) is considered to be CD quality, yet the quality of FM transmissions is only 32-56 kbps and AM transmissions stream at only 24 kbps. *Id.* 279:7-10, 280:7-13.

90. The vast majority of AM/FM simulcasters stream predominantly at bitrates between 24 and 32 kilobits per second. 5/3/06 Tr. 141:4-12 (Griffin). Although

sound quality at different bitrates varies depending on the codec employed, 32 kbps is generally considered "FM quality" sound and CD quality sound is not reached until around 128 kbps. 5/3/06 Tr. 141:4-12; 5/2/06 Tr. 278:6-280:13 (Griffin).

91. Further, part of the encoding process, required so that the audio can be feasibly transmitted over the Internet via streaming, involves compressing audio files. Compression necessarily results in a degradation of sound quality. *See* Zittrain WDT ¶ 15. Different degrees of compression may be employed. The greater the compression, the less bandwidth must be used to stream the compressed file – and the greater the degradation in sound quality. *See* Zittrain WDT ¶ 15; 5/2/06 Tr. 30:20-31:3 (Griffin).

92. Because of the low quality of the stream, it is highly unlikely that AM/FM Streaming will substitute for CD sales. 5/8/06 Tr. 226:4-7, 245:14-22 (Brynjolfsson) (asserting that streaming at lower bitrates is less likely to be substitutional of CD sales). Moreover, in a competitive market, a willing seller would be likely to charge a lower price for a lower bitrate stream. 5/8/06 Tr. 225:21-226:3 (Brynjolfsson). Indeed, the record companies consider sound quality as a factor when entering into voluntary licensing deals and charge lower rates for lower quality streams. 5/11/06 Tr. 39:8-40:11, 20:21-51:14 (Eisenberg) ("[T]o the extent a distributor wants to have high fidelity, high quality files, they'll pay more for that. If they're not willing to or don't really care about the fidelity to their end user, we can cap that by contract in the agreement so that they can't stream or provide files in a high quality fashion and that's reflected, again, in the wholesale pricing and typically in the retail pricing as well.").

93. Although the specter of stream ripping was raised frequently by SoundExchange witnesses, they could present nothing beyond anecdotal speculation that AM/FM Streaming under the statutory license might some day cause displacement. *See, e.g.,* 5/11/06 Tr. 184:3-187:19 (Eisenberg) (not aware of any studies analyzing or quantifying the extent to which stream-ripping software may be used); 6/6/06 Tr. 71:14-19 (Ghuneim); 6/7/06 Tr. 90:3-8 (Kenswil); 6/5/06 Tr. 95:11-96:6 (Bryan) (not aware of any studies concluding that webcasting substitutes for CD sales); 6/12/06 Tr. 150:4-153:13 (Kushner) (stating that he has no basis other than anecdotal evidence that digital piracy is related to radio simulcasting). No record company witness could offer anything approaching meaningful quantitative evidence. *Id.*; *see also* 6/6/06 Tr. 72:13-73:19 (Ghuneim) (stating that he has not done any studies to determine whether streaming listeners purchase the music they hear on the stream); 5/15/06 Tr. 90:12-19 (Pelcovits) (no empirical evidence of substitution); 5/11/06 Tr. 187:20-188:11 (Eisenberg) (cannot quantify how many lost CD sales were attributable to stream capture).

94. SoundExchange's witness James Griffin also could not quantify the use of stream-ripping software. He testified that there were at least three million downloads of stream-ripping software from download.com, 5/2/06 Tr. 112:14-22, but he admitted that this number included downloads of trial software with limited functionality, and he did not know how many trial downloads actually resulted in the purchase of a fully functional product. 5/3/06 Tr. 182:7-15 (Griffin). Mr. Griffin also testified that, of the three million downloads, many of the products were not specifically designed to capture a stream. 5/3/06 Tr. 184:21-185:9 (Griffin). Further, Mr. Griffin could not quantify how frequently people use devices to download streams. 5/3/06 Tr. 82:22-83:4.

95. As DiMA witness Roger Nebel testified, segues and talk-overs, as well as the quality generally, would be factors in discouraging recording from radio broadcast. 11/7/06 Tr. 151:8-21 (Nebel).

96. In any event, copyright owners have recourse against any displacement caused by illegal copying – record companies have litigated and will continue to litigate to shut down such activities. *See* Fisher 2001 Tr. 3841-43.

97. It goes without saying that such anecdotal and subjective beliefs, without more, cannot form the basis of a determination of the actual facts influencing a competitive market. Jaffe 2001 Tr. 12737-41; Jaffe 2001 WRT at 49.

98. Moreover, the evidence shows that people who stream frequently buy significantly more CDs than the general population. Servs. Ex. 62 at 14 ("Some have mistakenly equated the rise of streaming audio with a decrease in record purchase. However, the data show that the more active Streamies (those streaming in the last month and last week) were also the group that purchased the greatest number of CDs in the past year. The average American purchased 13 CDs in the past year while those that have ever streamed have purchased 15 CDs. Monthly Streamies report that they bought an average of 18 CDs, and weekly Streamies say they have purchase nearly 21 CDs in the past year.").

99. SoundExchange's record company witnesses make much of the decline in CD sales over recent years, but there is no evidence that the decline is attributable to AM/FM Streaming. Other factors – including peer-to-peer file sharing, routine fluctuations in releases by superstar artists, and competition from other forms of

entertainment such as DVDs and video games – have contributed to the decline. *See* JPFF Part I.B.; 5/11/06 Tr. 182:9-14 (Eisenberg) (stating that peer-to-peer file-sharing is a major factor in decline of CD sales); 5/18/06 Tr. 24:20-25:15 (Brynjolffson) (recognizing that the record industry blames the drop in CD sales on peer-to-peer file sharing). The record label witnesses could provide no evidence that AM/FM Streaming has contributed to the decline in CD sales. 5/11/06 Tr. 183:9-184:2 (Eisenberg) (not aware of any study correlating a connection between decrease in CD sales and Internet radio).

100. If displacement from AM/FM Streaming were a legitimate fear of record companies, presumably they would decrease their active promotional efforts to radio stations that provide AM/FM Streaming. But they do not do so. *See* 6/12/06 Tr. 106:20-107:3, 142: 17-22 (Kushner) (stating that promotional expenditures have not changed since the advent of webcasting and that "Atlantic promotes airplay irrespective of whether that terrestrial radio station Simulcasts its program or not.").

V. THE SIGNIFICANT CREATIVE AND TECHNOLOGICAL CONTRIBUTIONS BY RADIO BROADCASTERS TO THEIR PROGRAMMING – AS WELL THEIR CAPITAL INVESTMENTS, COST, AND RISK – POINT TOWARD A LOWER SOUND RECORDING PERFORMANCE ROYALTY.

A. THE STATUTE REQUIRES CONSIDERATION OF THE RELATIVE CREATIVE AND TECHNICAL CONTRIBUTIONS, AS WELL AS INVESTMENT, COST, AND RISK

101. The statutory license at issue in this proceeding specifically requires that the Judges consider "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)(ii).

B. ON THE MARGIN, RADIO BROADCASTERS MAKE SIGNIFICANT TECHNICAL AND FINANCIAL CONTRIBUTIONS AND INCUR RISK RELATED TO AM/FM STREAMING; THE RECORD COMPANIES DO NOT

102. The webcasting market is ancillary for both the radio industry and the record industry. *See* PFF Part VI.A, *infra*; JPFF Part II.C. Radio Broadcasters focus principally on their over-the-air operations, and record labels focus principally on the sale and distribution of sound recordings through other channels. Both industries repurpose their already-existing content for streaming. But only Radio Broadcasters incur additional costs and risks and make additional contributions that relate only to AM/FM Streaming. Record labels, in contrast, make no marginal investments in webcasting beyond those they already make for their principal business. These disparate marginal contributions weigh in favor of a lower royalty rate for Radio Broadcasters.

1. There Is No Evidence that Record Companies Make any Marginal Creative Contributions, Technological Contributions, Capital Investments, or incur Cost, or Risk in Connection with AM/FM Streaming.

103. The record is entirely devoid of evidence that the record labels engage in any "creative contribution, technological contribution, capital investments, cost, [or] risk" related to webcasting or AM/FM Streaming. As Mr. Kushner testified, the investments that the record companies make in the value chain of music are expenses that they would incur "if webcasting disappeared from the planet." 6/12/06 Tr. 134:17-135:3 (Kushner). In other words, record companies make no marginal contributions to AM/FM Streaming

and incur no marginal cost or risk that they would not otherwise incur. *See* Jaffe WRT at 28-29.

104. The concept of zero marginal cost was explained by Dr. Jaffe. "[I]t costs something originally to create a sound recording . . . . But once it's been made, it doesn't cost SoundExchange effectively anything. There may be certain small transfer costs but in general it doesn't really cost anything to make that available to another user, for example, webcaster in contrast to, for example, shoes and tires and chairs, things that to give one more to one more person there's a cost. You need to make that additional chair or that additional shoe and intellectual property is different in that regard." 6/28/06 Tr. 22:7-22 (Jaffe).

105. Record labels similarly make no creative contributions to webcasting or AM/FM Streaming. Any creativity involved with the music that is played on Radio Broadcasters' streams cannot be classified as a contribution to webcasting.

106. Similarly, there is no evidence that record labels make any webcasting-specific technological contributions or capital contributions, or run any risk. As labels are not the ones who actually engage in the streaming, and they have not contributed technology to it. Nor is there any credible evidence of a risk of substitution. *See* PFF Part IV.E, *infra.*

107. The labels do not even incur any significant additional costs as a result of their participation in AM/FM Streaming. Dr. Brynjolfsson admitted as much: "The first marginal costs are close to zero." 5/8/06 Tr. 305:3-19 (Brynjolfsson). There is no cost of distribution, as Radio Broadcasters already receive the music they play for over-the-air

use. *See* Parsons WRT ¶¶ 10-11. And there is no cost involved in record labels' compliance with the statutory license. Mr. Kushner testified that Atlantic's expenditures have not "changed or increased because of the advent of webcasting." 6/12/06 Tr. 107:4-112:16 (Kushner).

2. Radio Broadcasters Make Significant Technological and Financial Contributions Specific To Streaming.

108. On the other hand, Radio Broadcasters make technological contributions to webcasting that they would not otherwise make if they were not engaged in AM/FM Streaming. For example, requires processes such as ripping, encoding, interleaving and streaming, but also developing software algorithms that control various aspects of programming. *See* Zittrain 2001 Tr. 6041:11-6063:6.

109. Radio Broadcasters often start from promotional copies of CDs and digital files provided by the record companies. Parsons WRT ¶¶ 10-11; RBX 27, Tab B ¶¶ 6-10. The CDs are converted to files in "codec" formats amenable to streaming in a process known as "encoding." *See* Zittrain 2001 WDT ¶¶ 10-17; Zittrain 2001 Tr. 6034:17-6040:19.

110. Radio Broadcasters also expend considerable resources in developing dynamically referenced links, *i.e.*, links that relate to and shift with the particular sound recording being played at any particular moment. Such links include, for example, "buy" buttons, album art, video, lists of songs previously played, and links to artist information. *See* Halyburton WDT ¶ 39; Coryell WDT ¶¶ 41-43 ("Our websites and streaming windows contain prominent links to purchase the music being played on the radio."); 11/14/06 Tr. 131:9-132:7 (Parsons) (describing technology used to capture album

information); Parsons WDT ¶¶ 34, 38, 40 ("Clear Channel stations also strongly support e-commerce by providing direct links to retail sites such as amazon.com, so listeners can purchase music online."); Fine WDT ¶ 34; Fine 2001 Tr. 5719:10-21; 7/27/06 Tr. 247:20-248:16 (Coryell).

111. Radio Broadcasters have developed or been required to acquire sophisticated technology for in-stream advertising insertion, as over-the-air advertisements must be replaced with advertisements specifically made for the streaming audience. *See* Parsons WDT ¶ 18; 7/27/06 Tr. 82:15-20 (Coryell); 7/26/06 Tr. 47:5-11, 178:1-180:11 (Halyburton).

112. Radio Broadcasters also make significant capital investments in AM/FM Streamlining services, whereas the record companies make none. Radio Broadcasters must buy computer equipment and software necessary to operate an AM/FM Streaming service. *See* Halyburton WDT ¶ 41; Parsons WDT ¶¶ 17, 41; 5/8/06 Tr. 69:22-70:7 (Brynjolfsson).

113. Servers and software alone can impose a start-up cost of $5000. Parsons WDT ¶ 41. Though there are many different ways to stream audio to an end-user, *see* Nebel WRT ¶ 6, each method imposes significant startup costs on a Radio Broadcaster. Radio Broadcasters cannot rely on free software and "off-the-shelf" hardware to run a large-scale webcasting business. *See* Parsons WDT ¶ 40; Zittrain WDT ¶ 18.

3. Radio Broadcasters Incur Significant Operating Costs to Provide AM/FM Streaming.

114. Unlike the record labels, Radio Broadcasters incur substantial operating costs that are specifically attributable to their AM/FM Streaming operations. Radio Broadcasters spend large sums on bandwidth, storage, employment of high-tech personnel, software licensing, and other aspects of running their business. *See* Halyburton WDT ¶¶ 18-9; Coryell WDT ¶¶ 25, 27-28; Parsons WDT ¶¶ 1(B), 14-15, 40; RBX 2; RBX 10; RBX 22; 7/27/06 Tr. 26:3-8, 93:6-94:1, 95:7-97:13, 107:14-21 (Coryell); 7/31/06 Tr. 20:5-12 (Parsons).

115. Bandwidth is a substantial part of the cost of running a webcasting operation. *See* Parsons WDT ¶¶ 1(B), 14-15; Coryell WDT ¶¶ 25, 27-29; RBX 2; RBX 10; RBX 22; 7/27/06 Tr. 25:16-26:18, 93:6-94:1, 95:7-97:13, 107:14-21 (Coryell). For example, a "reasonably popular station" incurs approximately [[ ]] per month in bandwidth costs. *See* Halyburton WDT ¶¶ 18-19. And although bandwidth costs are usually paid on a continuing basis, a term contract is required up-front. Parsons WDT ¶ 41. Radio Broadcasters would not incur these bandwidth costs but for their participation in AM/FM Streaming.

116. Radio Broadcasters also devote significant resources to displaying sound recording information on the player, as required by the 17 U.S.C. § 114 statutory license. *See* 7/27/06 Tr. 74:16-75:3 (Coryell). This information is often not included on CDs or provided by record companies. Parsons WRT ¶¶ 10.

117. Of course, sound recording performance royalties are another enormous operating expense that Radio Broadcasters would not incur if they did not engage in

AM/FM Streaming. Halyburton WDT ¶¶ 18, 19; Coryell WDT ¶¶ 17-19, 24, 26; Parsons WDT ¶¶ 1, 14-15, 22-23; RBX 2; RBX 10; RBX 22; 7/26/06 Tr. 43:22-45:3 (Halyburton); 7/27/06 Tr. 93:6-95:6 (Coryell); 7/31/06 Tr. 19:18-20:4 (Parsons).

4. Radio Broadcasters Continue To Face Substantial Risks Related to AM/FM Streaming.

118. There is significant risk inherent in AM/FM Streaming for Radio Broadcasters. There is, of course, the risk that losses from streaming will cut into Radio Broadcasters' overall revenues, making their business less profitable.

119. It has been difficult for Radio Broadcasters to sell advertising given the small AM/FM Streaming audiences, and consequently "prices for streaming ads are dramatically lower than their terrestrial counterparts." Halyburton WDT ¶¶ 15-17; Coryell WDT ¶¶ 19-23; Parsons WDT ¶¶ 20-21; 7/27/06 Tr. 88:20-89:16, 90:18-91:1, 110:17-111:9 (Coryell). Because of the small audience size for Radio Broadcasters' simulcasts, advertisers are not interested in placing ads in simulcast streams. Halyburton WDT ¶ 15. Significant evidence exists in the record to indicate that as a whole, Radio Broadcasters have consistently been losing money in their streaming operations. *See* PFF Part X.C.2, *infra.*

120. The more Radio Broadcasters lose money on streaming, the more it cuts into the profits of their principal over-the-air business. *See* Coryell WDT ¶¶ 4 ("Unless the rates are significantly reduced in the near future, it is very probable that my stations will cease to provide music content over the Internet."), 35 ("it wouldn't take much more than a continuation of the current situation for us to [go off the Internet] again"); Parsons WDT ¶ 1(B), 8, 52. In fact, Mr. Coryell accurately characterized the risk inherent in

streaming for Radio Broadcasters when he said, "I believe if we were to terminate streaming and reallocate those resources, both the resources that we put into costs and things like my time, we would make more money." 7/27/06 Tr. 33:18-21 (Coryell).

121. What is more, Radio Broadcasters alone bear the risk of alienating their core listenership by offering streaming but then being forced to stop because of high costs. This risk is great because simulcast listeners are among the station's most loyal, so it would be "much better not to start in the first place" than to begin streaming and then stop. Parsons WDT ¶ 42. "[O]nce you start streaming with a company like Susquehanna and you've been doing it for quite a long time, nobody likes to have anything taken away from them." 7/26/06 Tr. 52:8-11 (Halyburton). Thus, if Radio Broadcasters are forced out of the AM/FM Streaming business by excessive royalties, they may suffer real harm to their primary broadcast business.

C. IN CREATING THEIR BROADCAST PRODUCTS FOR OTHER USES, RADIO BROADCASTERS' CREATIVE CONTRIBUTIONS ARE AT LEAST AS GREAT AS THOSE OF THE RECORD LABELS IN CREATING THEIR SOUND RECORDINGS.

122. To the extent the Judges consider whatever creative contributions the record labels make in the initial creation of their sound recordings, they should likewise consider the equally formidable creative contributions of Radio Broadcasters in the creation of their radio programming. If one looks beyond the margin to contributions that would be incurred regardless of webcasting, Radio Broadcasters are the best in the world at creating comprehensive, compelling, and entertaining audio programming. That programming is transmitted exactly over their Internet simulcasts.

1. Radio Broadcasters' Product Requires the Creation of a Package of Compelling Audio Content

123. Radio is an exceptionally creative business. "[W]hat we do as radio broadcasters, we are storytellers and we are editors and we are facilitators of saving time. We create an entertainment product using a palette of different ingredients, including personalities, including radio production, including clever writing, including jingles, certainly including music, including traffic reports, weather reports, your favorite DJ in the morning, and what have you." 7/27/06 Tr. 29:13-30:1 (Coryell). Radio Broadcasters incorporate a vast number of inputs and features into their product, and the result is a highly creative, highly compelling product that adds immeasurable value to the sound recordings it incorporates. *See* PFF Part IV.B.

124. Radio Broadcasters are in the business of creating quality audio programming. To succeed in those efforts, they must create a station with a particular mood and develop a complete entertainment experience. Unlike many Internet-only webcasts, radio programming features much more than just music, and it is these non-music elements that define the success and entertainment value of the station. "An imitator could copy the playlist of one of [a Radio Broadcaster's] stations and transmit the same music on an Internet-only webcast, but without the creative contributions that radio stations specialize in, it will not have nearly the same value." Halyburton WDT ¶ 42. *See also* Parsons WDT ¶ 37 ("It is not enough to simply play songs in any order in the format of the station"); Halyburton WDT ¶ 42; Meehan WRT ¶ 7; 7/27/06 Tr. 78:17-81:22, 267:9-268:1 (Coryell) ("Radio's future is in real people creating content, telling stories for communities who share an affinity, whether that's love for the blues or

residents in the Bay Area or an interest in news. Radio is about humanizing, personalizing, and localizing that affinity of information for our listeners. (quoting blog entry"); 6/6/06 Tr. 93:9-95:5 (Ghuneim) (describing contextualization provided by DJs); 11/13/06 Tr. 114:3-115:3 (Meehan).

125. The importance of non-music creative content was made clear in three experiences related by Mr. Halyburton, Mr. Coryell, and Mr. Meehan, in which the success of a radio station was determined not by the music it played, but by the non-music creative contributions of the radio station. Mr. Coryell was working at KOIT in San Francisco, and a nearby station seeking to compete with KOIT "record[ed] every song that we played on KOIT, song by song, and duplicate[d] that exact list." 7/27/06 Tr. 80:8-81:1 (Coryell). The competitor then implemented the same play list and had a strong signal, but "[t]hey never affected [KOIT's] ratings in any way. They never had any great success. They went away." 7/27/06 Tr. 81:2-12 (Coryell). "The reason that they couldn't duplicate [KOIT's] success was because you can't duplicate a successful radio station and the relationship that it has with its listeners and with its community and its history and its brand, and all of the thinking and blood, sweat, and tears that goes into creating that entertainment product . . . ." 7/27/06 Tr. 81:13-22 (Coryell).

126. Similarly, when Halyburton was at KPLX in Dallas, his station was playing the exact same songs as another station in the city, but was getting worse ratings. "We decided to reintroduce the radio station. We put all new disc jockeys on it, new imaging, brought this kind of Texas flavor to it, called The Wolf, and you know, the radio station, where it had been in a – been behind, playing the same music the other guy's

playing, kind of moved up and caught up to them and then surpassed this other station substantially. . . . So you know, radio stations are always doing a lot of things to try to drive their ratings and their listenership up. And most of those things have little to do with the music they play and mostly to do with other elements of the radio station." 7/26/06 Tr. 68:17-70:19 (Halyburton).

127. Mr. Meehan too testified that the strategy of competing with a radio station by copying its playlist is ineffective. He told the story of WPLJ in New York, a successful radio station that was challenged by a competitor. "And the way they intended to do that was to copy the playlist that WPLJ had." When the plan consists of nothing but copying another station's playlist, the result, according to Mr. Meehan, is "total failure." Thus it is clear that the success of a radio station is tied more to the non-music creative contributions of the station than to the music it plays. 11/13/06 Tr. 114:3-115:3 (Meehan).

2. Radio Broadcasters Employ Program Directors Who Determine the Creative Focus for a Station.

128. The creativity necessary to manage a successful radio station principally comes from the program directors. Radio Broadcasters employ these audio craftsmen to program their over-the-air stations in an order and mix most pleasing to the listeners. *See* Halyburton WDT ¶ 42 (programming directors "immeasurably increase the promotional value of the radio transmission of music, whether it is on-air or online"); Parsons WDT ¶¶ 36-37. It is clear that "[r]adio employs the best people in the world at selecting and presenting both music and talk as part of a usage-driven product." Coryell WDT ¶ 44.

129. Program Directors "craft[] a balance between various styles of songs within [the] format" and "create a compelling image and brand for the radio station to increase the experience for radio listeners." Parsons WDT ¶ 37. They "listen to way too many bad songs in a given day that the record companies want[] [them] to play and find the right ones that would appeal to [their] specific listeners" and "find that brilliant morning talent who could make you feel, when she was talking to you in the morning, that you were in the next seat and she was talking to you, and tell you the things that you need[] to know about your community." 7/27/06 Tr. 79:1-17 (Coryell).

130. The result is a compelling, creative product that has an uncanny ability to make people keep coming back for more. "People develop loyal relationships with their favorite radio stations because of all of the personality, information, and interactive potential beyond the music that radio provides." Halyburton WDT ¶ 42.

131. Mr. Coryell was referring to the creative contributions of program directors when he said, "Unlike someone who has to fiddle with his iPod in order to be entertained, a radio listener can lean back and let someone else do the work of selecting and presenting the entertainment – often new or unfamiliar content that the record companies want to promote. Rather than a mere string of songs, radio presents a unified, artistic product." Coryell WDT ¶ 44.

3. On-Air Talent Add Significant Creative Contributions To The Content That Is Aired On The Radio.

132. Every bit as important in terms of their creative contribution, on-air talent, including non-music personalities and the talent known popularly as disc jockeys or DJs, provide a constant flow of creativity that buttresses, promotes, and enhances the

music and other content included in radio programming. *See* 11/13/06 Tr. 113:11-22 (Meehan) (defining the term "on-air talent"). On air talent "engage the audience, which is a vital element to the success of over-the-air, and therefore simulcast, programming." Parsons WDT ¶ 36.

133. Radio Broadcasters' dynamic on-air talent and personalities engage the audience and provide reviews and recommendations. They conduct contests, giveaways, and listener call-ins, which allow the listeners to interact with the stations and musicians. They provide news, traffic, weather, community affairs information, on-site broadcasts from local businesses, and charity drives, all of which provide essential information and drives home the local flavor of the radio programming that is difficult to replicate elsewhere. DJs build large, loyal followings. 7/26/06 Tr. 31:20-32:14 (Halyburton). They might even enhance the audience's experience with the music the station plays by hosting artists in the studio or over the phone, making announcements about artists coming to town for album signings or tour dates, and providing information regarding ticketing. *See* Halyburton WDT ¶ 42; Parsons WDT ¶¶ 36; Meehan WRT ¶ 7; Mandelbrot WDT ¶ 16; 5/11/06 Tr. 300:21-301:11 (Eisenberg); 6/6/06 Tr. 93:9-95:5, 98:15-99:6 (Ghuneim); 6/5/06 Tr. 329:1-330:2 (Ghuneim); 11/13/06 Tr. 112:3-113:22 (Meehan).

134. One particular creative contribution to the value of the programming that DJs provide is the direct promotion of record sales. DJs make recommendations and provide information regarding what a particular band is doing and when they will be in town. Mr. Ghuneim, who was offered by SoundExchange as an expert on promotion,

waxed eloquent about the impact DJs can have on record sales through their creative contributions: "'I love that song. These guys are coming to town next week. They're going to stop by the studio. They're playing our show.' Those type of like almost DJ personal endorsement-type things that really bring – like personalize the record for a regional audience." 6/6/06 Tr. 94:1-7 (Ghuneim). DJs can also deliver to the audience information that is vital to promotion, like how to find a band's website. 6/6/06 Tr. 98:15-99:11 (Ghuneim). *See also* 5/18/06 Tr. 250:19-251:10 (Iglauer); 7/26/06 Tr. 31:20-32:14 (Halyburton) (describing the promotional clout of DJ Funkmaster Flex).

4. Radio Broadcasters' Websites Are Significant Creative Contributions To The Listening Experience, Whether Over-The-Air Or Online.

135. Radio Broadcasters also use their creativity to enhance the listener experience, whether it be over-the-air or online, by providing multi-faceted, multimedia entertainment websites. Radio station websites, which often have numerous sections and pages, are intended as a textual and graphical extension of the radio listening experience, enhancing the on air content in many ways. *See* Halyburton WDT ¶¶ 38-40; Parsons WDT ¶¶ 13, 33-34, 38; 5/3/06 Tr. 141:17-145:3 (Griffin); 7/26/06 Tr. 50:21-51:19 (Halyburton); 7/31/06 Tr. 11:2-13:18 (Parsons).

136. Radio Broadcasters' websites enhance the entertainment experience by presenting news, weather, sports, photo galleries of station events, biographies on artists and station personalities, links to online CD and download stores, listings of concerts, venues, station events, local events pages, lifestyle articles, classified ads, loyal listener clubs, contests, games, and local guides to weddings, restaurants, real estate, and other

businesses. *See* Parsons ¶ 13; 5/3/06 Tr. 141:17-145:3 (Griffin); 7/31/06 Tr. 11:2-13:18 (Parsons); 7/26/06 Tr. 11:13-21, 50:21-51:19 (Halyburton). These creative features contribute immeasurably to the bond that a local Radio Broadcaster forms with its listening audience.

137. Mr. Parsons indicated that a typical Clear Channel station website will include "news, sports, weather, photo galleries, playlist information for the radio station if it's a music formatted station. Picture upload capability where a radio station listener can come to the website and upload their picture and get ratings from other radio station listeners. Content such as Stripped, Sneak Peak, In Concert, and New, and streaming. Some have e-commerce capabilities and online guides for the local marketplace such as wedding guides or real estate guides. Mortgage company guides, electronic classified[s] that cater to the local market." 7/31/06 Tr. 11:4-19 (Parsons). Each of these features is an individual work of creativity that adds to or enhances the other content available from the radio station.

138. Mr. Halyburton testified similarly as to how a good radio station website will improve the listener's relationship with the station, and thus improve the listening experience: "The websites are very popular for the radio stations because they're a place to find out information about things that are going on at the station. So we can tell you hey, we're going to be out with the van this afternoon and we're going to be in your neighborhood, so go to the website and check it out." 7/26/06 Tr. 50:21-51:10 (Halyburton).

139. And the Radio Broadcaster websites are popular because of the local content included therein; not because they contain links to the stream. "The people can come to our website because they hear about it on the terrestrial radio. They can come to our website because it is their favorite website. We turned off the streaming at one point in 2001, and we still had websites with ads on them. You know, there's really no relationship at all there. . . . The website serves all of our customers, serves our advertisers, serves our listeners, serves as a place for us to put the morning guys' trivia question that they might miss because in the course of their commute they get out of the car five minutes before he gives them the answer. So it is, in many respects, it is an electronic magazine that we create and produce to serve our radio listeners." 7/27/06 Tr. 212:16-213:20 (Coryell).

140. In sum, all of these creative contributions by Radio Broadcasters add significant value to the programming beyond merely playing songs by enhancing the artists' connections to the local community. Such contributions allow "[p]eople [to] develop loyal relationships with their favorite radio stations. . . ." Halyburton WDT ¶ 42. *See also* Parsons WDT ¶ 13 (specially created materials "enhance the listener's relationship with the station"). None of this evidence of Radio Broadcasters' creative contributions was challenged by any of SoundExchange's witnesses; on the contrary, as pointed out above, they often acknowledged the value added by Radio Broadcasters. In light of the statutory mandate to consider creative contributions, the evidence weighs in favor of a lower royalty rate.

VI. IN A COMPETITIVE MARKET, THE SOUND RECORDING LICENSE FEES FOR AM/FM STREAMING WOULD BE LOWER THAN THOSE FOR INTERNET-ONLY WEBCASTING DUE ITS UNIQUE CHARACTERISTICS.

141. As Professor Jaffe testified:

> There are a range of different types of streamers including commercial webcasters and radio simulcasters as well as non-commercial streamers. There is no a priori reason that a single price for sound recording performances should apply uniformly to all services. Distinctions regarding the fees for different types of streamers should be made on the basis of the conclusion that the competitive market value of the sound recording is different in different contexts.

Jaffe WRT at 37.

142. Professor Jaffe further made clear that "[e]conomic forces that differ across different types of streamers drive their marketplace negotiations." Jaffe WRT at 38. He enumerated several such economic forces affecting the marketplace value of the performance right, including:

Jaffe WRT at 38.

143. The Copyright Act, of course, requires consideration of promotion and substitution. *See* JPCL Part II.B.1. Further, as record company documents demonstrate, the record companies agree with professor Jaffe that the promotional or substitutional effect of a service is an important licensing consideration. Servs. Ex. 41, at 2 ([[

]]); *id.* at 1

(stating that [[

]]).

The record company lawyers Eisenberg and Kenswil, viewing the world through "glass is half empty" litigation goggles, confirm that substitution (the flip side of promotion) is a factor. Eisenberg WDT at 7; 6/7/06 Tr. 83:21-84:4 (Kenswil).

144. SoundExchange's witnesses testified that, in addition, the degree of interactivity of a service bears upon the competitive market value for a sound recording performance license. "In general, the more interactive the service, the higher the rate that [Warner] receives." Bryan WDT at 13; Servs. Ex. 42 at 4 (Sony memo stating that [[ ]]); *see* 6/7/06 Tr. 84:14-85:5 (Kenswil) ("One of the factors in pricing is the degree of interactivity.").

145. Mr. Eisenberg further identified whether a service was free or required a subscription as relevant to the license fee that Sony would charge. Eisenberg WDT at 7; Servs. Ex. 41 at 1.

146. As discussed below, these are among the factors that differentiate AM/FM Streaming from Internet-only webcasting and lessen the competitive market value of the sound recording performance right at issue here. Specifically:

147. Moreover, different musical works performance rights agreements have been negotiated for AM/FM Streaming than those applicable to Internet-only webcasting. As Professor Jaffe testified, "if there is available evidence regarding the outcome of such musical work royalty negotiations for a given licensee or group of licensees, such contracts should provide good evidence of the reasonable rates and terms for the streaming of sound recordings for those different types of streamers." Jaffe WRT at 37-38.

148. In light of these differences, and the different musical works performance rights agreements applicable to these different types of services, competitive market price of the sound recording performance right would be significantly less for AM/FM Streaming than for Internet-only webcasting.

A. UNLIKE INTERNET ONLY WEBCASTERS, RADIO BROADCASTERS CAN REACH THEIR AUDIENCE AND CARRY ON THEIR CORE BUSINESS USING THEIR PRIMARY MEDIUM, FOR WHICH NO SOUND RECORDING FEE IS DUE.

149. Radio Broadcasters' core activity is over-the-air broadcasting. *See* Coryell WDT ¶ 9; Parsons WDT ¶ 11; 7/27/06 Tr. 27:8-28:16 (Coryell). As Roger Coryell of Bonneville San Francisco testified, "Radio stations that stream are differently situated from Internet-only webcasters. Our primary business is and always has been our terrestrial radio broadcast." Coryell WDT ¶ 9. Dan Halyburton, then of Susquehanna, likewise testified that "The core business of Susquehanna, like the rest of the radio industry, focuses on over-the-air broadcasting." Halyburton WDT ¶ 4.

150. Terrestrial radio is local in nature and design, and Radio Broadcasters program their channels with their terrestrial audience in mind. *See* Halyburton WDT ¶¶ 4, 5(C), 10 ("Radio has always been a local medium and continues to be so online."); Coryell WDT ¶¶ 9, 12, 14-16 ("Radio content is local. We feature local personalities, local news, local traffic, local weather reports, and local tastes in music. . . . Our local Program Directors have complete control over what gets played.").

151. Radio Broadcasters who simulcast their programming over the Internet are primarily interested in reaching their local audience in a different way and to enhance their appeal to their local listening audience. *See* Parsons WDT ¶¶ 1(D), 10-11 ("Clear Channel stations stream to serve their local over-the-air audience better."); 7/26/06 Tr. 34:4-35:21 (Halyburton) (testifying that Susquehanna's AM/FM Streaming was "all directed to the local listener") (Halyburton); 7/27/06 Tr. 87:1-88:19 (Coryell); 7/31/06 Tr.

39:17-40:9, 45:6-47:2 (Parsons); Fine 2001 WDT ¶ 28; 2001 Tr. 5746:5-5747:20 (Fine).

As Mr. Coryell testified:

> The streaming operation is really only an extension of the main broadcast operation, to help build brand loyalty. We stream because we want to be where our listeners are, in the hope that they will continue to listen to our over the air broadcasts also.

Coryell WDT ¶ 9; *see also* 7/27/06 Tr. 27:8-28:16 (Coryell). Dan Halyburton, then of Susquehanna, likewise stated that "Streaming is a supplemental activity that Susquehanna views as one of many ways to support its relationship with its local audiences, by giving them an additional means of accessing our stations at times during the day when they are not otherwise able to do so." Halyburton WDT ¶ 4; 7/26/06 Tr. 85:13-87:2 (Halyburton) (stating that AM/FM Streaming serves as "somewhat of a convenience factor" to enable people to listen at work via a computer rather than through a radio and/or through headphones connected to a computer).

152. The vast majority of AM/FM Streaming audiences are, in fact, local. Mr. Parsons testified that "an overwhelming majority of the listening is the existing over-the-air audience." 7/31/06 Tr. 45:19-46:2 (Parsons). Likewise, Mr. Coryell testified that, according to information provided by listeners to two of his three stations, roughly 85 percent of those stations' AM/FM Streaming listeners are local. *See* Coryell WDT ¶ 12; 7/27/06 Tr. 40:2-43:4 (Coryell); RBX 8. The locality of the audience is confirmed by the fact that AM/FM Streaming listenership is at its highest during the workday, and tails off during the morning and afternoon rush hours. *See* Coryell WDT ¶ 13; 7/27/06 Tr. 49:12-50:8, (Coryell) Parsons WDT ¶ 12; 7/27/06 Tr. 59:5-60:22 (Coryell); RBX Ex. 9.

153. With the possible exception of certain advertisements, listeners to a radio station's AM/FM Streaming signal hear the exact same locally targeted programming at the exact same time as the programming broadcast over the air to that station's terrestrial listeners. *See* Halyburton WDT ¶ 10 ("Simulcast programming is identical to its over-

the-air counterpart"); 7/27/06 Tr. 28:9-30:13 (Halyburton); Coryell WDT ¶ 40 ("[T]he exact same music and DJ talk and endorsements are streamed and played over the air at the exact same time."); Parsons WDT ¶ 11 ("Simulcasting merely transmits the over-the-air broadcast over the Internet"); 5/17/06 Tr. 239:16-241:8 (Simson) (agreeing that AM/FM Streaming listeners "would hear, barring a few ad substitutions perhaps, ... the same mix of entertainment and non-entertainment programming that a radio station puts together in compliance with its FCC license"); 5/17/06 Tr. 239:9-15 (Simson) (characterizing radio simulcasting as "where a radio [station] is transmitting a signal at the same time over the internet"); 6/5/06 Tr. 195:5-196:4 (Bryan) (agreeing that radio simulcasting "refer[s] to the simultaneous transmission of over-the-air terrestrial radio programming onto the internet minus some advertisements").

154. Radio Broadcasters are able to reach their core local listeners over the air without payment of any sound recording performance royalty. *See* 17 U.S.C. § 106(6) (confining sound recording public performance right to performances made via "digital audio transmission" and therefore excluding analog transmissions (emphasis added)); *id.* § 114(d)(1) (exempting digital over-the-air broadcast transmissions from sound recording digital performance right).

155. As Professor Jaffe testified, whether a service is able to reach its listeners through alternative means would impact the competitive market value of the sound recording performance right at issue here. Jaffe WRT at 38; *see also* Jaffe 2001 WRT at 41, 43-44. Because the great majority of AM/FM Streaming listeners are local and because Radio Broadcasters are able to reach those listeners over the air without payment

of any sound recording performance royalty, they would pay less for the sound recording performance right here at issue. Thus, the competitive market value to Radio Broadcasters of the performance right is less than the value to Internet-only webcasters, who are unable to reach their listeners through alternative means.

B. THE PROMOTIONAL VALUE TO THE RECORD COMPANIES AND ARTISTS OF AM/FM STREAMING IS BEYOND DISPUTE AND SOUNDEXCHANGE'S OWN TESTIMONY CONFIRMS THAT ITS PROMOTIONAL VALUE EXCEEDS THAT OF INTERNET-ONLY WEBCASTS.

156. As discussed elsewhere, AM/FM Streaming, like other forms of DMCA-compliant webcasting, is highly promotional of record sales. *See* PFF Part IV.B, *infra.* While SoundExchange argues that webcasting is not promotional, the very features that it claims are lacking in Internet-only webcasting, are precisely the features found in AM/FM Streaming, which is the same programming transmitted at the same time as that broadcast on a radio station over the air. Whatever the promotional value of Internet-only webcasting, the record is crystal clear that AM/FM Streaming is highly promotional and contains elements that render it more promotional of record sales than Internet-only webcasting. Conversely, AM/FM Streaming poses even less of a risk of substitution than Internet-only webcasting due to its broader programming characteristics, lower transmission rate, lack of any ability of the listener to control what is played, and greater degree of non-music programming elements. The Copyright Act requires the Judges to account for this greater promotional value and lower risk of substitution provided by AM/FM Streaming in setting a rate for this type of service.

1. Radio Simulcasts Are Even More Promotional of Record Sales than Internet-Only Webcasts.

157. SoundExchange attempts to rebut the claim that DMCA-compliant streaming is promotional by pointing to a number of characteristics that it claims Internet-only webcasting lacks. Those very characteristics are, however, present in AM/FM Streaming, including the hits-oriented nature of AM/FM Streaming programming, the pervasive DJ and radio station brand endorsements of artists and songs, and the coordination of the radio simulcast with the same promotional campaign activities as are coordinated with the over-the-air broadcast. Thus, whatever the promotional value of Internet-only webcasting, AM/FM Streaming is even more promotional, even under SoundExchange's view of the world.

a. The Hits-Oriented Nature of AM/FM Streaming Programming Makes It More Promotional of Record Sales, as Even SoundExchange's Own Witnesses Concede.

158. SoundExchange's own witnesses specifically recognize that smaller, hits-oriented playlists targeted to broad audiences, where songs are repeated more frequently, are more promotional than niche playlists. As SoundExchange witness Bruce Iglauer, the president of an independent record label, testified:

> We may make a physical single, a CD single for radio only to help the radio programmers concentrate on that one song, because just as with advertising, it's repeated impressions that cause people to remember a piece of music, and then hopefully buy it.

5/18/06 Tr. 150:5-153:13 (emphasis added). Similarly, Mark Ghuneim, the CEO of a company that promotes, distributes and markets music in the digital space, made clear that "the goal of a promotional campaign" is "targeted, focused exposure." *See* Ghuneim WDT at 1, 11-12. Warner Music Group witness Stephen Bryan likewise testified that

"there's literally at any given time a handful of tracks that we're trying to promote with very focused and comprehensive promotions." 6/5/06 Tr. 186:9-187:13 (Bryan).

159. Mainstream, focused playlists, where songs are repeated frequently, are precisely what is found on terrestrial radio. As Mr. Parsons testified, a typical radio station only has about 150-300 songs on its playlist, and "[t]he playlists change very slowly." 11/14/06 Tr. 111:10-114:3 (Parsons). A "song is usually on the playlist for about six to eight months depending on the format of the radio station and how much of a hit that song is." 11/14/06 Tr. 113:20-114:3 (Parsons).

160. SoundExchange's own witnesses agree that terrestrial radio playlists are shorter and repeat songs more often. For example, SoundExchange's Executive Director, John Simson, wrote in a SoundExchange newsletter that "webcasting is completely different from radio presenting a far greater variety of music, much of it not repeated with any regularity" and that FM radio "playlists are short" and "extremely homogenized." Servs. Ex. 96, at 3; *see also* 5/17/06 Tr. 298:16-302:1 (Simson) (admitting that terrestrial radio playlists are "more homogenized" than webcaster playlists). Similarly, Mr. Ghuneim acknowledged that "terrestrial radio is notoriously tight in their play lists." 6/5/06 Tr. 330:3-331:11 (Ghuneim); *see also* Ghuneim WDT at 11-12 (characterizing terrestrial music stations as having "very limited playlists"). And SoundExchange witness Jim Griffin agreed that "terrestrial radio plays less music and less variety of music than multi-channel, multi-genre Internet-only webcasters." 11/22/06 Tr. 229:14-18 (Griffin); 6/22/06 Tr. 11:21-13:2 (Frank) ("Traditional outlets such as radio have a finite air space, so they can't play every act").

161. Similarly, terrestrial radio programming is designed to appeal to a broader, more mainstream audience than Internet-only webcasting services, which typically transmit channels devoted specifically to every conceivable niche – *i.e.*, "narrowcasting." *See* 5/17/06 Tr. 298:16-302:1 (Simson) (admitting that terrestrial radio playlists are "more hit-oriented" than webcaster playlists), 11/22/06 Tr. 228:14-20 (agreeing that as to terrestrial radio and the music played on terrestrial radio, "in both cases it's broadcast, not narrowcasting."); *id.* at 229:4-13 (Griffin) (agreeing that "radio simulcasts are far less narrowcasts than multi-channel, multi-genre, Internet-only webcasters").

162. In short, as Mr. Simson acknowledged, "Radio is definitely different than webcasting." 5/17/06 Tr. 301:22-302:1 (Simson). Given that the same programming is heard at the same time on AM/FM Streaming as that transmitted over the air, AM/FM Streaming exhibits the same mainstream, hits-oriented character that SoundExchange's own witnesses have agreed is promotional. *See* PFF ¶ 69.

b. Radio DJ Endorsements of Artists and Sound Recordings, Not Typically Found on Internet-Only Webcasts, Further Enhance the Promotional Value of AM/FM Streaming.

163. AM/FM Streaming also includes DJ promotional endorsements of artists and songs not typically included in Internet-only webcasting. Indeed, Mr. Halyburton identified disc jockeys as radio station employees "who immeasurably increase the promotional value of the radio transmission of music, whether it is on-air or online." Halyburton WDT ¶ 42. He further made clear that DJs have a lot to do with the promotional value of radio in that they talk "with passion about new artists and artists

that they like or a new song" and encourage listeners to buy it, which "really helps drive the popularity of the songs on . . . a radio station." 7/26/06 Tr. 61:17-66:16 (Halyburton). SoundExchange witness Mark Ghuneim likewise specifically identified "the DJ chatter talking about" and raising excitement about a particular band as an important promotional component of terrestrial radio not typically found on Internet-only webcasting. 6/5/06 Tr. 328:9-329:20 (Ghuneim). The importance of these personal endorsements are discussed at length above. *See* PFF ¶ 49.

164. In contrast, one major Internet-only webcaster witness made clear that while Internet-only services may employ DJs to determine play lists, they do not appear on air or make recommendations like DJs on terrestrial radio. As Christine Winston of America Online, Inc. testified, DJs on AOL "are not DJs in the way that you think of a DJ in terrestrial radio. They are simply determining the play lists. There may be some liners in between songs on some of our stations, but they are not done by the radio employees." 6/15/06 Tr. 45:14-46:10 (Winston).

165. Mr. Coryell summarized the uniqueness of radio programming (whether transmitted online or over-the-air) that differentiates radio from Internet-only webcasting and makes radio the critical promotional vehicle that it is in driving record sales in the following way:

> Unlike someone who has to fiddle with his iPod in order to be entertained, a radio listener can lean back and let someone else do the work of selecting and presenting entertainment – often new or unfamiliar content that the record companies want to promote. <u>Rather than a mere string of songs, radio presents a unified, artistic product.</u>

> And that is part of why radio has always driven record sales.

Coryell WDT ¶ 44 (emphasis added).

c. AM/FM Streaming Is Fully Coordinated with other Promotional Activities

166. SoundExchange witnesses made much of the need to coordinate air play with other promotional activities and campaigns. *See* PFF ¶ 79. Whatever the validity of this claim with respect to Internet-only webcasting, there is no denying that over-the-air broadcasts are coordinated with other promotional activities and campaigns and, of course, AM/FM Streaming has exactly the same coordination. *See* PFF Part IV.B.

d. Key Internal Sony Documents Confirm that Record Labels View AM/FM Streaming as more Promotional than Internet-Only Webcasting.

167. Two important internal Sony documents further confirm explicitly that when record labels are not participating in rate-setting proceedings, they themselves willingly concede the promotional value of AM/FM Streaming. An internal Sony memorandum, on which SoundExchange witness Mark Eisenberg was copied,

[[ ]]:

[[

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Servs. Ex. 41, at 2 (emphasis added). The Sony memorandum [[

]] *Id.*

168. In another internal Sony memo, Mr. Eisenberg, in a moment of refreshing candor, [[

]]:

[[

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Servs. Ex. 42, at 2 (emphasis in original). There can be no dispute that whatever the promotional value of Internet-only services, AM/FM Streaming is not only promotional of record sales but is more promotional than Internet-only services – even under SoundExchange's party line.

2. AM/FM Streaming Poses Even Less of a Risk of Substituting for Record Sales than Internet-Only Webcasting.

169. No matter how unlikely it is that DMCA-compliant webcasting would substitute for record sales, it is even less likely that AM/FM Streaming would pose a risk of such substitution due to:

(a) the fact that AM/FM Streaming is the least interactive (in the sense of listener choice over what is played) of all services and is not "narrowcasting," which SoundExchange has argued displaces record sales;

(b) the lower bitrate at which AM/FM Streaming is transmitted as compared to Internet-only webcasting; and

(c) the unique programming elements found in AM/FM Streaming that are not found in Internet-only webcasting, such as segues, DJ talk, news, traffic, weather, listener call-ins, contests, etc.

The Judges are required by law to consider this comparatively lower risk of substitution posed by AM/FM Streaming in setting rates and terms that account for differences between Radio Broadcasters and other types of commercial webcasters.

a. Lack of Interactivity or Narrow Genre-Based Choice

170. As detailed above, the record labels view the degree of interactivity of a service as a pertinent pricing consideration – the less interactive the service, the lower the price of a license for that service. *See* PFF ¶ 144. That is because less interactive services are likely to be less substitutional than services with comparatively greater interactivity. *See* 6/7/06 Tr. 84:5-13 (Kenswil). As Professor Jaffe testified, the labels "themselves recognize an intrinsic range of values and an ordering of those values increasing as you move from terrestrial radio, DMCA-compliant radio, interactive webcasting, downloads and CDs." 11/8/06 Tr. 89:13-91:10 (Jaffe).

171. Moreover, SoundExchange witnesses argued that the more narrow a webcast offering, the greater potential it had to displace demand for CDs. *See* PFF ¶ 177 (quoting Dr. Brynjolfsson); Griffin WDT at 16-18 (detailing the seemingly infinite number of niche channels available in Internet-only radio, and commenting that, "[w]hen streaming music services can provide consumers the music they want, where and when they want it, products that contain music (e.g., CDs) may become less essential to the

music fan."). Whatever the validity of this claim with respect to Internet only webcasting, it does not apply to AM/FM Streaming.

172. AM/FM Streaming is the least interactive type of service at issue in this proceeding, without the type of narrowcasting identified by SoundExchange as creating a risk of substitution – a reason why even under SoundExchange's view of the world, it poses the least risk of substitution for record sales and why it should be licensed at a lower rate.

173. Some Internet-only webcasters allow users to rate and skip songs, more effectively allowing a user to influence which songs he will hear. *See* 11/9/06 Tr. 88:9-90:16 (Roback). Even many non-interactive Internet-only webcasting services typically permit listeners to select a channel from a narrow niche of music, permitting listeners to locate channels tailored to their individual music preferences. *See* Winston WDT ¶ 5 (testifying that AOL radio "offers approximately 300 stations, organized either by usage (e.g., the 'Hot 100' station) or genre and sub-genre (*e.g.*, the 'Dance & Electronic' category contains about 25 stations devoted to specific sub-genres, including 'Techno' and 'Trance')"); Roback WDT ¶ 10 (testifying that Yahoo! LAUNCHcast service "includes stations whose playlists are concentrated in a particular genre (jazz, blues, reggae, etc.) or sub-genre (jazz stations focused on fusion, big bands, acid jazz, etc.)"); Lam WDT ¶ 10 ("Live365's Broadcastrers' tastes cover the gamut of musical genres, from pop to punk to rap to jazz to classical – and other forms of music from around the world. These stations are accessible to the public.").

174. AM/FM Streaming exhibits none of these customized features. Rather, as discussed above, a person listening to AM/FM Streaming hears the same programming at the same time as what is being broadcast over the air –there are no options to skip songs or to customize the play list to one's individual preferences. *See* PFF ¶ 69-70. About the only way to hear a song of one's choice is to contact the radio station and make a request that the song be played over the air.

175. SoundExchange's own witnesses confirm this assessment. For example, Stephen Bryan of Warner Music Group agreed that the programming found on terrestrial radio "would probably be at the low end of the interactivity spectrum." 6/5/06 Tr. 239:16-240:14 (Bryan). Mr. Griffin likewise agreed that music played on terrestrial radio (which is identical to that played on AM/FM Streaming) "is not intended to be interactive" and consists of "a few genres broadcast to large groups of people who have no way of knowing when a particular song or artist is being played on some other channel." *See* 11/22/06 Tr. 227:21-228:13 (Griffin); *see* 5/11/06 Tr. 30:18-31:6 (Eisenberg) (when asked whether there are any webcasters that pose a lower threat of substitution, replying, "I mean, there may be some simulcasters that have a lower diversity of program, you know, shorter play lists. There may be some DJ banter. So there probably is a range there in terms of customization and personalization even within Internet radio.").

176. A key internal Sony memo further confirms AM/FM Streaming's place on the [[ ]] interactivity spectrum. That document, penned by

Mark Eisenberg, sets forth [[ ]] as follows:

[[

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Servs. Ex. 42, at 1. The memo explicitly observes that "[[ ]]." Servs. Ex. 42, at 1 (emphasis added); *see also* 5/11/06 Tr. 110:3-112:10, 121:14-122:15 (Eisenberg).

177. AM/FM Streaming's unique status as the least interactive type of service signifies that the competitive market price of the sound recording performance right for AM/FM Streaming would be less than that for more interactive services, or more narrowcast services. As even SoundExchange's economist, Dr. Brynjolfsson, acknowledged:

> [I]nternet radio is very different than over-the-air broadcasts in terms of its value proposition. Having a stream of music that's very focused on my personal tastes makes it much more of a substitute for my own CD collection buying things from iPod if I can find the same thing for free through one of these focus channels.

5/8/06 Tr. 151:1-8 (Brynjolfsson). Professor Jaffe described that different value proposition as follows:

> [I]f the record companies themselves recognize that the value of the sound recording performance right decreases as you move towards the terrestrial radio end of the spectrum . . ., that implies that the royalty there would be less than a competitive royalty in any kind of interactive streaming, and certainly less than a royalty in any kind of interactive streaming which is not necessarily competitive.

11/8/06 Tr. 92:17-93:6 (Jaffe).

b. Lower Bitrate Transmission

178. SoundExchange witnesses concede that when a service is transmitted at a lower bit rate, the service is less likely to be substitutional of record sales and is appropriately licensed at a lower rate. For example, Stephen Bryan of Warner Music Group agreed that "[l]imitations on the bit rate . . . limit the quality of the transmission, and thus make the station less likely to substitute for CD sales or digital downloads." *See* Bryan WDT at 15. Dr. Brynjolfsson likewise conceded that streaming at lower bitrates is "less likely to be substitutional of CD sales" and "that a willing seller would be likely to consider charging a lower price for a lower bit rate stream." 5/8/06 Tr. 225:21-226:7 (Brynjolfsson); Brynjolfsson WDT at 7.

179. Mr. Griffin testified that 320 kilobytes per second constitutes CD-quality sound but also asserted that 128 kilobytes per second might be "virtually indistinguishable." 5/2/06 Tr. 49:21-50:8, 278:6-279:6 (Griffin).

180. In contrast to the CD-quality bitrate, Dr. Brynjolfsson conceded that "most non-subscription webcasting is done at 50 kilobits or lower." 5/8/06 Tr. 226:8-11 (Brynjolfsson). Mr. Griffin, in discussing a particular Internet-only webcaster, likewise acknowledged that while that webcaster's premium subscription service was offered at 64K and 128K, the nonsubscription service was offered at 20K or 56K. *See* 5/2/06 Tr. 38:16-39:5, 40:2-7, 191:20-192:11 (Griffin).

181. Radio simulcasts generally are streamed at even lower bitrates than Internet-only webcasts. Specifically, Mr. Griffin agreed "that most radio simulcaster[s] stream at about 32k." 5/3/06 Tr. 141:4-12 (Griffin). Therefore, by SoundExchange's

own admission, AM/FM Streaming is entitled to a lower competitive market rate than Internet-only webcasting. *See* PFF Part III.

c. Radio-Specific Programming Elements

182. Radio broadcasts, and thus AM/FM Streaming, frequently are characterized by music segues and DJ talk-overs, which make the listening experience different than listening to CDs or downloaded copies of recorded music. For instance, DiMA witness Roger J. Nebel testified that, when he made a copy of an FM broadcast, he noticed "that there were other issues with the quality of the copy; for example, a DJ talking over top of the song . . . or a song segueing into another song, the songs covering each other up." 11/7/06 Tr. 151:8-152:1 (Nebel). He could "consider that sort of thing" to be "an audio experience issue").[8] 11/7/06 Tr. 152:10-17 (Nebel).

3. The Greater Promotional Value of Radio Simulcasts Must Be Accounted for in the Fees Applicable to Radio Simulcasters.

183. The demonstrated greater promotional value of AM/FM Streaming and lesser risk of substitution vis-à-vis Internet-only webcasting should be reflected in the rates and terms that the CRJs set for AM/FM Streaming. First, as explained in the Joint Services Proposed Findings and Conclusions, the Judges are <u>required</u> to consider such promotional value as part of their rate-setting analysis. *See* JPCL Part II.B.1.

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[8] Mr. Nebel also said these characteristics of simulcasting "would be a factor [he] would consider in choosing not to record off an FM broadcast." 11/7/06 Tr. 153:8-13 (Nebel). Radio Broadcasters do not believe there has been any showing that copying from streaming is significant or causes significant displacement of record sales, whether from Internet-only webcasting or AM/FM Streaming. *See* PFF ¶¶ __-__. Whatever the validity of such claims with respect to Internet only webcasting, however, it is clear that there has been no showing of substitution with respect to AM/FM Streaming.

184. Second, as discussed above, the record labels themselves have made clear that, as willing sellers, they are willing to license more promotional services at a lower rate. *See e.g.* PFF ¶ 143.

185. Third, there is no room in the marketplace for record labels and radio broadcasters to account for such promotional value in voluntary negotiations. The risk of liability is too great. Congress has enacted strict laws against the provision of consideration for air play, and simulcast stream play necessarily means broadcast air play. *See, e.g.*, 47 U.S.C. § 317 (imposing criminal penalties when radio stations receive money or other valuable consideration in exchange for any programming or music played on the air but fail to disclose that consideration in a sponsorship announcement); Communications Act Amendments of 1960, Pub. L. No. 86-752, 1960 U.S.C.C.A.N. 3516 (discussing longstanding efforts by Congress, the Federal Trade Commission, and the Federal Communications Commission to prevent record labels from unduly influencing what is broadcast on radio and television by offering monetary and in-kind incentives to broadcasters); PFF ¶ 85.

* * *

186. In sum, the unique characteristics of AM/FM Streaming not present in Internet-only webcasting that make AM/FM Streaming even <u>more</u> promotional of record sales and ensure that it is even <u>less</u> likely to substitute for record sales entitle AM/FM Streaming to a lower sound recording performance royalty.

C. THE SOUND RECORDING PERFORMANCE RIGHT IS OF RELATIVELY LESS VALUE TO AM/FM STREAMING THAN TO INTERNET-ONLY WEBCASTING BECAUSE RADIO BROADCASTERS CONTRIBUTE MORE ORIGINAL NON-MUSIC CONTENT TO THEIR PROGRAMMING THAN INTERNET-ONLY WEBCASTERS.

187. The competitive market value of the sound recording performance is lower for AM/FM Streaming than for Internet-only programming because sound recording play a much smaller role in the programming found on AM/FM Streaming. This is true whether the radio station operates with a "music" format or a "talk" format.

188. As an initial matter, many radio stations that stream their programming are not music-oriented at all. Rather, they operate with news, talk, sports, or religious formats, or they transmit under a mixed format consisting only partially of music. *See* 7/27/06 Tr. 282:10-285:6 (Hauth); Hauth WDT ¶¶ 2-4; 7/27/06 Tr. 15:3-17:2 (Coryell) (testifying that over 25 percent of Bonneville's streaming stations are news-talk stations); Parsons WDT ¶ 9 (stating that approximately 34 percent of Clear Channels stations that stream are news/talk stations and many of the remainder are mixed-format stations). Moreover, even when certain types of mixed-format stations do transmit music during blocks of their programming, those music blocks do not generate significant revenue for the stations, as Russell Hauth testified. 7/27/06 Tr. 285:7-12 (Hauth).

189. The existence of non-music-oriented and mixed-format stations stands in sharp contrast to most Internet-only webcasting services, which focus overwhelmingly on music. 6/15/06 Tr. 34:15-35:16 (Winston) ("news, sports, [and] talk" services offered by AOL Radio are in fact retransmissions of third party AM/FM services rather than in-

house programming). Certainly, these non-music-oriented streaming stations should be accounted for in the rates set by the CRJs. *See* Part VIII.C, *infra.*

190. Even for music-oriented AM/FM Streaming programming, sound recordings still play much less of a role than they do in Internet-only programming. As previously discussed, Radio Broadcasters make tremendous contributions to attract and retain their audiences than Internet-only webcasters do. *See* Part V, *supra.* These include, *inter alia*:

- featuring dynamic on-air talent and personalities on morning and afternoon drive time shows as well as throughout their programming, which engage the audience and provide music reviews and recommendations;
- conducting contests, giveaways, and listener call-ins, which allow the listeners to interact with the stations and musicians; and
- providing news, traffic, weather, community affairs information, on-site broadcasts from local businesses, and charity drives, which provide essential information and drives home the local nature of the programming.

See Part V.C.

191. By contrast, Internet-only webcasters typically do not include these non-music features in their programming; rather, their programming relies much more on music. As Dan Halyburton of Susquehanna commented, Internet-only webcasters "are usually . . . wall to wall music services. They don't feature any of the other elements that radio stations do. They don't have news, information, traffic, weather, services, that contact with the DJ." 7/26/06 Tr. 89:1-8 (Halyburton). Christine Winston, AOL's Executive Director of Programming Strategy and Planning, acknowledged the lack of DJs on AOL channels, testifying that although AOL employs DJs, "they are not DJs in the way that you think of a DJ in terrestrial radio. They are simply determining the play lists.

There may be some liners in between songs on some of our stations, but they are not done by the radio employees." 6/15/06 Tr. 45:14-46:10 (Winston).

192. The value of sound recordings to AM/FM Streaming programming is further diminished due to non-music public interest programming content requirements and regulations that the Federal Communications Commission ("FCC") imposes on radio broadcasters. *See, e.g.*, 47 C.F.R. § 73.3526(e)(12) (requiring a quarterly report listing the station's programs providing significant treatment of community issues); 47 U.S.C. § 315(a) (requiring a station to offer equal opportunity to all candidates for a public office to present views, if station afforded an opportunity to one such candidate); 47 C.F.R. § 73.1201 (requiring announcement of station identification); *id.* § 73.1212 (requiring identification of program sponsors); *id.* § 73.1216 (providing disclosure requirements for contests conducted by a station); *id.* § 73.1211 (regulating stations' broadcast of lottery information and advertisements); *id.* § 73.1250 (regulating broadcast of emergency information); *see also* 47 U.S.C. §§ 307, 309 (1998) (conditioning broadcast license grant on FCC finding that "the public interest, convenience, or necessity will be served" thereby).

193. By contrast, Internet-only webcasters are not subject to FCC licensing restrictions on their programming, as they are not radio broadcasters. *See* 47 U.S.C. § 152(a) ("The provisions of this Act [governing the creation, jurisdiction and powers of the FCC] shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio . . . ."); 5/3/06 Tr. 167:8-16 (Griffin) (acknowledging that webcasting is not subject to FCC requirements).

194. In light of the much greater importance and prominence of non-music elements in AM/FM Streaming programming compared to Internet-only webcasting programming, the competitive market value of the sound recording performance right is less for radio stations that engage in AM/FM Streaming than for Internet-only webcasting services. Further, it highlights the absurdity of charging the same percentage of revenue for Internet only webcasting and AM/FM Streaming.[9]

D. HOUR FOR HOUR, FEWER SOUND RECORDINGS ON AVERAGE ARE TRANSMITTED VIA AM/FM STREAMING THAN VIA INTERNET-ONLY WEBCASTING.

195. It is beyond dispute that services that use less music should pay less in sound recording performance royalties. As 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).

196. Dr. Brynjolfsson testified that the "standard assumption" for webcasting is 15.36 songs per hour. 5/8/06 Tr. 95:9-10 (Brynjolfsson); *see also* 5/16/06 Tr. 226:20-229:3 (Pelcovits) (assuming that Live365, an Internet-only webcaster, plays 15.5 songs per hour on average).

[9] For the reasons discussed at length in Part VIII, a percentage of revenue metric is not appropriate for AM/FM Streaming in any event.

197. Moreover, certain Internet-only webcasters allow listeners to skip a certain number of songs per hour, which causes those stations to air even more songs per hour than more non-interactive Internet-only webcasts. *See* 11/9/06 Tr. 90:1-91:4 (Roback) ("[I]t depends upon what a user does in a particular session. So if somebody chooses to listen all the way through all of the songs in a particular hour on the nonsubscription service, that may be different than if somebody chooses to skip and were counting the songs that are skipped, you're going to have more songs per hour. So it just depends on a user by user basis.").

198. Radio broadcasters who engage in AM/FM Streaming, in stark contrast, use far less music than Internet-only services due, among other things, to the original non-music programming elements included in AM/FM Streaming that is not typically included on Internet-only channels. *See* PFF ¶ 189. The average number of songs per hour for over-the-air music stations is 11.5. *See* 2001 Tr. 12380:16-12381:5 (Jaffe); *see also* Jaffe 2001 WDT ¶ 49 n.33 & Ex. B-1 (providing the average number of songs per hour on over-the-air stations by format, from a high of 13.8 for oldies to a low of 7.08 for Spanish); Jaffe 2001 WRT at 27-28.

199. Jack Isquith, AOL's Executive Director of Music Industry Relations, confirmed that:

> In general you will find much more music on Internet radio than you will on terrestrial radio right now. There is just a higher quantity of music played on AOL Radio than there would be, let's say, in the average major market in the United States, a market like New York City or Washington, D.C., or Los Angeles.

6/27/06 Tr. 29:4-12 (Isquith).

200. AM/FM Streaming programming also includes more advertisements than Internet-only webcasting, which also contributes to the lower music use on AM/FM Streaming than on Internet-only services. As Eric Ronning of Ronning Lipset Radio, an online advertising firm, testified: "In an hour in traditional radio, I believe that the current average is between 15 and 16 units per hour of commercial or promotional advertising. In online radio, it's approximately three to five units per hour, save for Clear Channel which is a direct [carry]over of their offline radio clock is exactly what they have on the online space." 6/26/06 Tr. 176:6-177:4 (Ronning).

201. Given that fewer songs, on average, are played on AM/FM Streaming than on Internet-only webcasting, AM/FM Streaming stations should be subject to a lower sound recording performance royalty.

E. THE FACT THAT DIFFERENT MUSICAL WORKS PERFORMANCE RIGHTS AGREEMENTS EXIST FOR AM/FM STREAMING THAN FOR INTERNET-ONLY WEBCASTING CONFIRMS THAT AM/FM STREAMING SHOULD BE SUBJECT TO A DIFFERENT, AND LOWER, FEE.

202. As discussed above, and as Professor Jaffe testified, "if there is available evidence regarding the outcome of such musical work royalty negotiations for a given licensee or group of licensees, such contracts should provide good evidence of the reasonable rates and terms for the streaming of sound recordings for those different types of streamers." Jaffe WRT at 37-38; *see* PFF ¶¶ 141-42.

203. In this instance, that is precisely the case: different musical works performance rights agreements have been negotiated that are uniquely applicable to AM/FM Streaming than the agreements applicable to Internet-only webcasting. As

Professor Jaffe testified, the ASCAP, BMI, and SESAC agreements applicable to Internet-only webcasters collectively charge approximately 3.8 percent of gross revenue (under an expansive definition of that term) or approximately 5.5 percent of revenue "directly attributable to music performances" (under a "more circumscribed definition of revenue"). Jaffe WDT at 33-36; Fancher WDT ¶¶ 22-24.

204. The AM/FM Streaming fees charged to radio broadcasters for the right to simulcast musical works, by contrast, are flat annual industry-wide fees that provide the right to stream to every radio broadcaster in the industry. RBX 5 at 10-11; RBX 6 at 10.

205. The BMI agreement charges a fixed annual payment for simulcasting. Halyburton WDT ¶ 47; RBX Ex. 5. The license is industry wide, covering everyone that streams, and calls for $2 million over four years (2003-2006), with $650,000 allocated to 2006. Halyburton WDT ¶ 47; RBX 5 at 10.

206. The ASCAP agreement consists flat annual industry-wide fees for 2004-2009 for both broadcasting and AM/FM Streaming and covers anyone that streams. Halyburton WDT ¶ 48; RBX Ex. 6. As Keith Meehan, the Executive Director of the Radio Music License Committee("RMLC"), testified, "Although the fees for Internet simulcasting are not separately stated in the RMLC/ASCAP Agreement, the RMLC and ASCAP did, in fact, negotiate separate Internet simulcast fees for 2007, 2008 and 2009, based on the parties' assessment of the fair market value of Internet simulcasting. Those fees were $675,000 for 2007, $700,000 for 2008, and $725,000 for 2009." Meehan WRT ¶ 11; RBX Ex. 6.

207. The ASCAP and BMI musical work performance fees for AM/FM Streaming recognize the difference in the value of the musical works performance right between AM/FM Streaming stations and Internet-only services by accounting for the fact that simulcast streaming is ancillary to terrestrial radio's primary business and generates little if any independent value for terrestrial radio stations. *See* Halyburton WDT ¶¶ 46-51; Parsons WDT ¶ 24; Meehan WRT ¶¶ 10-11; 11/13/06 Tr. 115:4-117:17 (Meehan). As Mr. Parsons testified, "Streaming is not a big moneymaker and the ASCAP and BMI fees much more accurately reflect this marketplace reality." Parsons WDT ¶ 24. This different, and lesser, value of the musical works performance right for AM/FM Streaming stations vis-à-vis Internet-only webcasting services provides an accurate measure of the analogous different, and lesser, value of the sound recording performance right for those different types of services. *See* Jaffe WRT at 37-38. As required by the statute, the Judges should account for this difference in setting royalties for these two types of services. *See* 17 U.S.C. § 114(f)(2)(B) ("[R]ates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation").

VII. SOUNDEXCHANGE'S "ONE-SIZE-FITS-ALL" FEE MODEL FAILS TO ACCOUNT FOR THE SIGNIFICANT DIFFERENCES BETWEEN LARGE INTERNET-ONLY WEBCASTERS AND RADIO SIMULCASTERS.

A. SOUNDEXCHANGE PRESENTS NO CASE WITH RESPECT TO AM/FM STREAMING EXCEPT A BOOTSTRAP ARGUMENT THAT ITS FEE PROPOSAL, BASED ENTIRELY ON LARGE INTERNET-ONLY WEBCASTING, SHOULD APPLY

208. SoundExchange's fee case depends on the analyses of Drs. Pelcovits and Brynjolfsson. For the reasons discussed at length in the Joint Services Proposed Findings

and Conclusions, these analyses should be rejected. Moreover, whatever their merit with respect to Internet only webcasters, they say nothing about AM/FM Streaming.

1. Dr. Pelcovits' Fee Model Is Based Entirely on Internet Only Webcasting—and Did Not Account for AM/FM Streaming.

209. Dr. Pelcovits based his fee model on 17 agreements between the major record companies and five interactive, subscription Internet only music services. He then adjusted for interactivity by analyzing the subscription fees charged by noninteractive subscription services. None of the services analyzed by Dr. Pelcovits were AM/FM Streaming services. 5/16/06 Tr. 215:8-216:6 (Pelcovits).

210. Dr. Pelcovits argued that, for a market to provide a good benchmark, it "must have similar characteristics to the target market." Pelcovits WDT at 12. He then argued that the interactive services market has numerous characteristics in common with the market at issue in this case. *Id.* at 12-13, 14. Notably, many of his allegedly similar characteristics are wholly inapplicable to AM/FM Streaming:

a. Dr. Pelcovits argued that "The buyers and sellers in these markets are essentially the same. . . . Indeed, many of the major buyers in the two markets are the same companies." *Id.* at 12. On cross examination, however, he conceded that there were no radio broadcasters in the benchmark market and "there certainly were no radio broadcasters in the 17 benchmark agreements that [he] considered." 5/16/06 Tr. 215:8-216:6 (Pelcovits). Dr. Pelcovits' Table 6.2 on page 40, comparing the "Subscription Price of Internet Radio vs. On-Demand Service" compared

the offerings of four large Internet only webcasters. No radio broadcasters were involved. Pelcovits WDT at 40.

b. Dr. Pelcovits argued that the "product being delivered to consumers at any given moment is essentially identical" between his benchmark and target markets. Pelcovits WDT at 13. However, the argument ignores the enormous contributions of Radio Broadcasters to their programming, which is actually the "product being given to consumers." *See* Part V.C. Interactive music services in Dr. Pelcovits' benchmark market make no such contributions. *See* PFF Part V.C.

c. Dr. Pelcovits identified the option to receive commercial free service as an important similarity of his target and benchmark markets. 5/16/06 Tr. 217:16-218:1 (Pelcovits); Pelcovits WDT at 13. In fact, Dr. Pelcovits "believe[s] whether or not a service contained commercials in its streams would be an important consideration for consumers." 5/16/06 Tr. 218:2-6 (Pelcovits). Of course, Dr. Pelcovits' interactive music services and the subscription Internet only services he analyzed do not include commercials; AM/FM Streaming does.

d. Dr. Pelcovits relied on the fact that "[c]onsumers of interactive and non-interactive music services experience service offerings that are identical with respect to . . . the range of titles" that are available or performed. Pelcovits WDT at 13. Yet, he admits that "radio stations, by and large, are not as narrowly targeted as the options available on the subscription

services." 5/16/06 Tr. 216:7-217:15 (Pelcovits). Dr. Pelcovits' admission is an understatement. *See* Part VI.B.1.a.

211. Dr. Pelcovits also states that he would "expect the number of channels or streams to be important to consumers when they value a service." 5/16/06 Tr. 220:5-9 (Pelcovits). Yet, "in recommending a rate for non-subscription services, [he] didn't consider the number of channels or streams offered" by the services. 5/16/06 Tr. 219:21-220:4 (Pelcovits).

212. SoundExchange's other economist, Dr. Brynjolfsson, testified "that a willing seller would be likely to consider charging a lower price for a lower bitrate stream." 5/8/06 Tr. 225:21-226:7 (Brynjolfsson); Brynjolfsson WDT at 7. Yet, in developing his fee proposal for non-interactive services, Dr. Pelcovits' analysis did not consider "or set any difference in rate based on the quality" of the transmission used by the service. 5/16/06 Tr. 219:12-20 (Pelcovits).

213. In short, Dr. Pelcovits did nothing in his model to address AM/FM Streaming. He based his model on Internet-only webcasters, using data related to Internet only webcasters.

2. Dr. Brynjolfsson's Fee Model Is Based Entirely on Internet Only Webcasting—and Did Not Account for AM/FM Streaming.

214. Dr. Brynjolfsson set out to examine the costs that would be incurred and revenues that would be earned by "the biggest, most efficient, and most profitable webcasters." Brynjolfsson WDT at 6.

215. Dr. Brynjolfsson admitted that his model "focused on internet-only webcasting" rather than radio simulcasting. 5/10/06 Tr. 277:10-13 (Brynjolfsson). Specifically, he admitted that he focused on Yahoo, Live365, AOL, Microsoft and possibly Rhapsody. 5/16/06 Tr. 281:21-282:15 (Brynjolfsson).

216. Dr. Brynjolfsson could not say that any of the advertising revenue numbers he obtained from AccuStream and used in the most significant part of his model (in-stream ads) were from radio simulcasting. 5/10/06 Tr. 135:12-17 (Brynjolfsson). Other numbers were taken from Live365 and AccuRadio, neither of which were Radio Broadcasters. *See* Brynjolfsson WDT Appendix A, Advertising at 3-4; 5/10/06 Tr. 135:3-7 (Brynjolfsson) (neither AccuRadio nor Live365 were Radio Broadcasters).[10]

217. Dr. Brynjolfsson's fee models assumed between 10 percent and 20 percent of listener hours would be from subscription services. Brynjolfsson WDT at 50, Table 10. However, he acknowledged that he was not "aware of any radio simulcasters that use a subscription model." 5/10/06 Tr. 281:16-20 (Brynjolfsson).

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[10] While one line from AccuStream did cite a Ronning Lipset Radio ("RLR") Video CPM number, and Dr. Brynjolfsson stated that RLR represented AOL, Yahoo!, MSN, Live365 and Clear Channel, the AccuStream report was prepared in 2005, before RLR was representing Clear Channel. *Compare* 5/10/06 Tr. 130:10-131:2 (Brynjolfsson)(report published in mid-2005), *with* 7/31/06 Tr. 218:13-16 (Parsons) ([[ ]]).

B. SOUNDEXCHANGE'S FEE MODELS AND FEE PROPOSAL DO NOT ACCOUNT FOR THE PLETHORA OF DIFFERENCES BETWEEN AM/FM STREAMING AND INTERNET ONLY WEBCASTING.

218. It is, of course, difficult to prove a negative. However, one may search the record in vain for any attempt by SoundExchange to account for the differences between AM/FM Streaming and Internet only webcasting; it simply is not there.

219. The failure to account for those differences is yet another reason, on top of all of those discussed in the Joint Services Proposed Findings and Conclusions, that SoundExchange has failed to demonstrate that its proposed fees are reasonable for AM/FM Streaming.

C. SOUNDEXCHANGE'S ASSERTED JUSTIFICATIONS FOR ITS BOOTSTRAP ARE UNSUPPORTED BY THE RECORD.

220. While ignoring the undisputed differences between AM/FM Streaming and Internet only webcasting that justify different fees, SoundExchange presents two arguments that it says trump those differences: (i) the two types of services "compete" for audience and (ii) a willing seller would not "allow" cannibalization of higher value services. Neither has been analyzed; both are the subject of vague anecdotal evidence, if they are the subject of any evidence at all.

221. SoundExchange can point to no evidence that demonstrates the nature or extent of the alleged competition between AM/FM Streaming and Internet only webcasting. While such competition has been asserted, Dr. Brynjolfsson admits that he did not perform any quantitative analysis of "the extent to which simulcasters compete with internet only webcasters for the sale of advertising." 11/21/06 Tr. 229:3-230:5. He

similarly admits that he did not perform "any quantitative analysis of the extent to which simulcasters compete with internet only webcasters for audience." *Id.* 230:6-11.

222. Mr. Griffin's assertions of competition, Griffin WRT at 5-12, amount to a glorified high-school term paper, based on selected newsletter, newspaper and magazine articles, selectively quoted, undisclosed conversations with undefined individuals, and asserted expertise. In any event, Mr. Griffin was tendered as "an expert on media and technology," 5/1/06 Tr. 23:2-5 (Griffin), not an economist. He is not qualified to opine on the nature or extent of competition.

223. Indeed, given the local focus of AM/FM Streaming for both audience and advertising, *see e.g.*, PFF ¶ 18, the record evidence suggests that claims of such competition are significantly overblown.

224. In any event, the fact that two services may compete in some undefined and unquantified way does not reduce the impact of the factors discussed above, which dictate a lower fee for AM/FM Simulcasting.

225. SoundExchange's claims of potential cannibalization are purely theoretical. SoundExchange offered no evidence to support those claims.

VIII. SOUNDEXCHANGE'S PROPOSED FEE METRIC BASED ON A PERCENTAGE OF REVENUE IS WHOLLY INAPPROPRIATE FOR RADIO BROADCASTERS.

226. SoundExchange has proposed a "greater-of" fee structure that includes a component that would require a webcasting service to pay to SoundExchange a

percentage of "all revenue paid or payable that is directly or indirectly derived from the service." SoundExchange Dir. Statement Vol. 1 tab B ¶ I(A)(1)(a).

227. For the reasons set forth below, a percent-of-revenue fee metric is not appropriate for sound recording performance licenses for AM/FM Streaming. The right to perform sound recordings is only one of the many elements that are used by broadcasters to create the programming that Radio Broadcasters deliver to their listeners. Many of those programming elements are contributed by the broadcaster itself. Moreover, programming is only part of what drives radio revenues, and it is not the largest part—sales and marketing strategies and branding are at least as important. To the extent programming is relevant to revenues, the uncontroverted evidence shows that the personalities and other programming elements are more important to revenue than the right to perform sound recordings.

228. Under these circumstances, a percent-of-revenue-based fee for a single input would compensate the record companies for value they do not contribute and would place the record companies in a favored position compared to all other programming inputs. It would not be adopted in a competitive market between willing buyers and willing sellers.

229. Furthermore, adopting SoundExchange's theory that would charge broadcasters the same percentage of revenue as Internet-only webcasters, who use more music and for whom music plays a more significant role in the generation of value, *see* PFF Part VI, would be grossly unfair and contrary to every expectation of a competitive market price.

230. In addition, a percent-of-revenue metric does not take into account the circumstances of the many Radio Broadcasters that perform relatively less music in their programming, or the great promotional value that radio brings to sound recordings.

A. REVENUES EARNED BY RADIO BROADCASTERS ARE RELATED TO ORIGINAL CONTRIBUTIONS, NOT TO THE MUSIC THEY PLAY.

231. A fee metric that ties sound recording royalty fees to revenues assumes that revenues are related to and driven by the sound recording right being licensed. In the case of Radio Broadcasters, this is simply not true. A radio broadcast, even on a music-intensive station, is far more than just a string of sound recordings put together. A successful radio station's programming includes many elements of original content, and it is these elements, and the business efforts of the station, not the music, that drive station revenues.

232. As Mr. Parsons testified, "if [Radio Broadcasters] are successful in selling streaming, it really doesn't have much to do with the music licensing as much as it has to do with [their] own innovation and creative contribution." 7/31/06 Tr. 26:14-18 (Parsons); *see also* 7/26/06 Tr. 72:7-73:8 (Halyburton). The creative contribution of Radio Broadcasters to the value of the content they stream cannot be overestimated, and it is this contribution, not the right to perform sound recordings, that creates revenues. *See* Meehan WRT ¶¶ 6-7; 7/26/06 Tr. 72:7-73:8 (Halyburton); 7/31/06 Tr. 25:17-26:10 (Parsons); 11/13/06 Tr. 111:17-113:3 (Meehan); Jaffe 2001 WRT at 78-79 ("In such circumstance, it is very likely that the revenue has relatively little to do with the performances themselves, and RIAA's collecting this exceedingly high rate would

essentially amount to its taxing other sources of value besides the performances. . . . There is no *a priori* basis for concluding that a large part of the value of streaming is associated with the sound recording performance rights.").

233. No other content provider receives a portion of station revenues, and there is no reason why SoundExchange should be any different. *See* 11/13/06 Tr. 113:4-7 (Meehan).

1. The Contributions of On-Air Talent Drive Radio Revenues.

234. One of the most obvious contributions made by radio stations to their programming is the on-air talent, known popularly as disc jockeys or DJs, including personalities that host shows that focus on talk or that mix talk and music, and those that are primarily known for selecting and playing music. *See* 11/13/06 Tr. 113:11-22 (Meehan) (defining the term "on-air talent"). These individuals, who engage the audience on a personal level, either by telling anecdotes, taking phone calls, introducing songs, or by relaying news, sports, traffic and weather and other information, are the "most important [factor] in driving radio station revenues." 11/13/06 Tr. 112:16-19 (Meehan). This is demonstrated by the fact that they are often among the most highly compensated individuals in the radio industry. *See* 7/27/06 Tr. 100:16-17 (Coryell) (singling out on-air talent from among other radio station staffers as being "very highly compensated"). Good on-air talent can "make you feel, when she [is] talking to you in the morning, that you [are] in the next seat and she [is] talking to you, and tell[ing] you the things that you need[] to know about your community." 7/27/06 Tr. 79:13-17 (Coryell).

235. Morning shows featuring popular personalities in particular are thought of as one of the very most important aspects of a radio station in terms of driving revenue. Morning and afternoon drive times are especially important to radio station revenues because these are the times with the highest listenership. 11/13/06 Tr. 112:12-113:3, 123:3-6 (Meehan); 7/26/06 Tr. 85:20-21 (Halyburton). As Mr. Halyburton testified, "if you can have a popular morning show, it frankly can drive your ratings, you know, very substantially and – and really have benefits throughout the day." 7/26/06 Tr. 31:6-10 (Halyburton). The on-air talent is so important to this audience magnet, in fact, that very often "morning shows don't play much music at all because of the personality aspect of the morning show." 7/26/06 Tr. 31:10-12 (Halyburton). Thus, in an effort to maximize revenue during one of the most important times of the day to advertisers, radio stations actually decrease the amount of music they play in order to increase the amount of time the personality spends on the air. *See, e.g.,* 11/13/06 Tr. 112:12-113:3 (Meehan) (on-air talent is the most important element of a radio station "[b]ecause you find on-air talent in the . . . morning drive and afternoon drive, which provide the overwhelming amount of revenue to a radio station.").

236. DJs do not only drive revenue for radio stations; they also drive revenues for record labels and artists. They engage the audience, provide music recommendations and personal endorsements, make announcements regarding artists coming to town for album signings and tour dates, and provide information on ticketing and how to learn more about the group or show. *See supra* section VI.A. Mr. Halyburton testified of his employee, a man known as "Funkmaster Flex," who is "probably the most listened to disc jockey in America in the 8:00 to midnight slot. . . [I]f he talks about products or

talks about things that are going on in the greater New York area, people pay a lot of attention." 7/26/06 Tr. 32:3-11 (Halyburton). DJ discussion and endorsement is considered to be one of the most important promotional features for the record labels because audiences come to trust these personalities, and consumers respond to recommendations from trusted sources. *See* 6/6/06 Tr. 80:19-81:2 (Ghuneim) (affirming that recommendations from trusted sources are "an important part of promoting an album").

2. The Contributions Of Programming Directors Contribute to Radio Revenues.

237. Program directors and news directors also make significant contributions to a radio station's revenue. These craftsmen are charged with creating a radio station's overall image and mood, and determining what information should be sent to the audience. Directors must find the perfect on-air talent and "find the stories that [are] of the most interest to [the] local community." 7/27/06 Tr. 79:11-22 (Coryell). Program directors make sure that their stations are doing all that they can in order to maximize the entertainment value of the station. *See supra* section VI.A.

238. Even when it comes to the use of music on a radio station, music directors listen to hundreds of songs to "find the right ones that would appeal to [the station's] specific listeners, which might not be the specific listeners at the radio station across the street." 7/27/06 Tr. 79:7-10 (Coryell). The value that radio stations do receive from music is much more than just the right to perform sound recordings. It involves choosing the right music at the right time in the right mix. "Rather than a mere string of songs, radio presents a unified, artistic product." Coryell WDT ¶ 44. And that is the

contribution of the programming directors, not of the record labels. "Radio employs the best people in the world at selecting and presenting both music and talk as part of a usage-driven product." Coryell WDT ¶ 44.

3. Radio Stations Must Develop a Relationship With Their Audience.

239. Another major factor in driving radio revenues, both over-the-air and online, is the development of a relationship with the listener through the creation of a radio station's brand identity. Because it is so easy for a radio listener to change the channel, much of what a radio station focuses on is developing a relationship with its audience. *See* 7/27/06 Tr. 34:22-35:6 (Coryell) (describing the "deep loyalty" listeners have with radio brands). As Mr. Coryell testified, "you can't duplicate a successful radio station and the relationship that it has with its listeners and with its community and its history and its brand, and all of the thinking and blood, sweat, and tears that goes into creating that entertainment product . . . ." 7/27/06 Tr. 81:14-22 (Coryell).

4. Radio Station Sales and Marketing Skills also Drive Radio Revenues.

240. "Revenue is driven by many other factors, including sales management and the use of innovative sales techniques [and] marketing." Meehan WRT ¶ 7; *see also* 11/13/06 Tr. 112:4-8 (Meehan) ("There are many factors that combine to drive station revenues [such as] the management of the station, the sales management, the sales force, [and] the technology that is deployed to the sales force."). Local advertising is sold by a local sales team employed by the radio station, and "their job is to identify selling opportunities in the [local] area, including ad agencies and direct customers and go out and – and find and secure business from that." 7/26/06 Tr. 22:16-23:3 (Halyburton).

241. In his oral testimony, Roger Coryell illustrated an unusual way that a radio station might go about making money: "We do sell a lot of what we would call integrated marketing programs. This might be something where there is a client need that we can meet, such as exposure to a million people at a giant waterfront event in San Francisco or that sort of thing. So we might sell a sponsorship where you could be the sponsor of Fleet Week and have your booth in front of a million people and hand out your little chotchkies to those million people and advertise it on the radio station. Everything we do is driven . . . by the need to meet our advertisers' needs and the ability to, quite frankly, sell things to our listeners, because of the deep loyalty that they have to our brands that we have invested in. 7/27/06 Tr. 34:10-35:6 (Coryell).

242. In short, Radio Broadcasters' "sales people are very innovative and have tried a bunch of different models and we feel that if we are successful in selling streaming, it really doesn't have much to do with the music licensing as much as it has to do with our own innovation and creative contribution." 7/31/06 Tr. 26:11-18 (Parsons).

5. Music Does Not Drive Radio Revenues.

243. If revenues were tied to music use, one would expect that two stations in the same market that played approximately the same amount and type of music would have similar revenues. The evidence shows that this is not the case.

244. As described in more detail in Part V, different radio stations in the same market can have the same music playlist, but are not equally successful. Mr. Coryell told of a rival station that began playing exactly the same music as his station, KOIT. But because the new station did not include all of the non-music elements that made KOIT

popular, it soon went out of business. *See* 7/27/06 Tr. 80:8-81:22 (Coryell). Similarly, Mr. Halyburton testified that when his station KPLX wanted to make a run at its rival—a station that played the exact same music—he decided to change the on-air talent and the branding, not the music. The strategy paid off, and KPLX was able to overtake the other station in terms of ratings while the two continued to play the same music. *See* 7/26/06 Tr. 68:17-70:19 (Halyburton).

245. In addition, if music use were the driving force behind radio revenues, one would expect to see that potential advertisers—the direct source of radio revenues, both over-the-air and online—would pay close attention to the music a station plays. But that is not the case. Mr. Halyburton testified that "if I'm a radio seller, if I'm a sales person and I come in to you and you're an advertiser and I want to talk to you about my radio station, we'll probably spend about 10 seconds talking about what kind of music we play. And then the rest of the time in – in my effort to kind of convince you that we might be the right place for your advertising, I'm going to talk about all the other elements of my radio station." 7/26/06 Tr. 32:15-33:2 (Halyburton). So many different radio stations play the same music that the real value to an advertiser in one station as opposed to another is found in the non-music elements of that station's programming.

246. And, of course, not all radio stations play a lot of music anyway. As discussed below, news, talk, and sports stations are among the most profitable in the industry, even though they only make virtually no use of sound recordings. *See* Part VIII.C.

B. VOLUNTARY AGREEMENTS FOR PERFORMANCE RIGHT ROYALTIES DEMONSTRATE THAT WILLING BUYERS AND SELLERS WILL NOT AGREE TO A PERCENT-OF-REVENUE METRIC.

247. Radio Broadcasters have presented two current agreements that demonstrate that Radio Broadcasters and copyright owners would not enter into percent-of-revenue agreements in a competitive market for performance rights related to the music that is performed on the radio and on AM/FM Streaming. The Radio Music License Committee ("RMLC") agreements with BMI and ASCAP involve a flat-fee metric, not a percent-of-revenue metric. *See* RBX 5, RBX 6. The fees in these agreements apply both to over-the-air broadcasting and Internet simulcasting of the radio station's programming.

248. A few years ago, Radio Broadcasters paid both ASCAP and BMI according to a percent-of-revenue metric. Meehan WRT ¶ 8; 7/31/06 Tr. 25:17-21 (Parsons); 11/13/06 Tr. 118:20-119:1 (Meehan). But one of the principal goals of the RMLC in recent years has been to get the radio industry away from the percent-of-revenue metric because it is not an appropriate way to value the performance of copyrighted works in radio broadcasts or Internet transmissions. Meehan WRT ¶ 6. Radio Broadcasters did not believe it was appropriate for copyright owners to be revenue partners in their radio stations. *See* Meehan WRT ¶¶ 6-7; 11/13/06 Tr. 115:4-117:12 (Meehan). That goal was achieved in the 2003 agreement with BMI and the 2004 agreement with ASCAP. *See* RBX 5; RBX 6.

249. Like the musical work performance right, the sound recording performance right is just one of many inputs that go into making a profitable radio

product. No other input to radio programming gets to share in stations' revenues, *see* 11/13/06 Tr. 113:4-7 (Meehan) (not "aware of any programming elements that are paid on the basis of a percentage of revenue"), so it makes no sense that sound recording performance rights would be any different.

C. SOUNDEXCHANGE'S PERCENT-OF-REVENUE METRIC DOES NOT ACCOUNT FOR DIFFERENT LEVELS OF MUSIC USE.

250. First, as discussed above, radio broadcasters use sound recording performances very differently than Internet-only webcasting. *See* PFF Part VI.C. Typically, a radio station plays substantially less music than an Internet-only channel. Even if a percentage of revenue metric were appropriate, which it is not, charging the same percentage of revenue for AM/FM Streaming and Internet-only webcasting would be inconsistent even with the goals identified by SoundExchange's own expert witness, Dr. Brynjolfsson. He testified that, in his view, a fee metric should accomplish the goal that "the rates paid by a given company should take into account that different companies use different amounts of music." 11/21/06 Tr. 251:2-18 (Brynjolfsson). Specifically, Dr. Brynjolfsson testified that "a company that uses less music should [pay] less . . . all else equal." *Id.* 252:1-4. Of course, a percentage-of-revenue metric is not affected at all by the amount of music used by a service.

251. For all of these reasons, a percent-of-revenue metric would be grossly inappropriate for any AM/FM Streaming. It would be truly absurd to apply such a metric to a station that does not use much music. A great many radio stations that are simulcasting their programming on the Internet are news, talk, sports, or religious talk and teaching stations that make only limited use of sound recordings often that use is

wholly incidental to the programming. Hauth WDT ¶¶ 3-4; Parsons WDT ¶ 49; Johnson WDT ¶ 9; Jaffe 2001 WRT at 46; RBX 1; RBX 7; RBX 20; 7/31/06 Tr. 34:19-35:6 (Parsons); 7/27/06 Tr. 282:10-284:21 (Hauth); 8/1/06 Tr. 20:8-12 (Johnson). These stations draw their audiences (which in turn is sold to advertisers) from activities that do not involve sound recordings at all, and therefore their revenues are wholly unrelated to their use of sound recordings. Even Universal's Larry Kenswil stated that he only had music-only services in mind when advocating a revenue-based fee. *See* 6/7/06 Tr. 243:4-244:18 (Kenswil).

252. Other stations mix formats, and include significant non-music programming and programming that features music. *See* 7/27/06 Tr. 284:10-285:6 (Hauth) (stating that a typical mixed-format religious station will include some programs that play music when the party purchasing the block of time plays music during that block, and on nights, weekends, or whenever the station cannot fill it with talk programming). When such a station uses music, it often is not profitable at all. *See* 7/27/06 Tr. 285:7-12 (Hauth). Again, charging a fixed percentage of revenue, whether based on webcasters that use more music or a separate fee for AM/FM Streaming, would grossly over-compensate sound recording copyright owners. *See* 11/21/06 Tr. 251:19-252:4 (Brynjolfsson). *See also* Hauth WDT ¶ 7; 7/27/06 Tr. 287:9-17 (Hauth).

253. SoundExchange's percent-of-revenue metric, would tie the royalties a station must pay to the value that is generated by talk programming and other features on the station, not anything having to do with the statutory license at issue in this proceeding SoundExchange's percent-of-revenue proposal effectively attributes all of a station's

revenues to the performance of sound recordings, even for stations that hardly perform sound recordings at all.

254. The injustice of a percent-of-revenue metric for talk-intensive stations would not be remedied even if they were assigned a lower percentage of revenue than music-intensive stations. Whatever the percentage, a music use fee metric that is tied to the revenues of a station that performs only a few sound recordings per day would be ridiculous, because there is no relationship between the fee and the station's music use. It would not be paid by a willing buyer to a willing seller in a competitive market.

D. SOUNDEXCHANGE'S HISTORY DEMONSTRATES THAT A PERCENT-OF-REVENUE FEE METRIC IS A RECIPE FOR ABUSE AND CONTROVERSY.

255. Based on its past actions, allowing SoundExchange to become a "revenue partner" with music services is a recipe for abuse and controversy, with SoundExchange engaging in unprecedented and heavy-handed second-guessing of the service's business decisions. Such interference with the day-to-day business of streaming services should not be tolerated or made possible.

256. SoundExchange's over-reaching propensities are amply demonstrated by the evidence of the SoundExchange audit of Muzak, which operates under a percent-of-revenue-based statutory license as a "preexisting subscription service." 11/28/06 Tr. 95:1-7 (Kessler). In November of 2005, SoundExchange completed an audit of Muzak's operations for the years 2001 to 2003. 11/28/06 Tr. 96:17-97:3 (Kessler); Servs. Reb. Ex. 45.

257. In its audit report, SoundExchange repeatedly questioned Muzak's everyday business decisions and the verified responses provided by Muzak to SoundExchange's audit. SoundExchange had the audacity to demand royalties based on a percentage of revenue that Muzak could have earned had different business decisions been made, but did not. Further, SoundExchange even went to the extent of demanding late fee payments on the royalties Muzak would have owed had it earned more revenue than it actually did.

258. Specifically, SoundExchange interfered with Muzak's business decisions in the following ways:

- SoundExchange interpreted a contract between Muzak and its distributor EchoStar and decided that EchoStar should have paid Muzak more than it actually did for certain subscriptions. SoundExchange thus demanded an additional [[ ]] in royalties from Muzak based on the fee SoundExchange believed EchoStar should have paid to Muzak, not what it actually paid. Servs. Reb. Exs. 45, 46. 11/28/06 Tr. 99:3-21 (Kessler).

- After examining EchoStar's SEC filings and making an estimate of the number of EchoStar customers purchasing certain packages of service, SoundExchange claimed that EchoStar had underreported its subscribers to Muzak, and thus owed Muzak additional money. Although Muzak verified the subscriber numbers with EchoStar, SoundExchange demanded an additional [[ ]] in royalties,

based on a percentage of these revenues that Muzak never received. Servs. Reb. Exs. 45, 46; 11/28/06 Tr. 100:5-107:5 (Kessler).

- Based on its interpretation of the Muzak-EchoStar contract and a subjective guess about the kinds of trial subscriptions EchoStar offered, SoundExchange believed EchoStar had underpaid Muzak for trial subscriptions. Muzak verified the matter with EchoStar and was satisfied with their payments. SoundExchange nonetheless demanded [[ ]] in royalties from Muzak based on its unconfirmed guesses. Servs. Exs. 45, 46; 11/28/06 Tr. 114:14-119:15 (Kessler).

- SoundExchange also assessed Muzak [[ ]] in royalties, based on the idea that Muzak should have charged EchoStar late fees and that SoundExchange was entitled to a portion of those late fees. This despite the fact that Muzak, like most businesses, views collection of late fees as a discretionary right that can affect the ongoing business relationship. Servs. Reb. Exs. 45, 46; 11/28/06 Tr. 120:2-121:10 (Kessler).

- SoundExchange then had the audacity to assess [[ ]] in late fees based on Muzak not paying on-time the charges noted above, i.e., those that were being assessed for the first time in the

audit based on revenue Muzak did not receive. Servs. Reb. Ex. 45; 11/28/06 Tr. 122:1-11 (Kessler).

259. SoundExchange's actions in this audit illustrate that when SoundExchange obtains a stake in a service's business operations through a percent-of-revenue metric, it will second-guess ordinary business decisions by a service that could potentially increase the service's income, and will assert a right to be paid a percentage of an amount that even the service believes it is not entitled to have earned. SoundExchange will be able always to claim "harm" to its members when a service collects less than the maximum revenues that SoundExchange believes it should have collected. *See* 11/28/06 Tr. 100:22-101:3 (Kessler). One could imagine SoundExchange demanding royalties from an advertising-based service derived from a price the service could have charged to its advertisers, rather than the price it actually did charge. The independent business judgment of all licensees is in grave danger when SoundExchange receives a percentage of revenue, as the service will be asked to pay royalties based on how SoundExchange would have run the service – plus a late fee for not doing it sooner.

E. IF ANYTHING, RADIO BROADCASTERS SHOULD SHARE IN THE REVENUES OF THE RECORD LABELS DUE TO THEIR TREMENDOUS CONTRIBUTION TO THE SUCCESS OF SOUND RECORDINGS.

260. In any event, there is at least as strong a case to be made that Radio Broadcasters should share in the labels' revenues as the other way around. As described above, Radio Broadcasters play a critical role in the commercial success of sound recordings due to the valuable exposure those sound recordings receive when they are performed on radio. *See* Part IV.. As Mr. Kushner testified, "radio is crucial" to

promotion of many record sales. 6/12/06 Tr. 30:7 (Kushner). Thus, while SoundExchange is demanding that the record labels share in Radio Broadcasters' success through a percent-of-revenue metric, Radio Broadcasters would actually be justified in seeking to share in the labels' profits. The better way, of course, and the way endorsed by Radio Broadcasters' fee proposal, is for neither party to share in the revenue of the other.

IX. SOUNDEXCHANGE'S PROPOSED "GREATER OF" METRIC IMPROPERLY ALLOCATES ALL RISK ON THE SERVICES.

261. SoundExchange's fee proposal calls for the Services to pay to it the greater of a percent-of-revenue metric, an aggregate tuning hour ("ATH") metric, and a per-subscriber metric. It also includes a minimum fee. SoundExchange Dir. Statement Vol. 1 tab B ¶ I(A)(1)(a).

262. Under SoundExchange's fee proposal, the risk is on the webcasters because the record labels will get paid in any event. Although Dr. Brynjolfsson claimed that SoundExchange's proposal allows the licensees and the copyright holders to share in the risk – both the upside and the downside, *see* 5/18/06 Tr. 72:21-73:12 (Brynjolfsson), a closer examination of this "risk sharing" shows that the only risk inherent in the structure falls on the licensees. If business turns sour and Radio Broadcasters are losing money, the record labels will still get paid handsomely through the ATH metric. This is not risk-sharing.

263. SoundExchange has effectively admitted as much, as Professor Brynjolfsson stated in his direct testimony that the labels do not risk any losses in the webcasting business, but rather all of their risks are in other parts of their business. *See* 5/8/06 Tr. 302:7-303:7 (Brynjolfsson).

264. The "greater of" metric effectively punishes Radio Broadcasters for being efficient, creative and increasing the value of their streaming business by allowing SoundExchange to share in the upside, without sharing in the downside of the business. Even though a broadcaster uses no more music, if a Radio Broadcaster enhances its sales efforts or its programming and begins to earn more revenue from AM/FM Streaming, it must pay the record label more (because presumably the highest figure would be a percentage of revenue) without getting any extra benefit in return.

265. As Professor Jaffe stated in his 2001 testimony, "a car with leather seats and power windows may be more desirable and sell for more than the same car with vinyl seats and window cranks. But that does not mean that the engine in the more expensive car is worth more than the engine in the second car." Jaffe 2001 WRT at 39. Similarly, the record labels' product is not worth more simply because the value added to radio programming by Radio Broadcasters makes such programming more desirable to the consumer.

266. In sum, SoundExchange has proposed what amounts to a "heads I win, tails you lose" royalty structure.

X. FINANCIAL RESULTS FROM AM/FM STREAMING DEMONSTRATE THE RISK FO A FEE SET HIGHER THAN A COMPETITIVE FAIR MARKET RATE AND CERTAINLY DO NOT SUPPORT AN INCREASED ROYALTY RATE

A. THE VALUE OF THE SOUND RECORDING PERFORMANCE RIGHT CANNOT BE DETERMINED BY THE OVERALL SUCCESS OF RADIO BROADCASTERS' STREAMING OPERATIONS; AT MOST, LACK OF SUCCESS CAN SHOW THAT A RATE WAS SET TOO HIGH.

267. When setting prices in competitive markets, it is inappropriate to look to the profitability of the parties or the allocation of the surplus between them. The value of the sound recording performance right at issue in this proceeding should not be determined according to whether or not the licensees have been able to turn a profit under the past rates. Because the profitability of the licensees bears no relationship to the value of the sound recording performance right, it is inappropriate to use it as a guidepost in setting the royalty rate. Indeed, doing so would be akin to concluding that a more profitable business should pay more for copy paper than a less profitable one.

268. As explained in Part III.C.1 of the Joint Services Proposed Findings and Conclusions, consideration of profitability or allocation of surplus is fundamentally inconsistent with how prices are established in competitive markets. Nevertheless, SoundExchange has based much of its case on the notion that the more profitable a service has been under the past CARP rates, the more it will be willing to pay for the sound recording performance right in the future. In particular, Dr. Brynjolfsson's allocation-of-surplus model depends on his rosy projections of future profitability for webcasters, assuming that the surplus will increase, and that the services will therefore be willing to give more of it to SoundExchange.

269. But the evidence on the record does not support drawing a conclusion about the value of the sound recording performance right based on the financial situation of the Radio Broadcasters who license the right, or whether they continue to invest in webcasting activities. There is no evidence of a direct correlation between the value of the sound recording performance right and the profitability of a streaming operation. The sound recording performance right is just one of many inputs into the content of AM/FM Streaming. It is only one factor that a radio station must consider when deciding whether or not to stream. And perhaps most importantly, the sound recording performance right is quite unrelated to whether a radio station is able to earn revenue from streaming. Therefore, one cannot conclude that its price should depend on whether Radio Broadcasters are financially successful or not.

270. Nevertheless, because SoundExchange has posited the illogical premise that the more successful a streaming operation is, the more it would be willing to pay for the right to perform sound recordings in a competitive marketplace, it is important to understand the true financial and business situation of Radio Broadcasters' streaming operations. Despite Dr. Brynjolfsson's pie-in-the-sky claims about the rosy financial picture of webcasting, the evidence is clear that the fees applicable to 2001-2005 did not permit profitable streaming operation.

B. STREAMING WAS A LOSING PROPOSITION FOR THE ENTIRE PERIOD OF THE PRIOR FEE (1998-2005)

271. Under the CARP rates, Radio Broadcasters lost significant amounts of money on streaming. The costs, including the cost of the sound recording performance right, have been high, and the opportunities for revenue have been slim. Mr. Halyburton,

whose radio group Susquehanna was one of the first to adopt streaming, testified, "Since we began streaming, the costs of streaming have far exceeded the revenues." Halyburton WDT ¶ 13. Mr. Coryell likewise decried the CARP rates, in particular their linear structure, which, because revenues do not also increase linearly, "means that we will lose even more money as listenership increases." Coryell WDT ¶ 18. In fact, as explained below, he has implemented user restrictions on his stream in order to limit his royalty liability. *See* PFF ¶ 279. And Mr. Parsons testified that "[t]he SoundExchange rates currently in place are excessive and hinder stations' efforts to establish sustainable business models for streaming." Parsons WDT ¶ 23. During the past license period, Radio Broadcasters have not been able to make AM/FM Streaming a successful venture.

C. EVEN NOW, RADIO BROADCASTERS' FINANCIAL EXPERIENCE WITH AM/FM STREAMING CANNOT BE CALLED A SUCCESS.

272. After years of trying, Radio Broadcasters still have not been able to determine how to make AM/FM Streaming consistently profitable under the current royalty structure. The evidence shows that, in general, costs still exceed revenues, and that SoundExchange royalties make up a disproportionate share of the costs. What is more, by engaging in the act of streaming, Radio Broadcasters are incurring added expenses or opportunity costs that make AM/FM Streaming and even more dubious proposition.

1. Dr. Brynjolfsson Relies On Incomplete Information To Make Generalizations About The Entire AM/FM Streaming Industry.

273. In presenting his picture of the current state of AM/FM Streaming, Dr. Brynjolfsson makes sweeping generalization from supports of information.

274. For example, in his rebuttal statement, Dr. Brynjolfsson stated his conclusion that "[t]he major webcasters and simulcasters are [[

]] at the current rate." Brynjolfsson WRT at 17. On cross-examination Dr. Brynjolfsson admitted that, with respect to simulcasters, this statement only referred to Clear Channel. 11/21/06 Tr. 216:18-217:10 (Brynjolfsson). Yet he has no problem generalizing his conclusions about Clear Channel to apply to all Radio Broadcasters.

275. Further, the numbers Dr. Brynjolfsson presents show streaming revenues, but they do not include any of the costs of generating these revenues, despite the fact that Radio Broadcaster witnesses have testified that these costs are significant. For example, it is not uncommon in the radio industry to offer ad salespeople a higher commission for selling streaming ads than for selling over-the-air ads. *See* Halyburton WDT ¶ 16; 7/26/06 Tr. 38:22-40:11 (Halyburton). Higher sales commissions take a large chunk of revenue off the top before the station ever sees it. In addition, while radio stations have a well-established advertiser base for their over-the-air operations, few advertisers are begging to be included on the stream, which makes selling the stream more difficult and time-consuming. *See* Halyburton WDT ¶¶ 15-16; Coryell WDT ¶ 19.

276. By ignoring these costs that are tied to the generation of revenue, Dr. Brynjolfsson has presented a distorted picture.

2. The Evidence Does Not Support Dr. Brynjolfsson's Conclusions about the Radio Broadcasters' Participating in this Case

277. The evidence simply does not support a conclusion that Radio Broadcasters are in an enviable financial position in their streaming operations.

278. First of all, the evidence does not support the conclusion that Bonneville streaming operations as a whole are making money. Indeed, the only document in evidence that shows Bonneville's streaming revenues and expenses, RBX 10, clearly shows that only [[ ]] of Bonneville's [[ ]] streaming stations were able to [[ ]] on streaming in the first six months of 2005. And the expenses cited did not include sales commissions or other selling costs. RBX 10. Dr. Brynjolfsson obtained revenue (but not expense) information for an additional three months, ignored the earlier streaming expense information available to him, and concluded that Bonneville's situation is improving. *See* Brynjolfsson WRT at 27-30. Mr. Coryell, on the other hand, who deals with Bonneville's streaming every day, could not have been clearer about the current situation when he testified ten months after Dr. Brynjolfsson's most recent data: "We lose money on streaming." 7/27/06 Tr. 33:10-11 (Coryell).

279. In fact, Mr. Coryell's Bonneville stations in San Francisco have taken various self-help measures to limit their financial losses on streaming and control the sound recording royalty costs. Specifically, Mr. Coryell testified that he has implemented a simultaneous streaming cap, a time limit, and a registration requirement – all intended to reduce and control the number of listeners to his Internet simulcasts. *See*

Coryell WDT ¶¶ 31-38; 7/27/06 Tr. 20:21-27:7 (Coryell). These are not the signs of a healthy business.

280. Likewise, there is no evidence that Susquehanna is making money on streaming. In fact, after analyzing data from Susquehanna, even Dr. Brynjolfsson admitted that Susquehanna has continued to incur a "loss" in their streaming operations. Brynjolfsson WRT at 30.

281. In the case of Clear Channel, a company with hundreds of streaming stations, bottom line totals and cross-company averages reveal little about the typical experience of an individual radio station. While overall revenues and profits have been increasing, that increase has been driven by a very small number of markets. An examination of the Clear Channel streaming revenue and expense information on the record reveals that only [[ ]] of Clear Channel's [[ ]] streaming markets turned a profit on streaming in 2005, and only [[ ]] of those earned more than [[ ]]. SX Ex. 19 RR. The documents comprising SX Ex. 19 RR do not reflect ad commission expense information. These expenses would decrease all revenues before they came in the door and thus decrease the profitability of every station's streaming operations.

3. Sales Costs and Opportunity Costs also Must Be Considered.

282. An assessment of the business health of Radio Broadcasters' streaming operations would not be complete without consideration of some of the expenses incurred in streaming other then the bandwidth and RIAA fees.

283. First, streaming imposes significant selling expenses. For example, Radio Broadcast witness Dan Halyburton testified that they pay "much higher"

commissions for streaming advertising compared to over-the-air advertising. 7/26/06 Tr. 40:6-11 (Halyburton) (stating that they "pay as high as 20% to a local seller to sell Internet advertising for [their] stream.").

284. Another such expense is the opportunity cost of streaming. When a radio station streams, it has to devote staff time to operating and maintaining the stream. Salespeople have to spend their valuable time selling streaming ads when they could be selling the much more valuable over-the-air ads. As Mr. Coryell put it, "I cannot rationally assign my top sellers to sell a couple of thousand dollars worth of ads for the Internet stream when he could be selling hundreds of thousands of dollars worth of ads over the air. And I'm not going to hire someone who isn't a top seller." Coryell WDT ¶ 20.

D. THERE IS NO EVIDENCE THAT RADIO BROADCASTERS AS A WHOLE ARE BENEFITING FINANCIALLY FROM STREAMING.

285. The Radio Broadcasters who are participating in this proceeding are not necessarily representative of all radio stations in the country that are interested in streaming; they are the ones that have tried the hardest and invested the most. Taken together, Bonneville, Susquehanna, and Clear Channel make up approximately 10 percent of the radio stations in the U.S. *See* NRBNMLC Ex. 7 (FCC document stating that as of June 30, 2005, there were 13,557 radio stations licensed in the U.S.); Coryell WDT ¶ 6 (stating that Bonneville owned 38 stations); Halyburton WDT ¶ 7 (stating that Susquehanna owned 27 stations); Parsons WDT ¶ 4 (stating that Clear Channel owned 1,274 stations). Yet Radio Broadcasters' fee proposal, if adopted, would apply to all

streaming radio stations across the country regardless of whether they have participated as parties here.

286. Nor do the Radio Broadcasters participating here represent even a quarter of streaming radio stations. As part of his rebuttal testimony, Dr. Brynjolfsson replicated the study conducted by Mr. Halyburton to determine the number of radio stations currently streaming. The record includes Dr. Brynjolfsson's list of radio stations in each of the top ten markets in the U.S., along with his count of which ones were streaming as of September 2006. Servs. Reb. Ex. 5. By comparing this exhibit with RBX 1 (a list of Susquehanna stations), RBX 7 (a list of Bonneville stations), and RBX 20 (a list of Clear Channel stations), one can easily determine that stations from these three radio groups only comprise 13.72 percent of the total stations in the top ten markets, and only 21.33 percent of the streaming stations in those markets. *See* Appendix A.

287. Thus, even though the profitability of a licensee is not a valid way to determine the value of the sound recording performance right, there is still no basis to conclude that Radio Broadcasters as a whole are making money on streaming; rather, the evidence would point in the opposite direction.

XI. RADIO BROADCASTERS' FEE MODEL

288. Radio Broadcasters' fee proposal is set out in Section XII below. This discussion is intended to provide the factual basis and explanation for that proposal, which is attached as Appendix C.

A. A FLAT PER-STATION FEE MODEL IS THE MOST APPROPRIATE FOR RADIO BROADCASTERS.

289. The most appropriate fee metric for radio simulcasters is a flat per-station annual fee. In contrast to the greater-of metric proffered by SoundExchange, or the percentage of revenue metric or usage metric encompassed by it, a flat fee offers advantages that are particularly applicable to the operations of Radio Broadcasters.

290. As described above, the value of radio programming has little to do with the amount or type of music played; therefore, a variable fee does not make sense for Radio Broadcasters. A flat per-station fee metric, in contrast, allows for growth of a simulcast audience without tying royalties to revenues. It reflects the realities of music as a part of radio broadcasting: it is simply one of many inputs that are used in creating a great radio station. Meehan WRT ¶ 7.

291. A flat fee is the only way that Radio Broadcasters can create a business plan without worrying about getting too popular for their own good, leading to SoundExchange royalties that grow much faster than advertising revenues. *See* Halyburton WDT ¶ 43; 7/27/06 Tr. 113:22-114:19 (Coryell); 7/31/06 Tr. 24:14-21 (Parsons). An ability to plan for the future helps a Radio Broadcaster grow its webcasting operation, and results in a greater promotional benefit to the record labels. And a Radio Broadcaster that leaves the simulcasting business does not promote sound recordings. *See* Coryell WDT ¶¶ 39-44.

292. The use of flat fees is far from unprecedented. In the musical works context, a flat fee metric has proven to be a fair way of compensating copyright owners, and there is no reason to treat the owners of musical works copyrights and sound

recording copyrights differently. *See* Jaffe 2001 WDT ¶¶ 51, 56; Halyburton WDT ¶¶ 44, 46-50; 7/26/06 Tr. 71:18-72:6 (Halyburton); 7/27/06 Tr. 113:9-21 (Coryell).

293. In addition, at least one voluntary licensing deal between a major record label and an interactive music provider relied on a flat licensing fee. It was also used in the 2003 SDARS agreement. *See, e.g.,* 6/7/06 Tr. 180:15-184:6, 285:6-286:2 (Kenswil). In contrast, the "greater-of" metric that SoundExchange has put forth as what a willing buyer would pay a willing seller today is of very recent vintage, as it is inconsistent with positions that it or the RIAA has taken in prior negotiations in 2000, 2001, and 2003, in the prior CARP proceeding, as well as in agreements that the RIAA reached with the DiMA and SDARS companies. *See* 5/4/06 Tr. 309:2-310:6 (Simson). *See* JPFF.

294. The use of a flat fee, regardless of the amount of music a station uses or the amount of revenue it generates, will also allow SoundExchange to cover the costs of administering the license. *See* Jaffe 2001 WDT ¶ 77; Jaffe 2001 WRT at 26, 31; 7/31/06 Tr. 35:12-13 (Parsons). Prior deals with ASCAP, BMI, and SESAC have all recognized that a minimum fee in the range of $250 is appropriate to cover the costs of administering a license. *See* Jaffe 2001 WRT at 30-33.

295. The flat fee structure set forth by the Radio Broadcasters, which provides for different fees for stations in different markets, and different sized stations, takes into account the varying markets for music and the relative popularity of individual stations within each market. Factors such as market and individual station popularity correlate with the actual usage of the sound recording performance right in each particular circumstance. *See* Parsons WDT ¶¶ 45-47; 7/26/06 Tr. 70:20-71:17 (Halyburton). Thus,

even with a flat-fee structure, the rate proposal put forward by Radio Broadcasters can fairly account for different levels of music use among different stations.

B. DERIVATION FROM ASCAP AND BMI STREAMING AGREEMENTS

1. Applying the Benchmark Agreements

296. Radio Broadcasters' fee proposal is based on a benchmark derived from the royalties currently paid by the radio industry to ASCAP and BMI for simulcast streaming. The agreements negotiated by the Radio Music License Committee (RMLC) and ASCAP and BMI are included in Radio Broadcasters' Written Direct Statement as RBX 5 and RBX 6.

297. Musical works royalty fees paid by Radio Broadcasters for the digital performance right are the most appropriate benchmark to use in this proceeding. *See* JPCL Part IV. The two markets involve the same buyers (Radio Broadcasters), the same right (digital performance of either musical works or sound recordings), and the same activity (radio simulcast streaming over the Internet). The sellers in the two markets, while not identical, approach the market in the same position. *See* JPCL Part IV.

298. Under the benchmark ASCAP and BMI agreements, the radio industry as a whole is obligated to pay an annual flat sum to each PRO in exchange for the right to publicly perform musical works both over the air and over the Internet. RBX 5; RBX 6. In each agreement, the fees for simulcast streaming were separately negotiated by the RMLC. Meehan WRT ¶¶ 9-11; 11/13/06 Tr. 115:22-117:12 (Meehan). The BMI agreement (RBX 5) specifically states that for the year 2006, $650,000 would be paid collectively by all radio stations in exchange for the right to perform musical works by

means of simulcast streaming. Halyburton WDT ¶ 47; RBX 5. The ASCAP agreement (RBX 6) has an identical total royalty figure to the BMI agreement, and the parties negotiated over and agreed on identical amounts for simulcast streaming. Halyburton WDT ¶¶ 48-49; Meehan WRT ¶ 10; 7/26/06 Tr. 77:10-21 (Halyburton); 11/13/06 Tr. 116:15-117:12 (Meehan). This results in a total annual payment to ASCAP and BMI of $1.3 million for 2006 for simulcast streaming. Halyburton WDT ¶ 49; 7/26/06 Tr. 77:22-78:3 (Halyburton).

299. SESAC's catalog of musical works encompasses a market share of approximately 4 percent. Halyburton WDT ¶ 51; Hauth WDT ¶ 9; RBX 19; 7/26/06 Tr. 78:4-8 (Halyburton); 7/27/06 289:17-22 (Hauth). Nevertheless, it is impossible for a radio station to operate without a license from SESAC because radio stations cannot always control or know in advance what musical works they broadcast. 7/27/06 Tr. 291:9-292:14 (Hauth). This gives SESAC tremendous market power despite its comparatively small catalog, and it uses this market power to charge rates far in excess of fair market rates. Hauth WDT ¶ 8; 7/27/06 Tr. 289:15-291:8 (Hauth).

300. Thus, rather than relying on the actual royalty fees charged by SESAC, Radio Broadcasters' fee proposal accounts for the musical works in its catalog by attributing an additional fee to account for SESAC's pro-rata share of music on radio. Halyburton WDT ¶ 51; Hauth WDT ¶ 8; 7/26/06 Tr. 78:4-15 (Halyburton); 7/27/06 Tr. 292:19-293:9 (Hauth).

301. There is also a very small number of musical works not accounted for in the catalogs of any of the three major PROs. Halyburton WDT ¶ 51, n. 2. Thus, Radio

Broadcasters' fee proposal starts with an industry-wide fee of $1.3 million to represent ASCAP and BMI, and adds an additional 5 percent of that number to account for SESAC and any other musical works. Halyburton WDT ¶ 51; Hauth WDT ¶ 8; 7/26/06 Tr. 78:4-15 (Halyburton); 7/27/06 Tr. 292:19-293:9 (Hauth). The resulting total is $1,365,000 for 2006. Halyburton WDT ¶ 51.

2. SoundExchange's Criticism Of This Benchmark Is Without Merit.

302. SoundExchange has taken issue with the use of the BMI and ASCAP agreements as benchmarks for this proceeding, but its criticisms ring hollow. Dr. Brynjolfsson conjectured that, when negotiating these deals, the only thing that mattered was the overall fee level for both terrestrial broadcasting and simulcast streaming. He claimed that the copyright holders "likely cared about the total payments but cared very little about the break-down between webcasting and over-the-air radio, whereas the simulcasters had a very real incentive to create a low 'benchmark' for use in this proceeding." Brynjolfsson WRT at 12.

303. Dr. Brynjolfsson's claims are purely hypothetical and should not be relied upon. During cross-examination, he testified that he did not talk to anyone at all—not people at BMI, not people at ASCAP, not people representing the radio industry—about what the parties intended or wanted in those agreements. 11/21/06 Tr. 189:20-190:14 (Brynjolfsson). And he did not have any factual information about whether the radio industry actually intentionally set low webcasting figures for purposes of using them as a benchmark in this proceeding. 11/21/06 Tr. 190:15-191:14 (Brynjolfsson).

304. Mr. Meehan, on the other hand, was personally involved in the negotiations of both of these agreements. Meehan WRT ¶¶ 9-10. He testified that the streaming numbers were agreed upon by the parties as "a reasonable, fair market value for the simulcast streaming license." Meehan WRT ¶ 9. He further testified that the RMLC, which negotiated the agreements on behalf of the radio industry, did not "[a]t any time during the negotiation of the simulcast streaming fees with ASCAP or BMI . . . consider the possible use of those agreements in this proceeding." 11/13/06 Tr. 117:13-17 (Meehan).

C. THE PROPOSED RATE STRUCTURE

305. Although Radio Broadcasters pay a flat collective fee for the ASCAP and BMI royalties for both over-the-air and simulcast streaming performances, Radio Broadcasters' proposal for a simulcast streaming fee actually adopts a per-station flat fee structure. Unlike the ASCAP and BMI royalty agreements, Radio Broadcasters' fee proposal does not contemplate an industry-wide ceiling on total fees. Thus, SoundExchange will benefit with each additional radio station that comes online. Parsons WDT ¶ 43.

306. Regardless of how many radio stations are streaming, under Radio Broadcasters' fee proposal, each station will pay a fixed amount depending on its size and market, as described below. The $1,365,000 calculated from the ASCAP and BMI agreements as a benchmark is a target which that reached based on the number of radio stations streaming as of October 2005. 7/31/06 Tr. 24:22-25:16 (Parsons). *See also*

Parsons WDT ¶ 44; Halyburton WDT ¶ 22 (discussing the count of streaming stations as of October 2005); RBX 4 (same); 7/26/06 Tr. 54:9-56:9 (Halyburton) (same).

307. Radio Broadcasters expect the number of streaming radio stations to increase under this proposal. Parsons WDT ¶ 43. To the extent that more stations begin streaming, the total fees paid to SoundExchange will also increase. Thus, SoundExchange would share in the upside of the growth of simulcast streaming in the radio industry.

308. In fact, Dr. Brynjolfsson has submitted evidence that the number of streaming radio stations has already grown since the time Radio Broadcasters' fee proposal was formulated. Brynjolfsson WRT at 22-26; 11/21/06 Tr. 72:6-75:1 (Brynjolfsson). Based on Dr. Brynjolfsson's more recent figures, Radio Broadcasters have calculated the total royalty fees that would be payable by the radio industry to SoundExchange. This calculation is attached to this document as Appendix B. The total, $2,374,393, already exceeds by over $1 million the $1,365,000 benchmark that would be equivalent to the musical works digital performance royalties paid by the radio industry. The more stations come online, the more this royalty figure will grow.

309. A flat per-station fee is the most appropriate metric for simulcast streaming. Because simulcast streaming is not the principal activity of a radio station, and because radio stations pay royalties via a flat fee metric for their principal over-the-air operations, a flat fee will keep administrative burdens to a minimum. It will also allow stations to grow their audience and make advertising sales goals without fear that a larger audience will result in unacceptably high fees. *See* Halyburton WDT ¶¶ 23-24;

Coryell WDT ¶¶ 26, 29; It will allow stations like the Bonneville San Francisco stations to remove restrictions on their audience. *See* Coryell WDT ¶¶ 31-38; 7/27/06 Tr. 20:21-27:7 (Coryell). A flat fee metric works for over-the-air royalties; it will work for streaming royalties. 7/26/06 Tr. 71:18-72:6 (Halyburton).

310. Because some radio stations are music-intensive, some are all-talk, and some are in between, it would not be fair for every radio station to pay the same flat royalty fee for the performance of sound recordings. Hauth WDT ¶ 7; Parsons WDT ¶ 50; 7/27/06 Tr. 287:6-288:13 (Hauth); Thus, Radio Broadcasters' fee proposal includes 5 categories of radio stations, determined by the relative amount of their programming that features recorded music. The less programming that features recorded music, the lower the percentage of the applicable flat fee a station should be required to pay. This accounts for differences in music use among various kinds of radio stations. *See* Brynjolfsson WRT at 18; 11/21/06 Tr. 251:2-22 (Brynjolfsson) (acknowledging that the less music a service uses, the less it should pay in royalties).

D. ANNUAL INCREASES

311. Radio Broadcasters' fee proposal contains an annual increase provision of 4 percent. This increase is based upon, but more generous than, the RMLC-ASCAP agreement.

312. During the negotiations of the agreement between the RMLC and ASCAP, which is in effect through 2009 (*see* RBX 6), the parties separately negotiated and settled upon an individual annual fee for simulcast streaming for each year from 2007 to 2009. Meehan ¶¶ 10-11; 11/13/06 Tr. 149:9-150:6 (Meehan). Although the agreement

on its face does not provide a separate number for simulcast streaming and for terrestrial broadcasting, those numbers were indeed negotiated separately and then added together in the final agreement. RBX 6; Meehan WRT ¶ 11; 11/13/06 Tr. 149:21-151:6 (Meehan). The fee they agreed to for 2007 is $675,000, the fee for 2008 is $700,000, and the fee for 2009 is $725,000. Meehan WRT ¶ 11.

313. In addition, the parties agreed that the simulcast streaming fees for the years 2004, 2005, and 2006 would mirror the separate simulcast streaming fees that had previously been negotiated with BMI and laid out in that agreement. 11/13/06 Tr. 116:15-117:12 (Meehan). For 2006, the fee for simulcast streaming separately set out in the BMI agreement, and therefore the fee agreed to during the negotiations for the ASCAP agreement, was $650,000. RBX 5; Halyburton WDT ¶ 47.

314. Thus, the annual increase for the fees agreed upon for simulcast streaming during the negotiation of the ASCAP agreement were, for 2006 to 2007, 3.8 percent (from $650,000 to $675,000); for 2007 to 2008, 3.7 percent ($675,000 to $700,000); and from 2008 to 2009, 3.6 percent ($700,000 to $725,000).

315. The 4 percent annual increase proposed by Radio Broadcasters is more generous to SoundExchange, than the annual increase which was specifically negotiated between the RMLC and ASCAP.

E. DESCRIPTION OF MARKET AND STATION SIZE ALLOCATIONS

316. In addition to the features outlined above, Radio Broadcasters' fee proposal also assigns per-station flat fees according to the size of the station and the size

of the market it is in. Parsons WDT ¶¶ 45, 47. This is another way to account for the number of performances of copyrighted sound recordings (in the sense of performances to individual listeners) that will occur on each station's simulcast stream. Because simulcast streaming audiences are predominantly local, *see* PFF ¶ 18, it is reasonable to assume that the size of a particular station's simulcast audience will be related to the size of the market where that station operates. Stations in bigger cities typically have bigger streaming audiences.

317. Likewise, not all stations within a particular market have equal audience sizes. Radio Broadcasters' fee proposal accounts for this differential by assigning each station within each market to a category of large, medium, or small based on its over-the-air Arbitron cume (a measure of the total number of unique listeners) for the most recent 4 quarters. Parsons WDT ¶ 47. Thus, the flat fee payable by any given station depends on the size of its market and the size of its over-the-air audience, in addition to its level of music use as described above.

318. Finally, because it takes stations about six months to establish a viable audience for a new simulcast stream, audiences will be smaller than normal during this initial start-up period, and fewer performances of sound recordings will take place. Thus, Radio Broadcasters' fee proposal includes a provision that discounts the royalty owed by a station for the first six months of the existence of its simulcast stream. Parsons WDT ¶ 51.

F. EPHEMERAL COPIES

319. Ephemeral copies are made solely for the purpose of effectuating public performances. Jaffe 2001 WRT at 85-87; Jaffe 2001 Tr. 6555:14-6557:16. Radio Broadcasters do not pay any royalties for ephemeral copies for the performance of musical works in over-the-air transmissions. 17 U.S.C. § 112(a); 2001 Tr. 6556:13-16 (Jaffe). Such copies have no economic value separate or distinct from the value of the public performances that they effectuate. Jaffe 2001 WDT ¶ 82; Jaffe 2001 WRT at 85; Jaffe 2001 Tr. 6556:10-13. To compensate SoundExchange separately for both the performance and the ephemeral rights would allow SoundExchange effectively to collect twice for the same right. 2001 Tr. 3904:2-16 (Fisher). Therefore, Radio Broadcasters' fee proposal does not include a separate royalty fee for ephemeral recordings; rather, the royalty for the Section 112(e)(1) statutory license is to be folded in as part of the royalty for the Section 114(d)(2) license. Radio Broadcasters take no position as to the percentage of the overall royalty that is to be designated as the portion attributable to the making of ephemeral copies.

320. SoundExchange's rate proposal adopts a similar posture on the ephemeral recording, at least in its absence of a separate fee. The monthly fee proposed by SoundExchange is intended "to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies." SoundExchange Rate Proposal at 1. Later, SoundExchange states that 8.8 percent of its proposed monthly fee be attributable to ephemeral recordings, SoundExchange Rate Proposal at 3, but the effect is that even under SoundExchange's proposal, licensees will be paying for the right to perform sound recordings without separately paying for the right to make ephemeral

copies. Not one of SoundExchange's witnesses discussed proposed rates or values for ephemeral recordings in written or oral testimony.

321. Radio Broadcasters' position is explicitly supported by the Copyright Office's DMCA Section 104 Report, issued in August 2001 ("Section 104 Report"), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf. The Copyright Office concluded that the Section 112(e) statutory license is best viewed as "an aberration" and expressly observed that it did not see "any 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." Section 104 Report at 144 n. 434.

G. MINIMUM FEE

322. Radio Broadcasters propose a minimum per-calendar-year fee per station, regardless of the number of months during the year that station is streaming.

323. The only justification for a minimum fee is to protect against a situation in which it costs the license administrator more to administer the license than it would receive in royalties. Jaffe 2001 WRT at 32; 2001 Tr. 12387:2-12388:16 (Jaffe). There is no evidence that this incremental cost exceeds the minimum fee amount proposed by Radio Broadcasters.

324. In any event, a flat per-station fee will be exceedingly inexpensive to administer. There will be no need to trade usage or revenue and no need for audits, saving SoundExchange and Radio Broadcasters burden and expense.

XII. RADIO BROADCASTERS' FEE PROPOSAL

325. Based on the foregoing analyses of the record evidence, Radio Broadcasters propose a per-station flat royalty fee for AM/FM Streaming. The base amount payable by each station depends on three factors: the size of the radio station's market (according to the BIA revenue rank of the market), the size of the station within that market (as determined by Arbitron over-the-air cume figures for the most recent 4 quarters), and the radio station's level of music use.

326. The fees are payable by each station monthly, in the amount of one-twelfth of the stated annual fees in this proposal.

327. The fees presented in this proposal are applicable for the calendar year 2006.

A. MUSIC-FORMATTED STATIONS

328. The annual fee payable by music-formatted stations in markets 1 – 5 will be $8,000 for large stations, $6,500 for medium stations, and $6,000 for small stations.

329. The annual fee payable by music-formatted stations in markets 6 – 10 will be $5,500 for large stations, $4,000 for medium stations, and $3,000 for small stations.

330. The annual fee payable by music-formatted stations in markets 11 – 25 will be $3,500 for large stations, $2,500 for medium stations, and $1,500 for small stations.

331. The annual fee payable by music-formatted stations in markets 26 – 50 will be $2,000 for large stations, $1,500 for medium stations, and $1,000 for small stations.

332. The annual fee payable by music-formatted stations in markets 51 – 100 will be $1,500 for large stations, $1,000 for medium stations, and $750 for small stations.

333. The annual fee payable by music-formatted stations in markets 101 – 200 will be $1,000 for large stations, $750 for medium stations, and $500 for small stations.

B. NEWS, TALK, SPORTS, AND/OR BUSINESS STATIONS

334. The annual fee payable by news, talk, sports, and/or business stations (that is, stations where at least 95 percent of the programming is news, business, talk, teaching/talk, or sports) in markets 1 – 10 will be $750. In markets 11 – 100 the annual fee for such stations will be $500. In markets 101 and higher the annual fee for such stations will be $250.

C. MIXED FORMAT STATIONS

335. Stations with between 25 percent and 95 percent of their programming reasonably classified as news, business, talk, teaching/talk or sports will pay a percentage of the applicable annual fee for a music-formatted station as follows.

336. Stations where 25 percent to 50 percent of the programming is news, business, talk, teaching/talk, or sports will pay 65 percent of the applicable fee for a music-formatted station.

337. Stations where 50 percent to 75 percent of the programming is news, business, talk, teaching/talk, or sports will pay 40 percent of the applicable fee for a music-formatted station.

338. Stations where 75 percent to 95 percent of the programming is news, business, talk, teaching/talk, or sports will pay 15 percent of the applicable fee for a music-formatted station.

D. MINIMUM FEE

339. The minimum fee is $250 in any calendar year for any station, regardless of the number of months during that calendar year the station is streaming.

E. STATIONS IN THEIR FIRST SIX MONTHS OF STREAMING

340. For the first six months that a station begins streaming, the applicable annual fee will be reduced by 50 percent.

F. ANNUAL INCREASES

341. All fees will increase by 4 percent each calendar year.

G. PAYMENT TERMS

342. Radio Broadcasters' proposed payment terms are discussed in JPFF, Part IV.

XIII. RECORDKEEPING

A. THE RECORD EVIDENCE SHOWS THAT RADIO BROADCASTERS HAVE PARTICULAR CHARACTERISTICS THAT AFFECT NOTICE AND RECORDKEEPING ISSUES.

343. The Judges have made clear that recordkeeping issues will not be determined in this proceeding. *See* Order Denying Radio Broadcasters' Mot. for Clarification at 1-2 (Sept. 8, 2006). The Judges also have made clear, however, that "[s]ome evidence concerning recordkeeping aids the Board's understanding of the collections/payment administration process as a matter of general background information." *Id.* at 1. Due to the unique characteristics and concerns of Radio Broadcasters concerning these issues, these issues are discussed briefly below.

1. Sample Reporting Is More Appropriate For Radio Broadcasters Than Census Reporting.

344. The Judges' current recordkeeping regulations requiring reporting of music use data for two seven-day periods per calendar quarter is a more than sufficient sample to ensure accurate royalty distributions with respect to Radio Broadcasters. Sample reporting is routinely relied upon by well-respected organizations such as Gallup or The Harris Poll as an efficient and accurate way to measure characteristics of a larger population. Parsons WRT ¶ 6. Other performing rights organizations, including ASCAP and BMI, rely on sampling for music use reporting. Parsons WRT ¶ 6; RBX 6 at 6 (demonstrating that ASCAP requires music use reporting for no more than one week per year).

345. As Mr. Parsons testified, sample reporting has many benefits. *See* Parsons WRT ¶ 7. For example, sampling greatly reduces the volume of data that

broadcasters would have to report and that SoundExchange would have to analyze and process, while sacrificing very little, if anything, in the way of accuracy. Parsons WRT ¶ 7; 11/14/06 Tr. 110:8-14 (Parsons).

346. Sample reporting is especially well-suited for radio because the playlists of terrestrial radio stations are typically drawn from narrow, mainstream sound recordings and radio stations tend to repeat songs frequently. Parsons WRT ¶ 8; 11/14/06 Tr. 111:19-114:9 (Parsons) (discussing the typically small playlists of radio stations). Indeed, Mr. Parsons testified that only about "150 to 300 songs are on a typical station playlist" and that "radio station systems are actually geared to rotate through the music in a week's time. So you will hear almost all the music on the radio station. It'd be rare not to hear a song within a week." 11/14/06 Tr. 113:9-17 (Parsons). Mr. Parsons further testified that "playlists change very slowly," with songs remaining on a playlist for about 6-8 months on average and with only 1-2 songs every week or two being substituted in and out. 11/14/06 Tr. 113:18-114:3 (Parsons). Thus, the likelihood that a particular song will be picked up in a report of only a small sample of a station's playlist is great. Parsons WRT ¶ 8; 11/14/06 Tr. 111:10-15 (Parsons). As even SoundExchange's Executive Director, John Simson, has acknowledged, sampling "may be perfectly suited to FM radio where playlists are short, extremely homogenized and the loss of data in sample is minimal." Servs. Ex. 96 at 3; Parsons WRT ¶ 8.

347. In addition, samples are collected across numerous radio broadcasters who simulcast their broadcast programming over the Internet, many of which simulcast in the same format. Thus, if a sound recording is omitted from a sample report prepared

by one station, there is a good chance that it would nonetheless be picked up in a subsequent report by that station or in a report by another station. Parsons WRT ¶ 7; 11/14/06 Tr. 110:18-111:3 (Parsons).

2. Radio Broadcasters Have Legacy Systems That Cannot Accommodate Changes To Recordkeeping Procedures.

348. Broad notice and recordkeeping obligations, applicable indiscriminately to all types of services, impose a particular burden on radio simulcasters. Parsons WRT ¶ 9. Radio broadcasters have had music use and tracking systems in place for many years – systems that were designed to report music use to the PROs for their over-the-air radio business, not AM/FM Streaming. Parsons WRT ¶ 9. These systems have certain limitations on, for example, the length of the fields in which music use information is stored and the use of abbreviations. 11/14/06 Tr. 116:6-117:14 (Parsons). Radio broadcasters are fundamentally different from Internet-only webcasters in that their core business does not revolve around Internet simulcasting, but rather is focused on terrestrial broadcasting. Parsons WRT ¶ 9. Forcing broadcasters to overhaul their integrated, established, and proven systems in order to provide music use reports for the ancillary activity of AM/FM Streaming is inefficient and unfair.

3. Radio Broadcasters Often Do Not Have the Required Recordkeeping Information Because the Labels Do Not Give It to Them.

349. Strict recordkeeping provisions requiring extensive reporting of multiple data elements concerning sound recordings transmitted beyond what is required in the current regulations would impose a particular burden on Radio Broadcasters. Radio

Broadcasters receive the music they play almost exclusively directly from record labels or their representatives in the form of promotional copies. *See* RBX 27, Tab B at 3-4.

350. The record shows that promotional CDs provided by the record companies contain only minimal identifying information – in many cases identifying only the title and artist. Parsons WRT ¶ 10; RBX 27 at atts. B1-3, E1-3, H1-2, K1-2; RBX 32. Even Mr. Simson has acknowledged in a publicly disseminated SoundExchange newsletter that Radio Broadcasters' position has merit: "[o]ne of the most compelling arguments made by the users in our recent proceedings on Notice and Recordkeeping was that they often get product with no identifying information – and they backed it up with several examples." RBX 33, at 2; Parsons WRT ¶ 10.

351. Mr. Simson testified that after receiving promotional copies of sound recordings, broadcasters will "typically . . . then get the full CD that has all of the elements at some point after that." 5/17/06 Tr. 302:18-20 (Simson). Mr. Parsons explained, however, that radio stations rarely receive anything other than the original promotional copy of a CD. Parsons WRT ¶ 11 ("It has been my experience in the radio industry, however, that the original promotional copies are often the only copies a radio station ever receives from a record label of any particular recording."). If radio stations do receive a follow-up CD from the record labels, it is usually a bare-bones CD-R and is usually sent long after a song has been added to a station's playlist. Parsons WRT ¶ 11.

352. It would be commercially unreasonable to require radio broadcasters to report informational elements concerning sound recordings transmitted to the collection

and distribution agent of the record labels when the labels themselves do not provide that information in the first place. *See generally* Parsons WRT ¶¶ 10-11.

PROPOSED CONCLUSIONS OF LAW

1. Recognizing the long-standing and mutually beneficial relationship between Radio Broadcasters and the recording industry, and the promotional benefits conformed by radio broadcasts on record companies and artists, Congress has steadfastly refused to grant a broad sound recording performance right, particularly in the context of radio broadcasting. *See* PFF ¶¶ 24-35.

2. Over-the-air radio has enormous promotional value to the record companies and is one of the most significant driving forces in the sale of sound recordings. *See* PFF ¶¶ 43-50. Over-the-air radio is crucial to the success of the recoding industry and its artists. *See* PFF ¶¶ 44-46.

3. The promotional benefit of public performances in influencing increased sales of sound recordings constitutes additional value (on top of direct royalty payments) flowing to sound recording copyright owners and performing artists that would be considered as compensation by willing buyers and willing sellers in a competitive market. *See* PFF ¶¶ 44-46.

4. Record companies expend huge sums of money to induce radio stations to play their recordings and engage in countless activities to promote their sound recordings to terrestrial radio for the purpose of boosting sales. Therefore, it is reasonable to conclude that radio airplay confers at least [[ ]] in value. If the net

promotional value of radio airplay did not exceed the [[ ]] that the record companies expend promoting to radio, the record companies would not incur these costs. *See* PFF 54-64.

5. AM/FM Streaming provides, at least, the same promotional value as terrestrial radio. *See* PFF ¶¶ 69-71, 80. If anything, additional features provided by AM/FM Streaming, such as real time, identification of artists, title and album,"the ability to purchase instantly, in-depth artist information, local concert information, music news and reviews and other website features, increase the promotional value of AM/FM Streaming beyond that of over-the-air radio on a per listener per-song basis. *See* PFF ¶¶ 72-77.

6. As the testimony presented by SoundExchange witnesses, expressing doubt about the promotional value of radio, consist of nothing but opinion and conjecture, they deserve no weight. *See* PFF ¶¶ 78-83.

7. The Judges are required by 17 U.S.C. § 114(f)(2)(B)(i) to consider the promotional or substitutional value when setting royalty rates. Therefore, Dr. Brynjolfosson's opinion that radio broadcasters and the record companies can negotiate deals to accommodate the promotional value of webcasting are contrary to law and should be disregarded. *See* PFF ¶¶ 84-86. In light of the risk of liability under state and federal law, willing buyers and willing sellers in a competitive market would not make such deals.

8. In any event, the Judges are obligated by law to factor promotional value into the statutory license. *See* 17 U.S.C. § 114(f)(2)(B)(i).

9. AM/FM Streaming does not pose any greater risk of displacing sales of sound recordings than the minimal risk posed by over-the-air radio, and SoundExchange's witnesses failed to provide any meaningful evidence, beyond pure speculation, that AM/FM Streaming is substitutional. *See* PFF ¶¶ 87-100.

10. Based on the enormous promotional value of AM/FM Streaming to the recording industry, a lower sound recording performance royalty is mandated by law. 17 U.S.C. § 114(f)(2)(B)(i); *see* PFF ¶¶ 36-100.

11. The record companies incur no marginal cost in licensing AM/FM Streaming. The significant marginal technological contributions, capital investments, cost, and risk made by Radio Broadcasters to the simulcast streaming industry counsel in favor of a lower rate because the seller would not have this particular income stream available to it without the buyer's investment, which is recognized by the seller in offering the buyer a lower cost for the desired product. *See* PFF ¶¶ 90-108. Furthermore, even beyond the margin, Radio Broadcasters make creative contributions to the programming they stream that equals or exceeds the creative contribution of record labels in the creation of sound recordings.

12. The Section 114 statutory license at issue in this proceeding mandates that the rates and terms set by the Judges "shall distinguish <u>among the different types</u> 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). Thus, there <u>are</u> different types of services and the Judges must determine more than one rate – a separate rate for each type of service.

13. Radio Broadcasting is unique and possesses characteristics that compel the determination of a separate rate, lower than the rate applicable to Internet-only webcasters. *See* PFF ¶¶ 128-135. Record labels make no relative creative or technological contributions, capital investments, cost, or risk to AM/FM Streaming.

14. Radio broadcasters' core business is their over-the-air operation and they can reach their audience through this activity without having to pay sound recording royalties. *See* PFF ¶¶ 149-155. The would lower the amount a willing buyer would pay.

15. Due to numerous factors, including the relative promotional benefit conferred on the recording industry by AM/FM Streaming compared to Internet only webcasting, *see* PFF ¶¶ 156-168. The lack of interactivity and narrow genre-based choices, its low bitrate transmission, and its radio-specific programming elements, *see* PFF ¶¶ 169-182, the license fee for AM/FM Streaming should be lower than the fee for Internet only webcasting.

16. In a competitive market, the value of the sound recording performance right is less for AM/FM Streaming than for Internet-only webcasting due to the comparatively small role of sound recordings in the programming for AM/FM Streaming. *See* PFF ¶¶ 187-194. Thus, AM/FM Streaming should be subject to lower rates.

17. Compared to Internet-only webcasting, the programming for AM/FM Streaming uses far fewer sound recordings than Internet only webcasting and far more original content. *See* PFF ¶¶ 195-201. Thus, a willing buyer would pay less and the fee should be lower..

18. Different musical works performance rights agreements that are uniquely applicable to AM/FM Streaming have been negotiated. The existence of these agreements confirms that AM/FM Streaming should be subject to lower rates than Internet-only webcasting. *See* PFF ¶¶ 202-207.

19. SoundExchange has presented no case with respect to AM/FM Streaming, but has merely "bootstrapped" its arguments relative to large, Internet-only webcasters to AM/FM Streaming. SoundExchange's experts, Drs. Pelcovits and Brynjolfsson, based their fee models entirely on Internet-only webcasting and data relevant to Internet-only webcasting and wholly failed to account for the unique characteristics of AM/FM Streaming. Therefore their models are inapplicable to Radio Broadcasters. *See* PFF ¶¶ 208-217.

20. A Radio Broadcaster as a willing buyer in a competitive market would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings because it is clear that Radio Broadcasters derive their revenues from their own creative contributions and the bond that they form with their audience through these contributions, rather than the right to perform sound recordings. *See* PFF ¶¶ 226-245.

21. A Radio Broadcaster as a willing buyer would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings, as reflected in the most recent agreements between Radio Broadcasters and licensing agencies. *See* PFF ¶¶ 247-249.

22. A Radio Broadcaster as a willing buyer would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings because such a fee metric does not take into account the different amount of music used by different services or the different amounts of music used by different types of stations, including talk-intensive or mixed-format stations. *See* PFF ¶¶ 250-254.

23. A Radio Broadcaster as a willing buyer would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings, because in such circumstances SoundExchange has shown that it will usurp the business judgment of the licensee and demand royalties based on revenues the licensee never received and does not believe it is entitled to. *See* PFF ¶¶ 255-259.

24. A Radio Broadcaster as a willing buyer would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings because Radio Broadcasters actually play a larger part in driving record label revenues than vice-versa. *See* PFF ¶ 260.

25. A Radio Broadcaster as a willing buyer would not agree to pay a willing seller a share of its revenue in exchange for a license to perform sound recordings because courts have ruled that percentage of revenue fees are not appropriate in the context of blanket licenses for the performance right. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, 831 F. Supp. 137, 156-57 (S.D.N.Y. 1993) ("Because ASCAP's percentage-of-revenue formula takes no account of changes in music use, it is not an acceptable method of arriving at a reasonable fee."); United States v. Am. Socy' of Composers, Authors & Publishers, 157 F.R.D. 173, 197 (S.D.N.Y. 1994) ("[W]e believe

that a license fee formula that relies *exclusively* on a percentage of gross revenue for the fee calculation is not a reasonable measure of the value of a music performance license because it does not account for changes in the value of the license by considering changes in the level of music use.").

26. A Radio Broadcaster as a willing buyer would not agree to pay a willing seller under a "greater of" metric because such a metric improperly places all risk on the buyer, as the seller will be paid even if the buyer sustains heavy losses. *See* PFF ¶¶ 261-263.

27. A Radio Broadcaster as a willing buyer would not agree to pay a willing seller under a "greater of" metric because such a metric would, upon the buyer's making the business more successful, allow the seller to recover a higher amount for providing nothing more than it would have provided otherwise. *See* PFF ¶¶ 264-266.

28. Consideration of profitability is fundamentally inconsistent with how agreements are reached in competitive markets; thus, the profitability of Radio Broadcasters with respect to AM/FM Streaming should not be considered. The rate established in this proceeding should not depend on whether Radio Broadcasters have been able to turn a profit under past rates. *See* PFF ¶¶ 267-270.

29. SoundExchange's expert, Dr. Brynjolfsson, made generalizations about the entire AM/FM industry based on distorted analysis of the evidence. Dr. Brynjolfsson was not qualified as an expert on the radio industry or webcasting. His review of radio streaming financial information deserves little or no weight. **[cites].**

30. Radio Broadcasters' proposed flat fee model is the most appropriate model for AM/FM Streaming and represents the fees a willing buyer would pay a willing seller in a competitive market. *See* PFF ¶¶ 288-295.

31. Musical works royalty fees paid to the performing rights organizations are the most appropriate benchmark for determining reasonable rates for AM/FM Streaming. *See* PFF ¶¶ 296-301.

32. Dr. Brynjolfsson's criticism of the musical works benchmark are based on hypothetical musings and are totally unsupported by the record. Accordingly, Dr. Brynjolfsson's opinion should not be relied upon. *See* PFF ¶¶ 302-304.

33. For all of the foregoing reasons, the Judges should adopt Radio Broadcasters' fee model set forth in PFF ¶¶ 325-341.

Respectfully submitted,

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December 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2006, the Public Version of Radio Broadcasters' Proposed Findings of Fact and Conclusions of Law was served by e-mail and by overnight courier on the following parties:

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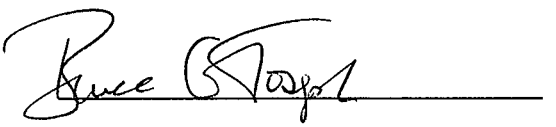

A

Appendix A

Expected Fees from Music Formatted Stations Under Broadcasters' Joint Simulcasting Fee Proposal

	Size in Market Based on Cume							
Market Rank:	Small	Medium	Large	No. Stns.	Small	Medium	Large	Total
1 - 5	$ 5,000.00	$ 6,500.00	$ 8,000.00	140	28	70	42	$ 931,000.00
6 - 10	$ 3,000.00	$ 4,000.00	$ 5,500.00	91	18.2	45.5	27.3	$ 386,750.00
11 - 25	$ 1,500.00	$ 2,500.00	$ 3,500.00	204	40.8	102	61.2	$ 530,400.00
26 - 50	$ 1,000.00	$ 1,500.00	$ 2,000.00	277	55.4	138.5	83.1	$ 429,350.00
51 - 100	$ 750.00	$ 1,000.00	$ 1,500.00	86	17.2	43	25.8	$ 94,600.00
100+	$ 500.00	$ 750.00	$ 1,000.00	43	8.6	21.5	12.9	$ 2,293.00

Total
$ 2,374,393.00

B

Radio Stations in Los Angeles, CA

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
cc	KHHT	92.3	FM	Los Angeles	yes		yes	
	KLIT	92.7	FM	Fountain Valley	yes		yes	
	KCBS	93.1	FM	Los Angeles	yes		yes	
	KDAY	93.5	FM	Redondo Beach	yes		yes	
	KZLA	93.9	FM	Los Angeles	no	yes	yes	
	KBUA	94.3	FM	San Fernando	no	yes	yes	
	KEBN	94.3	FM	Garden Grove	no	yes	yes	
	KTWV	94.7	FM	Los Angeles	yes		yes	
	KLOS	95.5	FM	Los Angeles	yes		yes	
	KFSH	95.9	FM	Anaheim	yes		yes	
	KXOL	96.3	FM	Los Angeles	no	no	no	Only morning live broadcast
	KWIZ	96.7	FM	Santa Ana	no	yes	yes	
	KLSX	97.1	FM	Los Angeles	yes		yes	
	KLYY	97.5	FM	Riverside	no	no	no	
	KVVS	97.7	FM	Mojave	yes		yes	
	KLAX	97.9	FM	East Los	no	no	no	
	KRCV	98.3	FM	West Covina	no	yes	yes	
cc	KYSR	98.7	FM	Los Angeles	yes		yes	
	KKLA	99.5	FM	Los Angeles	yes		yes	
	KKBT	100.3	FM	Los Angeles	no	yes	yes	
	KRTH	101.1	FM	Los Angeles	no	no	no	
	KSCA	101.9	FM	Glendale	no	yes	yes	
	KJLH	102.3	FM	Compton	yes		yes	
cc	KIIS	102.7	FM	Los Angeles	yes		yes	
	KDLD	103.1	FM	Santa Monica	yes		yes	
	KDLE	103.1	FM	Newport Beach	yes		yes	
cc	KOST	103.5	FM	Los Angeles	yes		yes	
	KEDD	103.9	FM	Johannesburg	no	no	no	
	KRCD	103.9	FM	Inglewood	no	yes	yes	
cc	KBIG	104.3	FM	Los Angeles	yes		yes	
	KMZT	105.1	FM	Los Angeles	no	yes	yes	
	KBUE	105.5	FM	Long Beach	no	yes	yes	
	KPWR	105.9	FM	Los Angeles	no	no	no	
	KALI	106.3	FM	Santa Ana	no	no	no	
	KGMX	106.3	FM	Lancaster	no	no	no	
	KROQ	106.7	FM	Pasadena	yes		yes	
	KSSE	107.1	FM	Arcadia	no	no	no	
	KLVE	107.5	FM	Los Angeles	no	yes	yes	
	KWVE	107.9	FM	San Clemente	yes		yes	
	XSUR	540	AM	Tijuana			no	
cc	KLAC	570	AM	Los Angeles	yes		yes	
	KAVL	610	AM	Lancaster	no	no	no	
cc	KFI	640	AM	Los Angeles	yes		yes	
	KIRN	670	AM	Simi Valley	no	no	no	

Radio Stations in Los Angeles, CA

	Radio Station Information			Live Webcast Availability			
Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
XTRA	690	AM	Tijuana			no	
KSPN	710	AM	Los Angeles	no	yes	yes	Local broadcasts
KBRT	740	AM	Avalon	yes		yes	
KABC	790	AM	Los Angeles	yes		yes	
KLAA	830	AM	Orange	no	no	no	
KRLA	870	AM	Glendale	yes		yes	
KALI	900	AM	West Covina	no	no	no	
KHJ	930	AM	Los Angeles	no	yes	yes	
KFWB	980	AM	Los Angeles	yes		yes	
KTNQ	1020	AM	Los Angeles	no	no	no	
KNX	1070	AM	Los Angeles	yes		yes	
KDIS	1110	AM	Pasadena	yes		yes	
cc KTLK	1150	AM	Los Angeles	yes		yes	
KXMX	1190	AM	Anaheim	no	yes	yes	
KHTS	1220	AM	Canyon Country	yes		yes	
KWKU	1220	AM	Pomona	no	no	no	
KYPA	1230	AM	Los Angeles	no	yes	yes	
KKGO	1260	AM	Beverly Hills	no	yes	yes	
KAZN	1300	AM	Pasadena	no	yes	yes	
KWKW	1330	AM	Los Angeles	no	no	no	
KWJL	1380	AM	Lancaster	no	no	no	
KLTX	1390	AM	Long Beach	yes		yes	
KMRB	1430	AM	San Gabriel	no	yes	yes	
KTYM	1460	AM	Inglewood	yes		yes	
KUTY	1470	AM	Palmdale	yes		yes	
KVNR	1480	AM	Santa Ana	no	no	no	Subscription required
KIEV		AM		no	no	no	
KMPC	1540	AM	Los Angeles	yes		yes	
KBLA	1580	AM	Santa Monica	no	no	no	
KAHZ	1600	AM	Pomona	no	yes	yes	
KFOX	1650	AM	Torrance	no	no	no	
Stations Total				75		75	
Streaming Stations Total				33		52	
% Streaming Stations				44.0%		69.3%	

Radio Stations in New York, NY

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	WFNY	92.3	FM	New York	yes		yes	
	WZAA	92.7	FM	Garden City	no	yes	yes	
	WPAT	93.1	FM	Paterson	no	no	no	
	WRTN	93.5	FM	New Rochelle	no	no	no	
	WJLK	94.3	FM	Asbury Park	no	yes	yes	
	WMJC	94.3	FM	Smithtown	no	yes	yes	
	WHFM	95.3	FM	Southampton	no	yes	yes	
	WPLJ	95.5	FM	New York	yes		yes	
	WQXR	96.3	FM	New York	no	yes	yes	
	WCTZ	96.7	FM	Stamford	yes		yes	
	WQHT	97.1	FM	New York	no	no	no	
	WALK	97.5	FM	Patchogue	no	yes	yes	
	WSKQ	97.9	FM	New York	nc	no	no	
	WKJY	98.3	FM	Hempstead	no	no	no	
	WMGQ	98.3	FM	New Brunswick	no	yes	yes	
	WBON	98.5	FM	Westhampton	no	no	no	
	WRKS	98.7	FM	New York	no	no	no	
	WAWZ	99.1	FM	Zarephath	yes		yes	
CC	WHTZ	100.3	FM	Newark	yes		yes	
	WHUD	100.7	FM	Peekskill	no	yes	yes	
	WCBS	101.1	FM	New York	no	yes	yes	
	WQCD	101.9	FM	New York	no	no	no	
	WBAB	102.3	FM	Babylon	no	yes	yes	
	WNEW	102.7	FM	New York	no	no	no	
	WBZO	103.1	FM	Bay Shore	no	yes	yes	
CC	WKTU	103.5	FM	Lake Success	no	yes	yes	
	WFAS	103.9	FM	White Plains	no	no	no	
	WRCN	103.9	FM	Riverhead	no	no	no	
CC	WAXQ	104.3	FM	New York	no	yes	yes	
CC	WWPR	105.1	FM	New York	yes		yes	
	WDHA	105.5	FM	Dover	yes		yes	
	WCAA	105.9	FM	Newark	no	yes	yes	
	WBLI	106.1	FM	Patchogue	no	yes	yes	
	WFAF	106.3	FM	Mount Kisco	no	no	no	
CC	WLTW	106.7	FM	New York	yes		yes	
	WLIR	107.1	FM	Hampton Bays	yes		yes	
	WWZY	107.1	FM	Long Branch	no	yes	yes	
	WXPK	107.1	FM	Briarcliff Manor	no	yes	yes	
	WBLS	107.5	FM	New York	no	no	no	Coming soon
	WLIE	540	AM	Islip	no	yes	yes	
	WMCA	570	AM	New York	yes		yes	
	WSNR	620	AM	Jersey City	yes		yes	
	WFAN	660	AM	New York	no	yes	yes	
	WOR	710	AM	New York	yes		yes	
	WNYII	740	AM	Huntington	no	no	no	
	WABC	770	AM	New York	yes		yes	
	WCBS	880	AM	New York	no	yes	yes	
	WRKL	910	AM	New City	no	yes	yes	
	WPAT	930	AM	Paterson	no	no	no	

Radio Stations in New York, NY

Radio Station Information				Live Webcast Availability			
Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
WWDJ	970	AM	Hackensack	no	no	no	
WINS	1010	AM	New York	no	yes	yes	
WEPN	1050	AM	New York	yes		yes	
WHLI	1100	AM	Hempstead	no	no	no	
WBBR	1130	AM	New York	yes		yes	
WVNJ	1160	AM	Oakland	no	yes	yes	
WWTR	1170	AM	Bridgewater	no	yes	yes	
WLIB	1190	AM	New York	no	no	no	
WFAS	1230	AM	White Plains	no	no	no	
WMTR	1250	AM	Morristown	yes		yes	
WADO	1280	AM	New York	no	yes	yes	
WRCR	1300	AM	Spring Valley	no	yes	yes	
WALK	1370	AM	East Patchogue	no	no	no	
WKDM	1380	AM	New York	no	no	no	
WLNA	1420	AM	Peekskill	no	no	no	
WNSW	1430	AM	Newark	no	no	no	
WCTC	1450	AM	New Brunswick	no	no	no	
WVOX	1460	AM	New Rochelle	yes		yes	
WZRC	1480	AM	New York	no	no	no	
WGHT	1500	AM	Pompton Lakes	no	yes	yes	
WJDM	1530	AM	Elizabeth	no	no	no	
WQEW	1560	AM	New York	no	yes	yes	Radio Disney
WWRL	1600	AM	New York	no	yes	yes	
WWRU	1660	AM	Jersey City	no	no	no	
Stations Total				73		73	
Streaming Stations Total				17		46	
% Streaming Stations				23.3%		63.0%	

Chicago Totals:
Clear Channel - 7 of 86 Stations
Bonneville - 3 of 86 Stations
Susquehanna - 0 of 86 Stations

Radio Stations in Chicago, IL

	Radio Station Information				Live Webcast Availability		
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final
	WPWX	92.3	FM	Hammond	yes		yes
	WKIE	92.7	FM	Arlington Heights	yes		yes
	WXRT	93.1	FM	Chicago	no	yes	yes
	WVIX	93.5	FM	Jolict	no	yes	yes
CC	WLIT	93.9	FM	Chicago	no	yes	yes
	WJKL	94.3	FM	Elgin	yes		yes
	WZZN	94.7	FM	Chicago	yes		yes
	WIIL	95.1	FM	Kenosha	yes		yes
CC	WNUA	95.5	FM	Chicago	no	yes	yes
	WJDK	95.7	FM	Seneca	no	no	no
	WERV	95.9	FM	Aurora	yes		yes
	WBBM	96.3	FM	Chicago	no	yes	yes
	WSSR	96.7	FM	Joliet	no	yes	yes
	WWDV	96.9	FM	Zion	yes		yes
Bonn.	WDRV	97.1	FM	Chicago	yes		yes
	WLUP	97.9	FM	Chicago	no	no	no
	WCCQ	98.3	FM	Crest Hill	yes		yes
	WFMT	98.7	FM	Chicago	no	no	no
	WUSN	99.5	FM	Chicago	no	yes	yes
	WRZA	99.9	FM	Park Forest	yes		yes
Bonn.	WILV	100.3	FM	Chicago	yes		yes
	WRXQ	100.7	FM	Coal City	yes		yes
	WKQX	101.1	FM	Chicago	no	no	no
Bonn.	WTMX	101.9	FM	Skokie	yes		yes
	WXLC	102.3	FM	Waukegan	no	yes	yes
	WYCA	102.3	FM	Crete	no	no	no
CC	WVAZ	102.7	FM	Oak Park	no	yes	yes
	WCSJ	103.1	FM	Morris	no	no	no
	WVIV	103.1	FM	Highland Park	no	yes	yes
CC	WKSC	103.5	FM	Chicago	no	yes	yes
	WWYW	103.9	FM	Dundee	no	no	no
	WXRD	103.9	FM	Crown Point	no	no	no
	WJMK	104.3	FM	Chicago	no	yes	yes
	WOJO	105.1	FM	Evanston	no	yes	yes
	WLJE	105.5	FM	Valparaiso	no	no	no
	WYKT	105.5	FM	Wilmington	no	no	no
	WZSR	105.5	FM	Woodstock	no	no	no
	WCKG	105.9	FM	Elmwood Park	no	yes	yes
	WSRB	106.3	FM	Lansing	yes		yes
	WPPN	106.7	FM	Des Plaines	no	yes	yes
	WSPY	107.1	FM	Plano	no	no	no
	WZVN	107.1	FM	Lowell	no	no	no
CC	WGCI	107.5	FM	Chicago	no	yes	yes
	WLFY	107.9	FM	Aurora	no	no	no
	WIND	560	AM	Chicago	yes		yes
	WSCR	670	AM	Chicago	yes		yes
	WGN	720	AM	Chicago	yes		yes
	WNDZ	750	AM	Portage	no	no	no

Radio Stations in Chicago, IL

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	WBBM	780	AM	Chicago	yes		yes	
	WAIT	820	AM	Willow Springs	no	no	no	
	WCPT	850	AM	Crystal Lake	yes		yes	
	WLS	890	AM	Chicago	yes		yes	
	WNTD	950	AM	Chicago	no	yes	yes	Registration required
	WMVP	1000	AM	Chicago	yes		yes	
	WNVR	1030	AM	Vernon Hills	no	yes	yes	
	WLIP	1050	AM	Kenosha	no	no	no	
	WNWI	1080	AM	Oak Lawn	yes		yes	
	WYLL	1160	AM	Chicago	yes		yes	
	WRTO	1200	AM	Chicago	no	no	no	
	WKRS	1220	AM	Waukegan	no	no	no	
	WJOB	1230	AM	Hammond	no	yes	yes	
	WSBC	1240	AM	Chicago	no	no	no	
	WWCA	1270	AM	Gary	yes		yes	
	WBIG	1280	AM	Aurora	yes		yes	
	WRDZ	1300	AM	La Grange	no	yes	yes	
	WKTA	1330	AM	Evanston	no	no	no	
	WJOL	1340	AM	Joliet	no	no	no	
	WLTH	1370	AM	Gary	no	no	no	
CC	WGRB	1390	AM	Chicago	no	yes	yes	
	WRMN	1410	AM	Kane	yes		yes	
	WEEF	1430	AM	Highland Park	no	no	no	
	WCEV	1450	AM	Cicero	no	no	no	
	WVON	1450	AM	Cicero	no	yes	yes	
	WCFJ	1470	AM	Chicago Heights	no	no	no	
	WSPY	1480	AM	Geneva	no	no	no	
	WPNA	1490	AM	Oak Park	yes		yes	
	WAKE	1500	AM	Valparaiso	no	no	no	
	WPJX	1500	AM	Zion	no	no	no	
	WJJG	1530	AM	Elmhurst	no	no	no	
	WCSJ	1550	AM	Morris	no	no	no	
	WBGX	1570	AM	Harvey	no	no	no	
	WKKD	1580	AM	Aurora	no	yes	yes	
	WONX	1590	AM	Evanston	no	no	no	
	WCGO	1600	AM	Chicago Heights	no	no	no	
	WMCW	1600	AM	Harvard	no	no	no	
CC	WRLL	1690	AM	Berwyn	no	yes	yes	
	Stations Total				86		86	
	Streaming Stations Total				27		51	
	% Streaming Stations				31.4%		59.3%	

Radio Stations in San Francisco, CA

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	KKDV	92.1	FM	Walnut Creek	no	yes	yes	
	KSJO	92.3	FM	San Jose	no	yes	yes	
	KNGY	92.7	FM	Alameda	yes		yes	
	KFGY	92.9	FM	Healdsburg	no	no	no	
	KRZZ	93.3	FM	San Francisco	no	no	no	
	KJZY	93.7	FM	Petaluma	no	no	no	
	KBAY	94.5	FM	Clay	no	yes	yes	
cc	KYLD	94.9	FM	San Francisco	no	yes	yes	
	KRTY	95.3	FM	Los Gatos	yes		yes	
	KUIC	95.3	FM	Napa	no	yes	yes	
	KMAX	95.7	FM	San Francisco	no	yes	yes	
	KRSH	95.9	FM	Healdsburg	no	yes	yes	
Bonn.	KOIT	96.5	FM	San Francisco	yes		yes	
	KLLC	97.3	FM	San Francisco	no	yes	yes	
	KFFG	97.7	FM	Los Altos	no	yes	yes	
	KVRV	97.7	FM	Monte Rio	no	no	no	
cc	KISQ	98.1	FM	San Francisco	no	yes	yes	
	KUFX	98.5	FM	San Jose	no	yes	yes	
	KSOL	98.9	FM	San Francisco	yes		yes	
	KSQL	99.1	FM	Santa Cruz	no	no	no	
	KVYN	99.3	FM	St. Helena	no	no	no	Some live broadcasts
	KFRC	99.7	FM	San Francisco	no	no	no	
	KZST	100.1	FM	Santa Rosa	no	no	no	
	KBRG	100.3	FM	San Jose	no	no	no	
	KVVZ	100.7	FM	San Rafael	no	yes	yes	
	KXTS	100.9	FM	Calistoga	no	no	no	
cc	KIOI	101.3	FM	San Francisco	no	yes	yes	
	KKIQ	101.7	FM	Livermore	no	yes	yes	
	KXFX	101.7	FM	Santa Rosa	no	no	no	
Bonn.	KDFC	102.1	FM	San Francisco	no	yes	yes	
	KBLX	102.9	FM	Berkeley	no	yes	yes	
cc	KKSF	103.7	FM	San Francisco	no	yes	yes	
	KJOR	104.1	FM	Windsor	no	no	no	
Sus.	KFOG	104.5	FM	San Francisco	yes		yes	
	KCNL	104.9	FM	Sunnyvale	yes		yes	
	KMHX	104.9	FM	Pinnert Park	no	no	no	New website; no link
	KITS	105.3	FM	San Francisco	yes		yes	
	KVVF	105.7	FM	Santa Clara	no	yes	yes	
cc	KMEL	106.1	FM	San Francisco	no	yes	yes	
	KEZR	106.5	FM	San Jose	yes		yes	
	KIFR	106.9	FM	San Francisco	no	yes	yes	
Sus.	KSAN	107.7	FM	San Mateo	yes		yes	
	KSFO	560	AM	San Francisco	yes		yes	

Radio Stations in San Francisco, CA

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
Sus.	KNBR	680	AM	San Francisco	yes		yes	
	KCBS	740	AM	San Francisco	no	yes	yes	
	KGO	810	AM	San Francisco	yes		yes	
	KNEW	910	AM	Oakland	no	yes	yes	
CC	KQKE	960	AM	Oakland	no	yes	yes	
	KATD	990	AM	Pittsburg	no	no	no	
	KIQI	1010	AM	San Francisco	no	no	no	
Sus.	KTCT	1050	AM	San Mateo	yes		yes	
	KFAX	1100	AM	San Francisco	no	yes	yes	
	KLOK	1170	AM	San Jose	no	no	no	
	KDYA	1190	AM	Vallejo	no	yes	yes	
	KNTS	1220	AM	Palo Alto	no	yes	yes	
Bonn.	KOIT	1260	AM	San Francisco	yes		yes	
	KMKY	1310	AM	Oakland	no	yes	yes	
	KSRO	1350	AM	Santa Rosa	no	no	no	
	KZSF	1370	AM	San Jose	no	yes	yes	
	KVTO	1400	AM	Berkeley	no	no	no	
	KVVN	1430	AM	Santa Clara	no	no	no	
	KVON	1440	AM	Napa	no	no	no	
	KEST	1450	AM	San Francisco	no	no	no	
	KSJX	1500	AM	San Jose	no	no	no	Unable to open KSJX-specific website
	KPIG	1510	AM	Piedmont	no	no	no	Realpass subscription
	KYCY	1550	AM	San Francisco	no	yes	yes	
	KLIV	1590	AM	San Jose	no	no	no	
	KDIA	1640	AM	Vallejo	no	yes	yes	
	Stations Total				68		68	
	Streaming Stations Total				14		44	
	% Streaming Stations				20.6%		64.7%	

Dallas-Ft.Worth Totals:
Clear Channel - 5 of 67 Stations
Bonneville - 0 of 67 Stations
Susquehanna - 6 of 67 Stations

Radio Stations in Dallas-Ft. Worth, TX

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	KXEZ	92.1	FM	Farmersville	yes		yes	
CC	KZPS	92.5	FM	Dallas	no	yes	yes	
Sus.	KDBN	93.3	FM	Haltom City	yes		yes	
	KNOR	93.7	FM	Krum	no	no	no	
	KLNO	94.1	FM	Fort Worth	no	yes	yes	
	KSOC	94.5	FM	Gainesville	no	no	no	
	KLTY	94.9	FM	Arlington	no	yes	yes	
	KHYI	95.3	FM	Howe	yes		yes	
	KFWR	95.9	FM	Mineral Wells	yes		yes	
	KSCS	96.3	FM	Fort Worth	no	yes	yes	
	KTYS	96.7	FM	Flower Mound	no	yes	yes	
CC	KEGL	97.1	FM	Fort Worth	no	yes	yes	
	KBFB	97.9	FM	Dallas	no	no	no	
	KBOC	98.3	FM	Bridgeport	no	no	no	
	KLUV	98.7	FM	Dallas	yes		yes	
	KFZO	99.1	FM	Denton	no	no	no	
Sus.	KPLX	99.5	FM	Fort Worth	yes		yes	
	KJKK	100.3	FM	Dallas	n/a	n/a	no	Station not found
	KWRD	100.7	FM	Highland Village	yes		yes	
	WRR	101.1	FM	Dallas	yes		yes	
	KTCY	101.7	FM	Azle	no	no	no	
CC	KDGE	102.1	FM	Fort	no	yes	yes	
CC	KDMX	102.9	FM	Dallas	no	yes	yes	
	KESN	103.3	FM	Allen	yes		yes	
	KVIL	103.7	FM	Highland	no	yes	yes	
Sus.	KTDK	104.1	FM	Sanger	yes		yes	
	KKDA	104.5	FM	Dallas	no	yes	yes	
	KZMP	104.9	FM	Pilot Point	no	no	no	
	KLLI	105.3	FM	Dallas	yes		yes	
	KRNB	105.7	FM	Decatur	no	no	no	
CC	KHKS	106.1	FM	Denton	no	yes	yes	
	KZZA	106.7	FM	Muenster	no	no	no	
	KRVF	106.9	FM	Kerens	no	no	no	
	KDXX	107.1	FM	Benbrook	no	yes	yes	
	KOAI	107.5	FM	Fort Worth	yes		yes	
	KESS	107.9	FM	Lewisville	yes		yes	
	KDFT	540	AM	Ferris	no	no	no	
Sus.	KLIF	570	AM	Dallas	yes		yes	
	KMKI	620	AM	Plano	no	yes	yes	
	KSKY	660	AM	Balch Springs	yes		yes	
	KKDA	730	AM	Grand Prairie	no	no	no	
	KAAM	770	AM	Garland	yes		yes	
	WBAP	820	AM	Fort Worth	yes		yes	
	KJON	850	AM	Carrollton	no	yes	yes	
	KFJZ	870	AM	Fort Worth	no	no	no	
	KXEB	910	AM	Frisco	no	yes	yes	
	KHVN	970	AM	Fort Worth	no	yes	yes	
	KFCD	990	AM	Farmersville	yes		yes	
	KGGR	1040	AM	Dallas	no	yes	yes	

Radio Stations in Dallas-Ft. Worth, TX

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	KRLD	1080	AM	Dallas	no	yes	yes	
	KCLE	1140	AM	Cleburne	no	yes	yes	
	KMGS	1160	AM	Highland Park	no	no	no	
	KFXR	1190	AM	Dallas	no	yes	yes	
	KZEE	1220	AM	Weatherford	yes		yes	
	KFLC	1270	AM	Fort Worth	no	no	no	
Sus.	KTCK	1310	AM	Dallas	yes		yes	
	KMNY	1360	AM	Hurst	no	no	no	
	KBEC	1390	AM	Waxahachie	yes		yes	
	KPIR	1420	AM	Granbury	no	no	no	
	KTNO	1440	AM	University Park	no	yes	yes	
	KHFX	1460	AM	Burleson	no	no	no	Live baseball broadcasts
	KNIT	1480	AM	Dallas	no	no	no	
	KZMP	1540	AM	University Park	no	no	no	
	KPYK	1570	AM	Terrell	no	no	no	
	KRVA	1600	AM	Cockrell Hill	no	no	no	
	KKGM	1630	AM	Ft. Worth	no	yes	yes	
Sus.	KKLF	1700	AM	Richardson	no	no	no	
	Stations Total				67		67	
	Streaming Stations Total				21		43	
	% Streaming Stations				31.3%		64.2%	

Atlanta Totals:
Clear Channel - 7 of 72 Stations
Bonneville - 0 of 72 Stations
Susquehanna - 2 of 72 Stations

Radio Stations in Atlanta, GA

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	WBTR	92.1	FM	Carrollton	no	no	no	
	WZGC	92.9	FM	Atlanta	yes		yes	
	WVFJ	93.3	FM	Manchester	yes		yes	
	WSTR	94.1	FM	Smyrna	yes		yes	
cc	WLTM	94.9	FM	Atlanta	yes		yes	
	WBTS	95.5	FM	Doraville	yes		yes	
cc	WKLS	96.1	FM	Atlanta	yes		yes	
cc	WVWA	96.7	FM	Peachtree City	yes		yes	
	WSRV	97.1	FM	Gainesville	yes		yes	
	WPZE	97.5	FM	Fayetteville	no	no	no	
	WSB	98.5	FM	Atlanta	yes		yes	
Sus.	WNNX	99.7	FM	Atlanta	yes		yes	
	WNSY	100.1	FM	Talking Rock	no	no	no	
Sus.	WWWQ	100.5	FM	College Park	yes		yes	
	WKHX	101.5	FM	Marietta	yes		yes	
	WLKQ	102.3	FM	Buford	no	no	no	Website under construction
	WAMJ	102.5	FM	Mableton	no	no	no	
	WVEE	103.3	FM	Atlanta	no	no	no	
	WALR	104.1	FM	La Grange	yes		yes	
	WFSH	104.7	FM	Athens	yes		yes	
cc	WBZY	105.3	FM	Bowdon	yes		yes	
cc	WWVA	105.7	FM	Canton	yes		yes	
	WYAY	106.7	FM	Gainesville	yes		yes	
	WTSH	107.1	FM	Rockmart	yes		yes	
	WJZZ	107.5	FM	Roswell	no	no	no	
	WHTA	107.9	FM	Hampton	no	no	no	
	WDWD	590	AM	Atlanta	no	yes	yes	Radio Disney
	WPLO	610	AM	Grayson	no	no	no	
cc	WGST	640	AM	Atlanta	yes		yes	
	WCNN	680	AM	North Atlanta	yes		yes	
	WSB	750	AM	Atlanta	yes		yes	
	WQXI	790	AM	Atlanta	yes		yes	
	WAEC	860	AM	Atlanta	no	no	no	Website under construction
	WWOF	1000	AM	Walhalla	no	no	no	
	WGKA	920	AM	Atlanta	yes		yes	
	WNIV	970	AM	Atlanta	yes		yes	
	WGUN	1010	AM	Atlanta	no	yes	yes	
	WPBS	1040	AM	Conyers	no	no	no	
	WFTD	1080	AM	Marietta	no	no	no	
	WWWE	1100	AM	Hapeville	no	no	no	
	WXJO	1120	AM	Gordon	no	no	no	
	WLBA	1130	AM	Gainesville	yes		yes	
	WCFO	1160	AM	East Point	yes		yes	
	WAFS	1190	AM	Atlanta	no	no	no	
	WFOM	1230	AM	Marietta	no	no	no	Same as WALR

Radio Stations in Atlanta, GA

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	WTJH	1260	AM	East Point	no	no	no	
	WYXC	1270	AM	Cartersville	yes		yes	
	WCHK	1290	AM	Canton	no	no	no	
	WIMO	1300	AM	Winder	yes		yes	
	WNEA	1300	AM	Newnan	no	no	no	
	WPBC	1310	AM	Decatur	no	no	no	
	WHIE	1320	AM	Griffin	no	no	no	
	WLBB	1330	AM	Carrollton	no	no	no	
	WALR	1340	AM	Atlanta	no	no	no	Same as WFOM
	WAOK	1380	AM	Atlanta	yes		yes	
cc	WCOH	1400	AM	Newnan	no	no	no	
	WLTA	1400	AM	Alpharetta	yes		yes	
	WKKP	1410	AM	McDonough	no	no	no	
	WATB	1420	AM	Decatur	no	no	no	
	WGFS	1430	AM	Covington	no	no	no	
	WBHF	1450	AM	Cartersville	no	no	no	
	WKEU	1450	AM	Griffin	no	no	no	
	WXEM	1460	AM	Buford	yes		yes	
	WYZE	1480	AM	Atlanta	no	yes	yes	
	WKUN	1580	AM	Monroe	no	no	no	
	WYYZ	1490	AM	Jasper	no	no	no	
	WDPC	1500	AM	Dallas	no	no	no	
	WDCY	1520	AM	Douglasville	no	no	no	
	WAZX	1550	AM	Smyrna	no	no	no	
	WSSA	1570	AM	Morrow	yes		yes	
	WAOS	1600	AM	Austell	yes		yes	
	WMLB	1690	AM	Avondale Estates	no	yes	yes	
	Stations Total				72		72	
	Streaming Stations Total				33		37	
	% Streaming Stations				45.8%		51.4%	

Washington Totals:
Clear Channel - 8 of 55 Stations
Bonneville - 5 of 55 Stations
Susquehanna - 0 of 55 Stations

Radio Stations in Washington, D.C.

	Radio Station Information				Live Webcast Availability		
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final
	WWXT	92.7	FM	Prince Frederick	no	no	no
	WFLS	93.3	FM	Fredericksburg	no	no	no
	WKYS	93.9	FM	Washington	no	no	no
	WWXX	94.3	FM	Warrenton	no	no	no
	WARW	94.7	FM	Bethesda	no	no	no
	WPGC	95.5	FM	Morningside	yes		yes
	WHUR	96.3	FM	Washington	no	yes	yes
CC	WASH	97.1	FM	Washington	no	yes	yes
CC	WMZQ	98.7	FM	Washington	no	yes	yes
	WLZL	99.1	FM	Annapolis	no	no	no
CC	WIHT	99.5	FM	Washington	no	yes	yes
	WFRE	99.9	FM	Frederick	yes		yes
CC	WBIG	100.3	FM	Washington	yes		yes
CC	WWDC	101.1	FM	Washington	yes		yes
	WMMJ	102.3	FM	Bethesda	no	yes	yes
	WAFY	103.1	FM	Middletown	no	no	no
Bonn.	WTOP	103.5	FM	Washington	yes		yes
	WGYS	103.9	FM	Braddock	yes		yes
Bonn.	WGMS	104.1	FM	Waldorf	yes		yes
	WGRX	104.5	FM	Falmouth	no	yes	yes
	WAVA	105.1	FM	Arlington	yes		yes
	WJZW	105.9	FM	Woodbridge	no	no	no
	WJFK	106.7	FM	Manassas	no	yes	yes
	WWEG	106.9	FM	Hagerstown	no	no	no
	WRQX	107.3	FM	Washington	no	no	no
	WTWP	107.7	FM	Warrenton	yes		yes
CC	WTNT	570	AM	Bethesda	no	yes	yes
	WMAL	630	AM	Washington	yes		yes
	WDMV	700	AM	Walkersville	yes		yes
Bonn.	WXTR	730	AM	Alexandria	no	n/a	no
	WAVA	780	AM	Arlington	yes		yes
Bonn.	WTOP	820	AM	Frederick	yes		yes
	WILC	900	AM	Laurel	yes		yes
	WFMD	930	AM	Frederick	yes		yes
	WCTN	950	AM	Potomac-Cabin	no	yes	yes
CC	WTEM	980	AM	Washington	no	yes	yes
	WWGB	1030	AM	Indian Head	no	yes	yes
Bonn.	WFED	1050	AM	Silver Spring	no	yes	yes
	WUST	1120	AM	Washington	yes		yes
	WMET	1160	AM	Gaithersburg	yes		yes
	WAGE	1200	AM	Leesburg	no	yes	yes
	WFAX	1220	AM	Falls Church	yes		yes
CC	WWRC	1260	AM	Washington	no	yes	yes
	WDCT	1310	AM	Fairfax	no	no	no
	WYCB	1340	AM	Washington	no	no	no
	WZHF	1390	AM	Arlington	no	no	no

Radio Stations in Washington, D.C.

Radio Station Information				Live Webcast Availability		
Call Letters	**Frequency**	**AM/FM**	**Location**	**Radio-locator**	**Station's Web**	**Final**
WOL	1450	AM	Washington	no	yes	yes
WKDV	1460	AM	Manassas	no	no	no
WPWC	1480	AM	Dumfries-Triangl	no	no	no
WTWP	1500	AM	Washington	yes		yes
WTRI	1520	AM	Brunswick	no	yes	yes
WACA	1540	AM	Wheaton	no	yes	yes
WKIK	1560	AM	La Plata	no	no	no
WPGC	1580	AM	Morningside	no	yes	yes
WLXE	1600	AM	Rockville	no	no	no
Stations Total				55		55
Streaming Stations Total				19		37
% Streaming Stations				34.5%		67.3%

Houston-Galveston Totals:
Clear Channel - 7 of 56 Stations
Bonneville - 0 of 56 Stations
Susquehanna - 1 of 56 Stations

Radio Stations in Houston-Galveston, TX

	Radio Station Information				Live Webcast Availability		
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final
	KROI	92.1	FM	Seabrook	no	no	no
	KKBQ	92.9	FM	Pasadena	no	yes	yes
	KQBU	93.3	FM	Port Arthur	no	yes	yes
cc	KKRW	93.7	FM	Houston	no	yes	yes
cc	KTBZ	94.5	FM	Houston	no	yes	yes
	KHJZ	95.7	FM	Houston	no	yes	yes
cc	KHMX	96.5	FM	Houston	no	yes	yes
	KTHT	97.1	FM	Cleveland	no	yes	yes
	KFNC	97.5	FM	Beaumont	yes		yes
	KBXX	97.9	FM	Houston	no	no	no
	KTJM	98.5	FM	Port Arthur	no	yes	yes
cc	KODA	99.1	FM	Houston	no	yes	yes
	KVST	99.7	FM	Willis	yes		yes
	KSHN	99.9	FM	Liberty	yes		yes
	KILT	100.3	FM	Houston	no	yes	yes
	KKHT	100.7	FM	Winnie	yes		yes
	KLOL	101.1	FM	Houston	no	yes	yes
	KSTB	101.5	FM	Crystal Beach	no	no	no
	KMJQ	102.1	FM	Houston	no	no	no
	KLTN	102.9	FM	Houston	no	yes	yes
	KJOJ	103.3	FM	Freeport	no	yes	yes
	KIOL	103.7	FM	La Porte	yes		yes
Sus.	KRBE	104.1	FM	Houston	yes		yes
	KPTY	104.9	FM	Missouri City	no	yes	yes
	KPTI	105.3	FM	Crystal Beach	no	yes	yes
	KTWL	105.3	FM	Hempstead	yes		yes
	KOVE	106.5	FM	Galveston	no	yes	yes
	KHPT	106.9	FM	Conroe	yes		yes
	KLDE	107.5	FM	Lake Jackson	no	yes	yes
	KQQK	107.9	FM	Beaumont	no	yes	yes
	KILT	610	AM	Houston	no	yes	yes
	KIKK	650	AM	Pasadena	no	no	no
	KSEV	700	AM	Tomball	yes		yes
cc	KTRH	740	AM	Houston	no	yes	yes
cc	KBME	790	AM	Houston	yes		yes
	KEYH	850	AM	Houston	no	no	no
	KJOJ	880	AM	Conroe	no	no	no
	KYST	920	AM	Texas City	no	no	no
cc	KPRC	950	AM	Houston	no	yes	yes
	KRTX	980	AM	Rosenburg/Rich	no	yes	yes
	KLAT	1010	AM	Houston	no	yes	yes
	KCHN	1050	AM	Brookshire	no	no	no
	KNTH	1070	AM	Houston	yes		yes
	KTEK	1110	AM	Alvin	no	no	no

Radio Stations in Houston-Galveston, TX

Radio Station Information				Live Webcast Availability		
Call Letters	**Frequency**	**AM/FM**	**Location**	**Radio-locator**	**Station's Web**	**Final**
KYOK	1140	AM	Conroe	no	yes	yes
KGOL	1180	AM	Humble	no	no	no
KQUE	1230	AM	Houston	no	no	no
KXYZ	1320	AM	Houston	no	no	no
KWWJ	1360	AM	Baytown	no	yes	yes
KCOH	1430	AM	Houston	yes		yes
KBRZ	1460	AM	Freeport	no	no	no
KLVL	1480	AM	Pasadena	no	no	no
KYND	1520	AM	Cypress	no	no	no
KGBC	1540	AM	Galveston	no	no	no
KILE	1560	AM	Bellaire	no	yes	yes
KMIC	1590	AM	Houston	no	yes	yes
Stations Total				56		56
Streaming Stations Total				12		39
% Streaming Stations				21.4%		69.6%

Boston Totals:
Clear Channel - 4 of 65 Stations
Bonneville - 0 of 65 Stations
Susquehanna - 0 of 65 Stations

Radio Stations in Boston, MA

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	WFEX	92.1	FM	Peterborough	no	yes	yes	
	WXRV	92.5	FM	Haverhill	yes		yes	
	WBOS	92.9	FM	Brookline	no	yes	yes	
	WMKK	93.7	FM	Lawrence	yes		yes	
CC	WJMN	94.5	FM	Boston	no	yes	yes	
	WHRB	95.3	FM	Cambridge	yes		yes	
	WATD	95.9	FM	Marshfield	yes		yes	
	WTKK	96.9	FM	Boston	no	yes	yes	
	WILD	97.7	FM	Brockton	yes		yes	
	WOQL	97.7	FM	Winchendon	no	no	no	
	WBMX	98.5	FM	Boston	no	no	no	
	WPLM	99.1	FM	Plymouth	no	no	no	
	WKLB	99.5	FM	Lowell	no	yes	yes	
	WNYN	99.9	FM	Athol	no	no	no	
	WZLX	100.7	FM	Boston	no	no	no	
	WFNX	101.7	FM	Lynn	yes		yes	
	WCRB	102.5	FM	Waltham	no	no	no	
	WODS	103.3	FM	Boston	no	no	no	
	WBCN	104.1	FM	Boston	no	yes	yes	
	WXLO	104.5	FM	Fitchburg	no	yes	yes	
	WBOQ	104.9	FM	Gloucester	no	no	no	
	WROR	105.7	FM	Framingham	no	yes	yes	
	WFNQ	106.3	FM	Nashua	no	no	no	
	WMJX	106.7	FM	Boston	yes		yes	
	WAAF	107.3	FM	Westborough	yes		yes	
CC	WXKS	107.9	FM	Medford	no	yes	yes	
	WEZE	590	AM	Boston	no	no	no	
	WSRO	650	AM	Ashland	no	yes	yes	
	WRKO	680	AM	Boston	yes		yes	
	WJOE	700	AM	Athol	no	no	no	Same as WGAW
	WJIB	740	AM	Cambridge	no	no	no	
	WNNW	800	AM	Lawrence	no	yes	yes	
	WEEI	850	AM	Boston	yes		yes	
	WAMG	890	AM	Dedham	no	yes	yes	
	WROL	950	AM	Boston	no	no	no	
	WCAP	980	AM	Lowell	no	no	no	
	WBZ	1030	AM	Boston	no	yes	yes	
	WBIX	1060	AM	Natick	no	yes	yes	
	WILD	1090	AM	Boston	no	no	no	
	WBNW	1120	AM	Concord	yes		yes	
	WTTT	1150	AM	Boston	no	no	no	
	WDIS	1170	AM	Norfolk	n/a	n/a	no	
CC	WKOX	1200	AM	Framingham	no	yes	yes	
	WESX	1230	AM	Salem	no	no	no	
	WMKI	1260	AM	Boston	no	yes	yes	Radio Disney
	WEIM	1280	AM	Fitchburg	no	no	no	
	WJDA	1300	AM	Quincy	no	no	no	
	WRCA	1330	AM	Waltham	no	no	no	
	WGAW	1340	AM	Gardner	no	no	no	Same as WJOE

Radio Stations in Boston, MA

	Radio Station Information				Live Webcast Availability		
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final
	WLYN	1360	AM	Lynn	no	no	no
	WPLM	1390	AM	Plymouth	no	no	no
	WLLH	1400	AM	Lowell	no	yes	yes
	WMSX	1410	AM	Brockton	no	no	no
CC	WXKS	1430	AM	Everett	no	yes	yes
	WNBP	1450	AM	Newburyport	no	no	no
	WBET	1460	AM	Brockton	no	no	no
	WAZN	1470	AM	Watertown	no	no	no
	WCCM	1490	AM	Haverhill	no	yes	yes
	WMRC	1490	AM	Milford	no	no	no
	WWZN	1510	AM	Boston	yes		yes
	WVBF	1530	AM	Middleborough	no	no	no
	WNTN	1550	AM	Newton	yes		yes
	WNSH	1570	AM	Beverly	no	no	no
	WSMN	1590	AM	Nashua	no	yes	yes
	WUNR	1600	AM	Brookline	no	no	no
Stations Total					65		65
Streaming Stations Total					13		33
% Streaming Stations					20.0%		50.8%

Philadelphia Totals:
Clear Channel - 6 of 41 Stations
Bonneville - 0 of 41 Stations
Susquehanna - 0 of 41 Stations

Radio Stations in Philadelphia, PA

	Radio Station Information				Live Webcast Availability			
	Call Letters	Frequency	AM/FM	Location	Radio-locator	Station's Web	Final	
	WXTU	92.5	FM	Philadelphia	yes		yes	
	WMMR	93.3	FM	Philadelphia	yes		yes	
	WYSP	94.1	FM	Philadelphia	no	yes	yes	
	WBEN	95.7	FM	Philadelphia	no	yes	yes	
	WRDW	96.5	FM	Philadelphia	no	yes	yes	
	WTHK	97.5	FM	Burlington	no	yes	yes	
	WOGL	98.1	FM	Philadelphia	no	yes	yes	
CC	WUSL	98.9	FM	Philadelphia	no	yes	yes	
	WPHI	100.3	FM	Media	no	no	no	
	WBEB	101.1	FM	Philadelphia	no	yes	yes	
CC	WIOQ	102.1	FM	Philadelphia	no	yes	yes	
	WMGK	102.9	FM	Philadelphia	no	yes	yes	
	WPFZ	103.9	FM	Jenkintown	no	no	no	
CC	WSNI	104.5	FM	Philadelphia	no	yes	yes	Same as WJJZ
CC	WDAS	105.3	FM	Philadelphia	no	yes	yes	
CC	WJJZ	106.1	FM	Philadelphia	no	yes	yes	
	WRNB	107.9	FM	Pennsauken	no	no	no	
	WFIL	560	AM	Philadelphia	no	yes	yes	
	WIP	610	AM	Philadelphia	no	yes	yes	
	WWJZ	640	AM	Mount Holly	no	yes	yes	
	WPHE	690	AM	Phoenixville	yes		yes	
	WVCH	740	AM	Chester	no	no	no	
	WTMR	800	AM	Camden	no	no	no	
	WWDB	860	AM	Philadelphia	no	no	no	
	WURD	900	AM	Philadelphia	no	no	no	
	WPEN	950	AM	Philadelphia	no	yes	yes	Only locally broadcast shows
	WNTP	990	AM	Philadelphia	no	no	no	
	KYW	1060	AM	Philadelphia	no	yes	yes	
	WNAP	1110	AM	Norristown	no	yes	yes	
	WPHT	1210	AM	Philadelphia	no	yes	yes	
	WEMG	1310	AM	Camden	no	no	no	
	WHAT	1340	AM	Philadelphia	yes		yes	
	WPAZ	1370	AM	Pottstown	no	yes	yes	
	WCOJ	1420	AM	Coatesville	no	no	no	
	WNPV	1440	AM	Lansdale	no	yes	yes	
	WIFI	1460	AM	Florence	no	no	no	
CC	WDAS	1480	AM	Philadelphia	no	yes	yes	
	WBCB	1490	AM	Levittown-Faireles	yes		yes	
	WCHE	1520	AM	West Chester	no	no	no	
	WNWR	1540	AM	Philadelphia	yes		yes	
	WPWA	1590	AM	Chester	no	yes	yes	
	Stations Total				41		41	
	Streaming Stations Total				6		29	
	% Streaming Stations				14.6%		70.7%	

C

Broadcasters' Joint Proposal for Simulcast Streaming

1. **Base Fee.** A flat annual fee, to be paid on a monthly basis for each month in which streaming occurs, regardless of number of listeners, dependent on the BIA revenue rank of the market, and the size of the station within the market as follows. For 2006:

A. **Music-Formatted Station:**

Market Rank	Fee Per Station Per Year		
	Large Stations	Medium Stations	Small Stations
1-5	$ 8,000	$ 6,500	$ 6,000
6-10	$ 5,500	$ 4,000	$ 3,000
11-25	$ 3,500	$ 2,500	$ 1,500
26-50	$ 2,000	$ 1,500	$ 1,000
51-100	$ 1,500	$ 1,000	$ 750
101-200	$ 1,000	$ 750	$ 500

B. **News, Talk, Sports, and/or Business Stations.** Stations with at least 95% programming that reasonably can be classified as news, business, talk, teaching/talk or sports:

Market Rank	Fee Per Station Per Year
1-10	$ 750
11-100	$ 500
100+	$ 250

C. **Mixed Format Stations.** Stations with more than 25% of their programming reasonably classified as news, business, talk, teaching/talk or sports, but not, as a station, classified as a "News, Talk, Sports and/or Business Station:"

25% to 50% NTSB (50-75% music), pay 65% of the Music Format Fee

50% to 75% NTSB (25-50% music), pay 40% of the Music Format Fee

> 75% NTSB (< 25% music), pay 15% of Music Format Fee (but in no event less than the fee for a News, Talk, Sports and/or Business Station in the market).

2. **Minimum Fee for Partial Year Streaming.**

Minimum fee of $250 in any calendar year, regardless of the number of months streaming

3. **Stations in their first six months of streaming**

Half the applicable fee set forth in Section 1, subject to the minimum fee in Section 2.

4. **Annual Increases.** All fees increase by 4% per year.

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2006, the Public Version of Radio Broadcasters' Proposed Findings of Fact and Conclusions of Law was served by e-mail and by overnight courier on the following parties:

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REDACTION LOG FOR RADIO BROADCASTERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Document	Paragraph/Page/Exhibit	Description
Proposed Findings of Fact	¶ 48, lines 2,3	Statement of Mark Eisenberg regarding the importance of terrestrial radio
Proposed Findings of Fact	¶ 52, lines 8,9	Statement of Eisenberg regarding record label radio airplay departments
Proposed Findings of Fact	¶ 52, lines 2,4	Promotional activity expenditures for SoundExchange and Atlantic
Proposed Findings of Fact	¶ 57, lines 4,5	Number of Atlantic employees that work in Radio Promotion Department
Proposed Findings of Fact	¶ 58, line 1	Atlantic's total overhead in fiscal year 2005
Proposed Findings of Fact	¶ 59, lines 2,3,4	Atlantic Radio Promotion Department Overhead Expense
Proposed Findings of Fact	¶ 60, line 2	Estimate of Atlantic's expenditure on promotional activities directed to radio airplay
Proposed Findings of Fact	¶ 61, line 2, n.7	Estimate of industry's expenditure on promotional activities directed to radio airplay
Proposed Findings of Fact	¶ 65, line 2	Market value of radio airplay
Proposed Findings of Fact	¶ 67, lines 12,13,14	Promotional value of CD downloads

Proposed Findings of Fact	¶ 68, lines 2, 5-6	Promotional benefits of radio airplay
Proposed Findings of Fact	¶ 71, lines 2-5, 5-9, 9-11	Promotional benefits of AM/FM streaming
Proposed Findings of Fact	¶ 87, lines 6-10	Evidence regarding AM/FM streaming and record sales
Proposed Findings of Fact	¶ 115, line 4	Proportion of Bandwidth cost in webcast operation
Proposed Findings of Fact	¶ 143, lines 4-7, 8-9	Licensing consideration of promotional or substitution affect
Proposed Findings of Fact	¶ 144, line 5	Testimony of SoundExchange witness
Proposed Findings of Fact	¶ 167, line 5, 6-19, 20-22	Sony documents confirming value of AM/FM streaming
Proposed Findings of Fact	¶ 168, lines 2-4, 5-14	Eisenberg statement in Sony memo
Proposed Findings of Fact	¶ 176, lines 2,3, 5-7, 8-9	Sony memo discussing AM/FM streaming
Proposed Findings of Fact	¶ 216, n. 10	Statement of Dr. Brynjolfsson in regard to RLR and AccuStream
Proposed Findings of Fact	¶ 258, lines 6, 15, 24, 27, 34	SoundExchange's relationship with Muzak's business decisions
Proposed Findings of Fact	¶ 274, lines 2-3	Rebuttal statement of Dr. Brynjolfsson
Proposed Findings of Fact	¶ 278, lines 4,5	Evidence regarding Bonneville's streaming revenues and expenses
Proposed Findings of Fact	¶ 281, lines 6,7	Clear Channel streaming revenue and expense information

Proposed Conclusions of Law	¶ 4, lines 4, 5	Value conferred by radio airplay