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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)	Docket No. 16–CRB–0001–SR/PSSR (2018–2022) (Remand)

MUSIC CHOICE'S RESPONSIVE BRIEF ON REMAND

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INTRODUCTION

In its Opening Brief, Music Choice established that its internet transmissions must be treated as an existing service offering because – as the D.C. Circuit held was undisputed – Music Choice was providing its music channels to subscribers via internet transmissions on July 31, 1998. Under the Register's prior analysis, Music Choice's existing service offering is allowed broadly to evolve, improve, and adapt to technological changes in those existing transmission media, so long as the fundamental nature of those audio transmissions remains non-interactive digital audio transmissions made only to consumer subscribers via cable, satellite, or internet. Music Choice also established that its internet transmissions today easily meet that standard. With respect to the defensive audit provision, Music Choice established that there are no valid grounds to make the change regarding the "scope" of an audit requested by SoundExchange.

SoundExchange has failed to provide any evidence supporting a different conclusion on either point. With respect to the internet transmissions, SoundExchange bases its entire argument on two false premises. First, SoundExchange claims that Congress intended to freeze the PSS as they existed in 1998, and that any improvements adapting to changes in technology are sufficient to render even an existing service offering an entirely new service, outside the scope of the PSS license. But as noted above, the Register has already rejected that argument and held that Congress clearly intended for the PSS to be allowed to grow and develop and that a PSS – especially in the same media used in 1998 – is allowed to change in many ways, including to adapt to new technologies used in a given medium of transmission.

Second, SoundExchange rests its argument on a claim that Music Choice was not, in fact, transmitting its channels via internet in 1998, attempting to persuade the Judges that Music Choice's proven transmissions via a "high speed internet service" were somehow not "internet transmissions." Having no evidence that could prove a proposition so nonsensical on its face,

SoundExchange relies solely on mischaracterizations of various documents and deposition testimony. But even cursory examination of the cited documents and testimony shows that they do not support SoundExchange's claim and in fact corroborate Music Choice's evidence.

SoundExchange's arguments fare no better with respect to its requested change to the audit provision. SoundExchange leads with a repetition of various arguments it previously made to the Judges and the D.C. Circuit, and which were rejected by the appellate court. Next, it submits the testimony of its long-time forensic accountant, Lewis Stark, who purports to identify certain deficiencies in the defensive audits conducted by BDO for Music Choice, and alleges that Music Choice and BDO refused to cooperate with his investigation. As demonstrated below, each of these claims is demonstrably false. Moreover, the evidence shows that Mr. Stark's procedures are inferior to the true independent audits conducted by firms like BDO and that Mr. Stark's preferred process is neither independent, nor an audit, nor done pursuant to generally accepted auditing standards, as required by the PSS regulations. SoundExchange has failed to meet the substantial burden noted by the D.C. Circuit to support the need for a significant change to this provision, which has been in place for almost twenty-five years.

ARGUMENT

I. Music Choice's Internet Transmissions Are Part of Its Existing Service Offering and Within the Scope of the PSS License

A. Music Choice's Existing Service Offerings Are Allowed to Evolve and Develop, Including With Changes in Technology

SoundExchange's entire argument regarding internet transmissions rests on a false premise: that a PSS is strictly limited to the "precise scope" of its service offerings as they existed on July 31, 1998. Under SoundExchange's faulty reading, Congress intended to freeze the PSS in time, unable to evolve or develop with changes in technology or the marketplace. This view is inconsistent with the relevant legislative history, the very structure of the PSS

grandfather provisions as recognized by the D.C. Circuit, and the original CARP determination, and has been expressly rejected by the Register. As set out in more detail in Music Choice's Opening Remand Brief ("MC Opening Br."), at 6-8, 14-16, Congress recognized in creating the PSS designation that a small group of three companies had launched the very first digital radio-type services and created the very market for such services under prior rules (and in Music Choice's case before there was any sound recording performance right at all) and grandfathered those services under the original rules so that they could continue to grow their businesses.

In the very first rate-setting proceeding for the PSS, the Librarian of Congress noted Congress's intent to protect the PSS' "need for access to the works at a price that would not hamper their growth." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings (Final Rule and Order), 63 Fed. Reg. 25,394, 25,409 (May 8, 1998). In 1998, the Register – rejecting a similar argument by SoundExchange to limit the scope of the PSS license – explained that in light of the pioneering investments made by the PSS, Congress intended the grandfather provisions to allow those few companies "to develop their businesses accordingly." Designation as a Preexisting Service, 71 Fed. Reg. 64,639, 64,645 (Nov. 3, 2006). *See also SoundExchange, Inc. v. Muzak LLC*, 854 F.3d 713, 715 (D.C. Cir. 2017) ("As an obvious compromise, however—in a concession to the businesses that had invested under the more favorable pre-1998 rates—the Act provides a grandfather clause. 'Preexisting subscription services' could still pay rates set according to the old method."); *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1004 (D.C. Cir. 2014) (the PSS license was intended "to protect the investment of noninteractive services that had come into existence before the recognition of the digital performance right.").

As the D.C. Circuit noted in its review of this proceeding, the very structure of the PSS grandfather provisions evince Congress's intent to allow the PSS to expand into entirely new

transmission media without losing PSS status. *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 421, 426 (D.C. Cir. 2020). The statute's very premise for allowing for such expanded service offerings is that the PSS may continue to develop their services and are not frozen as they were in 1998.

And in this proceeding, the Register expressly rejected the same argument advanced by SoundExchange. With respect to Music Choice's service offered in the same transmission media used on July 31, 1998, the Register held that such existing service offerings have significant ability to evolve, improve, and adapt to new technologies inherent in those media:

> an existing service offering can grow and expand significantly within the same transmission medium while remaining a PSS offering. The Register has found no indication that Congress meant to freeze existing service offerings exactly as they were on July 31, 1998, in order for them to continue to qualify for the grandfathering provisions. The user interface can be updated, certain functionality can be changed, the number of subscribers can grow, and channels can be added, subtracted, or otherwise changed. The only restriction is that the existing service offering as it is today must be fundamentally the same type of offering that it was on July 31, 1998—*i.e.*, it must be a noninteractive, residential, cable or satellite digital audio transmission subscription service.

Scope of Preexisting Subscription Services, 82 Fed. Reg. 59, 652, 59,658 (December 15, 2017) (the "Register's Ruling"). The Register also specifically noted that an existing service offering can adapt to and take advantage of benefits of significant technological changes in those existing media. Using cable as an example, the Register ruled that a PSS that was transmitting its service via coaxial cable in 1998 could thereafter adapt to later technologies by transmitting its service via optical fiber and still remain an existing service offering "because it would still be part of what is traditionally considered to be a residential television service; this is true even though optical fiber may provide certain advantages over coaxial cable." *Id.* at 59,659.

Even with respect to expanded service offerings in new media, the Register rejected SoundExchange's argument that a PSS must remain exactly as it was in 1998, noting that

because "an existing service offering can expand over time while remaining a PSS offering, the comparison [of the similarities of an expanded service offering] should be made to the existing service offering as it exists *at the time of comparison*, not, as SoundExchange argues, as it existed on July 31, 1998." *Id.* at 59,658.

The D.C. Circuit subsequently ruled that the Register should not have categorically excluded internet from the transmission media eligible for treatment as an existing service offering. *Music Choice*, 970 F.3d at 426. And as demonstrated in MC Opening Br., at 17-18, the term "residential" as applied to Music Choice's service and all other television programming services merely refers to the type of subscriber – consumer as opposed to business subscribers. Consequently, under the Register's correct interpretation of the applicable statutory language, the only limitation on the evolution of Music Choice's PSS is that the service must remain a non-interactive digital audio service that is transmitted to consumer subscribers through cable, satellite, or internet. As Music Choice amply demonstrated in its Opening Brief, its current service easily meets this test and any evolutionary changes to its service over the past twenty-five years are of the types allowed for an existing service offering.

Completely ignoring the Register's ruling on this legal standard, SoundExchange takes a line of dictum from the D.C. Circuit's opinion out of context and attempts to argue that the appellate court created a new legal standard for existing service offerings. The D.C. Circuit did no such thing. Nor could it. As a preliminary matter, neither SoundExchange nor Music Choice appealed the parts of the Register's ruling dealing with the ability of existing service offerings to develop and evolve. Consequently, these questions were not before the D. C. Circuit in the first place. It is therefore not surprising that the D.C. Circuit's holding on the internet-related issues was limited to the Register's statutory interpretation error of excluding Music Choice's internet transmissions from the existing service offering category even though it was undisputed on the

record that Music Choice had in fact been transmitting its channels to subscribers since well before July 31, 1998. *Music Choice*, 970 F.3d at 427.

At no point did the D.C. Circuit discuss, much less overrule the Register's legal analysis regarding the ability of existing service offerings to expand and evolve. Instead, the court instructed that on remand the Judges would have to reconsider, using the corrected legal standard, the degree to which Music Choice's internet transmissions today are within the scope of the PSS license. In other words, the Judges must first analyze those transmissions as existing service offerings, not expanded service offerings, as the Judges did in reliance on the Register's erroneous statutory interpretation. And to do so, the D.C. Circuit merely noted that the Judges must consider the nature of the service, including the transmission media and various features, actually available on July 31, 1998 in order to determine whether the channels offered today are part of the same service that was offered in 1998. *Id.* at 427-28. In noting this, the D.C. Circuit did not say that the current service needed to be identical to the service as it existed in 1998. As noted above, such a statement would have been inconsistent with (1) the D.C. Circuit's own acknowledgment that a PSS may expand into new transmission media; (2) the statutory structure of the PSS license; and (3) Congress's intent to allow the PSS to develop and grow their services as recognized by the Librarian of Congress and Register. It also would have been dictum, and therefore neither sufficient to overrule the Register's ruling to the contrary nor binding on the Judges on remand. *See, e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ('[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.'); *Gersman v. Group Health Ass'n*, 975 F.2d 886, 897 (D.C.Cir.1992) ('Binding circuit law comes only from the holdings of [the court], not from its dicta.').

Thus, while the D.C. Circuit suggested that the Judges should consider facts regarding

Music Choice's service in 1998, including whether the service was available outside the home or whether "apps" were used to receive the service at that time, the court did not indicate what weight the Judges should give to any such facts nor did it provide a new legal standard for evaluating whether any changes were so significant as to render the current channels a different service. The Register *has* provided a legal test to determine whether the internet transmissions today remain part of an existing service offering. That test merely asks: are the Music Choice channels provided via internet still fundamentally part of a non-interactive digital audio transmission service provided to consumer subscribers through cable, satellite, or internet? As demonstrated in Music Choice's Opening Brief, the answer to this question is clearly yes.

B. Music Choice Was Transmitting Its Music Channels Via Internet on July 31, 1998

The D.C. Circuit correctly noted that on the record in this proceeding, it is "undisputed that Music Choice had been providing some digital audio transmissions over the internet since 1996 and was still doing so on July 31, 1998." *Music Choice*, 970 F.3d at 428. This is certainly true. In his written testimony and at the hearing, David Del Beccaro – who has been personally involved in every facet of the launch and development of Music Choice and its services – clearly testified that Music Choice had launched its first internet-based transmissions of its consumer audio service in 1996 and has continued transmitting via internet to this day. May 18, 2017 Hearing Tr. at 4599:2-18 (Del Beccaro). SoundExchange introduced no evidence contradicting that testimony in any way.

On remand, Mr. Del Beccaro has submitted further testimony with more details about the launch and development of Music Choice's internet transmissions, and Music Choice submitted various documents further corroborating Mr. Del Beccaro's testimony. MC Opening Br. at 9-14. SoundExchange has not offered any evidence actually refuting these established facts. Instead, it

relies solely upon gross misrepresentations of the record in hopes of confusing the Judges into thinking there is a factual dispute where the D.C. Circuit found none. There is not.

1. SoundExchange has provided no evidence rebutting Music Choice's showing that it was transmitting its music service via internet since 1996

Incredibly, SoundExchange's remand argument is based upon a claim that Music Choice was not transmitting its music channels via the internet on or prior to July 31, 1998. SoundExchange, Inc.'s Opening Brief on Remand ("SX Opening Br.") at 9-15. The only sources cited to support this claim, however, are (1) Mr. Del Beccaro's own testimony and (2) a few unauthenticated and inadmissible printouts from the Internet Archive's "Wayback Machine" website. SoundExchange's characterization of the cited materials is pure gaslighting, however. Mr. Del Beccaro's testimony and even the Wayback Machine printouts corroborate what Music Choice's evidence had already established: that Music Choice launched its internet-based offering in 1996 and has continued to provide that offering through today.

SoundExchange leads with a claim that Mr. Del Beccaro's testimony in the *Webcasting I* proceeding is inconsistent with his testimony in this proceeding. SX Opening Br. at 9. To further its misrepresentation, SoundExchange quotes selected portions of Mr. Del Beccaro's testimony out of context. *Id*. But that testimony was not about the service offering at issue in this proceeding at all. Music Choice in 1999 launched a non-subscription, advertising-supported service on its website and – because a non-subscription service cannot be a PSS – that service would have to pay royalties under the new non-subscription webcasting license created by the DMCA at rates that would be set in the first webcasting proceeding. Declaration of David Del Beccaro in Support of Opening Brief on Remand ("Del Beccaro Opening Decl.") at ¶ 24. Given that *Webcasting I* only involved potentially non-PSS offerings, Mr. Del Beccaro focused his testimony on the non-subscription internet offering that would be subject to the *Webcasting I*

rates and terms. Declaration of David Del Beccaro in Support of Responsive Brief on Remand ("Del Beccaro Responsive Decl.") at ¶¶ 9-16.

Review of the portions of his Webcasting testimony strategically ignored by SoundExchange makes this clear. SX Opening Br., Ex. R, at 2 ("Music Choice seeks a statutory license for the performance of sound recordings by means of our eligible nonsubscription Internet-enabled music offering. The statutory license will cover performances made from April 1, 1999 until March 5, 2001."). SoundExchange misrepresents the quoted snippets of testimony as stating that Music Choice's internet transmissions in 1999 comprised "only" the nonsubscription offering. SX Opening Br. at 9. The actual testimony does not say anywhere that the nonsubscription service was the only form of internet transmission offered by Music Choice in 1999. It merely discusses the launch of the non-subscription service in 1999, and its discontinuance in 2001. Given that the subscription internet transmissions that had been offered since 1996 were already covered by the PSS license, there was no reason for Mr. Del Beccaro to discuss the history or the launch of that irrelevant offering in his *Webcasting I* testimony. Del Beccaro Responsive Decl. at ¶ 14.

SoundExchange plays similar games with Mr. Del Beccaro's deposition testimony in this proceeding. SoundExchange cites Mr. Del Beccaro's testimony that Music Choice's service historically was transmitted via satellite uplink and ultimately through digital tuners, and implies that this somehow proves that Music Choice was not making internet transmissions in 1998. SX Opening Br. at 10. But in those passages, Mr. Del Beccaro was discussing one historical way that its channels were transmitted through cable television providers. *Id.*, Ex. G, Deposition of David Del Beccaro ("Del Beccaro Dep."), Tr. 61:3-67:16. Indeed, in answering the very next question, Mr. Del Beccaro clearly testified that this was not the only way to get Music Choice in 1998, and specified that subscribers could also receive the channels via internet:

> Q: Were there – in 1998, were there other ways a consumer got access to the Music Choice signal? . . .
>
> A. Yes. They could get it over the Internet.
>
> Q. So when they received it over the Internet from a cable operator, was it by this same method of transmitting a pure digital signal that the cable operator distributed to its customers? . . .
>
> A. No.

Id. at Tr. 67:24-68:12.

SoundExchange also mischaracterizes various documents in an attempt to muddy the waters. But these documents, to the extent they are admissible or relevant at all, only support Music Choice's case. As a preliminary matter, SoundExchange submits several documents that its attorneys printed out from the Internet Archive's Wayback Machine website. These printouts cannot serve as reliable evidence of what Music Choice's website looked like for several reasons. They do not come from Music Choice's actual website, but rather from a third party's alleged "indexing" of limited pages from certain dates in time. SoundExchange has not submitted testimony or other evidence establishing the accuracy of the third party documents, nor even established how the Wayback Machine created these images, purportedly of a small portion of Music Choice's website from decades ago. These documents are simply not reliable and should not be admitted by the Judges.

Contrary to SoundExchange's argument (SX Opening Br. at 9 n.6), there is no blanket "Wayback Machine" exemption from authentication requirements.[1] In keeping with the general

[1] Nor do any of the cases cited by SoundExchange support such an exemption. None of those cases approved the admission of Wayback Machine printouts solely based upon testimony of trial counsel who printed them out. In the first cited case, *Klayman v. Judicial Watch, Inc.*, 299 F. Supp.3d 141, 147 (D.D.C. 2018), the court did not admit the Wayback Machine printout, but rather admitted substitute copies of the same web page taken directly from the actual website. And in all of the cited cases, additional authentication evidence was relied upon, including testimony from a representative of the Internet Archive, comparison to actual copies of the relevant website or other properly authenticated documents, or testimony from witnesses with personal knowledge of the website at issue at the relevant time vouching for the accuracy of the Wayback Machine printout. SoundExchange provides none of this necessary supporting evidence.

principles requiring authentication of documentary evidence "circuit courts generally have required that the Wayback Machine print-outs be authenticated by a representative [from Internet Archive] with personal knowledge before they can be judicially noticed or admitted." *Setai Hotel Acquisition, LLC v. Miami Beach Luxury Rentals, Inc.*, 2017 WL 3503371, at *8 (S.D. Fla. Aug. 15, 2017) (collecting authority). This is for good reason. First, the Wayback Machine website itself contains a disclaimer of the accuracy of the pages available. *Computer Program & Sys. Inc. v. Wazu Holdings, Ltd.*, 2019 WL 1119352, at *18 (S.D. Ala. Mar. 11, 2019). Second, the way that websites are indexed, copied, and stored renders them particularly unreliable for accurately proving what the webpages actually looked like on specific dates. *See Pavo Sols. LLC v. Kingston Tech. Co.*, 2019 WL 4390573, at *3 (C.D. Cal. June 26, 2019).

Where courts do admit screenshots from the Wayback Machine, it is upon authentication by a witness who works at the Internet Archive and can testify to the reliability of the Wayback Machine in connection with the specific URL captured, or by a witness who viewed the actual original website at the time represented by the archive capture and can attest that the archive accurately represents what they themselves saw on that website at that time. *See, e.g., United States v. Bansal*, 663 F.3d 634, 667–68 (3d Cir. 2011) (cited by SoundExchange); *Specht v. Google Inc.*, 747 F.3d 929, 933 (7th Cir. 2014); *United States ex rel. Oliver v. Philip Morris USA, Inc.*, 101 F. Supp. 3d 111, 117, n.4 (D.D.C. 2015), *aff'd*, 826 F.3d 466 (D.C. Cir. 2016); *Gavrieli Brands LLC v. Soto Massini (USA) Corp.*, 2019 WL 10248462, at *2 (D. Del. Apr. 18, 2019). Absent such authentication, courts decline to admit or consider screenshots from the Wayback Machine or similar internet archives when only submitted with an attorney's declaration. *Really Good Stuff, LLC v. BAP Inv'rs, L.C.*, 2021 WL 2469707, at *10 (S.D.N.Y. June 17, 2021) (collecting authority).

In any event, even if they were admissible, the Wayback Machine printouts would

actually corroborate that Music Choice was actually transmitting its music channels via internet in 1998. For example, SoundExchange cites a purported FAQ page indicating it was last updated on October 23, 1996, which describes the Music Choice service as a "music service that comes into your home or business via cable or DIRECTV," arguing that this somehow proves that Music Choice was not offering its service via internet at that time. SX Opening Br. at 10. But the cited sections of the FAQ merely describe the cable and satellite transmissions available from Music Choice and do not say these are the "only" way to get Music Choice. To the contrary, the very same FAQ clearly states: "MUSIC CHOICE is also available [as of October 23, 1996] as part of Continental Cablevision's ***High Speed Internet Service*** in Jacksonville, Florida." *Id*., Ex. C, at 1 (emphasis added). So this document, accepted at face value, corroborates that Music Choice had already launched its internet service by October 23, 1996. Similarly, SoundExchange submits what purports to be a press release from Music Choice's website, announcing the September 23, 1996 launch of the consumer music channels on Continental Cablevision's "Highway 1 high-speed Internet service." *Id*., Ex. D.

SoundExchange submits two other seemingly random pages it claims are from Music Choice's website from July 5, 1998, and notes that those pages do not show any music streaming option. SX Opening Br. at 10-11 & Exs. E, F. It is not clear why SoundExchange thinks this proves anything relevant. Even if these were accurate representations of these two pages, there is no reason why those pages – neither of which even look like a home page – would have music streaming functionality on them. Nor can we tell from these two random pages what else was on the Music Choice website on that date. Nor for that matter can we tell when these pages were actually posted to the Music Choice website – if they were at all. The reference to July 5, 1998 on Exhibit F comes not from the Music Choice website, but from the Wayback Machine, and

indicates a claim that the website was indexed on that date. This in no way establishes when the page was actually first published.

Finally, SoundExchange points to an article, apparently from a European trade periodical, describing various internet services offered by Music Choice Europe in 1997. SX Opening Br. at 10 & Ex. H. Music Choice Europe was a company that Music Choice helped form, but it was a different company and different service. Other than having a passive ownership interest for a time, Music Choice was not actually involved in the operation of Music Choice Europe. Del Beccaro Responsive Decl. at ¶ 17. Nor does the document in any way support SoundExchange's argument. To the contrary, it shows that a similar service had begun transmitting its service via internet in connection with the roll-out of high-speed internet services by cable and telephone companies: the article indicates that the Music Choice Europe service was launched in early 1997 on Telecom Finland's Quicknet internet service. The article also corroborates Mr. Del Beccaro's testimony that even in 1997 internet transmission of similar music channels required subscribers to install "apps" to receive the service. SX Opening Br. Ex. H (noting that subscribers need to install "a suitable Plug-In such as Telos Systems' Audioactive.").

2. SoundExchange's argument that Music Choice's "high speed internet" offering somehow did not include "internet transmissions" is absurd

SoundExchange next tries to argue that Music Choice's channels offered via "high speed internet service" somehow do not count as "internet transmissions." SX Opening Br. at 11-15. This argument fails on multiple grounds. First, to the extent the channels were transmitted through a cable modem, those were still internet transmissions. Second, Music Choice's internet offering was not limited solely to cable modems in 1998 or thereafter.

In its Opening Brief, Music Choice established that it launched its internet-based offering on Continental Cablevision's Jacksonville system in September of 1996, and that between then

and July 31, 1998 the offering expanded to many other affiliates and systems throughout the country. MC Opening Br. at 9-12; Del Beccaro Opening Decl. at ¶¶ 10-18. That first launch was initially marketed as part of Continental's "high speed internet service," which was provided to the subscriber using a "cable modem" to connect the user's computer to the internet. Del Beccaro Responsive Decl. at ¶ 23. Other than allowing for faster connection speeds than some other types of modems in use at the time, these cable modems were not fundamentally different from any other type of modem used to connect to the internet – including the modems built into mobile devices. *Id*. at ¶¶ 21-23. But the whole point of the service was to provide internet transmissions to the subscriber. So even if Music Choice's transmissions to high speed cable subscribers in 1998 had been limited to subscribers' cable modems, they would still have been internet transmissions. *Id*. But Music Choice's internet transmissions were not limited to cable modems.

As Mr. Del Beccaro testified, even at the earliest launches, not all of the various MVPD affiliates who provided Music Choice's channels to their high speed internet subscribers limited access to the cable modem. Many of them always allowed access from any internet-connected device, irrespective of location or what type of modem was used to connect to the internet. Del Beccaro Opening Decl. ¶ 45. And even the few that initially did tie access specifically to a cable modem quickly abandoned that restriction. *Id*. By July 31, 1998, several Music Choice affiliates were offering internet access to the channels to regular television as well as high speed internet subscribers from any internet-connected device. *Id*. Regardless of the type of modem used, transmissions received via any modem connected to the internet ***are internet transmissions***. SoundExchange's attempt to argue to the contrary is nonsensical.

SoundExchange next claims that Music Choice's pre-July 1998 internet transmissions were limited to the one Jacksonville system discussed above. SX Opening Br. at 11. Even if true, this would be irrelevant. The D.C. Circuit expressly rejected the Register's view that there was

some kind of materiality threshold for whether a PSS was using a particular medium "enough" in 1998; the threshold question is merely whether Music Choice was transmitting via the internet at all on that date. But SoundExchange's claim is not true. As Mr. Del Beccaro testified, Music Choice's music channels were available via internet through several different affiliates by July 31, 1998, and that testimony is corroborated by multiple documents produced to SoundExchange in discovery, including requests for PRO licenses for internet performances and various partner meeting presentations mentioning launches on various affiliates' systems. MC Opening Br. at 9-12; Del Beccaro Opening Decl. at ¶¶ 7-18 & Exs. MC 10-15.

Not surprisingly, SoundExchange does not cite a shred of evidence actually supporting its incoherent argument that Music Choice's high speed internet service transmissions were somehow not actually internet transmissions. Instead, it misrepresents Mr. Del Beccaro's deposition testimony as saying that Music Choice's internet service was only available on cable providers' "own local broadband network." SoundExchange Opening Br. at 12. It is not clear exactly what distinction SoundExchange is trying to make here, but in any event Mr. Del Beccaro said no such thing. In the portion of the transcript cited by SoundExchange, Mr. Del Beccaro had been asked a serious of confusing questions by an attorney who admitted that he had no understanding of internet technology in 1998. Del Beccaro Dep. Tr. 123:4-123:14. Mr. Del Beccaro was trying to explain why there was no material difference between different types of software applications used to access content like Music Choice's channels via the internet. *Id*., Tr. 120:6-121:6. In that context, he discussed the ways that internet service providers could use different types of software applications to limit access to authenticated subscribers – as opposed to an "open" website accessible to the public for free—and used the example of AOL employing a "walled garden" approach to certain content. *Id*., Tr. 121:19-122:17. Even SoundExchange's counsel understood that they were discussing access using apps over the internet, not a local

network. *Id.*, Tr. 123:13-14 ("That's my conception of what the Internet was in 1998").

Mr. Del Beccaro certainly never said that Music Choice's MVPD affiliates offered – much less *only* offered – the Music Choice channels via a "local network." That claim is simply not true. Del Beccaro Responsive Decl. at ¶¶ 25-26. During his deposition, Mr. Del Beccaro repeatedly testified that the channels were transmitted over the internet in 1998 (and before), and were not limited to devices connected to a cable modem, nor even limited to high speed internet subscribers. *See, e.g.*, Del Beccaro Dep. Tr. 53:1-56:4; 104:24-106:4; 107:13-109:8.

With no actual evidence to support its false narrative, SoundExchange next asks the Judges to ignore Mr. Del Beccaro's testimony and supporting documentary evidence merely because during his deposition he could not – solely from memory – remember the specific details of precisely which affiliates and systems launched the internet service on which dates prior to July 31, 1998. SX Opening Br. at 13-14. Due to the sequencing of the schedule on remand, Mr. Del Beccaro had not even begun researching or otherwise preparing his testimony in this remand proceeding. Del Beccaro Dep. Tr. 159:11-160:2. During the deposition, including at the various places cited in SX Opening Br., SoundExchange's counsel repeatedly asked Mr. Del Beccaro questions seeking granular details from twenty-five years ago about specific affiliates' internet offerings, including which affiliates launched on which specific dates and in which order, and how specific affiliates' internet offerings differed on those dates. Counsel did this without even providing Mr. Del Beccaro any documents Music Choice had produced, and which provide timeframes and names of specific affiliates. This was an impossible – and pointless – memory test, which no CEO or other witness could reasonably have satisfied.

But he was clear that Music Choice had launched and was providing its internet offering in 1996 and by July 31, 1998, the service was available through many different affiliates and systems. *Id.* at Tr. 79:23-81:16. Mr. Del Beccaro similarly explained the different ways that the

Music Choice channels would be transmitted via internet and received by subscribers, which varied depending on the affiliate. *Id*. at Tr. 51:6-56:10. It was only when counsel asked him to recall precise dates for specific affiliates or to say which specific affiliates employed each of the various different features or methodologies for the internet transmissions on specific dates that Mr. Del Beccaro could not remember those specific details.

SoundExchange's claim that Mr. Del Beccaro testified that he was unaware of any documents that could supply more details is similarly false. In the very section cited by SoundExchange, Mr. Del Beccaro expressly stated that he personally knew that the service was available on the internet on July 31, 1998, that the only questions he could not answer involved specific launch dates for specific affiliates, and that he knew Music Choice had produced documents with at least some of this information:

> Q. Is there anyone at Music Choice who you could talk to who knows when – whether or not the company had launched their Internet service where consumers could listen to Music Choice over the Internet on or before July 31, 1998?
>
> A. Okay. I could testify that it was --- the answer to that question, which is yes. The question I couldn't answer is: Which systems and which operators on which dates? And, no, no one can answer that question 25 years later.
>
> Q. And so do you know if you have any documents that list that?
>
> A. I only—do I know of any documents? I know I have seen a few of the documents that we produced for you, because those are the ones I reviewed with counsel. A few of them. And those are the only documents I know of.

Id. at Tr. 166:22-167:13.

Even SoundExchange is compelled to acknowledge the clear evidence of the launch of the internet service on Continental's Jacksonville system in 1996. Even if that were the only system providing Music Choice's service via internet, that would be sufficient for the internet service to be an existing service offering. But Mr. Del Beccaro clearly testified that by July 31,

1998 the channels were available via internet through many of its affiliates, including Time Warner, Adelphia, Comcast, MediaOne, and Cox. MC Opening Br. at 10-11. When able to review the Music Choice documents produced to SoundExchange during the preparation of his testimony, those documents both refreshed Mr. Del Beccaro's recollection of some of the details he could not recall solely from memory in his deposition and corroborated his deposition testimony. Del Beccaro Responsive Decl. at ¶¶ 7-8.

This is hardly unusual and certainly does not justify ignoring his testimony, as SoundExchange argues. SX Opening Br. at 14. The cases cited by SoundExchange bear no relation to the facts in this case, and do not support its argument.[2] As a preliminary matter, Mr. Del Beccaro's written testimony is not inconsistent with his deposition testimony and is consistent with the documentary evidence submitted with Music Choice's Opening Brief. *See Akinsinde v. Not-For-Profit Hosp. Corp.*, 2018 WL 6251348, at *6 (D.D.C. Nov. 29, 2018) ("Defendant asserts that Plaintiff's sworn statement should be disregarded as a sham affidavit . . . [F]or the doctrine to apply, the affidavit must clearly contradict prior sworn testimony, rather than clarify confusing or ambiguous testimony.") (internal quotation marks omitted). If anything, the written testimony clarifies points Mr. Del Beccaro was unable to testify to based only upon his unaided recollection at the time of deposition. *Johnson v. Shinseki*, 811 F. Supp. 2d 336, 342 (D.D.C. 2011) ("[I]f the supplemental affidavit [or declaration] does not contradict but instead clarifies the prior sworn statement, then it is usually considered admissible.'"). *See also Sandvig*

[2] *Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 74 (D.D.C. 2015) involved employment discrimination claims, and the testimony discounted was the plaintiff's own subjective evaluation of her own work performance, which the court found to be irrelevant and contradicted by other undisputed evidence in the case. *Competitive Telecommunications Ass'n v. F.C.C.*, 998 F.2d 1058, 1063 (D.C. Cir. 1993) did not even involve a court's discounting of testimony. Instead, the D.C. Circuit merely affirmed an agency's decision to accept self-serving testimony from both parties and weigh them against each other. *Huthnance v. District of Columbia*, 722 F.3d 371, 378-81 (D.C. Cir. 2013) is even further afield. In that case, the D.C. Circuit held that the district court *erred* by issuing an adverse inference instruction, because there were innocuous reasons why the missing evidence had not been introduced and it therefore would be unreasonable to infer that the evidence would have been damaging.

v. Barr, 451 F. Supp. 3d 73, 80 (D.D.C. 2020); *United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F. Supp. 3d 180, 194 (D.D.C. 2017).

Moreover, where a deponent was merely unable to remember details at the time of a deposition, but was later able to refresh that recollection with documentary or other evidence prior to submitting a written statement, courts will overlook any resulting discrepancies in that witness's testimony. *See Johnson v. Shinseki*, 811 F. Supp. 2d 336, 343–44 (D.D.C. 2011). The very nature of deposition testimony – and the difficulties in discerning the precise question posed – may also explain any perceived "inconsistencies" between Mr. Del Beccaro's deposition and his written submission. *Flynn v. Veazey Constr. Corp.*, 424 F. Supp. 2d 24, 36 (D.D.C. 2006) ("Courts are especially lenient in accepting later testimony that may not be wholly consistent with an earlier account where, like here, the initial statement took the form of a deposition rather than ... an affidavit. . . . This is because [a] deponent may have been confused about what was being asked or have lacked immediate access to material documents.") (internal quotation marks omitted); *Hinch v. Lucy Webb Hayes Nat'l Training Sch.*, 814 A.2d 926, 931 (D.C. 2003) ("We cannot find within the deposition testimony any unambiguous assertion that is directly contradicted by the later affidavit. . . [Instead,] her affidavit clarifies a rather rambling and confusing deposition in which the witness and counsel engaged in a somewhat academic and unfocused discussion of the possible hypothetical causes of Ms. Hinch's hospital condition.").

3. Music Choice's internet transmissions were available to subscribers outside the home in 1998

Music Choice has demonstrated that its music channels transmitted via internet were available outside the home in 1998. MC Opening Br. at 12-14. SoundExchange attempts to argue that the service was not available outside the home, but the only support cited for that proposition is Mr. Del Beccaro's deposition testimony. SX Opening Br. at 17. Mr. Del Beccaro

did not testify at his deposition that subscribers receiving Music Choice's internet transmissions were unable to do so outside the home. In the testimony cited by SoundExchange, he testified that the Music Choice service was available in cars through DIRECTV, though he was not certain whether that service was available in 1998, and that he was not aware of any "Walkman" type device that would allow a subscriber to listen to the service while jogging. SX Opening Br., Ex. G, Tr. 126:24-127:12. This hardly amounts to a clear statement that the service was not available in any way outside the home, nor is it inconsistent with his written testimony establishing other ways that subscribers could in fact receive the channels from locations outside the home. Del Beccaro Opening Decl. at ¶¶ 42-46.

Similarly, while Mr. Del Beccaro acknowledged that there were not "smartphones" in 1998, as that term is understood today, he pointed out that the Music Choice channels would have been available to subscribers on their cell phones if they had internet access on those phones in 1998, and that such phones and other internet-connected devices were available in 1998. SX Opening Br., Ex. G, Tr. 22:12-23:14. And although SoundExchange argues that the branded term "Wi-Fi" did not come into existence until 2000, SX Opening Br. at 17, Mr. Del Beccaro testified at his deposition that other similar forms of wireless telecommunications allowed subscribers to listen to Music Choice wirelessly, including microwave and satellite. SX Opening Br., Ex. G., Tr. 23:17-23; 45:17-46:17.

4. Music Choice's cable, satellite, and internet transmissions have always been received using "apps," including in 1998

Music Choice established that it has always required subscribers to use "apps" to receive its music channels, whether transmitted via cable, satellite, or internet. MC Opening Br. at 21-22. SoundExchange argues that the service was not available through a "mobile app" in 1998. SX Opening Br. at 16. Again, SoundExchange mischaracterizes Mr. Del Beccaro's deposition

testimony on this point. In the portion cited, Mr. Del Beccaro acknowledged that there were no iPhones in 1998 and therefore no iTunes apps at that time. But he went on to explain that the term "app" is merely a shortened version of "software application" and that Music Choice has always used apps, including in 1998, including in connection with its internet transmissions. *Id*., Ex. G., Tr. 116:2-121:6. As Mr. Del Beccaro explained in this testimony, any access from outside the home in 1998, including on an internet-connected phone, computer, or other device, would necessarily use an "app" to receive the channels, whether that app was a web browser or a special purpose software application. *Id*.

C. Music Choice's Current Consumer Subscription Audio Channels Received Via Internet Are Fundamentally Part of the Same Service Offered in 1998

As noted above, the correct legal standard to determine whether Music Choice's internet transmissions today remain part of its existing service offering is whether the internet channels are fundamentally the same service Music Choice was offering in 1998. Consistent with previous rulings by the Register and D.C. Circuit, Music Choice's existing service offering is allowed to change, evolve, improve, and take advantage of technological advancements in the existing transmission media without being a new or different service offering, so long as its music service remains a non-interactive digital audio transmission service transmitted to consumer subscribers through cable, satellite, or internet. *Supra*, pp. 2-4. Any differences between Music Choice's channels via internet in 1998 versus today fall well within that standard.[3]

[3] SoundExchange argues alternatively that the Judges should simply re-issue the vacated portion of the Final Determination, continuing to treat Music Choice's internet transmissions as an expanded service offering and using the same reasoning and six-factor test announced by the Register. SX Opening Br. at 17-19. This line of argument is misplaced. First, the category "expanded service offering" – and the Register's test was only applicable to expanded service offerings – only applies to offerings transmitted in a new medium of transmission. Given that Music Choice was transmitting via internet on July 31, 1998, the expanded service offering rubric is irrelevant. A feature, like mobile access, is not a different, non-internet medium of transmission. Moreover, the Register's six-factor test was premised on the same error that led the D.C. Circuit to vacate the Register's ruling and should not be followed. As the D.C. Circuit noted, it did not review the test only because its vacatur of the Register's ruling due to the threshold error mooted such review, but any future legal test for the evaluation of expanded service offerings should be done based upon the statutory PSS definition and the criteria enumerated in 17 U.S.C. § 114(d)(2)(C), and not the kind of

1. The interface for Music Choice's audio channels has evolved and improved over time but the fundamental nature of the musical audio programs transmitted on those channels is the same as it was in 1998

As a preliminary matter, the nature of the music programming offered on Music Choice's audio channels is exactly the same today as it was in 1998. Del Beccaro Responsive Decl. at ¶¶ 27-28. The only changes have been related to the technologies and interfaces used to receive the channels. Notably, the license at issue in this case only covers the music performed on those channels. No license is needed from the record companies for Music Choice's interfaces or technologies. And to the extent Music Choice has bundled other types of programming – like music videos – with its audio channels, it licenses those rights separately from the record companies. *Id*. at ¶ 27. Thus, these types of changes are unrelated to the rights included in the PSS license itself. Nor do these changes constitute a change in the medium of transmission for the service. Register's Ruling at 59,659 (holding that medium of transmission means the basic type of telecommunications service through which the offering is being delivered, in this case: cable, satellite, or internet). 82 Fed. Reg. 59, 652, 59,659 (December 15, 2017). The programming transmitted to subscribers on the audio channels at issue is exactly the same as it was in 1998: multiple channels of non-interactive, expert-curated, radio-type, commercial-free music audio, provided to consumer subscribers via internet.

2. Any changes to the interface or modes of transmission have been driven by Music Choice's need to adapt to changes in technology and market conditions, which are allowed for a PSS's existing service offerings

SoundExchange argues that Music Choice's internet transmissions today should be considered a completely different service than the service offered in 1998, merely because some of its non-music features have evolved over time as new technologies were invented or old

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fact-finding engaged in by the Register in creating this now-irrelevant test. *Music Choice v. Copyright Royalty Bd*., 970 F.3d 418, 427 n.9 (D.C. Cir. 2020).

technologies were improved, including the evolution of internet-connected mobile phones to today's "smartphones," the introduction of "WiFi" to connect to modems wirelessly, and the introduction of smartphone "apps." SX Opening Br. at 16-17. As Music Choice has established, however, none of its improvements related to these advances in technology change the fundamental nature of the programming heard on the music channels. Moreover, all of these changes were driven by Music Choice's need to adapt to new technologies and market conditions so that it could develop and grow its service. Del Beccaro Opening Decl. ¶¶ 19-25. And they are all of the type the Register recognized as allowed for an existing service offering. Register's Ruling at 59,658-59.

3. The channel lineups available to a given consumer have always varied, depending on various factors, and differing lineups do not constitute an entirely different service

SoundExchange argues that the transmission of specific music channels via internet that are not also transmitted to the television is sufficient to render those channels a totally different service. SX Opening Br. at 16. Again, SoundExchange is simply wrong. As a preliminary matter, the Register expressly ruled that an existing service offering is allowed to add or remove channels without becoming a different service. Register's Ruling at 59,658 ("The user interface can be updated, certain functionality can be changed, the number of subscribers can grow, and channels can be added, subtracted, or otherwise changed."). Moreover, the number of channels and channel lineup provided to a given Music Choice subscriber has always been variable, even on the television. Although Music Choice makes a master set of channels available to all MVPD affiliates, each affiliate can choose which channels to take, so the lineup and number of channels can vary between affiliates. And even within an affiliate, different subscribers may get different lineups and numbers of channels depending on what kind of cable box they have. Del Beccaro Opening Decl. at ¶¶ 28, 39-40. Thus, even on the television the number of channels and lineups

received by a given subscriber are variable and constantly change.

In the context of an existing service offering, there is no reason the exact same channels must be transmitted to all subscriber in every different medium of transmission. That has never been the way that Music Choice's service worked – including in 1998 – and it is contrary to the Register's ruling on this point. In any event, as Music Choice established, since before the current rate period began there have been no channels available via internet that are not also available on the television. Del Beccaro Opening Decl. at ¶¶ 26-41.

II. The PSS Audit Provision Should Not Be Changed

The D.C. Circuit made clear that SoundExchange bears the burden of submitting evidence – beyond the arguments it previously made – of a significant need for its proposed change, in light of how long the existing audit provision has been in place, the sound policy reasons cited by the CARP for creating the defensive audit provision, the Judges' prior refusal to grant SoundExchange's request for the same change, and Music Choice's long reliance on that provision. *Music Choice*, 970 F.3d at 428-430. SoundExchange has again failed to justify its requested change to the audit provision. SoundExchange starts by repeating the same arguments it made to D.C. Circuit and which were rejected. It then adds testimony from its partisan forensic accountant, but the alleged deficiencies argued by Mr. Stark are not actually related to the scope of defensive audits, and in any event his testimony is riddled with misleading characterizations and outright falsehoods. Indeed, the lack of candor and independence evinced by his testimony only further support Music Choice's showing that it should continue to be protected by a robust defensive audit provision.

A. SoundExchange Repeats the Same Arguments Already Rejected by the D.C. Circuit

SoundExchange leads by reiterating the very same arguments and testimony that it

previously submitted to the Judges, including that "harmonizing" the PSS audit provision with those of other licensees is sufficient justification for its requested change and that any audit done differently than SoundExchange would choose to do it is inherently insufficient. SX Opening Br. at 20-21. But SoundExchange – and the Government – submitted these very same arguments to the D.C. Circuit on appeal. *See* Corrected Br. of Intervenor SoundExchange, 2020 WL 133595, pp. *35-40; Final Brief for Appellees, 2020 WL 133594, pp. *49-52. Presented with these arguments, the D.C. Circuit nonetheless vacated the change to the audit provision, holding that in order to justify a material change after so many years – especially having previously rejected SoundExchange's request for the exact same change based on the exact same arguments – the Judges would need to provide specific and sufficient evidence-based justifications for the change including a relevant change in circumstance since the Judges' prior rejection of the change and reasons for departing from the CARP's policy judgment balancing the interests of the PSS and copyright owners. *Music Choice*, 970 F.3d at 429. The court also emphasized that any argued justification must be sufficient to overcome Music Choice's reliance on the defensive audit protection for many years. *Id*. The Judges should decline SoundExchange's invitation to re-issue the same vacated change based on the same arguments previously advanced and rejected.

B. The Alleged Deficiencies in Music Choice's Defensive Audits Argued by SoundExchange Are Unrelated to the "Scope" of Those Audits and Are Based Upon Testimony Riddled With Misleading Characterizations and Outright Falsehoods

The only new "evidence" submitted by SoundExchange to support its requested change is the testimony of its outside accountant, Lewis Stark. As Music Choice previously demonstrated, though SoundExchange calls Mr. Stark an "independent auditor" he is in fact quite the opposite. MC Opening Br. at 31-34. While Mr. Stark purports to identify certain alleged deficiencies in defensive audits conducted by BDO for Music Choice, those alleged deficiencies are not related

to the "scope" of the audits performed and therefore do not support the requested language change. Moreover, Mr. Stark's testimony is riddled with misleading characterizations and outright falsehoods relating to the BDO audits, further demonstrating his lack of objectivity and independence, and showing exactly why the defensive audit protection is necessary.

1. Pursuant to GAAS, the "scope" of Music Choice's defensive audits is not limited and is no different from the "scope" of SoundExchange's audits

SoundExchange and Mr. Stark pepper their submissions with the term "scope," but the actual alleged deficiencies are not related to the actual scope of the BDO audits. SX Opening Br. at 21-23; *Id*., Ex. A, Declaration of Lewis Stark ("Stark Decl."), at ¶¶ 7-14. As required by the PSS regulations, BDO conducted its audits pursuant to GAAS. Declaration of Russell Potts in Support of Music Choice's Responsive Brief on Remand ("Potts Responsive Decl.") at ¶ 2. GAAS has specific rules relating to the scope of an audit. For whatever financial statement is being audited the scope of an audit is the entirety of the financial data contained in that statement, and the entire financial statement is covered by the auditor's opinion as to accuracy. *Id.* at ¶ 3. To that end, GAAS specifically provides that if management of the audited company attempts to limit the scope of the audit in any way, the auditor must request that the company remove the limitation. If the company does not do so, the auditor must either issue a qualified opinion, disclaim any opinion, or withdraw from the engagement. *Id*. at ¶ 5. Notably, Music Choice's independent auditors have never issued a qualified opinion, disclaimed an opinion, or withdrawn from the engagement. *Id*. at ¶ 6. The scope of these audits in each instance was the entirety of Music Choice's PSS royalty payments pursuant to the PSS regulations for the audited year. *Id*. Thus, Mr. Stark's vague and conclusory complaints about the "scope" of BDO's audits are unfounded. His more specific complaints regarding those audits are not related to scope and

therefore do not support SoundExchange's requested change to the regulations. They are also grossly misleading, and in some instances objectively false.

2. SoundExchange and its partisan forensic accountant flatly misrepresent the facts relating to Music Choice's defensive audits in order to manufacture false claims of inadequacy

Although SoundExchange and Mr. Stark repeatedly refer to Mr. Stark as an "independent" auditor, *see, e.g.*, SX Opening Br. at 21; Stark Decl. at 1, as Music Choice has demonstrated, he is anything but independent as that term is understood by CPAs and regulated by AICPA. MC Opening Br. at 31-34. The liberties Mr. Stark takes with the facts alleged in his Declaration only further demonstrate that he does not exercise independence or objectivity, but rather acts as a mouthpiece for SoundExchange's most extreme positions.

Mr. Stark starts by clarifying that his use of the term "audit" to describe his work is in a "colloquial" sense of the word. Stark Decl. at ¶ 2. This is at least a tacit acknowledgement that he does not conduct audits, as CPAs and AICPA understand that term. But the PSS regulations require audits by their plain language, and even reference GAAS and AICPA. *See* 37 C.F.R. §382.1 (a Qualified Auditor must be independent as defined by the AICPA Code of Professional Conduct, which excludes the type of work done by Mr. Stark from any independence requirement); §382.7(d) (requiring that verification of royalty payments be done by audits conducted by Qualified Auditors pursuant to GAAS). SoundExchange and Mr. Stark apparently also use a "colloquial" sense of the term "independent," which allows Mr. Stark to avoid using the more stringent GAAS and instead use the Consulting Standard, which requires him to put the interests of his client before independence or objectivity. But the term "independent auditor" is a term of art under AICPA's rules, which dictate that any licensed CPA *must* employ GAAS when engaged as an independent auditor: "An independent auditor plans, conducts, and reports the results of an audit in accordance with generally accepted auditing standards." Potts Responsive

Decl. at ¶ 23. Thus, even if following GAAS were not expressly mandated by the PSS regulations, it would implicitly be required by the repeated use of the term "independent auditor." By Mr. Stark's own admission, his forensic royalty "examinations" do not satisfy these requirements of the PSS regulations.

As Music Choice set out in its Opening Brief, Mr. Stark and his team were given access to BDO's audit reports, working papers, and the BDO auditors themselves. They obtained and reviewed these papers, met in person with BDO, and received answers to any questions asked. After not hearing from Mr. Stark for some time after cooperating with his investigation, Music Choice reached out and asked if Mr. Stark needed any further information. Months later, he replied: "At this time, we do not need anything else from BDO. We may need more information from you and BDO or may perform additional procedures at a later date." But he never requested any additional information or sought to perform any additional procedures. MC Opening Br. at 31-32; Potts Responsive Decl. at ¶ 11 & Ex. MC 22. Now Mr. Stark claims that Music Choice did not cooperate with his investigation and identifies several alleged deficiencies with the BDO audits. His claims are false and – thankfully – Music Choice has the receipts to prove it.

Mr. Stark claims that Music Choice refused to cooperate, first with Prager Metis's requested audit of the PSS payments, and then with its investigation of the BDO audits.[4] Stark Decl. at ¶¶ 7-9. With respect to the first allegation, the entire point of the defensive audit provision is to allow a licensee that proactively commissions its own audits of those payments by an independent auditor pursuant to GAAS to avoid an intrusive and disruptive audit by

[4] Mr. Stark further claims that Music Choice is refusing to cooperate with a current royalty "audit" he has been retained to conduct for SoundExchange. Stark Decl. at ¶ 6 n.3. He fails to disclose, however, that Music Choice in April requested assurances from Mr. Stark and SoundExchange that any procedure will comply with the requirement that it be conducted as an independent audit pursuant to GAAS, and neither SoundExchange nor Mr. Stark replied to that request until the end of July, when SoundExchange proposed delaying the audit. Potts Responsive Decl. at ¶ 20.

SoundExchange. *Music Choice*, 970 F.3d at 428-29. Thus, Mr. Stark's complaint that Music Choice invoked this protection hardly constitutes a lack of cooperation. While Mr. Stark admits that Music Choice tendered the BDO audit reports as required by the regulations, he claims that it otherwise failed to cooperate with his evaluation of those audits by refusing to provide any copies of "most" of the work papers to Prager Metis, instead only allowing Mr. Stark to view a limited subset of those papers on a computer screen at Music Choice's offices. Stark Decl. at ¶ 8. These claims are false.

First, there was a comprehensive on-site review of work papers at BDO's offices (not at Music Choice's office as Mr. Stark claims) where a team from Prager Metis reviewed any work papers they desired and were able to discuss them with BDO and Music Choice. Next, BDO answered numerous follow-up questions propounded by Prager Metis via email and provided pdf copies of any specific BDO work papers Prager Metis requested. The only exception were two "cash reconciliation" work papers requested by Prager Metis, which were not provided because they were not relevant to the PSS royalty calculation and therefore not related to testing that BDO relied upon for these audits. Potts Responsive Decl. at ¶¶ 8-10 & Exs. MC 18-21. Neither BDO nor Music Choice refused to answer any specific questions propounded by Prager Metis related to the PSS royalty payments during this investigation. Potts Responsive Decl. at ¶ 9.

It is not surprising that after receiving the results of Prager Metis's investigation, SoundExchange failed to identify any flaws in those audits and simply dropped its demands to conduct further testing. In Prager Metis's memorandum setting out the results of its review, after summarizing BDO's methodology (in some cases inaccurately) and noting certain procedures that BDO chose not to employ, Mr. Stark's firm concluded that [[ ]] Wheeler-Frothingham Decl., Ex. MC 25, p. 3. Notably, SoundExchange

itself [[ ]] *Id*,, p.1. And while the work papers, by their nature, [[ ]] *Id*., p. 3.

Nowhere in that memo does Prager Metis identify a single error or flaw in the BDO audits. Instead, it merely stated that [[ ]] But all of these quibbles come down to Prager Metis trying to justify doing its own duplicative audit of the same payments without demonstrating any actual deficiency, error, or failure to follow GAAS by BDO. Indeed, it is clear that Mr. Stark never intended to review the BDO audits in good faith to see if they satisfied the PSS regulations. Instead, SoundExchange instructed Mr. Stark specifically *not* to [[ ]] Wheeler-Frothingham Decl., Ex. MC 26 ([[ ]]). And because Mr. Stark is not an independent auditor, but rather operates under the AICPA Consulting Standard, he was obligated to place SoundExchange's strategic objective over any duty of objectivity or independence.

Turning to his testimony in this proceeding, the alleged deficiencies Mr. Stark now claims to have uncovered – which he never identified to Music Choice back when he conducted his investigation – are either misleading or completely false. First, he complains that the BDO audits "only" provide opinions that Music Choice's statements of PSS royalty payments were "presented 'fairly in all material respects.'" Stark Decl. at ¶ 9. He seems to claim that this shows

that BDO did not test whether the royalty payments were accurate. *Id.* at ¶ 2.[5] This is demonstrably false. The language of BDO's opinion is standard language, dictated by GAAS, and understood by CPAs as reflecting a determination of accuracy. Potts Responsive Decl. at ¶ 15. Moreover, the very work papers provided to Prager Metis show that BDO specifically tested the accuracy of the PSS royalty payments and their compliance with the PSS regulations, and the answers to various follow-up questions posed by Prager Metis further explained the ways in which BDO tested the accuracy of the payments. *Id*. Exs. MC 19-21.

Nor does the fact that BDO used a sampling methodology to test the accuracy of the payments render the audits unreliable. As Music Choice has previously demonstrated, sampling is a standard technique under GAAS and is used in essentially all audits in a way to test efficiently while providing a high level of accuracy. MC Opening Br. at 34. And Mr. Stark also uses sampling for his non-audit "royalty examinations" *Id*..

Mr. Stark next complains that the audit reports do not "explain the materiality standard used." Stark Decl. at ¶ 9. The reason for this is simple: The materiality standard is well known by CPAs and is established by GAAS. Potts Responsive Decl. at ¶ 16. It requires an independent auditor to use professional judgment as to whether a misstatement found would influence the judgment of a reasonable user of the audited statements. *Id*. Thus, if an error found is so small that it would not matter to a reasonable user of the royalty statements, the auditor can still give an opinion that the statement is accurate. Nor does Mr. Stark allege that Prager Metis ever asked BDO for any information regarding how it implemented the materiality standard, much less that it refused to answer such questions.

[5] In making this argument, Mr. Stark also claims that BDO only opined on whether Music Choice's royalty statements complied with Generally Accepted Accounting Principles. *Id*. This is false. BDO's audit reports and working papers all make clear that the statements of royalty payments were tested for accuracy in compliance with the PSS regulations, not GAAP. Potts Responsive Decl. at ¶ 14.

In any event, none of this means, as SoundExchange attempts to argue, that the materiality standard "prohibited [BDO] from presenting schedules that showed any discrepancies they found." Stark Decl. at ¶ 2. This claim is objectively false. Indeed, one of the very BDO audit reports that Mr. Stark reviewed discloses that a small underpayment of [[ ] for unpaid interest was found and that Music Choice thereafter paid the unpaid interest. Potts Responsive Decl. at ¶ 17 & Ex. MC 23. This was the only error found for all of 2015, a year in which Music Choice paid over [ ] in PSS royalties. *Id.* Nonetheless, that minor error was reported by BDO and therefore was disclosed to Prager Metis in its review.

Mr. Stark next claims that BDO did not identify what gross receipts were included or excluded from royalty statements, and did not assess whether Music Choice accurately interpreted the PSS regulations or allocated revenue between PSS and non-PSS services. Stark Decl. at ¶ 9. Again, this claim is simply false. The work papers provided to Prager Metis disclose that in testing the accuracy of the statements of PSS royalty payments, BDO verified the accuracy and completeness of gross revenues related to the PSS, independently assessed the payments' compliance with the PSS regulations and fully disclosed the methodology for any allocations between different services. Potts Responsive Decl. at ¶ 18 & Ex. MC 21.

Even if he had not received the actual documents with all of this information he now claims was missing, Mr. Stark and his team had a full opportunity to discuss these issues with BDO both in an office meeting and via email. BDO answered many questions and did not refuse to answer any. The fact that Mr. Stark would put these false claims into his declaration only serves to highlight that he is not an auditor, seems to have no practical experience with or understanding of GAAS, and embodies the antithesis of an auditor's required independence.

Mr. Stark also notes that BDO initially proposed to provide a different scope of work, similar to the type of non-independent, non-audit examination procedure that Mr. Stark employs,

and that Music Choice rejected that proposal. Stark Decl. at 2 n.1. What Mr. Stark fails to tell the Judges is the reason: because the regulations clearly require that an audit be a real audit, conducted pursuant to GAAS under a duty of independence. Mr. Stark's examinations – and the alternative examination initially proposed by BDO – do not comply with the more stringent requirements of the PSS regulations. Indeed, when BDO was instructed on the need to perform a full audit under GAAS, it noted that the more rigorous requirements under that standard required additional testing. Potts Responsive Decl. at ¶ 19 & Ex. MC 24. Thus, contrary to Mr. Stark's insinuation, Music Choice insisted on a more – not less – rigorous audit methodology.

Mr. Stark then proceeds to list various tasks he would have done, had he been allowed to conduct an additional audit. Stark Decl. at ¶10. These tasks are all either tasks that were in fact already done by BDO, or would not apply to an audit of the PSS royalties due to the PSS royalty formula. Potts Responsive Decl. at ¶¶ 21-29. Given that Mr. Stark had ample opportunity to review BDO's reports and work papers and had all of his questions answered by BDO – and *still* has not identified a single actual error in BDO's audit, it is notable that he does not explain why having his team repeat the same processes could be expected to yield a different result.

Finally, Mr. Stark and SoundExchange make various conclusory allegations regarding alleged massive underpayments by Music Choice and Muzak, which supposedly justify gutting the defensive audit provision. These allegations are false, and in any event do not support changes to the PSS regulations. Mr. Stark's only claim in this regard relates not to the PSS license, but to the BES license. In particular, SoundExchange's audit of Music Choice's BES payments led SoundExchange to dispute Music Choice's application of the royalty calculation formula for the BES license. SoundExchange took the position that Music Choice must include all revenues from all transmissions of its BES service, even though there is no license required for the public performance of sound recordings by that type of service and only a small fraction

of those transmissions actually require the making of ephemeral copies. Potts Responsive Decl. at ¶ 31. Other than this one interpretive dispute, which will appropriately be resolved in federal civil litigation, Prager Metis only identified two alleged minor underpayments, totaling less than [[redacted]] *Id.* Given that the interpretive issue would have been obvious from the work papers of a defensive audit – as the BDO audit work papers clearly disclosed the allocations between PSS and non-PSS services – this hardly justifies changing the defensive audit provision.

In a similar attempt at diversion, SoundExchange claims that prior audits have supposedly uncovered "millions of dollars of unpaid royalties by Music Choice and Muzak alone." SX Opening Br. at 22. These claims are grossly misleading. As demonstrated in Music Choice's Opening Brief, the RZO "audit" cited by SoundExchange was – similar to Mr. Stark's examinations – not an independent audit pursuant to GAAS. It was conducted by a SoundExchange board member, and the supposed "net liability of more than [[redacted]]" was almost entirely made up of invalid claims that were ultimately settled, after four years of disruption and wasted time, for [[redacted]]. MC Opening Br. at 26-31. That SoundExchange is still trying to cite that "audit" as proving liability of more than [[redacted] is outrageous. With respect to the Muzak allegations, that case involved Muzak's attempt to pay royalties under the PSS rate for a totally different, non-PSS service it had acquired. *SoundExchange v. Muzak, LLC*, 854 F.3d 713, 715-16 (D.C. Cir. 2017). Such a dispute certainly would have been uncovered even if Muzak had conducted defensive audits.

SoundExchange has completely failed to demonstrate any actual reason why a defensive audit conducted by a truly independent auditor pursuant to GAAS would fail to adequately balance royalty recipients' legitimate interests in accurate payments against the licensees' interests in avoidance of undue disruption and expense from the types of hyper-aggressive, partisan "examinations" it routinely conducts. It keeps repeating conclusory claims that

defensive audits allow licensees to skew the scope of the audit, but the evidence shows just the opposite. Only independent audits under GAAS provide the necessary assurances that the audits are objective, fair, and accurate.

C. None of the Facts Related to the Policies Cited by the CARP When Creating the Defensive Audit Provision Have Changed

SoundExchange has failed to demonstrate any intervening change in circumstance that would support the Judges' rejection of the CARP's policy judgment in establishing the defensive audit provision. The only change cited by SoundExchange since the time of the first CARP is that the regulations now only allow audits by SoundExchange, and not any other interested parties. SX Opening Br. at 23-24. This hardly justifies overturning the CARP's sound policy judgment. First, nowhere within the CARP's discussion of defensive audits does it mention the potential for a large number of interested parties to flood the PSS with audits. Trial Ex. 929, CARP Report, ¶ 194. Nor would such a justification make sense. Under the original regulations, the CARP had already limited all audits of any one PSS to one per year. *Id.* at ¶ 210.

Finally, SoundExchange claims that the Judges need not consider Music Choice's reliance interest in the defensive audit provision because its requested change is "largely prospective." SX Opening Br. at 24. First of all, this argument asks the Judges to ignore the D.C. Circuit's holding that the Judges previously erred in not considering Music Choice's reliance interest. *Music Choice*, 970 F.3d at 429. Second, any regulatory change that takes away a long-established benefit is "largely prospective." SoundExchange's rule would effectively negate any reliance interest and read the fourth policy factor out of the applicable rate standard. In any event, Music Choice has established both that it has long relied upon defensive audits, and continues to do so to this day. SoundExchange has demonstrated no justification, other than its own desire to avoid truly independent audits under GAAS, for the requested change.

Dated: October 7, 2021 Respectfully submitted,

/s/ Paul M. Fakler_____

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Proof of Delivery

I hereby certify that on Thursday, October 07, 2021, I provided a true and correct copy of the Corrected - Music Choice's Responsive Brief on Remand to the following:

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