

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)

**DECLARATION OF DAVID DEL BECCARO
IN SUPPORT OF RESPONSIVE BRIEF ON REMAND**

1. My name is David J. Del Beccaro and I am the Co-President and CEO of Music Choice. I submit this Declaration in support of Music Choice’s Responsive Remand Brief in the SDARS III proceeding. I am fully familiar with the facts set forth in this Declaration, including based upon my review of Music Choice business records and discussions with other Music Choice employees, and if called upon to further testify could do so truthfully and competently.

**My Deposition Testimony Was Completely
Consistent With My Written Testimony in This Proceeding**

2. At the time of my deposition, I had not yet begun preparing my written testimony – which would not be due for another two months. Of course, I had prepared for my deposition in a short meeting with my counsel, and had reviewed certain internal Music Choice documents (all of which I understand had been produced in discovery prior to my deposition) related to the company’s internet offerings. But I certainly had not committed those documents to memory.

3. At my deposition, SoundExchange's counsel repeatedly asked me to answer questions tied to the exact dates and the order in which specific individual affiliates launched the internet offering, and even in which systems and geographic areas the service was launched. He asked me to answer these questions solely from memory and without showing me any of the documents we produced that could have helped refresh my recollection about at least some of the details surrounding these launches.

4. I was personally involved with all of these activities as President and CEO of Music Choice. But these launches started in 1996, almost twenty-five years ago. I do not believe anyone running a company for over thirty years as I have could be expected to remember such granular details from memory during a deposition.

5. I did my best to honestly answer his questions, but told him it was not possible for me to remember those kinds of details. Nonetheless, he kept asking the same types of questions. I told him that I did remember that we had our first launches towards the end of 1996 and that the offering was successful and rolled out to several affiliates by 1998. I also explained to him that affiliates typically launched the internet offering – like any new feature provided by Music Choice – in one system and then if the feature was successful would quickly roll it out across the rest of its systems. And that is exactly what happened with the internet offering.

6. Music Choice has hundreds of affiliates, and most affiliates operate many systems. Certainly, there were some affiliates and systems that had not yet launched the internet feature by July 31, 1998. Most had. But for me to try to remember – solely from memory – exactly which affiliates and systems launched by then, and in what order, was impossible.

7. Later, as I was preparing my written testimony, I reviewed various documents that had been produced to SoundExchange in discovery. Review of these documents helped me

remember more details about the earliest affiliates that launched the internet offering in 1996 and 1997. Had SoundExchange bothered to show me any of these documents during my deposition I certainly could have remembered more details.

8. In any event, with my refreshed recollection and internal discussions with the few remaining Music Choice employees who were involved in these matters back in 1996, I was able to provide more detail in my written testimony. None of that testimony is inconsistent with anything I said in my deposition. I was merely able to provide more details.

My Testimony in the Webcasting I Proceeding Had Nothing to Do With Music Choice's PSS

9. As I mentioned in my prior testimony, Music Choice in 1999 launched a non-subscription webcasting offering. That service could not be considered a PSS because it was not a subscription service, but rather was purely advertising-based and available to any member of the public over the internet. Because it was not a PSS offering, royalties for the non-subscription service had to be paid under the webcasting rates and terms, which had not yet been set in 1999.

10. The CARP proceeding to set the original rates and terms for the statutory webcasting license ("Webcasting I") commenced on July 30, 2000. Music Choice filed to participate in that proceeding because its new non-subscription webcasting service would have to comply with those rates and terms.

11. By March of 2001, shortly before written direct cases were due in Webcasting I, Music Choice discontinued its non-subscription webcasting service. It had become clear that the service simply was not commercially viable; any advertising revenues could not come close to covering the costs of providing the service. Given that we had been preparing our direct case already when we made this decision, we filed our written direct case on April 11, 2001.

12. After we filed the written direct case, and given that we had already discontinued the one internet-based service that was the company's reason for participating, Music Choice withdrew from the proceeding. Although the CARP also would set rates for the newly-established ephemeral copy license potentially applicable to our commercial background music service, that service was not generating enough revenue at that time to justify the significant costs of CARP litigation under those circumstances. Having recently spent significant sums on the first PSS proceeding, we opted to let other background services litigate those rates and terms.

13. SoundExchange takes a few statements from my Webcasting I testimony out of context and then misrepresents them by adding limiting language that I never said, all to make a false claim that I testified that Music Choice never transmitted its music channels over the internet until 1999. This is obviously false, as SoundExchange knows from the documents Music Choice produced in discovery, and is not what I said in that testimony.

14. First of all, precisely because we had already been providing a subscription service via the internet, only Music Choice's new non-subscription internet service could possibly be subject to the webcasting license rates and terms. That is why – in a portion of my testimony SoundExchange conveniently left out of its citation – I made clear that the purpose of my testimony was to seek “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.” This is why my testimony focused on the launch and discontinuation of the non-subscription webcasting service.

15. Thus, when I testified that “Music Choice began delivering its service over the Internet in April of 1999” the service I was speaking of was the non-subscription service. Similarly, when I described the service as comprising “four channels on a free, nonsubscription

basis” I did not – as SoundExchange misleadingly adds to its paraphrasing – say that these were the “only” internet transmissions Music Choice was making at that time. I was only discussing the non-subscription service at issue in the proceeding.

16. Finally, SoundExchange claims I testified that “Music Choice did not launch any subscription-based internet service until April 26, 2000.” But this is not what I said. I merely noted that in April of 2000 Music Choice had launched a new a la carte webcasting-only subscription service on the same website providing the non-subscription service, called Backstage Pass. In no way did I say that was the first time Music Choice ever offered a subscription service via the internet. Nor would I have ever said that, because it is not true.

Music Choice Europe is Not the Same Company as Music Choice

17. SoundExchange submits a printout of an article discussing certain internet-based services offered in 1997 by a company called Music Choice Europe, arguing that it somehow proves something about how Music Choice transmitted its U.S. service via internet during that time. This is yet another document that SoundExchange did not bother to ask me about in my deposition and therefore makes unwarranted assumptions. In fact, Music Choice Europe is a totally different company than Music Choice and provides a different service. Music Choice was involved in the creation of the Music Choice Europe entity and held a minority ownership interest in the company for a while. I sat on the board in the very early days of that company as well. But Music Choice had no involvement with the actual management or operations of the Music Choice Europe service. It was a totally separate company, with separate management, programming, etc. So any argument that this article describes the scope of Music Choice’s actual internet operations in 1997 is simply false.

18. That said, the article does corroborate certain points of my testimony. First, it shows that other MVPD-oriented digital music services were expanding to other channels and transmitting via internet in 1997. In addition to the new internet offering described via cable operator Telewest, the article also notes that Music Choice Europe's music channels had been available through Telecom Finland's Quicknet internet service since the beginning of 1997. Second, the article also demonstrates that even back in 1997, consumers needed to install apps in order to receive those digital music channels via the internet from Music Choice Europe.

**Music Choice's Transmissions as Part of a High Speed
Internet Service Were in Fact Internet Transmissions**

19. In my deposition, SoundExchange's counsel repeatedly asked questions that did not make sense, apparently due to his lack of understanding of the various technologies involved. I tried to sort out the confusion as best as I could and explain the technical issues, but now SoundExchange is trying to use the confusion created by counsel's lack of understanding to mischaracterize my testimony.

20. For example, SoundExchange claims that Music Choice's early internet transmissions were not actually internet transmissions because they were only made via a local network. This is false. Strangely, the only support they cite for this proposition is my deposition testimony. But I never said anything that could support such a nonsensical proposition.

21. As I previously testified, in the mid-1990s, MVPDs began offering what they marketed as "high speed internet" access service to consumers and businesses as a new product line. Prior to this, consumers typically had to use modems that worked over the voice signal of phone lines to connect to the internet. The MVPDs provided a different type of modem, called a

cable modem. These cable modems typically could provide a faster connection to the internet than voice signal telephone modems.

22. The point I was trying to make in my deposition is that cable modems are just one type of modem. A modem is simply a device that connects another device to a computer network such as the internet. Any internet-connected device needs to be connected to a modem of some kind in order to establish and maintain that internet connection. Cable modems are just one type, but the type of modem is irrelevant to the Music Choice service. The type of modem used does not in any way impact the nature of the Music Choice service – consumers get the same channels irrespective of what type of modem they are using to connect to the internet. The same was true in 1998.

23. The sole purpose of these cable modems was to provide “high speed internet” connections to consumers. They were not used to set up local networks. And the provision of the Music Choice channels to the MVPDs’ internet access subscribers – including when that feature was first launched in 1996 as part of Continental Cablevisions’ “high speed internet” service – was marketed as allowing users to listen to Music Choice’s service while they were using the internet, such as while they were surfing the web or sending email, using the very same internet connection. SoundExchange’s claim that these transmissions via cable modem as part of a high speed internet service were somehow not internet transmissions makes no sense, is simply false, and I certainly never testified to that effect.

24. Moreover, as I have previously testified, the Music Choice service was not limited to cable modem access by July 31, 1998. During the period from 1996 through 1998, only a few affiliates initially linked the internet offering to cable modems and internet subscribers. Others never limited the service that way. And even the few that initially limited the service quickly

opened it up to all subscribers via any internet connection because once they went through the effort of setting up internet access for some it did not cost them any more to provide the service to all subscribers. By July 31, 1998, most if not all affiliates were providing the service to all subscribers, whether they were high speed internet subscribers or television subscribers, from any internet-connected device.

25. SoundExchange cites my use of the term “walled garden” during my deposition and tries to argue that this was somehow an statement that the Music Choice internet offering was only offered via local network. But that is not what we were even discussing when I used that term. Instead, counsel was asking about the use of “apps” to access Music Choice, and I was trying to explain that there is no material difference between what type of software application is used to provide a user interface and subscriber authentication for a service like Music Choice. I was discussing how various types of software applications could be used to authenticate subscribers so that only subscribers received access and not the general public. In that context, I gave the example of how AOL back in those days used a “walled garden” approach so that its internet access subscribers had access to the internet, but AOL also provided subscriber-only content over the internet which you could only access if you were an AOL subscriber. I meant nothing more than that. I certainly was not saying that Music Choice was only available via a local network – nor was I saying that about AOL. Those were internet transmissions, too, they were just limited to authenticated subscribers using software to do the authentication.

26. Similarly, SoundExchange cites my testimony about certain ways that the Music Choice channels have been transmitted historically using satellite uplink, transmission to a cable company “headend” and then to subscribers, and also testimony about how those methods of transmission have changed in more recent times, shifting to an internet-based means of getting

the signal from Music Choice to the various MVPDs. But in that testimony, I was not talking about the consumer internet offerings. I was describing how we transmitted the television broadcast channels and how that has changed in recent times. The internet offering was transmitted differently. In some instances, the channels would be transmitted from Music Choice servers directly to the consumer's device. Sometimes they would be transmitted from Music Choice to an MVPD, which would then transmit the channels from its servers to the consumer's device. This would depend on the particular affiliate and their capabilities. In all instances, however, those transmissions were over the internet. And in any event, none of this testimony cited by SoundExchange regarding satellite uplink, etc., had anything to do with the internet offering.

**The Music Choice Channels Transmitted Via Internet Today
Are Fundamentally the Same as the Channels Transmitted Via Internet in 1998**

27. I have previously testified that the music channels offered today via internet are fundamentally the same as they were in 1998. Any changes and improvements made to the Music Choice consumer subscription service have been to the user interface, transmission technologies, and new features like music videos, none of which are related to the sound recording copyrights covered by the PSS license. With respect to these changes, Music Choice has either created them itself or obtained separate licenses to cover those changes.

28. The actual music channels covered by the PSS license remain the same. They are non-interactive, commercial-free programs of professionally-curated music, compliant with the sound recording performance complement.

29. Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: July 30, 2021
Horsham, Pennsylvania

A handwritten signature in black ink, appearing to read "David Del Beccaro", written over a horizontal line.

David Del Beccaro

Proof of Delivery

I hereby certify that on Thursday, October 07, 2021, I provided a true and correct copy of the Declaration of David Del Beccaro in Support of Responsive Brief on Remand to the following:

Universal Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Federation of Musicians of the United States and Canada, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

American Association of Independent Music ("A2IM"), represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Sony Music Entertainment, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Warner Music Group, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SoundExchange, Inc., represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

SAG-AFTRA, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Recording Industry Association of America, represented by Steven R. Englund, served via ESERVICE at senglund@jenner.com

Sirius XM, represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Signed: /s/ Paul Fakler