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

IN THE MATTER OF:

DIGITAL PERFORMANCE RIGHT
IN SOUND RECORDINGS AND
EPHEMERAL RECORDINGS

Docket No. 2005-1 CRB DTRA

THE NATIONAL RELIGIOUS BROADCASTERS
NONCOMMERCIAL MUSIC LICENSE COMMITTEE'S
REPLY TO SOUNDEXCHANGE'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Bland WDT	Ron Bland	Written Direct	Collegiate Broadcasters, Inc.'s Written Direct Statement
Bradley WDT	Harold Ray Bradley	Written Direct	SoundExchange's Written Direct Statement, Vol. 2 Tab 10
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
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Fancher WDT	J. Donald Fancher	Written Direct	DiMA's Written Direct Statement, Vol. 2 Tab C

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Fancher WRT	J. Donald Fancher	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony, Tab B
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
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Halyburton WDT	Dan Halyburton	Written Direct	Radio Broadcasters' Written

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			Direct Statement, Vol. 2 Tab 1
Hanson WDT	Kurt Hanson	Written Direct	AccuRadio, et al.'s Written Direct Statement
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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

<u>Citation Format</u>	<u>Witness Name</u>	<u>Type of Testimony</u>	<u>Location of Testimony</u>
			System, Inc.'s Written Direct Statement
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	Written Rebuttal	DiMA's Written Rebuttal Statement, Witness Testimony, Tab H
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, Tab C
NRBNMLC's Fee	N/A	Fee Proposal	National Religious Broadcasters

<u>Citation Format</u>	<u>Witness Name</u>	<u>Type of Testimony</u>	<u>Location of Testimony</u>
Proposal			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
Robedee WDT	William C. Robedee	Written Direct	Collegiate Broadcasters, Inc.'s Written Direct Statement

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

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<u>Citation Format</u>	<u>Witness Name</u>	<u>Type of Testimony</u>	<u>Location of Testimony</u>
			Written Direct Statement, Vol. 6 Tab MM

INTRODUCTION

The National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”) hereby submits its Reply to SoundExchange’s Proposed Findings of Fact and Conclusions of Law (“SX PFF” and “SX PCL”). SoundExchange’s filing, while nearly 530 pages long, pays little attention to the case presented by the NRBNMLC. Nevertheless, in several important areas, SoundExchange significantly misstates the facts and mischaracterizes the relevant law. The NRBNMLC addresses the most important of those misstatements and mischaracterizations in these Reply Findings and Conclusions (“NRBNMLC’s Reply Findings and Conclusions”). In many cases, however, a complete response to SX’s Findings and Conclusions is contained in the NRBNMLC’s Proposed Findings of Fact and Conclusions of Law (“NRBNMLC PFFCL”) and the Joint Noncommercial Findings and Conclusions, submitted jointly by the NRBNMLC, NPR, and CBI (“Joint Noncomm. PFFCL”). In those instances where an argument has been advanced by SoundExchange and is not responded to herein, the NRBNMLC will rely on its Opening Findings and Conclusions.¹

PROPOSED FINDINGS OF FACT

I. SOUNDEXCHANGE HAS FAILED TO SHOW THAT NONCOMMERCIAL STATIONS SHOULD BE SUBJECT TO THE SAME RATE AS COMMERCIAL WEBCASTERS UNDER THE APPLICABLE STANDARD.

A. THE MISSION OF THE BUYER IS IMPORTANT TO THE WILLING BUYER/WILLING SELLER STANDARD.

1. SoundExchange argues that one rate should apply to all webcasters, noncommercial and commercial. SX PFF ¶ 1086. In its discussion of noncommercial stations, SoundExchange essentially states that the public mission of noncommercial broadcasters should

¹ Reply proposed findings of fact from this document are cited herein as “RB-RPFF.” Reply proposed conclusions of law from this document are cited herein as “RB-RPCL.”

not be figured into the willing buyer/willing seller calculus. *See, e.g.*, SX PFF ¶¶ 1157-1160.

SoundExchange's claim is misguided.

2. Throughout its filing, SoundExchange seems to forget about the willing buyer side of the equation. Willing buyers will value the right to perform sound recordings differently depending on their mission and the relative importance of the right to their mission. Mr. Johnson has testified of how his station's religious mission affects his business decisions and the value of the sound recording performance right. *See, e.g.*, 8/1/06 Tr. 51:19-56:4 (Johnson). Thus, it is apparent that the mission of the willing buyer is very important to the transaction.

3. The willing buyer's mission is also important to the willing seller's side of the equation. To the extent that a buyer of intellectual property is not willing to buy at a certain rate, the seller will not make any sales. But because the seller incurs no incremental costs in licensing his intellectual property, it will be in his interest to license to all parties at the rate that they are willing to buy. By pricing some buyers out of the market, a seller of intellectual property is only hurting himself.

B. THE EVIDENCE DOES NOT SUPPORT SOUNDEXCHANGE'S CLAIMS ABOUT COMPETITION AMONG LICENSEES OR CANNIBALIZATION.

4. In support of its theory that one royalty rate fits all and that the nonprofit mission of noncommercial broadcasters does not matter, SoundExchange offers only two intertwined arguments: it claims that the services all compete with each other, and it claims that cannibalization of the market might occur if different prices are set. *See* SX PFF ¶ 1095-14. But SoundExchange has failed to point to any evidence that either proposition is true.

1. Competition

5. First, the testimony of SoundExchange's witnesses that the NRBNMLC and other noncommercial broadcasters actually compete directly with commercial broadcasters and webcasters for either audience or advertising dollars is not credible. In fact, the evidence points in the other direction: there is very little if any competition.

6. SoundExchange's Proposed Findings make no attempt to quantify the nature or extent of the alleged competition between any two groups of webcasters. Dr. Brynjolfsson admitted he had not done any quantitative analysis of the level of competition among webcasters for the sale of advertising. 11/21/06 Tr. 229:1-230:11 (Brynjolfsson). Without any evidence of the actual extent to which competition exists among different kinds of licensees, SoundExchange's argument rings hollow.

7. NRBNMLC stations cannot compete for the same advertisers as commercial broadcasters and advertisers, because, of course, noncommercial stations do not have advertisers. Johnson WDT ¶ 10. CDR, Mr. Johnson's station, receives 50% of its funding from listener donations, 25% from programming partners, and 25% from sponsors and underwriters. Johnson WDT ¶ 10. Clearly CDR is not competing with the likes of Yahoo! or Clear Channel for funding.

2. Cannibalization

8. SoundExchange raises the specter of cannibalization if different rates are set for different types of services, SX PFF ¶¶ 42, 1095-1103, but in the end, it all turns out to be conjecture. As discussed in the Joint Noncomm. PFFCL, Part XI, there is no evidence that cannibalization will actually occur. Dr. Brynjolfsson always carefully characterized it as a "risk," not a sure thing, *see, e.g.*, 11/21/06 Tr. 106:16 (Brynjolfsson), and the evidence points to

the conclusion that the magnitude of that risk is small. First, Dr. Brynjolfsson once again did not do any quantitative study of his cannibalization theory. 11/21/06 Tr. 257:5-14 (Brynjolfsson). So he has no support for his claims that the risk is great.

9. Second, the evidence suggests that, in fact, when different rates are set for webcasting services, cannibalization does not occur. The 2001 CARP set separate rates for noncommercial licensees, and further, different rates were later established under the Small Webcasters Settlement Act of 2002. This means that webcasters have been paying under several different rate structures for years. Surely, if cannibalization were a real threat, there would be some evidence of it having happened. But SoundExchange has not even attempted to offer any. SoundExchange's failure to put its money where its mouth is speaks volumes.

10. Moreover, a review of the small listenership numbers particular on religious and college stations shows that these types of noncommercial broadcasters with focused educational and religious missions do not, in fact, cannibalize listeners from broader-based multi-channel commercial webcasting services. Indeed, Eric Johnson testified that CDR's online average concurrent listenership ("ACL") from February to August 2006 was only 13.8, and WRVL's (a religious station affiliated with Liberty University) was only 5.4 from December 2005 through August 2006. Johnson WRT ¶¶ 9-12, 15-16, Tables 2-3; NRBNMLC Ex. 11. If cannibalization were truly occurring between noncommercial religious stations engaging in AM/FM Streaming and large (or even smaller) commercial webcasters, one would expect the listenership numbers on the noncommercial religious stations to be much higher.

11. The probable explanation for this lack of any cannibalization evidence is that Dr. Brynjolfsson's cannibalization theory depends on a premise that turns out to be false. SoundExchange stated in its Proposed Findings that "webcasters [meaning both noncommercial

stations and commercial broadcasters and webcasters] are seeking the same goods – a blanket license in sound recordings – to offer to the same consumers.” SX PFF ¶ 1098. It is true that both groups of stations are seeking a blanket license to perform sound recordings over the Internet, but that is not the product they are offering to their consumers. CDR, for example, offers a unique blend of religious talk and teaching and Christian inspirational music, of which sound recordings are only one part. *See* Johnson WDT ¶ 9. It defies logic to imagine that a religiously-minded listener who wants to hear James Dobson’s Focus on the Family, inspirational choral hymns, or other religious worship music would consider rap music, Top 40 hits, heavy metal, or other commercial genres, to be acceptable substitutes. Dr. Brynjolfsson said that “the risk of cannibalization is very real and it’s enormous” when “you’re offering the identical product.” 11/21/06 Tr. 106:13-17 (Brynjolfsson). But noncommercial and commercial licensees are not offering an identical product.

II. SOUNDEXCHANGE HAS NOT PRESENTED SUFFICIENT EVIDENCE TO SUPPORT ITS CLAIMS ABOUT NRBNMLC STATIONS.

A. LIMITED INFORMATION ABOUT NPR IS NOT APPLICABLE TO THE NRBNMLC.

12. Based on a quick glance through Part XI.E of SoundExchange’s PFF (titled “Noncommercial Webcasters Cannot Be Easily Distinguished from Commercial Stations”), one would think that NPR is the only noncommercial party to this case. In the 17 pages of that section, the NRBNMLC is not mentioned once. Rather, SoundExchange presents some limited information about NPR and extrapolates conclusions to all noncommercial licensees. It cites some listenership and revenue figures from a few NPR stations, but has nothing that would even indicate the situation of NPR as a whole, let alone the NRBNMLC.

13. Dr. Brynjolfsson, one of the SoundExchange witnesses who presented a small amount of information about a few NPR stations, specifically stated, "I didn't necessarily mean for them to be representative of noncommercial stations. I just gave them as examples." 11/21/06 Tr. 256:19-21 (Brynjolfsson). Thus, whatever these data may say about NPR, they certainly say nothing about the NRBNMLC.

B. THE NRBNMLC HAS PARTICULAR FUNDRAISING NEEDS.

14. When SoundExchange does eventually discuss the NRBNMLC in particular, it attempts to sling mud at CDR for allocating more money to its budget for things like telephone bills, postage, and copy charges than the NRBNMLC is proposing for a digital sound recording performance license. SX PFF ¶ 1217].

15. CDR is a noncommercial terrestrial radio station. As such, fundraising is a huge part of its activities. As Mr. Johnson testified, "About 50 percent of our support comes from individual donors. And that's why In Gathering [CDR's annual fundraiser] is so important to us. We have to keep that 50 percent, let people know that we need their support to help the ministry stay strong." 8/1/06 Tr. 33:14-19 (Johnson). Without soliciting donations from individuals, CDR will not be able to stay in business. Telephone, copying, postage, and even travel and entertainment expenses are a big part of fundraising. Certainly keeping the entire operation afloat is indeed more important than providing performances of six sound recordings per hour to an average of less than 14 people. *See* 8/1/06 Tr. 32:19-33:4 (Johnson) (stating an average number of sound recordings transmitted per hour); Johnson WRT ¶ 10 (stating the average concurrent listenership of CDR's simulcast stream).

III. SOUNDEXCHANGE MISLEADS THE JUDGES WITH INAPPOSITE ARGUMENTS.

A. SOUNDEXCHANGE'S FEE EXAMPLE USING EXPIRED NONCOMMERCIAL CARP FEES IS FALSE AND MISLEADING.

16. SoundExchange, in an attempt to demonstrate the alleged reasonableness of the current noncommercial CARP rates, cites a portion of Mr. Johnson's cross-examination wherein he was asked how much CDR would pay under those rates. SX PFF ¶ 1216. But, contrary to SoundExchange's assertion, Mr. Johnson did not admit "that at the noncommercial rate set by the CARP and Librarian in the previous proceeding, his station would only pay approximately \$12 per month in SoundExchange royalties." SX PFF ¶ 1216. In fact, when directly asked on cross-examination whether CDR would "be paying somewhere in the range of \$12, \$13 or \$14 a month," his response was, "With a minimum of \$500." 11/13/06 Tr. 74:15-18 (Johnson). Mr. Johnson is right. The current noncommercial CARP rates feature a minimum fee of \$500. 37 C.F.R. §§ 262.3(d)(2); 263.3.

17. This argument is misleading for two additional reasons, as touched upon briefly in the Joint Noncomm. PFF at Part VII.B.3. First, neither SoundExchange, nor any other party, is asking the Judges to re-adopt the current noncommercial CARP rates. Rather, SoundExchange is asking for a per-performance fee of nearly four times that rate for 2006 alone. *Compare* SoundExchange Revised Rate Proposal (filed Sep. 29, 2006) (requesting a \$0.0008 per performance rate for 2006) *with* 37 C.F.R. §§ 261.3(a)(2)(ii), 261.3(c), 263.3 (specifying that a noncommercial station shall pay at a per-performance rate of \$0.0002176). By 2010, SoundExchange seeks \$.00214 per performance, an increase over the 2006 rate of nearly three-fold. *See* SoundExchange Revised Rate Proposal. And these requests do not even account for

the additional fees SoundExchange is seeking through its proposed “greater of” fee structure.

See id.

18. Second, SoundExchange’s proposed fees leave no room whatsoever for noncommercial religious stations to expand their mission to reach out to more listeners. If a noncommercial religious station streamed to only 20 average concurrent listeners in 2010, it would owe \$4,499 under SoundExchange’s proposal. If it reached 100 average concurrent listeners, its fees would jump to a staggering \$22,496, and if it someday reached 500 average concurrent listeners online, its SoundExchange fees would be a back-breaking \$112,478. In short, implementation of SoundExchange’s proposal in the noncommercial world would threaten the very online presence of noncommercial religious broadcasters.

B. DIRECT LICENSING IS NOT A VIABLE OPTION FOR RELIGIOUS BROADCASTERS.

19. SoundExchange suggests that perhaps, because Mr. Johnson’s audience at CDR is so small, he should enter into a direct license with the record companies rather than pursue the statutory license available here. SX PFF ¶ 1214. But direct licensing is not a realistic option for stations like CDR.

20. Merely because religious stations broadcast a narrow genre of music does not mean that fewer copyright owners are involved. It is the number of copyright owners, not the number of sound recordings, that is relevant to the feasibility of direct licensing. If a religious station engaging in AM/FM Streaming decides to engage in direct licensing and plays even a single sound recording from a copyright owner, it must obtain a license from that owner. Religious music spans across the label spectrum, including among the many independent labels.

21. Also, religious stations add songs regularly from different copyright owners. 11/13/06 Tr. 57:21-59:2 (Johnson) (describing his revolving playlist of nearly 1,000 songs).

There is no way for a station to know in advance the copyright owners who will be involved with each song played. In addition, such a direct licensing scheme, wherein the service would have to negotiate with each and every copyright owner before streaming a new sound recording would involve enormous transaction costs and would therefore become unworkable. *See* 8/1/06 Tr. 56:19-57:7 (Johnson) (describing the disruption that would occur under a direct licensing scheme).

IV. SOUNDEXCHANGE'S OWN ARGUMENTS CONFIRM THAT THE NPR-SOUNDEXCHANGE AGREEMENT IS HIGHLY RELEVANT PRECEDENT THAT THE JUDGES SHOULD CONSIDER IN SETTING NONCOMMERCIAL RATES.

22. SoundExchange's Proposed Findings and Conclusions present additional evidence of the appropriateness of looking to the agreement between NPR and SoundExchange, Servs. Ex. 157, as a benchmark for other noncommercial services in this proceeding.

23. SoundExchange states that "the most relevant benchmarks for the setting of the rates and terms in this proceeding are prices for other blanket licenses for the use of sound recordings." SX PCL ¶ 13 (citing legal authority). The best benchmarks are those that most closely resemble the actual license at issue and were negotiated under comparable circumstances. Indeed, SoundExchange itself asserts in its Proposed Findings that "A good benchmark is one with characteristics that are reasonably similar to the market for which the rate is being set." SX PFF ¶ 222; *see also* Pelcovits WDT at 11 (stating, "As the last CARP recognized, if there were negotiated agreements between webcasters and the major copyright owners of sound recordings for the precise types of services at issue, such agreements would likely provide the best available benchmark for setting the market rate.").

24. The Judges are explicitly permitted by the statute to "consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under

voluntary license agreements described in subparagraph (A).” 17 U.S.C. § 114(f)(2)(B).

Subparagraph(A), in turn, refers to agreements for the Section 114 statutory license. Thus, the NPR agreement, as a license for the same right at issue in the Section 114 statutory license, is precisely the type of statutory agreement that Congress invited the Judges to consider as a benchmark.

25. By the terms of SoundExchange’s own proposed findings and conclusions, then, the NPR agreement is a nearly perfect benchmark for noncommercial services in this proceeding. It licenses the same right in the same medium for the same copyrighted works between the same buyer and the same seller as the license for noncommercial services at issue here.

26. As explained in more detail in the NRBNMLC’s initial Proposed Findings and Conclusions, the NPR agreement provides for a one-time fee of [[]] over the course of a [[]] -year period, yielding an average annual lump-sum fee of [[]], which [[]]

]]. Dividing that average annual lump-sum fee further by the at least [[]]

]] yields a per-station annual fee of [[]] per station. This is the most persuasive benchmark available for the fair market value of a license for a noncommercial broadcaster to stream sound recordings over the Internet, because that is precisely the type of license it is.

PROPOSED CONCLUSIONS OF LAW**I. SOUNDEXCHANGE MISSTATES THE APPLICABLE LAW.****A. THE RATES ARE REQUIRED TO DISTINGUISH AMONG DIFFERENT TYPES OF SERVICES.**

1. As an initial matter, SoundExchange has critically misstated the legal standard by which fees are to be set in this proceeding. SoundExchange says, “Pursuant to 17 U.S.C. § 114(f)(2)(B), the Court may establish different rates to ‘distinguish among the different types of eligible nonsubscription transmission services then in operation.’” SX PCL ¶ 65. The sentence in the statute, however, actually begins, “Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation.” 17 U.S.C. § 114(f)(2)(B) (emphasis added).

2. The difference between the permissive “may” in SoundExchange’s proposed conclusion and the mandatory “shall” in the actual statute is crucial. It is not left to the discretion of the Judges to decide whether or not to set rates and terms that distinguish among the different types of services, such as noncommercial broadcasters – that is a statutory command. set separate rates for different types of services, such as noncommercial broadcasters. Thus, SoundExchange’s statement that the Judges have “discretion to set a single rate or multiple rates for different types of webcasters,” SX PCL ¶ 65, misconstrues the law. And, as demonstrated in the Joint Noncomm. PFFCL, at Part II, noncommercial broadcasters such as NRBNMLC stations are precisely such a different type of service.

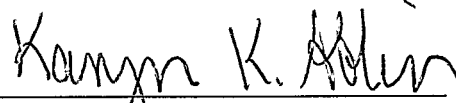
B. CONGRESS HAD NO NEED TO CREATE SEPARATE STATUTORY LICENSES DISTINGUISHING AMONG DIFFERENT TYPES OF SERVICES WHEN ALL IT HAD TO DO WAS MANDATE THE JUDGES TO DIFFERENTIATE AMONG THESE SERVICES.

3. SoundExchange also posits that if Congress had intended for there to actually be separate rates for different kinds of services, it could have created separate Section 114 statutory

licenses for each type of service, as it did for the Section 118 statutory license. This argument is a red herring. *See* SX PFF ¶ 1092; SX PCL 65. Section 118, which creates a statutory license for the performance of musical works, only applies to a particular type of copyright user: noncommercial over-the-air broadcasters. All other services seeking to perform musical works must obtain voluntary licenses, subject to ASCAP and BMI rate court authority. This license was specially created for noncommercial broadcasters only, in an effort to support public broadcasting. *See* H.R. REP. NO. 94-1476, at 117 (1976) (stating that one of the motivations behind the bill was Congress's finding "that encouragement and support of noncommercial broadcasting is in the public interest").

4. The Section 114 license, by contrast, is intended to apply to a wide range of noninteractive services, from small noncommercial broadcasters to sophisticated subscription webcasters. To create a separate statutory license for each kind of webcaster to whom Section 114 applies would be unnecessary and duplicative. Since the same license applies to a wide range of services, all that is necessary is a provision specifying that the Judges adopt rates that differentiate among different types of services. And that is just what the statute says.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2006, the Public Version of The National Religious Broadcasters Noncommercial Music License Committee's Reply to SoundExchange's 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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NRBNMLC'S REPLY TO SOUNDEXCHANGE'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

<u>Document</u>	<u>Paragraph/Page/Exhibit</u>	<u>Description</u>
NRBNMLC's Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law	¶ 26, lines 2-7	NPR/SoundExchange information regarding license agreement terms