Public Version

Electronically Filed
Docket: 16-CRB-0001-SR/PSSR (2018-2022) (Remand)
Filing Date: 10/07/2021 09:02:34 PM EDT

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: 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)

SOUNDEXCHANGE, INC.'S RESPONSIVE BRIEF

Table of Contents

I. Introduction

SoundExchange, Inc. ("SoundExchange"), by its attorneys, submits this response to Music Choice's Opening Remand Brief dated June 30, 2021 ("MC Br."). *See* 37 C.F.R. § 351.15; Order Regarding Proceedings on Remand (Dec. 1, 2020) ("Remand Order"); Order Granting Music Choice's Motion for Extension of Time to File Written Reply Submission (July 30, 2021).

The record in this remand proceeding and the original rate-setting preceding confirms that the Copyright Royalty Judges ("Judges") were correct in finding that (1) Music Choice's internet transmissions are not within the scope of its pre-1998 offerings and are not entitled to the grandfathered pre-existing subscription service ("PSS") rate, and (2) the PSS audit regulation, 37 C.F.R. § 382.7(d), should make clear that a service's own ordinary-course audit does not preclude SoundExchange from commissioning a broader verification of the accuracy of royalty payments. Although the D.C. Circuit's Remand Order requires the Judges to provide additional explication of their reasoning for those conclusions, nothing in Music Choice's brief provides any basis to reach a different conclusion concerning either issue.

II. Music Choice's Internet Transmissions Are Far Removed from the Scope of Its Pre-1998 Service and So Do Not Qualify for a Grandfathered PSS Rate.

The D.C. Circuit provided the Judges with a clear mandate on remand: to determine whether or not Music Choice's current internet transmissions fall within "the precise scope of Music Choice's service offering as it actually existed on July 31, 1998." *Music Choice v. Copyright Royalty Bd.*, 970 F.3d 418, 427-28 (D.C. Cir. 2020). The Judges must compare Music Choice's current internet service with the service it was offering in 1998, and determine which parts (if any) of Music Choice's current service "were a part of Music Choice's service on July 31, 1998," *id.* at 428, because only those transmissions that "can fairly be characterized as

included in the service offering Music Choice provided on July 31, 1998" are entitled to a grandfathered PSS royalty rate today. *Id.* at 425.[1]

Music Choice's claim in this proceeding that its current internet transmissions are part and parcel of the service it was offering prior to July 31, 1998 is contrary to the more contemporaneous testimony of its CEO David Del Beccaro and all the other available evidence concerning the history of Music Choice's business. In *Web I,* a proceeding that commenced not long after 1998, Mr. Del Beccaro testified under oath that Music Choice did not begin making any internet transmissions until *after* July 31, 1998. *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings ("Web I"),* No. 2000-9 CARP DTRA 1& 2, (Web I) (WDT of David J. Del Beccaro, at 5) (emphasis added) ("Music Choice began delivering its service over the Internet in April of 1999"). And Music Choice's website from the relevant period and the documents adduced in discovery confirm that Music Choice provided no streaming option prior to 1999. *See* Ex. E to SX Br. at SXREMAND000000325; Ex. F. to SX Br. at SXREMAND000000321 (archived version of pages from Music Choice's website from July 5, 1998 showing no music streaming option and not identifying streaming on Music Choice's website as a method to "get" Music Choice); *see also* Del Beccaro Dep. Tr. at 124:17-

[1] To qualify for an "unconditional grandfathered rate," transmissions must be made "'in the same transmission medium used by such service on July 31, 1998.'" 970 F.3d at 421 (quoting 17 U.S.C. § 114(d)(2)(B)). "Medium," for purposes of this analysis, refers to "the basic telecommunications service through which that offering is being delivered to the user." Register's Decision, 82 Fed. Reg. at 59,659. If the Judges find that a transmission is made by a PSS in a different transmission medium, it must assess whether the transmissions might be eligible to pay royalties subject to a "conditional grandfathered rate," 17 U.S.C. § 114(d)(2)(C). 970 F.3d at 427 & n.9. Either way, "parts of Music Choice's current service offering are eligible for the grandfathered rate" only if "they were a part of Music Choice's service on July 31, 1998." *Id*. at 428.

135:13 ([ ]); SX Br. at 10-11.

Mr. Del Beccaro's decades-late change of tune cannot erase these facts now. Rather than crediting the contrary self-serving declaration that Mr. Del Beccaro submitted in this remand proceeding, the Judges should credit the relatively contemporaneous evidence from *Web I* and Music Choice's website. *See Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 74 (D.D.C. 2015) (self-serving statements are afforded little weight), *aff'd*, No. 15-5137, 2015 WL 9309960 (D.C. Cir. Dec. 4, 2015); *cf. Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1063 (D.C. Cir. 1993) (refusing to "second-guess the agency's decision weighing" self-serving testimony); *Huthnance v. District of Columbia*, 722 F.3d 371 (D.C. Cir. 2013) (adverse inference may be drawn where a party in the best position to proffer evidence fails to do so).

Even if Music Choice had made internet transmissions before July 31, 1998 – and it did not – its current transmissions cannot "fairly be characterized as included in the service offering Music Choice provided on July 31, 1998." 970 F.3d 425. Music Choice's current internet service differs from what it provided in 1998 in countless ways, including that the current service is available for streaming over the public internet, available on mobile devices and mobile apps, and available to customers nationwide. Unable to point to factual evidence that suggests otherwise, Music Choice merely rehashes semantic arguments about access from outside the home and the use of apps that the Judges rejected last time they considered this issue.[2] *See infra* at 6-7, 19-20; *see also* MC Br. 13-14.

[2] The Judges previously determined that Music Choice's internet transmissions must be excluded from the conditional grandfathered rate "to the extent they are available outside a subscriber's residence," such as through mobile applications. 970 F.3d at 422 (quoting Determination, 83 Fed. Reg. at 65,227); *see* Determination, 83 Fed. Reg. at 65,227 (finding conditional rate unavailable to Music Choice); Rehearing Order at 12-16. The D.C. Circuit did not question the

In attempting to shoehorn its current internet transmissions into a grandfathered PSS royalty rate, Music Choice asks the Judges to ignore the D.C. Circuit's clear instructions and credit a counterfactual version of the technological changes that have occurred over the past two decades. There is no basis in the record or the law to do so. Taking the "precise scope" of Music Choice's internet service into account, it remains ineligible for the grandfathered PSS rates under either section 114(d)(2)(B) or 114(d)(2)(C).

A. The Jacksonville Multicast Offering Was Not Transmitted over the Public Internet and Was Fundamentally Different from Music Choice's Current Internet Transmissions.

One of the few things the participants in this proceeding agree about is that a Music Choice offering was provided to certain Continental Cablevision broadband subscribers in Jacksonville, Florida starting in September of 1996. However, Music Choice's brief confirms that the Jacksonville offering was not only limited, but was technologically distinct from the type of internet service that Music Choice provides today. Music Choice's brief is careful to refer to the Jacksonville offering as a "multicast." MC Br. at 10 ("Music Choice was ultimately able to develop technology that enabled it to be the first music service to multicast over the internet . . . . The first system to launch the feature was Continental Cablevision's Jacksonville system."); *id.* at 11 (stating that internal Music Choice document contains "a reference to Music Choice having the first music multicast over the internet in 1996"); Del Beccaro Decl. ¶¶ 7-8 (discussing Jacksonville "multicast").[3]

Register's six-factor test on which the Judges relied, nor did it give any indication that it doubted the Judges' previous conclusion that Music Choice is not eligible to pay PSS rates under that test. *See* 970 F.3d at 427 n.9.

[3] Elsewhere Music Choice uses the term "cable modem offering" to describe this early service. Ex. G to SX Br., Deposition of David Del Beccaro ("Del Beccaro Dep.") ¶¶ 3-4; MC Br. at 10.

Multicast is a term of art that refers to a specific set of transmission protocols typically used on private networks. When Music Choice refers to being the first music service to *multicast*, it is referring to these specialized protocols, because it certainly was not the first service to transmit music over the internet. Music transmission over the internet was recognized as a phenomenon by Congress when it originally created the statutory license in 1995. *E.g.*, S. Rep. No. 104-128 at 22; *see also Copyrighted Webcast Programming on the Internet: Hearing before the H. Jud. Subcomm. on Courts & Intell. Prop.*, 106th Cong. 14 (2000) (statement of Marybeth Peters, Register of Copyrights) (noting that "audio transmission of sound recordings via the Internet has been taking place for some time" and that 56 radio stations were webcasting in 1996). Rather, as Music Choice's CEO explained, a multicast occurs when [ ]. Del Beccaro Dep. Tr. at 59:8-11.[4] This process is not the same as the typical method of internet transmission used over the public internet: namely, unicasts, where a separate stream is sent to each recipient.[5] The

[4] *See also Cascades Streaming Technologies, LLC v. Big Ten Network, LLC*, 2016 WL 2344578 *18 (N.D. Ill. May 4, 2016) (describing multicast as "the server sends the same stream to multiple users, such that if it changed the content of that stream, it would necessarily change the content that each user received"); IP Multicast Technology Overview, Cisco (Apr. 18, 2002), https://www.cisco.com/c/en/us/td/docs/ios/solutions_docs/ip_multicast/White_papers/mcst_ovr.html#wp1015335 ("Multicast is based on the concept of a group. A multicast group is an arbitrary group of receivers that expresses an interest in receiving a particular data stream"); Global IP Network Multicast FAQ, T-Mobile for Business, https://www.sprint.net/faq/multicasting (last visited Sept. 30, 2021) ("Multicast is an IP technology that allows for streams of data to be sent efficiently from one to many destinations.").

[5] *Cascades Streaming Technologies, LLC*, 2016 WL 2344578 *18; Global IP Network Multicast FAQ, T-Mobile for Business, https://www.sprint.net/faq/multicasting (last visited Sept. 30, 2021) (noting that "not all networks are multicast enabled" and "[w]hile multicast is robust for IPv4, scalable standards for IPv6 multicast have yet to be defined so T-Mobile does not currently offer IPv6 multicast"); Cisco, Multicast-Unicast Conversion (Feb. 24, 2021), https://documentation.meraki.com/MR/Other_Topics/Multicast-Unicast_Conversion.

distinction between unicasts delivered over the public internet and multicasts delivered over a private network is significant.[6]

Music Choice does not and cannot claim that its pre-1998 Jacksonville offering was transmitted over the public internet, or that it is currently using multicast protocols when it transmits over the public internet. In fact, Music Choice's pre-1998 Jacksonville offering was a far cry from the type of internet transmissions that Music Choice and other webcasters now offer. *See* Music Choice, *Where to Find Music Choice*, musicchoice.com (last visited Sept. 30, 2021) ("Music Choice is available on your TV, Web App, and on the go with the Music Choice app for iOS & Android."); SX Opening Br. at 16-19.

Music Choice's attempt to explain away other differences between its service now and in 1998 highlight the weakness of its position. First, Music Choice argues that its pre-1998 "internet" service (*i.e.* its Jacksonville multicast offering) was available outside of the home and was therefore portable. In doing so, it conflates the mobility associated with today's smart phones with the ability to (1) unplug and carry your modem to another location, or (2) "log on from computers in the workspace, schools, libraries, etc." MC Br. 13-14.

As an initial matter, this argument is completely untethered from the actual facts of the Jacksonville offering. That offering was available only to Continental Cablevision residential subscribers over its network through their cable modems. *See* MC Br. at 10 (1996 service was a "cable modem" offering); Del Beccaro Dep. Tr. 121:19-122:21 ([ ]); SX Br. 12; Ex. D to SX Br. at SXREMAND000000313; Ex. C to SX Br. at SXREMAND000000316 (FAQ on Music Choice's website in April 1997

[6] This distinction may explain why Mr. Del Beccaro testified in *Web I* that Music Choice did not begin delivering its service over the Internet until April 1999. *Web I* WDT of David J. Del Beccaro, at 5; *see infra* at 12.

stating that "MUSIC CHOICE is also available as part of Continental Cablevision's High Speed Internet Service in Jacksonville, Florida" and identifying no other markets in which Music Choice was available over the internet). While it certainly was possible to access the public internet from many workplaces by 1998, there is no indication that Continental Cablevision residential broadband subscribers could access Music Choice from their offices, even if they carried their home cable modems to the office, because their offices presumably were not where they received their Continental Cablevision residential cable service.

Further, to suggest that usage "outside the home" (for instance, in one's office) is tantamount to the type of ubiquitous mobile user experience available today defies reason. One need only to imagine listening to music while driving in a car or going on a run to recognize that access to the internet via mobile device is profoundly different from what Music Choice describes. Moreover, there is no dispute that smart phones and other truly mobile music listening devices were not commercially available in 1998. *See* SX Br. at 16 (first iPhone not sold until 2007); Ex. K to SX Br. at Music Choice_Remand_0011763 ([ ]); MC Br. at 14 ("mobile internet-connected devices" other than laptops "were not yet widely available" in 1998). And, Music Choice admits that it did not begin transmitting to mobile phones or other mobile internet devices until years after 1998. MC Br. at 14.

Second, although Music Choice admits that its service included internet-exclusive channels at the time of the underlying proceeding in this case, it urges the Judges to ignore this fact, which it characterizes as "transitory." MC Br. at 17 (admitting that "for a short time, including at the time of the hearing in this proceeding, there were additional channels available via internet that were not available on the television," and asserting that "today every channel

transmitted via internet is also available on the television"). But the D.C. Circuit specifically directed the Judges to consider whether or not Music Choice offered internet-only channels. *See Music Choice*, 970 F.3d at 420, 428 (instructing Judges to assess whether Music Choice was available on mobile applications or included internet-exclusive channels). Accepting Music Choice's invitation to ignore this issue would flatly disregard the D.C. Circuit's direction. Failing to consider the fact that Music Choice offered internet-only channels at the time of this proceeding (at least until it recently became disadvantageous to do so) would also be contrary to the broader task at hand: identifying whether Music Choice's internet offerings fall within the "precise scope" of its 1998 service. *Id.* at 427.

Permitting Music Choice to bolster its position in this litigation by referencing changes it has supposedly made *after* the close of discovery would also prejudice SoundExchange. SoundExchange has no way to know how Music Choice's channels developed over time, or whether Music Choice intends to reintroduce internet-only channels. More to the point, there is nothing preventing Music Choice from reverting to its prior practice and offering internet-only channels again as soon as this litigation concludes. These problems highlight the importance of focusing rate-setting determinations on the record evidence – and not later adopted changes.

Third, in what can only be described as a poorly conceived sleight of hand, Music Choice suggests that apps available on smart phones today should be treated as equivalent to the software used to play its pre-1998 multicasts. MC Br. at 21-22. Music Choice's argument seems to go as follows:

- Music Choice offered software applications prior to July 31, 1998. MC Br. at 22 (Music Choice has "*always* utilized software applications") (emphasis in original).
- A smart phone app is a type of software application. *Id.* at 21 ("the term 'app' is merely a shortened version of the term 'software application'").

- Therefore, Music Choice offered apps prior to July 31, 1998—at least for purposes of this proceeding. *Id.* at 22 ("in 1996, [Music Choice] consumers had to use apps to interface with the channels").

This syllogistic fallacy scarcely warrants a response.

More incredible still is Music Choice's insistence that its development of mobile applications for smart phones and other modern portable devices was somehow "among the investments that the DMCA sought to recognize and protect with the PSS designation," *id.* at 22, despite the fact that it admits that internet-connected mobile devices and mobile applications did not exist until well after 1998, *id.* at 14. The D.C. Circuit has held that the PSS designation extends only to the service as it actually existed in 1998. *See Music Choice*, 970 F.3d at 428 ("The Board must sort through these issues on remand to determine which parts of Music Choice's current service offering are eligible for the grandfathered rate because they were a part of Music Choice's service on July 31, 1998."). Software designed for mobile technology that did not yet exist plainly cannot not fall within this category.

Music Choice fails to acknowledge other significant differences between its current internet service and what it offered in 1998. As the proponent of a proposal to pay a PSS rate for its internet transmissions, Music Choice bears the burden to show that its current internet transmissions are within the scope of its pre-1998 service. See *infra* at 16 (discussing Music Choice's burden of proof and citing *Final Determination (Web IV)*, 81 Fed. Reg. 26,316, 26,320 and *Initial Determination (Web V)*, at 277); MC Br. at 23; *cf. Huthnance v. District of Columbia*, 722 F.3d 371, (D.C. Cir. 2013) (Under the "missing evidence rule, when a party has relevant evidence [which includes testimonial evidence] within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him . . . ."). But Music Choice does not even attempt to make such a showing with respect to many of the features that

distinguish now from then. *See* SX Br. at 16-17. Music Choice's current website advertises numerous features of its internet offerings that were not available in 1998, including the ability to create one or more user profiles, to filter kids' content based on ratings, to access video content, and to search for desired content. *Help/Music Choice*, Music Choice, https://musicchoice.com/help-center/music-choice/ (last visited July 30, 2021), attached as Exhibit A. Ignoring these facts does not change them.

Music Choice also fails to acknowledge the differences in the geographic reach and customer base of the Jacksonville multicast offering (available only to a limited number of Continental Cablevision customers in Jacksonville, Florida) versus Music Choice's current internet offering (available nationwide through numerous MVPDs and publicly accessible websites).[7] Together with the differences noted above, these facts make clear that Music Choice's current internet service cannot be fairly characterized as falling within the limited scope of the pre-1998 multicast offered to Continental Cablevision customers in Jacksonville.

B. There Is No Credible Evidence That Music Choice Otherwise Made Pre-1998 Internet Transmissions.

[7] Music Choice produced no evidence showing that the Jacksonville multicast offering was available to customers outside of Jacksonville or outside of Continental's network; admitted that [ ], Del Beccaro Dep. Tr. 92:25-93:1; and, admitted that [ ], Del Beccaro Dep. Tr. 132:13-133:23. Even without these numbers (which Music Choice bore the burden to provide), descriptions of the Jacksonville multicast that are in evidence indicate the geographic and other restrictions on the service at that time. SX Br. at 11-12; Ex. D to SX Br. at SXREMAND000000313; Ex. H to SX. Br. at SXREMAND000000327.

Looking beyond the Jacksonville multicast offering, Music Choice has provided no credible proof of any internet transmissions prior to July 31, 1998.[8] Despite months of discovery in the underlying proceeding and in this remand proceeding, Music Choice has not identified a single document that indicates that it transmitted its service over the internet prior to July 31, 1998. Music Choice has identified no press releases, no advertisements, no contracts with or documentation from its MVPD partners. Music Choice did not even issue any third party subpoenas to any MVPD partner seeking to corroborate its claims. This lack of evidence stands in sharp contrast with the documents Music Choice has retained and produced, including all of those cited in its brief. Although the lapse in time might explain why providing full documentation would be difficult, it does not explain why Music Choice has been able to produce internal planning documents, among others, from the 1990s, but not a single document that supports its claims regarding Time Warner Cable, Adelphia, Comcast, MediaOne, Cox, or any other MVPD that it claims provided Music Choice's music service over the internet prior to July 1998. MC Br. at 10.

In place of documentary evidence, Music Choice offers (1) a far-from-credible declaration from Mr. Del Beccaro, and (2) a mountain of irrelevant evidence that does not speak to pre-1998 internet transmissions. *See, e.g.*, MC Br. at 10-11 (citing only Del Beccaro's declaration for the proposition that "MVPDs, including Time Warner Cable, Adelphia, Comcast,

[8] Music Choice's contrary, self-serving statements, should be afforded no weight. *See Mokhtar v. Kerry*, 83 F. Supp. 3d 49, 74 (D.D.C. 2015), *aff'd*, No. 15-5137, 2015 WL 9309960 (D.C. Cir. Dec. 4, 2015). "This is especially true when," as here, "these statements are unsubstantiated by any non-self-serving evidence and, . . . are rendered unreasonable given other undisputed evidence in the record." *Id.; cf. Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1063 (D.C. Cir. 1993) (refusing to "second-guess the agency's decision weighing" self-serving testimony); *Huthnance v. District of Columbia*, 722 F.3d 371 (D.C. Cir. 2013) (adverse inference may be drawn where a party that is in the best position to proffer evidence fails to do so).

MediaOne, and Cox began providing Music Choice's music channels via internet" in 1996 and 1997); *id.* at 10. None of this evidence establishes that Music Choice provided an internet service before July 31, 1998.

1. Mr. Del Beccaro's Self-Serving Declaration Is Not Credible.

Mr. Del Beccaro's declaration regarding MVPDs through which Music Choice purportedly offered internet service prior to July 31, 1998 is not only self-serving, but is also at odds with his *Web I* testimony and his deposition testimony in this proceeding. Specifically, the three different positions Mr. Del Beccaro has taken are:

- First, in his Written Direct Testimony in *Web I*, Mr. Del Beccaro testified under oath that Music Choice did not offer its service over the internet until *after* July 31, 1998. *See* Ex. R to SX Br., Testimony of David J. Del Beccaro 5, *In re Rate Setting for the Digital Performance Right in Sound Recordings and Ephemeral Recordings (Web I)*, No. 2000-9 CARP DTRA 1 & 2 (Apr. 11, 2001) ("Music Choice began delivering its service over the Internet in April of 1999"). According to Mr. Del Beccaro, the internet transmissions that Music Choice offered in 1999 included only "four channels on a free, nonsubscription basis." *Id.* (testifying that Music Choice discontinued this free internet service on March 5, 2001).

- Then, in his May 5, 2021 deposition in this remand proceeding, Mr. Del Beccaro testified under oath that he could not recall when any specific distributor first provided Music Choice over the internet, including any of the providers identified in Music Choice's interrogatory responses (and later in Mr. Del Beccaro's declaration). *See* Del Beccaro Dep. Tr. 49:3-4 ([redacted]); *id.* at 76:15-25 ([redacted]); *id.* at 78:16-81:1 ([redacted]); *id.* at 96:4-14 ([redacted]); *id.* at 97:4-16 ([same for Adelphia]); *id.* at 77:21-79:9; *id.* at 99:18-25 ([redacted]).

- In his declaration, filed the following month, Mr. Del Beccaro claimed that "[t]he first system to launch the internet-based access to Music Choice's music channels was Continental Cablevision's Jacksonville system. Continental began providing the Music Choice service via internet in September of 1996. Over the remainder of 1996 and 1997, various other MVPDs, including Time Warner Cable, Adelphia, Comcast, MediaOne, and Cox began providing Music Choice's music channels via internet." Del Beccaro Decl. at ¶ 10. He also claimed that "[b]y July of 1998, the internet access feature was widely available through the MVPDs named above and others, though not necessarily on every system owned by that MVPD." Del Beccaro Decl. at ¶ 11.

This unexplained, inconsistent testimony lacks credibility. *See, e.g.*, *Am. Prop. Const. Co. v. Sprenger Lang Found.*, 768 F. Supp. 2d 198, 205 (D.D.C. 2011) (disregarding declaration inconsistent with prior testimony where "declaration makes no attempt to explain why [witness's] recollection of the 'contingency' line item has improved in the time since she sat for her deposition. Without some credible explanation for the change, the Court cannot credit [the declarant's] recent declaration to the exclusion of her prior deposition testimony"). The most that Mr. Del Beccaro's declaration proves is a willingness to adapt his memory to the needs of the moment.

In other circumstances, it might be tempting to treat the gap between Mr. Del Beccaro's deposition and declaration testimony as innocent. But – even putting aside the third version of history to which Mr. Del Beccaro swore in *Web I* – such an explanation is implausible here. Music Choice's interrogatory responses were served on SoundExchange on March 31, 2021—*before* Mr. Del Beccaro's deposition. SoundExchange's interrogatories asked Music choice to, among other things, "[i]dentify and describe in detail your service offerings that were in existence and making digital audio transmissions to the public over the internet on July 31, 1998." Ex. I to SX Br. at 9, Interrogatory No. 3. Music Choice was specifically asked to "state

the name of each internet service offering and the Distributor(s) through which subscribers could access the offering on July 31, 1998." *Id.* In response, Music Choice said that

> As of July 31, 1998 Music Choice was making its audio channels available to any of its Distributors as part of their consumer internet offerings to their individual subscribers. And by that date, Music Choice was actively transmitting the internet service through several Distributors, including Continental, Time Warner, Adelphia, MediaOne, Comcast, and Cox.

Id. at 11. [ ]. Del Beccaro Dep. Tr. 166:22-167:6. Music Choice could not have gleaned that information from nonexistent documents; and Mr. Del Beccaro testified that [ ]. Del. Beccaro Dep. Tr. 166:22-167:6. Taken together, this means that Mr. Del Beccaro would have had to have remembered the names and dates of each of the MVPDs listed in the interrogatory response on March 31, 2021, forgotten all of this information by May 5, 2021 (SoundExchange's only opportunity to question him), and conveniently recalled it again just in time to provide his declaration accompanying Music Choice's brief.

Relying on Mr. Del Beccaro's new factual claims would prejudice SoundExchange and undermine the purpose of this proceeding. Because at his deposition Mr. Del Beccaro was unable or refused to provide any details about the MVPDs he claims were involved in Music Choice's pre-1998 internet activities, SoundExchange has had no opportunity to test his position. For instance, SoundExchange had no opportunity to explore whether any of these MVPDs transmitted Music Choice's service over the public internet (as opposed to multicasts over their private networks), how many customers subscribed to each, what geographic areas they served, what technology they used, or what investments Music Choice had made in them. The Judges should disregard Mr. Del Beccaro's self-serving testimony.

2. Music Choice's Other Evidence Does Not Establish That It Actually Provided a Pre-1998 Internet Service.

Faced with an utter lack of evidence of pre-1998 internet transmissions, Music Choice throws up a smokescreen of irrelevant information. The documents on which both Music Choice's brief and Mr. Del Beccaro's declaration rely come in two flavors: documents that reflect Music Choice' *intention* to develop and offer an internet service,[9] *see* MC BR. at 10, and documents that refer to the provision of internet service *after* July 31, 1998, *id.* at 10-12. Neither of these points matter.[10]

The first group of documents show Music Choice's intention to offer an internet service in the future – not that it actually did so during the relevant period. *See, e.g.*, MC Br. at 14 (Music Choice "had begun working on ways to make its service available on such devices" prior to 1998, but implicitly had not completed that process); *id.* at 11 (document regarding "imminent" not actual service launches). Even the examples that Music Choice quotes reinforce that plans do not always go as expected. For instance, although Music Choice had an "expectation that 'modem opportunities [would] expand to every partner by 6/97,'" there is no evidence (other than Mr. Del Beccaro's on-again, off-again recollections) that this expectation was actualized until much later. *See, e.g.*, MC Ex. 12 at I-7 (noting [redacted]

[9] The only cited MVPDs that appears to have actually been offering a Music Choice service – as opposed to planning one – at the time of these documents was the Jacksonville service, discussed above at 4-6.

[10] Music Choice also tries to hang its hat on the D.C. Circuit's statement that it is "undisputed that Music Choice was making some internet transmissions" before July 31, 1998. MC Br. at 2-3. The suggestion that there is no dispute about this issue – which is squarely presented on remand – appears to be based on the fact that SoundExchange did not respond to one passing reference in Mr. Del Beccaro's testimony in the underlying proceeding. At the time, there was no indication that this passing reference was material to the rate proposals, and there is no basis for Music Choice's plainly incorrect assertion that SoundExchange agrees with it.

[redacted]).[11] The standard that the Judges must apply, consistent with the D.C. Circuit's instruction, is not about intent. Rather, the salient question is what type of service "actually existed" and what Music Choice actually "provided" on July 31, 1998. 970 F.3d at 425, 428.

Music Choice also cites documents showing that it – like every other webcaster in the world – did eventually begin offering its service over the internet. MC Br. at 11-12 (citing MC Ex. 11 & Eric D. Leach, *Everything You Always Wanted to Know about Digital Performance Rights but Were Afraid to Ask,* 48 J. Copyright Soc'y U.S.A. 191 at 223, and n. 195 & 198. (2000)). But whatever types of service Music Choice introduced after July 31, 1998 do not matter. *See Music Choice,* 970 F.3d at 427-28 (("[T]he Board must determine the precise scope of Music Choice's service offering as it actually existed on July 31, 1998.")). If anything, the fact that Music Choice was able to document details about its service offerings in 2000, 2002, and other years raises questions about why similar documentation does not exist from 1998, just a few years earlier, if a 1998 internet offering actually existed.

Music Choice can show only (1) that it intended to develop internet offerings, and (2) that – like other webcasters – it eventually did so. Not only are these facts totally unsurprising, but neither of them have any bearing on the questions the Judges must decide.

Music Choice attempts to deflect by insinuating that SoundExchange, not it, must bear the burden of proof. See MC Br. at 9 (incorrectly claiming that "SoundExchange introduced no

[11] Music Choice's reference to its 1995 agreement with BMI is yet another example of why forward-looking documents are not reliable for the purpose of showing what actions Music Choice actually took. MC Br. at 11; Del Beccaro Decl. ¶ 14 (attaching BMI license request and stating recollection of a similar request made to ASCAP). Even by Music Choice's account, this agreement pre-dated any type of actual internet offering. Music Choice states that it did not begin "multicasting" over the internet until 1996, and did not offer a streaming service over the public internet or mobile devices until years later. *See* MC Br. at 10-11, 14.

evidence contradicting [Mr. Del Beccaro's] testimony in any way"). There is no legal basis for this incorrect position, and Music Choice can identify none. Rather, as the proponent of a proposal, Music Choice bears the burden to support that proposal. *See* MC Br. 23; *see also Final Determination (Web V),* at 209-10, 219, 259, 277; *Final Determination (Web IV),* 81 Fed. Reg. 26,316, 26,320; *Puerto Rico v. Fed. Mar. Com.*, 468 F.2d 872, 881 (D.C. Cir. 1972) (acknowledging that the general principle that under the Administrative Procedure Act, the proponent of a rule or order normally has the burden of proof in an administrative proceeding applies to rate-making proceedings); 5 U.S.C. § 556(d). Ignoring these principals and assigning the burden of proof to SoundExchange would make little sense as a practical matter for multiple reasons: (1) SoundExchange would have to prove a negative, (2) Music Choice is the party most likely to have the relevant information, (3) if Music Choice were right, and all that was required to expand its PSS eligibility was showing that SoundExchange cannot prove otherwise, a PSS could claim it had done all variety of things prior to 1998 and grow the advantage associated with the grandfathered rate indefinitely.

A grandfather clause like the one that Music Choice seeks to rely on for its internet transmissions should be construed narrowly. *See 2006 Referral,* 71 Fed. Reg. at 64646 (stating that "it is a well established canon of statutory interpretation that grandfather provisions are to be narrowly interpreted," and applying this principal to Section 114(j)(11)); *SoundExchange, Inc. v. Muzak LLC,* 854 F.3d 7133, 719 (2017) (same). Assigning the burden of proof to SoundExchange, as Music Choice suggests, would do just the opposite. Rather than accept Music Choice's groundless invitation to break with precedent, the Judges should continue to apply of the principle that grandfather provisions be interpreted narrowly in order to ensure that

webcasters compete on level terms, eliminate distortions in the market, and effectuate the goal of shifting rates towards those that reflect arms-length market transactions.[12]

C. Music Choice's Categorical Arguments in Favor of Expanding Its PSS Eligibility Are at Odds with the D.C. Circuit's Instructions to the Judges and Must Be Rejected.

Unable to show that its current internet transmissions fall anywhere close to "the precise scope of Music Choice's service offering as it actually existed on July 31, 1998," 970 F.3d at 427-28, Music Choice flips the D.C. Circuit's mandate on its head with a categorical argument that its service is a PSS; Congress intended to allow PSS to evolve; and the fundamental changes to its service over the last 23 years should not matter with regard to its PSS eligibility. MC Br. 14-23. In effect, Music Choice asks the Judges to adopt a presumption that its offerings are all PSS-eligible unless the evolution of its service somehow departs from "industry understanding" and "industry norms." MC Br. 19, 20.

The Judges should reject these arguments out of hand. In overruling the Register's legal guidance, the D.C. Circuit held that the question of whether or not an internet offering is encompassed in a service's pre-1998 offering cannot be determined categorically. 970 F.3d at 425. Yet this is precisely what Music Choice seems to do with its theory of PSS evolution. The instructions the Judges received from the D.C. Circuit are clear. They must consider "the precise scope of Music Choice's service offering as it actually existed on July 31, 1998" and whether Music Choice's internet transmissions qualify for what it called an "unconditional grandfathered

[12] The argument about burden is also purely academic here. Because SoundExchange *has* provided evidence that Music Choice was not making internet transmissions prior to July 31, 1998—namely, prior testimony of Music Choice's CEO and statements on Music Choice's website—it should prevail regardless of which party bears the burden. *See supra* at 16.

rate" pursuant to § 114(d)(2)(B), or a "conditional grandfathered rate" pursuant to § 114(d)(2)(C). 970 F.3d at 427-28.

Music Choice's current internet transmissions cannot "fairly be characterized as included in the service offering Music Choice provided on July 31, 1998." *Id.* at 425. Certainly PSS evolution and "industry norms" have nothing to do with an inquiry into eligibility for an "unconditional grandfathered rate." That depends on the medium used by a service on July 31, 1998. 970 F.3d at 421 (quoting 17 U.S.C. § 114(d)(2)(B)). As described above, Music Choice was not making internet transmissions before 1998, and certainly not the same kinds of transmissions it is today.

As to eligibility for a "conditional grandfathered rate," the Judges previously applied the Register's six-factor test and determined that Music Choice's internet transmissions must be excluded from the conditional grandfathered rate "to the extent they are available outside a subscriber's residence," such as through mobile applications. 970 F.3d at 422 (quoting Determination, 83 Fed. Reg. at 65,227); *see* Determination, 83 Fed. Reg. at 65,227 (finding conditional rate unavailable to Music Choice); Rehearing Order at 12-16.

Music Choice's brief addresses access from outside the home and the use of apps within the context of its made-up presumption of PSS eligibility, rather than within the context of eligibility for a "conditional grandfathered rate." However, it is in the latter context that the Judges must consider these arguments. As noted above, the D.C. Circuit did not question the Register's six-factor test, nor did it give any indication that it doubted the Judges' previous conclusion that Music Choice is not eligible under that test. *See* 970 F.3d at 427 n.9. Music Choice's rehash of previous arguments about access from outside the home and the use of apps does not lead to a contrary conclusion this time. There is no credible evidence that in 1998,

Music Choice was available outside the home, and Music Choice's arguments about the meaning of the term "residential" do not change that. The point is that in 1998, Music Choice was only available by cable, satellite and, in Jacksonville, via multicast transmissions over Continental Cablevision's broadband network. Regardless of industry norms today, Music Choice was not available everywhere through apps on mobile devices in 1998, nearly a decade before smartphones were even available. Consistent with the Judges' findings and the D.C. Circuit's instruction, Music Choice is not eligible for either an "unconditional grandfathered rate" or a "conditional grandfathered rate."

III. The Judges Should Disregard Music Choice's Handwringing and Reissue the Audit Provision.

Music Choice's screed concerning audits also misses the mark. The narrow question the Judges must address on remand is what justification undergirds their decision to amend the so-called defensive audit provision, 37 C.F.R. § 382.7(d). This provision relates to when an audit conducted by a service that meets certain requirements[13] can foreclose SoundExchange's right to "verify [a service's] payments . . . with an independent audit" that "determine[s] the accuracy of royalty payments." 37 C.F.R. § 382.7(a), (d). In the underlying proceeding, the Judges narrowed that provision by clarifying that a service's own audit only has preclusive effect "with respect to the information that is within the scope of the audit," as was previously the case for audits of SDARS and webcasters. 37 C.F.R. § 382.7(d); 37 C.F.R. § 382.15(e) (effective for rate period 2013-17) (SDARS); 37 C.F.R. § 380.6(d) (webcasters). The D.C. Circuit found that the Judges' explanation of the rationale for their change was lacking, but its opinion did not call the

[13] The audit must be "performed in the ordinary course of business according to generally accepted auditing standards by a Qualified Auditor." 37 C.F.R. § 382.7(d). SoundExchange does not concede that Music Choice's so-called "defensive audits" meet these standards.

substantive decision into question. *See* 970 F.3d at 429-30 (acknowledging that the Judges may be able to justify their position).

Thus, on remand, the question is whether there is a sufficient basis for the Judges' previous conclusion that a self-audit by a PSS provider should only have preclusive effect "with respect to the information that is within the scope of the audit," or whether an audit of cramped scope that does not actually "determine the accuracy of royalty payments" should be enough to deny SoundExchange and the artists and copyright owners it represents visibility into the accuracy of the service provider's payments.

There are ample justifications for the Judges to reach the same conclusion they did originally. As SoundExchange detailed in its opening brief, justifications for amending section 382.7 include (1) bringing the PSS regulations in line with the defensive audit provisions applicable to other service types, SX Br. at 20-21; (2) updating the provision to align with the changed regulatory and industry landscape, as the original justification for a broader defensive right was developed before SoundExchange existed, when multiple individual copyright owners could potentially audit a PSS provider, and the potential burden on licensees was thus greater than it is today, *id.* at 23-24; and (3) to provide meaningful oversight, and hence an incentive for licensees to pay what they owe and protection against underpayments that happen all too frequently, *id.* at 22-23.

The declaration of Lewis Stark, an independent CPA who leads Prager Metis' SoundExchange audits, describes the differences between the defensive audit that BDO conducted for Music Choice and the type of procedures that would be necessary to suss out systemic underpayments like those that [ ]. Stark Decl. at ¶¶ 2-3; SX Br. at 22. Based on his expertise in royalty accounting as well as his personal

experience auditing Music Choice and Muzak, Mr. Stark concluded that Music Choice's internal audits are insufficient to accomplish the purpose of the audit provision, which is to "determine the accuracy of royalty payments or distributions." 37 C.F.R. § 382.7(d); *see* Stark Decl. ¶¶ 2-3 ("The royalty verification procedures that Prager Metis conducts on behalf of SoundExchange . . . have a different purpose and scope than the type of audit BDO performed for Music Choice" and additional steps to "identify errors that might affect the calculation of royalties and, importantly, to *quantify* and present the impact of these errors on the royalties actually paid."); *see also* Ex. A, SXREMAND00000415 at SXREMAND0000417-18 [ ].[14]

Rather than addressing the significance of the differences in scope between the audits it has commissioned and the audits Mr. Stark would conduct for SoundExchange if permitted to do so (for instance, by eliciting evidence or testimony from BDO), Music Choice provided an inaccurate and incendiary rant focused primarily on alleged misconduct in an audit that occurred over 15 years ago. *See, e.g.*, MC Br. at 26-31 (calling auditors "partisan" and SoundExchange's conduct "outrageous"). This rant is irrelevant to any question at issue in this proceeding. Plainly, SoundExchange must conduct its audits in accordance with the Judges' regulations. If

[14] Music Choice states that there have been only a "handful of instances in which Music Choice's auditors have determined, in the course of conducting defensive audits, that there had been any underpayment." MC Br. at 26. This assertion does not prove that Music Choice's royalty calculations have otherwise been accurate. To the contrary, it suggests that Mr. Stark is correct that the processes Music Choice's auditors have employed are designed not to find underpayments. Music Choice should not be rewarded for its willful ignorance.

Music Choice wanted to challenge SoundExchange's interpretations of the regulations *beyond* the defensive audit provision, it could have done so in the underlying rate-setting proceeding and still may do so in other fora.[15] But any alleged misconduct – particularly misconduct alleged to have occurred more than 15 years ago – has no bearing on the extent to which a narrow self-audit should in the coming years preclude a SoundExchange audit properly conducted in accordance with the Judges' regulations.

Because Music Choice's rant is irrelevant to the narrow question before the Judges in this remand proceeding, a point-by-point refutation is unnecessary. But to be clear, SoundExchange takes exception to almost everything Music Choice has to say. As just a few examples that are clear without discovery into Music Choice's allegations:

- Music Choice's arguments assume that the current PSS regulations governed an audit of 2001-2003 royalty payments conducted in 2005, when of course that is not the case. The applicable regulations were quite different from the current regulations. Among other things, they did not require auditor independence, or even that an audit be conducted by a CPA. *PSS I*, 63 Fed. Reg. 25,394, 25,414-15 (May 8, 1998) ("Interested parties may conduct" an audit); see also 68 Fed. Reg. 39,837, 39,841 (July 3, 2003) (2003 settlement made no relevant change to 1998 audit regulations).[16]

[15] Now is not an appropriate time for Music Choice to try to introduce new issues into this proceeding, especially issues on which there has been no discovery. *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C.Cir.1987) (attempt to raise a new issue years after filing the complaint, after discovery had been conducted, and after summary judgment had been granted against the plaintiff was untimely); *United States v. All Assets Held at Bank Julius, Baer & Co., Ltd.*, 268 F. Supp. 3d 135, 145 (D.D.C. 2017) (denying introduction of new affirmative defense); *Becker v. D.C.*, 258 F.R.D. 182, 185 (D.D.C. 2009) (denying attempt to raise new issues that would necessitate new discovery after a five-year delay).

[16] Fee shifting required a determination by an independent auditor. 63 Fed. Reg. at 25,415.

- Music Choice asserts that generally accepted auditing standards should govern an audit commissioned by SoundExchange. However, in 2001-2003 and 2005, as now, those standards were referred to only in the so-called defensive audit provision, not the provisions concerning audits by interested parties (or SoundExchange). 63 Fed. Reg. at 25,415; 37 C.F.R. § 382.7(d).
- To the extent that any audit standards may have been required in 2001-2003 or 2005, they were obviously not the current ones cited by Music Choice. MC Br. 27, 29, 33. Auditing standards change frequently.[17]
- Music Choice faults SoundExchange and Prager Metis for not performing their own audit of "the PSS royalty periods covered by the BDO audits." MC Br. 32. However, as Mr. Stark explained, he could not carry out such an audit "because Music Choice refused to comply with our information requests related to its PSS." Stark Decl. ¶¶ 7-9.

Music Choice's arguments concerning the conduct of auditors are rife with misstatements. But the only question here concerns the preclusive effect of a PSS provider's self-audit, and particularly whether the Judges should stick with their prior decision to give self-audits preclusive effect only "with respect to the information that is within the scope of the audit." This is not an issue about sampling as Music Choice suggests in the concluding pages of is brief. MC Br. 34-35. Rather is about whether an audit not designed to "determine the accuracy of royalty payments" should substitute for one that is designed for that purpose. SX Br.

[17] *E.g.*, Gerald W. Hepp & Alan Reinstein, *Major Revisions to the Auditor's Report*, CPA Journal (Apr. 2021), https://www.cpajournal.com/2021/04/07/major-revisions-to-the-auditors-report/; AICPA, *Recently Issued Auditing and Attestation Standards: Information and Resources*, https://www.aicpa.org/interestareas/frc/auditattest/auditing-standards-information-and-resources.html (last visited July 30, 2021).

21-22. Music Choice simply does not engage with that question. The Judges should reaffirm their previous decision in this regard.

IV. CONCLUSION

In light of the arguments above and in SoundExchange's opening brief, SoundExchange respectfully requests that the Judges find that Music Choice's internet transmissions are ineligible for PSS rates, and re-promulgate 37 C.F.R. 382.7(d) as amended.

Dated: October 7, 2021

Respectfully submitted,

/s/ Emily L. Chapuis

Emily L. Chapuis (D.C. Bar # 1017600)
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Plaintiff SoundExchange, Inc.

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 ANDREW B. CHERRY
(On behalf of SoundExchange)

I am counsel for SoundExchange, Inc. in Docket No. 16-CRB-0001-SR/PSSR (2018-2022) (Remand), and I am authorized to submit this declaration in support of SoundExchange's Responsive Brief on Remand.

1. Attached as Exhibit A is a true and correct copy of the document produced from SoundExchange's files with the Bates Number SXREMAND00000415.

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

Dated: October 7, 2021
Arlington, Virginia

Respectfully submitted,

Andrew B. Cherry (Cal. Bar # 315969)

EXHIBIT A

This exhibit is restricted in its entirety and is therefore omitted from this public version.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: 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)

SOUNDEXCHANGE, INC.'S REDACTION LOG
FOR ITS RESPONSIVE BRIEF DATED OCTOBER 7, 2021

PAGE OR EXHIBIT	DESCRIPTION
Page 3, line 1	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 5, lines 10-11	Confidential information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 6, lines 19-20	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 7, lines 14-15	Confidential and commercially sensitive information regarding the operation of Music Choice's service from an internal Music Choice document, which Music Choice produced as "RESTRICTED."
Page 10, FN 7, lines 3-4	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 10, FN 7, lines 5-6	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del

	Beccaro, which the parties designated as "RESTRICTED."
Page 12, lines 22-24	Confidential and commercially sensitive information regarding Music Choice's distributors from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 12, lines 25-26	Confidential and commercially sensitive information regarding Music Choice's distributors from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 12, lines 27-28	Confidential and commercially sensitive information regarding Music Choice's distributors from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 12, lines 28-29	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 12, line 30	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 12, lines 30-33	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 14, lines 9-10	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 14, lines 11-13	Confidential and commercially sensitive information regarding the operation of Music Choice's service from the deposition of David Del Beccaro, which the parties designated as "RESTRICTED."
Page 15 line 17-Page 16, line 1	Confidential and commercially sensitive information regarding Music Choice's distributors from an internal Music Choice document, which Music Choice produced as "RESTRICTED."
Page 21, line 22	Confidential and commercially sensitive information regarding the results of audits conducted by SoundExchange from the declaration of Lewis Stark, which was designated by SoundExchange as "RESTRICTED."
Page 22, lines 8-12	Confidential and commercially sensitive information regarding an analysis of past defensive audits from a document confidentially exchanged between SoundExchange and its retained auditor, which SoundExchange produced as "RESTRICTED."

Exhibit A	An analysis of past defensive audits confidentially exchanged between SoundExchange and its retained auditor, which SoundExchange produced as “RESTRICTED.”

Proof of Delivery

I hereby certify that on Thursday, October 07, 2021, I provided a true and correct copy of the SoundExchange, Inc.'s Responsive Brief to the following:

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

Sony Music Entertainment, 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

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

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

Universal Music Group, 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

Music Choice, represented by Paul M Fakler, served via ESERVICE at pfakler@orrick.com

Signed: /s/ Emily Chapuis