**Before the**
**UNITED STATES COPYRIGHT ROYALTY JUDGES**
**Library of Congress**
**Washington, D.C.**

| | | |
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| *In re* | ) | |
| **DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)** | ) | **DOCKET NO. 14-CRB-0001-WR (2016-2020)** |

## DECLARATION OF ANJAN CHOUDHURY

I, Anjan Choudhury, declare as follows:

1. I am an attorney with Munger, Tolles & Olson LLP and am counsel for SoundExchange, Inc., in Docket No. 14-CRB-0001-WR (2016-2020).

2. I submit this Declaration (1) in Support of SoundExchange's Opposition To Licensee Services' Motion To Strike SoundExchange's Corrected Written Rebuttal Testimony of Daniel Rubinfeld and Section III.E of the Written Rebuttal Testimony of Daniel Rubinfeld ("Opposition") and (2) to comply with the terms of the Protective Order governing these proceedings.

3. This Declaration is made based upon my personal knowledge.

4. SoundExchange produced Apple's webcasting license agreements with Universal, Sony, and Warner, on November 14, 2014.

5. SoundExchange produced valuation documents concerning the iTunes Radio, Beats Music, Spotify, and Nokia MixRadio agreements, among others, on January 30, 2015.

6. Attached hereto as Exhibit 1 is a true and correct copy of Pandora's Motion for

Issuance of Subpoenas, filed on March 10, 2014, in this matter.

7. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of R. Bruce Rich in Support of Pandora's Motion for Issuance of Subpoenas, filed on March 10, 2014, in this matter.

8. Attached hereto as Exhibit 3 is a true and correct copy of the Declaration of Todd Larson in Support of Pandora's Motion for Issuance of Subpoenas, filed on March 10, 2014, in this matter. The exhibits accompanying this declaration have been omitted, but can be provided upon request.

9. Attached hereto as Exhibit 4 is a true and correct copy of The National Association of Broadcasters' Consolidated (1) Joinder in Pandora's Motion for Issuance of Subpoenas and (2) Motion for Issuance of Subpoenas To Apple Inc., and the Three Major Record Labels, filed on March 12, 2014, in this matter.

10. Attached hereto as Exhibit 5 is a true and correct copy of The National Association of Broadcasters' Reply In Support of Its Motion for Issuance of Subpoenas to Apple Inc., and the Three Major Record Labels, filed on March 24, 2014, in this matter.

11. Attached hereto as Exhibit 6 is a true and correct copy of Apple's 2013 webcasting license agreement with Warner. This Exhibit has been marked RESTRICTED and will be redacted from the Public version of SoundExchange's submission because it contains confidential terms of the agreement between Apple and Warner that, if disclosed, could place Apple, Warner, or both of them at a competitive disadvantage.

12. Attached hereto as Exhibit 7 is a true and correct copy of Apple's 2013 webcasting license agreement with Sony. This Exhibit has been marked RESTRICTED and will be redacted from the Public version of SoundExchange's submission because it contains

confidential terms of the agreement between Apple and Sony that, if disclosed, could place Apple, Sony, or both of them at a competitive disadvantage.

13. Attached hereto as Exhibit 8 are relevant excerpts of the Declaration of Todd D. Larson In Support of the Services' Motion to Compel SoundExchange to Produce Negotiating Documents Directly Relating to SoundExchange's Written Direct Statement, filed on December 8, 2014, in this matter.

14. Attached hereto as Exhibit 9 is a true and correct copy SDNEX0126385. This Exhibit has been marked RESTRICTED and will be redacted from the Public version of SoundExchange's submission because it contains confidential terms of the agreement between Apple and a record company that, if disclosed, could place Apple, the record company, or both of them at a competitive disadvantage.

15. Attached hereto as Exhibit 10 is a true and correct copy of SNDEX0177335. This Exhibit has been marked RESTRICTED and will be redacted from the Public version of SoundExchange's submission because it contains confidential terms of the agreement between Apple and a record company that, if disclosed, could place Apple, the record company, or both of them at a competitive disadvantage, as well as confidential information regarding a record company's competitive strategy that, if disclosed, could place the record company at a competitive disadvantage.

16. Attached hereto as Exhibit 11 is a true and correct copy of SNDEX0177710. This Exhibit has been marked RESTRICTED and will be redacted from the Public version of SoundExchange's submission because it contains confidential terms of the agreements between digital music services and a record company that, if disclosed, could place the digital services, the record company, or all of them at a competitive disadvantage, as well as confidential

information regarding a record company's competitive strategy that, if disclosed, could place the record company at a competitive disadvantage.

17. Attached hereto as Exhibit 12 is a true and correct copy of an email dated February 25, 2015, from Evan T. Leo, counsel for iHeartMedia.

18. Attached hereto as Exhibit 13 is a true and correct copy of an email dated February 25, 2015, from Todd Larson, counsel for Pandora.

19. Attached hereto as Exhibit 14 is a true and correct copy of an email dated February 25, 2015, from Bruce Joseph, counsel for the National Association of Broadcasters.

20. Attached hereto as Exhibit 15 is a true and correct copy of a letter dated February 26, 2015, from Anjan Choudhury to Evan T. Leo, copying Todd Larson and Bruce Joseph, regarding SoundExchange's Notice of Submission of Corrected Written Rebuttal Testimony. This Exhibit has been marked RESTRICTED and will be redacted from the Public version of SoundExchange's submission because it contains confidential information regarding the terms of agreements between Apple and Sony and between Apple and Warner that, if disclosed, could place Apple, Sony, Warner, or all of them, at a competitive disadvantage.

21. Attached hereto as Exhibit 16 is a true and correct copy of the First Set of Rebuttal-Phase Document Requests to SoundExchange, Inc. From Licensee Participants dated February 26, 2015.

22. Attached hereto as Exhibit 17 is a true and correct copy of the Supplemental Rebuttal-Phase Document Requests to SoundExchange, Inc. From iHeartMedia, Inc., dated February 28, 2015.

23. Attached hereto as Exhibit 18 is a true and correct copy of relevant excerpts of Volume 12 of the Hearing Transcript in *Determination of Rates and Terms for Preexisting*

*Subscription Services and Satellite Digital Audio Services ("SDARS II"),* dated August 14, 2012.

24. Attached hereto as Exhibit 19 is a true and correct copy of relevant excerpts of Volume 13 of the Hearing Transcript in *SDARS II*, dated August 15, 2012.

25. Attached hereto as Exhibit 20 is a true and correct copy of relevant excerpts of Volume 17 of the Hearing Transcript in *Adjustment of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Services* (*"SDARS I"*), dated August 15, 2007.

26. Attached hereto as Exhibit 21 is a true and correct copy of relevant excerpts of Volume 22 of the Hearing Transcript in *SDARS I*, dated August 23, 2007.

27. Attached hereto as Exhibit 22 is a true and correct copy of Sirius XM's Opposition to SoundExchange's Motion to Strike Rebuttal Testimony, filed on August 10, 2012 in *SDARS II*. The exhibits to this motion have been omitted, but can be provided upon request.

28. Attached hereto as Exhibit 23 is a true and correct copy of SoundExchange's Motion to Strike Portions of Sirius XM's Testimony as Improper Rebuttal, filed on August 3, 2012, in *SDARS II*.

29. Attached hereto as Exhibit 24 is a true and correct copy of the Revised Written Rebuttal Testimony of Roger G. Noll, dated August 12, 2012, and filed in *SDARS II*.

30. I and/or attorneys working under my direction have reviewed this Declaration, the accompanying exhibits, and SoundExchange's Opposition. The attorneys working under my direction and I have also reviewed the terms of the Protective Order.

31. I and/or the attorneys working under my direction have determined that portions of SoundExchange's Opposition contain information that should be designated RESTRICTED pursuant to the terms of the Protective Order. Specifically, SoundExchange's Opposition discloses the terms of confidential agreements between certain record companies and digital

music services that, if disclosed, could place the record companies, the digital music services, or all of them at a competitive disadvantage. This confidential information has been redacted from the Public version of SoundExchange's Opposition.

32. I and/or the attorneys working under my direction have determined that certain exhibits appended to this Declaration contain information that should be designated RESTRICTED pursuant to the terms of the Protective Order. The reason for each such designation has been identified above. Exhibits designated RESTRICTED will be redacted from the Public version of SoundExchange's submission.

Dated: March 16, 2015

Anjan Choudhury

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Ex. 1

EX. 1

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR** |

# MOTION FOR ISSUANCE OF SUBPOENAS


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Pandora Media, Inc. ("Pandora") respectfully moves pursuant to 17 U.S.C. § 803(b)(6)(C)(ix) for the Copyright Royalty Judges ("Judges") to issue the annexed subpoenas *duces tecum* to the entities identified in the exhibits hereto, *see* Exs. A-I, as well as in the accompanying Declaration of Todd Larson ("Larson Decl.").[1]

## INTRODUCTION AND BACKGROUND FACTS

On January 3, 2014, the Judges issued a notice of the commencement of this proceeding under 17 U.S.C. § 803(b) to determine reasonable rates and terms for public performances of sound recordings, and ephemeral recordings made to enable such performances, by eligible webcasters during the 2016-2020 statutory license period. *See* Copyright Royalty Board, Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (*Web IV*), 79 Fed. Reg. 412 (Jan. 3, 2014) ("*Web IV Notice*"). Past experience in comparable proceedings attests both to the complexity of this adjudicative exercise and the importance of its resolution to all affected parties. As the D.C. Circuit has recognized, "rates can obviously mean life or death for firms and even industries." *Intercollegiate Broad. Sys. Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012); *see also SoundExchange, Inc. v. Library of Congress*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("As this case demonstrates, billions of dollars and the fates of entire industries can ride on the Copyright Royalty Board's decisions.").

Even against prior experience, the stakes presented by the *Web IV* proceeding are exceedingly high, especially for Pandora. Streaming digital music services have become an

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[1] It is Pandora's understanding that, should this motion be granted, the subpoenas would be issued and served by the Judges. Pandora has accordingly provided subpoenas listing the Copyright Royalty Board as the issuing party. However, should the Judges prefer, the undersigned counsel for Pandora will be available to effectuate service of the subpoenas at the Judges' instruction. In addition, pursuant to 37 C.F.R. § 351.9(e), Pandora has notified each of the proposed subpoenaed entities of the filing of this motion and provided them a copy of these moving papers.

increasingly popular and integral part of the U.S. entertainment landscape. *See* Declaration of R. Bruce Rich ("Rich Decl.") ¶ 2. Listenership to Pandora alone, the leading such service, represents 8.9% of all U.S. radio listening. *Id.* Reflecting this industry growth, SoundExchange reports its 2013 royalty disbursements will exceed $500 million, a five-fold increase since 2008. *Id.* ¶ 3. Pandora's current statutory royalty payments comprise more than half that total and nearly 50% of Pandora's total revenues. *Id.*; *see also id.* ¶ 15.

It is against this backdrop that the rates in this proceeding will be determined. Congress has instructed that in undertaking their assigned ratemaking task with respect to webcasters, the Judges are to select rates that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). "In determining such rates and terms," the Judges must "base their decision on economic, competitive and programming information *presented by the parties*." *Id.* (emphasis added). These inputs include consideration of "the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements" for services subject to the Section 114 license. *Id.*[2] Given these statutory requirements, a critical evidentiary component underlying every major rate decision issued by the Judges (both for webcasting and satellite radio services) has been marketplace evidence of privately negotiated agreements between assertedly comparable services ("willing buyers") and record companies ("willing sellers"). *See* Rich Decl. ¶ 13; *see also, e.g.*, Copyright Royalty Board, Determination After Remand of Rates and Terms for Royalty Years 2011-2015, Docket No. 2009-1 CRB (Webcasting III), at 33 n.28 (Jan. 9, 2014) (Initial Determ.) ("*Web III*

[2] The Judges have likewise considered privately negotiated agreements between the record companies and services not operating under the statutory license, with adjustments. *See Written Direct Statement of SoundExchange*, Testimony of Janusz Ordover, *Satellite II*, at 18-20 (Nov. 29, 2011) ("Ordover Testimony") *available at* http://www.loc.gov/crb/proceedings/2011-1/pss/sx_vol_2.pdf.

*Remand*") ("A wide array of potentially comparable markets can and should be considered by the Judges"). Specifically, in every significant rate setting proceeding to date, the Judges have assessed proffered negotiated license agreements for their viability as "benchmarks" that, with appropriate adjustment, may form suitable economic touchstones for the determination of the applicable royalty rate between the parties to the proceeding and other statutory licensees. *See* Rich Decl. ¶ 13; *Web III Remand* at 51. In line with this established practice, the *Web IV Notice* initiating this proceeding sets forth several questions regarding various characteristics of the webcasting marketplace that are reflected in (and sometimes *only* in) such agreements. 79 Fed. Reg. at 413-14.

Despite its fundamental importance to the rate-setting process, a significant portion of the very marketplace evidence on which the parties will join issue in these proceedings, and that Pandora understands the Judges to be asking the parties to *Web IV* to appraise with care, is currently unavailable to Pandora. *See* Rich Decl. ¶ 17. Specifically, Pandora does not have access to non-public, privately negotiated agreements between record companies and other digital music services or the usage and royalty payment information related to the services' operation under such agreements. *See id.* SoundExchange, by contrast, as the collective representing virtually all of the industry's recording companies, readily does. *See id.* ¶ 18; *see also* Declaration of Christopher Harrison ("Harrison Decl.") ¶ 5. Thus, whereas SoundExchange and its member labels (as well as the law firm and outside experts representing SoundExchange) have the benefit of full information about the range of marketplace arrangements many months before the respective economic positions of the parties must be set forth in written direct cases, service-side participants such as Pandora are prejudiced by a near-complete lack of such information. *See* Rich Decl. ¶¶ 17-19.

Notably, the statutory procedures governing discovery between opposing participants does not rectify – and indeed may exacerbate – Pandora's lack of timely access to such information. As the Judges are aware, and as reflected in the Judges' February 19 Scheduling Order,[3] the prevailing statutory procedures provide for participants to file written direct statements, which include "witness statements, testimony and exhibits to be presented in the proceedings," by a specified date. 17 U.S.C. § 803(b)(6)(C)(i)-(ii). The statute and the Judges' Scheduling Order thereafter provides for an abbreviated period of discovery in connection with the written direct statements. *See id.* § 803(b)(6)(C)(ii); *see also* Rich Decl. ¶ 24. Such discovery is limited to a period of 60 days, and the scope of a party's document requests to an opposing participant is confined to discovery "directly related to the written direct statement or written rebuttal statement of that participant." 17 U.S.C. § 803(b)(6)(C)(iv)-(v); *see also* Rich Decl. ¶ 24. Subsequent oral testimony at the hearing phase likewise has been confined to the parameters of the parties' written statements. The upshot of this procedure has been that the written direct statements and hearing testimony supporting a given participant's rate proposal are limited by its (and its expert witnesses') access to, and resulting analysis of, such information as may be in its own possession or otherwise obtainable from the public record *prior to* filing such written direct statements. *See* Rich Decl. ¶ 17.[4]

This motion seeks to remedy the combined information gap and information imbalance Pandora and other *Web IV* participants are facing. Under Section 803(b)(6)(C)(ix) of the Act, the Judges may, once a proceeding has been initiated, issue subpoenas for the production of

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[3] *See* Copyright Royalty Judges, Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, Feb. 19, 2014 ("Scheduling Order").

[4] As discussed below, *see infra* Section II, the statutory procedures providing brief windows for amendment of direct testimony and filing any written rebuttal statement do not cure this fundamental information deficit. In particular, as the Judges emphasized in their Scheduling Order, any "Written Rebuttal Statements shall be limited to rebuttal testimony of witnesses and legal memoranda addressing solely and directly issues raised in the direct case." Scheduling Order at 3.

documents upon a determination that the Judges' resolution of the proceeding would be "substantially impaired" without the benefit of the information sought thereby.[5] *See* Rich Decl. ¶ 20. The Register of Copyrights has confirmed that the Judges' subpoena power includes the authority to issue subpoenas to non-participants as well as participants in the proceeding. *See* Copyright Office, Copyright Royalty Judges' Authority to Subpoena a Nonparticipant to Appear and Give Testimony or to Produce and Permit Inspection of Documents or Tangible Things, 75 Fed. Reg. 13306, 13310 (Mar. 19, 2010) ("*2010 Subpoena Opinion*").

By this motion, Pandora asks the Judges to invoke that subpoena power to elicit targeted information from certain digital music services that have entered into private agreements with record labels. Simply put, absent the requested subpoenas, the Judges' resolution of this proceeding will be substantially impaired. Without the requested information, Pandora and other service-side participants cannot effectively prepare written direct testimony that reflects the broad spectrum of marketplace agreements, and will be significantly constrained in responding to the specific questions presented in the *Web IV Notice*. The Judges, therefore, will not have the benefit of party submissions that mutually are fully informed by, and engage with, the totality of available data. Instead, the Judges will risk making their decision on a record that is incomplete and imbalanced, and that invites the record industry, with better access to marketplace agreements, to present a selective analysis that reflects only the data favorable to it. Rich Decl. ¶¶ 17-18. Especially given the Judges' own recognition in the *Web IV Notice* that "the Judges are best served if the participants, their economic witness and their counsel craft arguments in a

[5] Specifically, the Judges may issue subpoenas "commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things, if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired in the absence of such testimony or production of documents or tangible things." 17 U.S.C. § 803(b)(6)(C)(ix). This authority is supplemented by the similar empowerment of the Judges to "request[] the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact." *Id.*

manner that assists the Judges identifying and applying the optimal economic analysis when establishing rates and terms pursuant to the Act," 79 Fed. Reg. at 413, the requested subpoenas will enable Pandora and other service-side participants to undertake those analyses on equal footing with the record industry, and will ensure the reliability, fairness and integrity of the Judges' determination.

## ARGUMENT

### I. THE JUDGES' RESOLUTION OF THIS PROCEEDING WILL BE SUBSTANTIALLY IMPAIRED AND PANDORA WILL BE SEVERELY PREJUDICED IN THE ABSENCE OF THE INFORMATION SOUGHT IN THE SUBPOENAS

#### A. Pandora's Lack of Basic Information Concerning Marketplace License Transactions Will Impair the Judges' Stated Interest in a Fuller Understanding of Industry Economics

The Copyright Act authorizes the Judges to issue subpoenas when, in the absence of the material sought, they would be "substantially impaired" in their resolution of the proceeding. 17 U.S.C. § 803(b)(6)(C)(ix). While the statute does not further define "substantially impaired," it is evident from the legislative history that Congress granted the Judges the subpoena power to ensure that they made their determinations on the basis of a comprehensive evidentiary record: "The purpose of this provision is to give the decisionmakers a means to create a more complete record upon which to make their decisions." H.R. Rep. No. 108-408, at 33 (2004). Under prior administrative regimes lacking the subpoena power (the Copyright Royalty Tribunal and the Copyright Arbitration Royalty Panels), Congress observed that participants were able to avoid inconvenient data simply by limiting the scope of their direct testimony: "Historically, the process has allowed parties to circumscribe the type and amount of evidence considered by limiting discovery to documents underlying a party's direct case and by limiting the decisionmakers' authority to request additional evidence." *Id.* This ability to cherry-pick the

most favorable evidence, Congress recognized, had adversely affected the quality of the prior tribunals' adjudications: "Consequently, decisionmakers have set rates or made distributions in some instances without the benefit of the most probative evidence or access to witnesses that, for example, were better to explain [] the intricacies of a study or explain the rationale for specific provisions in a negotiated agreement." *Id.* Congress thus determined that "the grant of subpoena power [] will alleviate this problem." *Id.* And, in addition to specifically authorizing the Judges' use of the subpoena power, Congress granted the Judges inherent and express authority to manage the conduct of the proceedings before them, as the Judge's recently recognized. *See* 17 U.S.C. § 801(c) ("The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter."); *see also* Scheduling Order at 3 (recognizing the Judges' "inherent authority to manage proceedings and the explicit authority granted by section 801(c) of the Act.").

This congressional recognition and response is consonant with the more general recognition that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation," *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 540 n. 25 (1987) (citation omitted) – and that "one purpose of discovery is to create equally informed parties and, in that sense, a level playing field." *Chiperas v. Rubin*, No. 96-130, 1998 WL 765126, at *4 (D.D.C. Nov. 3, 1998).

The Judges themselves have recently affirmed the importance of developing a more comprehensive record in aid of an optimal determination, explaining in the *Web IV Notice* that "the Judges are best served if the participants, their economic witnesses, and their counsel craft arguments in a manner that assists the Judges in identifying and applying the optimal economic analysis when establishing rates and terms pursuant to the Act." *Web IV Notice*, 79 Fed. Reg. at

413. At the same time, the Judges have recognized that information *supplied by the parties* will, for better or worse, form the bedrock of the ultimate determination – indeed, that "a judge will, for the most part, be limited by what the parties serve up to her." *Id.* (citing Patricia Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, 50 DUKE J.L. & CONTEMP. PROB. 225, 228 (1987)); *see also* Rich Decl. ¶ 4.

The absence of the information sought by subpoena via this motion will substantially impair the Judges' ultimate resolution of the proceeding by substantially impeding Pandora's ability to prepare its rate case and respond meaningfully to issues of the type raised by the *Web IV Notice* and increasing the likelihood that the Judges' will receive a biased presentation of the critical issues in dispute. First and foremost, Pandora's preparation of a direct case that is maximally effective and meaningful for the Judges necessarily implicates a more comprehensive understanding of the digital music licensing market than that which Pandora presently possesses. Specifically, as the prior proceedings demonstrate,[6] the Judges' determination in this proceeding without doubt will involve a careful analysis of private and voluntary agreements entered into between record companies and a variety of music users; certain of these agreements, in turn, will be claimed – with various adjustments – to constitute "benchmarks" for statutory rates.[7] *See* Rich Decl. ¶ 13. Pandora and other participant services presently lack access to nearly all such agreements, the rates, terms and resulting economics of which are not matters of public record. This dearth of information, if left uncorrected, will severely limit Pandora's and its experts' ability to fashion a rate proposal (including the appropriate rate structure and accompanying

[6] *See Web IV Notice*, 79 Fed. Reg. at 413 ("[A]s a practical and strategic matter, participants in these proceedings carefully consider prior rate proceedings as roadmaps to ascertain the structure of the rates they propose.").

[7] For example, in both *Web II* and *Web III*, the Judges determined the applicable rate for non-interactive webcasting services in part by applying adjustments to benchmark rates derived from negotiated agreements for interactive services. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24092-93 (May 1, 2007) ("*Web II*"); *Web III Remand* at 48-65.

terms) that is responsive to, and aids the Judges' resolution of, the core inquiry: a determination of "reasonable" rates and terms reflecting those that would be observed in a competitive marketplace.

Pandora thus seeks targeted, easily-gathered information that fills this evidentiary gap and goes directly to the specific issues identified by the Judges in the Notice.[8] Specifically, Pandora seeks license agreements and basic usage and payment information[9] from a small number of leading providers in three categories of digital music services:

- **Interactive/On-Demand Digital Music Services**: These services (*e.g.*, Spotify, Rhapsody, Beats) allow their users to select and listen to specific songs and/or albums on demand (as distinguished from non-interactive services that select the particular song for the user). *See* Larson Decl. ¶ 3; *Web III Remand* at 47. For this reason, interactive services do not qualify for the Section 114 statutory license and must obtain sound recording performances licenses directly through negotiation with sound recording owners. In four prior CRB proceedings (*Web II, Satellite I, Satellite II, and Web III*), SoundExchange has presented the royalty rates paid by interactive digital music services as its primary benchmark for rates proposed to be paid (after various adjustments) by non-interactive webcasters and satellite radio providers.[10] In at least three of the above-mentioned proceedings, the Judges have relied to some degree on the interactive service benchmark in setting rates for the services at issue.

- **Interactive Video Services:** While audio-only interactive services have played a more prominent role in prior Copyright Royalty Board proceedings, many consumers now obtain much of the music they consume from interactive *video* services. Indeed, YouTube, the best-known video service, was widely reported

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[8] Under the governing regulations, subpoenas "shall specify with reasonable particularity the materials to be produced or the scope and nature of the required testimony." 17 U.S.C. § 803(b)(6)(C)(ix).

[9] The usage and payment information includes subscriber counts, performance counts, and revenues as reported to the record companies in the services' periodic royalty reporting, as well other consideration, such as advances and/or equity grants. *See, e.g., Web III Remand* at 52-53 (discussing SoundExchange expert's use of revenue and play counts reported by interactive services to record companies).

[10] *See Web II,* 72 Fed. Reg. at 24092-93; Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4092-93 (Jan. 24, 2008) ("*Satellite I*"); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054, 23062 (Apr. 17, 2013) ("*Satellite II*"); *Web III Remand* at 48-65.

recently to be the largest single source of music listening for teens.[11] In the *Satellite I* proceeding, SoundExchange experts used differential per-play rates from video agreements to adjust benchmark rates for interactivity. *See* 73 Fed. Reg. at 4093 n.35. In *Satellite II*, Stephen Bryan of Warner Music Group likewise offered testimony about Warner's license agreements with YouTube and Vevo, which he identified as the two services that "dominate" the interactive video market. *See Written Direct Statement of SoundExchange*, Testimony of Stephen Bryan, *Satellite II*, at 13 (Nov. 29, 2011) *available at* http://www.loc.gov/crb/proceedings/2011-1/pss/sx_vol_2.pdf

- **Noninteractive Webcasters**: This category ranges from AM/FM simulcasts to pre-programmed genre and decade-based channels programmed completely by the service to so-called "customized" services that create personalized stations for users in response to various types of user input (identification of a "seed" artist or track, "thumbs-up" rankings, etc.). *See* Larson Decl. ¶ 5. Even where playlists are influenced by user input, however, the noninteractive services share a common characteristic: unlike on-demand services, users cannot select the specific songs that they hear. *See Web III Remand* at 51-52. Because noninteractive services typically are able to rely on the statutory license, license agreements between such services and record labels are quite rare. At the same time, because they represent the very service category to be addressed in this proceeding, such agreements are of particular interest – and will be a focus – here.[12]

*See also* Rich Decl. ¶¶ 22-23. The requested agreements for these services should provide important information about whether there is "variation" in negotiated rates across a range of market buyers and sellers (thus addressing question #1 in the *Web IV Notice*), whether the implementation of "Most Favored Nations" clauses leads to more uniform pricing, and whether independent labels charge different rates than majors. *See Web III Remand* at 61 (noting SoundExchange's failure to include data from independent labels).[13] The agreements will also inform the issue of whether record companies are able to demand a higher share of revenue from

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[11] *See, e.g.*, *Music Discovery Still Dominated by Radio, Says Nielsen Music 360 Report*, NIELSEN.COM (Aug. 14, 2012), *available at* http://www.nielsen.com/us/en/press-room/2012/music-discovery-still-dominated-by-radio--says-nielsen-music-360.html.

[12] 17 U.S.C. §114(d)(2)(B) explicitly invites the Judges to consider "voluntary license agreements" between record companies and services otherwise "eligible" for the statutory license.

[13] Pandora has directed the subpoenas to the leading digital music services rather than the record company licensors in part because it results in fewer subpoenas (there are a handful of services who likely contract with dozens or even hundreds of labels) and also because it is not publicly known which specific labels, in particular which *independent* labels, have entered into agreements with the various digital services.

on-demand services (low elasticity buyers that must provide their users with access to virtually all available sound recordings) than from non-interactive services (higher elasticity buyers that choose what songs to play for their users and therefore have more ability to substitute away from higher-priced music inputs) – thus addressing Question #2 in the *Web IV Notice*.[14]

The requested royalty payment information (which should exist in summary fashion in already-existing royalty statements) will likewise address the first two questions in the *Web IV Notice* by revealing the size of the various services (relative to each other and the participant services in this proceeding); whether they pay according to the per-performance, per-subscriber, or percent-of-revenue prong of their respective rate formulas; variations in usage and payment across service tiers (many services offer both on-demand and non-interactive channels, as well as free, advertising-supported tiers and subscription tiers); and, ultimately, the effective rates actually paid by the services when all the usage and payment information above is factored in to the rate formula, including the exclusion of non-compensable performances.[15] This information will also address the Judges' third question in the *Web IV Notice* addressing the advantages and disadvantages of a per-performance royalty rate, as it will demonstrate whether percent-of-revenue or per-subscriber metrics are common in marketplace agreements, how industry participants protect against the issues identified by the Judges (*e.g.*, "disproportionate" use of music by low-revenue services), and whether those issues actually arise between the significant commercial entities who lead the market. *Cf. Web III Remand* at 14 n.18, 24 n.22, 31 n.26 (discussing potential viability of a percent-of-revenue rate structure).

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[14] The Judges' second question asks whether the rates set by the Judges should embody some form of price discrimination, that is, the ability of sellers to increase prices to buyers in certain submarkets that exhibit a less elastic demand curve. *Web IV Notice*, 79 Fed. Reg. at 413.

[15] In prior CRB proceedings, such royalty statements have been the primary source of information factored into the rate models of the various economic experts. *See, e.g.*, *Web III Remand* at 52-53; Ordover Testimony at 18-20.

### B. Pandora's Information Imbalance Vis-à-Vis the Opposing Record Industry Participants Also Substantially Impairs the Judges' Resolution of the Proceeding

Without the requested subpoenas, not only will the Judges' resolution of the proceeding suffer from the foregoing impediments to Pandora's ability to present its case fully, but also will be substantially impaired by the fact that the record industry's CRB litigating arm, SoundExchange, operates under no similar disadvantage. SoundExchange's members (and its likely witnesses in the proceeding) are the very record companies that have entered into the above-described voluntary marketplace agreements with digital music users that have in the past proven critical to both SoundExchange's rate proposals and the Judges' determinations. SoundExchange thus presently has access to documents and information that Pandora does not, as evidenced recently by statements made by SoundExchange representatives to executives of Pandora. *See generally* Harrison Decl. Those disclosures revealed that SoundExchange and its lawyers had already obtained non-public agreements between Apple and various record companies for its iTunes Radio service and analyzed those agreements to determine their potential applicability to Pandora. *See id.* ¶ 5. This informational imbalance will substantially impair the Judges' resolution of these proceedings by upending the fairness of the proceeding in a manner that is highly prejudicial to Pandora and, if left uncorrected, will undermine the Judges' ability to arrive at a reasonable rate determination on the basis of a balanced record. In particular, SoundExchange's present access to such agreements, and familiarity with the context in which they were negotiated, enables the record industry, well in advance of the due dates for direct case submissions, to:

- sift through and analyze the agreements and accompanying payment information;
- make judgments as to those that optimize its case (typically, those agreements where the major record labels have been able to secure the highest rates), while effectively "burying" the rest;[16] and
- share (collectively through SoundExchange) those documents it deems desirable with the record industry's retained economists.[17]

*See* Rich Decl. ¶ 18; *Web III Remand* at 51 (describing 214 agreements provided to Dr. Pelcovits in preparation for his written direct testimony).

Such early and exclusive access by the record industry to a range of potentially relevant marketplace license deals severely prejudices Pandora and other participant services, which first learn of the content and context (and often the very existence) of such agreements only after the parties have committed to their written direct statements – and with all too little time to take account of their implications or build them into their own case presentations. *See infra* Section II. The informational imbalance also enables the record industry to cherry-pick those agreements it likes while discarding the rest, posing the very real prospect that neither the Judges nor Pandora and the other services on which the record industry seeks to press its preferred rates may never gain access to other agreements, or obtain them only after a drawn-out motion to compel process that often extends well past the close of discovery. *See* Rich Decl. ¶¶ 18, 26. The legislative history cited above, *see supra* Section I.A., suggests that Congress intended to prevent precisely this result.

In sum, without the information requested in the subpoenas, the Judges will be substantially impaired in rendering an ultimate resolution of the proceedings. Pandora and other

[16] For example, in the *Satellite II* proceeding, SoundExchange's direct case made no mention of so-called "custom" non-interactive webcasters like Slacker and Last.fm, which paid rates far lower than the on-demand services proffered as benchmarks by SoundExchange. *See* Rich Decl. ¶19.

[17] When cross-examined in *Satellite II*, SoundExchange economist Janusz Ordover admitted that he had only been shown whatever documents SoundExchange and its counsel wanted him to see. *See Satellite II* 6/14/2012 Tr. at 2309:18-2311:10.

service-side participants will be significantly impeded in their ability to respond comprehensively to the specific questions posed by the Judges and more generally to offer written direct statements that are informed by the broad range of actual private agreements negotiated in the marketplace. And the impairment of the Judges' decision-making is only exacerbated by the informational imbalance between Pandora and the record industry: there is a significant risk that the Judges will make their determination on the basis of an incomplete and skewed record. The requested subpoenas are therefore warranted to ensure the fairness and integrity of the rate determination.

## II. SUBSEQUENT PROCEEDINGS WILL NOT REMEDY THE EFFECTS OF THE INFORMATION DEARTH AND ASYMMETRY

The untenable posture in which Pandora finds itself, and the resulting impairment to the Judges' ability to reach a reasonable determination of this proceeding, cannot be meaningfully remedied by discovery between the parties or by Pandora's ability to amend its written direct statement. As an initial matter, the non-subpoena discovery procedures provided by the statute are limited to adversarial discovery between opposing parties and, at that, are available only *after* the submission of written direct statements. *See* 17 U.S.C. § 803(b)(6)(C)(ii)(I). As such, they necessarily are of no aid either in eliciting the universe of potentially apposite licensing benchmarks or in obtaining such information in time to incorporate it into written testimony.

In addition, the existing adverse party discovery regime provides only limited means for Pandora to cross-examine the selective sampling of proffered benchmarks put forward by the record industry in its substantive case. For one, it is limited in scope. Under the Copyright Act, requested documents must "directly relate[] to the written direct statement" of the opposing participant to which the discovery request is directed. *See* 17 U.S.C. § 803(b)(6)(C)(v); *see also* Rich Decl. ¶ 24. As prior experience has shown, this limitation raises the realistic prospect that a

participating service like Pandora would receive only a limited subset of the potentially relevant agreements, namely, those agreements on which SoundExchange has chosen to rely. *See* Rich Decl. ¶ 24. Such an outcome would leave services like Pandora, as well as the Judges, in the dark concerning the full universe of potentially relevant benchmark agreements.

The post-filing discovery process is also confined to an extremely abbreviated period of sixty (60) days. *See* 17 U.S.C. § 803(b)(6)(C)(iv). As discussed in the accompanying Declaration of R. Bruce Rich, the time required for obtaining a full grasp of the volume and complexity of the discovery involved, let alone attempting to have one's economists thoughtfully consider the implications of the newly discovered information for economic models already developed and presented, simply exceeds that available in these proceedings. *See* Rich Decl. ¶ 25. This alone renders the amendment opportunity – whereby the parties have until 15 days from the close of discovery to incorporate the information adduced in the discovery process into amended testimony – a non-solution to the above-stated limitations. *See* 17 U.S.C. § 803(b)(6)(C)(i); *see also* Rich Decl. ¶ 25. Even were it otherwise, prior experience has demonstrated that the opposing-party discovery process inevitably involves disputes and contested motion practice that can linger well past the discovery deadline set by the statute. *See* Rich Decl. ¶¶ 25-26. As a result of discovery disputes, this evidence – often some of the most probative in the case – can arrive late into the discovery period, or even after the discovery period or amendment deadline has concluded. *Id.* ¶ 26. Obviously, information received after the deadline for filing amended statements cannot be incorporated into that amended testimony. *Id.* As a practical matter, the limitations inherent in the process give the record industry a monopoly on the affirmative use (or not) of scores of marketplace agreements.

Nor does the rebuttal phase of the proceeding serve as an adequate substitute for the subpoenas Pandora seeks here. To be sure, the rebuttal phase offers each side an opportunity to critique the other side's direct case while discussing what information has been disclosed during direct-case discovery. But this opportunity comes only in the context of challenging the opposing side's position; it falls far short of providing participating services with the chance to use any newly discovered agreements in the supplementation or adjustment of their own direct-case positions. *See* Scheduling Order at 3. Moreover, as a practical matter, any eleventh-hour revisions to a party's rate position based on newly provided agreements comes on the heels of a multi-week trial and extensive record already established – after the Judges have spent significant time considering the case. As a result, information presented in rebuttal is often of far less import than had the same information been presented as a part of a direct case. *See* Rich Decl. ¶ 27.

In sum, because the opposing party discovery mechanisms provided under the Copyright Act are limited as to timing, duration and scope, they are insufficient to cure the inherent information imbalance between the licensor record companies and the licensee services prior to such direct case submissions. This imbalance necessarily affects the quality and comprehensiveness of those submissions, and, therefore, the evidentiary record available to the Judges to make their determination. The requested subpoenas, by contrast, can meaningfully ameliorate the present information imbalance by affording Pandora the information it requires to fully participate in this proceeding.

## III. THE REQUESTED SUBPOENAS MEET THE STATUTORY TEST FOR THEIR ISSUANCE AT THIS STAGE OF THE PROCEEDING

Pandora acknowledges that the Judges have in the past indicated that subpoenas are appropriate "at the initial stage of the filing of written direct statements" only in "rare instances,"

*see* Copyright Royalty Board, Order Denying Issuance of Subpoenas for Nonparty Witnesses, Docket No. 2009-1 (March 5, 2010) at 2 – even going so far as to opine that "[s]ubpoenas are not permitted for the purposes of building one or more party's direct cases." *Id.* at 3. Despite those cautions, the Judges have affirmed that they have the authority to issue subpoenas at any stage of the proceeding, *see id.* at 1.n1,[18] and Pandora respectfully submits that the predicate facts and circumstances supporting the relief sought by the instant motion fully satisfy the statutory "substantial impairment" standard, warranting a departure from past practice.

As discussed, the economic stakes in this proceeding are enormous, implicating cumulative fees for Pandora alone in excess of a billion dollars. Pandora suffers from tremendous information deficits and disadvantages that are prejudicial in its preparation of a case of this magnitude. The Judges likewise have acknowledged the significance of the *Web IV* proceeding, informed as it will be upon the prior webcasting proceeding records and economic models. As Pandora reads the *Web IV Notice,* the Judges are seeking assistance in bringing those records and the economic thinking embedded in the prior determinations forward in light of current marketplace circumstances. And the Judges have specifically requested that the parties' responses be provided as part, *inter alia,* of their "written direct statements." *See Web IV Notice,* 79 Fed. Reg. at 413. By definition, accomplishing that objective in advance of the filing of written direct cases entails the parties (certainly the services) timely gaining access to information they do not have and cannot, without aid of subpoena, otherwise obtain at this juncture of the proceeding.

[18] The only statutory requirement with respect to the time at which a subpoena may issue is that the subpoena issue in the context of a commenced "proceeding[] to determine royalty rates." 17 U.S.C. § 803(b)(6)(C)(ix). This proceeding commenced on January 3, 2014. As noted above, the Judges also have recently affirmed their inherent and express authority to manage the proceedings. *See* Scheduling Order at 3; 17 U.S.C. § 801(c).

These factors set the instant motion apart from past efforts to gain issuance of subpoenas, where no similar showing of magnitude of potential prejudice was made, where no similar requests of the parties for a broad understanding of market dynamics were pending from the Judges, and where the requests were denied as premature. This is manifestly not the case here, particularly in light of the Judges' call for an informed discussion of specific questions in the written direct statements that cannot thoroughly be answered by Pandora based on presently available information. Accordingly, without difficulty, the Judges can conclude that in the absence of the information sought by the subpoenas, they stand to be deprived of "the benefit of the most probative evidence," H.R. Rep. No. 108-408 at 33, and, correspondingly, that resolution of the case would be "substantially impaired."[19]

[19] To the extent the Judges determine that (a) the Copyright Act or its accompanying regulations do not permit the issuance of a subpoena at this stage of the proceeding (*i.e.*, before written direct statements are submitted); or (b) on the facts described here and in the accompanying declarations, the Judges' resolution of the proceeding, absent the subpoena, would not be "substantially impaired" as that term has been previously interpreted by the CRB, Pandora respectfully requests that the Judges refer the appropriate question to the Register of Copyrights pursuant to 17 U.S.C. § 802(f)(1). That statute authorizes the Judges, as well as any participant in the proceeding (by Motion to the Judges), to request from the Register an "interpretation of any material questions of substantive law that relate to the construction of provisions of this title and arise in the course of the proceeding." *Id.* § 802(f)(1)(A). Although Pandora believes the standard for issuing the subpoenas at this stage of the proceeding is easily met here, should there be any doubt whether the Judges' resolution of the proceeding would be "substantially impaired" in the absence of the requested information, the Judges should certify the question concerning their authority to issue subpoenas at this stage, or the proper interpretation of the "substantial impairment" standard, to the Register of Copyrights.

## CONCLUSION

For the foregoing reasons, the Judges should issue the annexed subpoenas.

Dated: March 10, 2014

Respectfully submitted,

By: R. Bruce Rich /SMH

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*Attorneys for Pandora Media, Inc.*

# EXHIBIT A

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Spotify USA Inc.<br>c/o CT Corporation System<br>111 Eighth Avenue<br>New York, NY 10011 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Spotify," "you" and "your" shall mean Spotify USA Inc. and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Spotify becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Spotify is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Spotify shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All agreements in effect during the Period between Spotify and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement between Spotify and a Record Company or other licensor referred to in Request No. 1, all royalty statements and/or statements of account delivered from Spotify to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Spotify reports to its licensors): (1) the number of Spotify subscribers/users at each tier of service and fee level (*e.g.*, users of free tiers versus subscribers for each paid tier and fee level); (2) the number of streams/performances made by Spotify in each tier of service and fee level, including the number of streams on free versus on each paid-subscription tier of the Spotify service, and to mobile devices versus desktop/laptop computers;

(3) the number of on-demand streams versus non-interactive or "push" streams on each tier of service; (4) advertising and other ancillary revenue for each tier of service; (5) subscription revenue for each tier of service; and (6) total payments paid by Spotify to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement between Spotify and a Record Company or other licensor referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Spotify to the Record Company.

# EXHIBIT B

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Google Inc.<br>c/o Corporation Service Company which will do Business in California as CSC – Lawyers Incorporating Service<br>2710 Gateway Oaks Drive, Suite 150N<br>Sacramento, CA 95833 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Google," "you" and "your" shall mean Google, Inc. and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. "Google Play All Access" means the music streaming service offered by Google.

4. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Google becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Google is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to

respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Google shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All license agreements in effect during the Period covering the Google Play All Access service between Google and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement covering Google's Google Play All Access service referred to in Request No. 1, all royalty statements and/or statements of account delivered from Google to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Google reports to its licensors): (1) the number of Google Play All Access subscribers/users at each tier of service and fee level (e.g., users of free tiers versus subscribers for each paid tier and fee level); (2) the number of streams/performances

made by Google Play All Access in each tier of service and fee level, including the number of streams on free versus on each paid-subscription tier of the Google Play All Access service, and to mobile devices versus desktop/laptop computers; (3) the number of on-demand streams versus non-interactive or "push" streams on each tier of service; (4) advertising and other ancillary revenue for each tier of service; (5) subscription revenue for each tier of service; and (6) total payments paid by Google for its Google Play All Access service to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement between Google's Google Play All Access service and a Record Company or other licensor referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Google to the Record Company.

# EXHIBIT C

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

## SUBPOENA DUCES TECUM
## TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Beats Music, LLC<br>c/o Luke Wood<br>1601 Cloverfield Boulevard, Suite 5000N<br>Santa Monica, CA 90404 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Beats Music," "you" and "your" shall mean Beats Music, LLC and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Beats Music becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Beats Music is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to

respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Beats Music shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All agreements in effect during the Period between Beats Music and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists. (To the extent Beats Music is licensed via agreements between a Beats predecessor, i.e., MOG, and the above-name entities, this request includes such agreements.)

2. For each agreement between or covering Beats Music and a Record Company or other licensor referred to in Request No. 1, all royalty statements and/or statements of account delivered from Beats Music to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Beats Music reports to its licensors): (1) the number of Beats Music subscribers/users at each tier of service and fee level; (2) the number of

streams/performances made by Beats Music in each tier of service and fee level, including the number of streams to mobile devices versus desktop/laptop computers; (3) the number of on-demand streams versus non-interactive or "push" streams on each tier of service; (4) subscription revenue for each tier of service; and (5) total payments paid by Beats Music to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement between or covering Beats Music and a Record Company or other licensor referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Beats Music (or other related entity) to the Record Company.

# EXHIBIT D

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Rhapsody International, Inc.<br>c/o David Rosenberg<br>1420 Fifth Avenue, Suite 1500<br>Seattle, WA 98101 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Rhapsody," "you" and "your" shall mean Rhapsody International and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf, including RealNetworks, Inc. (For example, to the extent the requested agreements were executed in the name of RealNetworks, Inc. rather than Rhapsody, the requests should be interpreted to include and cover RealNetworks, Inc.)

3. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Rhapsody becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Rhapsody is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Rhapsody shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All agreements in effect during the Period between or covering Rhapsody and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement covering Rhapsody referred to in Request No. 1, all royalty statements and/or statements of account delivered from Rhapsody to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Rhapsody reports to its licensors): (1) the number of

Rhapsody subscribers/users at each tier of service and fee level (e.g., users of free tiers versus subscribers for each paid tier and fee level); (2) the number of streams/performances made by Rhapsody in each tier of service and fee level, including the number of streams on free versus on each paid-subscription tier of the Rhapsody service, and to mobile devices versus desktop/laptop computers; (3) the number of on-demand streams versus non-interactive or "push" streams on each tier of service; (4) advertising and other ancillary revenue for each tier of service; (5) subscription revenue for each tier of service; and (6) total payments paid by Rhapsody to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement covering Rhapsody referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Rhapsody to the Record Company.

# EXHIBIT E

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Cricket Communications, Inc.<br>c/o Corporation Service Company which will do Business in California as CSC – Lawyers Incorporating Service<br>2710 Gateway Oaks Drive, Suite 150N<br>Sacramento, CA 95833 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Cricket," "you" and "your" shall mean Cricket Communications, Inc. and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Cricket becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Cricket is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Cricket shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All agreements in effect during the Period between Cricket (and/or Muve Music, as the case may be) and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement between Cricket (or Muve) and a Record Company or other licensor referred to in Request No. 1, all royalty statements and/or statements of account delivered from Cricket to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2010.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Cricket (or Muve) reports to its licensors): (1) the number of Cricket/Muve subscribers/users at each tier of service and fee level; (2) the number of streams/performances made by Cricket/Muve in each tier of service and fee level; (3) subscription revenue for each tier of service; and (4) total payments paid by Cricket/Muve to

each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement between Cricket (or Muve) and a Record Company or other licensor referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Cricket/Muve to the Record Company.

# EXHIBIT F

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

## SUBPOENA DUCES TECUM
## TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Rdio, Inc.<br>c/o New Season Corporate Services<br>4600 Larson Way<br>Sacramento, CA 95822 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Rdio," "you" and "your" shall mean Rdio, Inc. and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Rdio becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Rdio is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Rdio shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All agreements in effect during the Period between Rdio and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement between Rdio and a Record Company or other licensor referred to in Request No. 1, all royalty statements and/or statements of account delivered from Rdio to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Rdio reports to its licensors): (1) the number of Rdio subscribers/users at each tier of service and fee level (e.g., users of free tiers versus subscribers for each paid tier and fee level); (2) the number of streams/performances made by Rdio in each tier of service and fee level, including the number of streams on free versus on each paid-subscription tier of the Rdio service, and to mobile devices versus desktop/laptop computers; (3)

the number of on-demand streams versus non-interactive or "push" streams on each tier of service; (4) advertising and other ancillary revenue for each tier of service; (5) subscription revenue for each tier of service; and (6) total payments paid by Rdio to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement between Rdio and a Record Company or other licensor referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Rdio to the Record Company.

# EXHIBIT G

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

## SUBPOENA DUCES TECUM
## TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Google Inc.<br>Corporation Service Company which will do Business in California as CSC – Lawyers Incorporating Service<br>2710 Gateway Oaks Drive, Suite 150N<br>Sacramento, CA 95833 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Google," "you" and "your" shall mean Google, Inc. and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. References to the "YouTube service" are intended to cover both the existing YouTube video service as it has been offered throughout the Period as well as the recently announced YouTube on-demand music streaming service. (*See* Pham, Alex, *Youtube Close to Launching Subscription Music Service*, BILLBOARD (Oct. 23, 2013), *available at* http://www.billboard.com/biz/articles/news/digital-and-mobile/5763268/youtube-close-to-launching-subscription-music-service; Sisaro, Ben, *YouTube Said to Introduce Paid Service for Music*, NEW YORK TIMES (Oct. 24, 2013), *available at* http://www.nytimes.com/2013/10/25/business/media/youtube-said-to-introduce-paid-music-service.html.)

4. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Google becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Google is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Google shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All license agreements in effect during the Period covering the YouTube service between Google (or YouTube, as the case may be) and: (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement covering the YouTube service referred to in Request No. 1, all royalty statements and/or statements of account delivered from Google/YouTube to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Google/YouTube reports to its licensors): (1) the number of users of the YouTube service; (2) the number of streams/performances of music content made by the YouTube service, including the number of streams of music content to mobile devices versus desktop/laptop computers; (3) advertising and other ancillary revenue for streams/performances of music content on the YouTube service; and (4) total payments paid by Google/YouTube for the YouTube service to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement covering the YouTube service referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Google/YouTube to the Record Company.

# EXHIBIT H

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>VEVO, LLC<br>c/o Sunny Sun<br>21011 Granite Wells Road<br>Walnut, CA 91789 |
| 1. At the Request of : *(party name)*<br><br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A.**

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Vevo," "you" and "your" shall mean Vevo, LLC and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Vevo becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Vevo is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Vevo shall so state in writing.

## REQUESTS FOR DOCUMENTS

1. All license agreements in effect during the Period between Vevo and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement between Vevo and a Record Company or other licensor referred to in Request No. 1, all royalty statements and/or statements of account delivered from Vevo to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Vevo reports to its licensors): (1) the number of Vevo users; (2) the number of streams/performances made by Vevo, including the number of streams to mobile devices versus desktop/laptop computers; (3) advertising and other ancillary revenue for streams/performances; and (4) total payments paid by Vevo to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement between Vevo and a Record Company or other licensor referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Vevo to the Record Company.

# EXHIBIT I

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

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| **DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | ) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY BOARD TO:** | *(name and address of person being subpoenaed)*<br>Slacker, Inc.<br>c/o Charles Kimmel<br>16935 W. Bernardo Drive, Suite 270<br>San Diego, CA 92127 |
| 1. At the Request of : *(party name)*<br>**Pandora Media, Inc.** | *(name, address, and telephone of contact person)*<br>R. Bruce Rich<br>Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>(212) 310-8170 |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Weil, Gotshal, and Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153 | April [15], 2014 at 9:00am (EST) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| Issuing Officer's Name, Address, and Telephone Number: | |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## DEFINITIONS

1. "Record Company" means any entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

2. "Slacker," "you" and "your" shall mean Slacker, Inc. and its directors, officers, board members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, representatives, and anyone else acting on its behalf.

3. Unless otherwise specified, the Documents requested are those referring to, or created during, the period from January 1, 2010 to the present (the "Period").

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event Slacker becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Slacker is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive documents encompass activities both within and outside the U.S., they should be produced in full.

3. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

4. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

5. These requests are intended to include all requested Documents in your possession, custody, control, or otherwise known or available to you, including Documents in the possession, custody, or control of your attorneys, agents, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf.

6. If there are no Documents responsive to any particular request, Slacker shall so state in writing.

**REQUESTS FOR DOCUMENTS**

1. All agreements in effect during the Period between Slacker and (a) a Record Company; (b) a distributor affiliated with and/or owned by Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); and/or (c) entities such as BMG, Orchard, Merlin, and IODA, that represent and/or enter into licensing agreements on behalf of independent Record Companies and/or artists.

2. For each agreement between Slacker and a Record Company or other licensor referred to in Request No. 1, all royalty statements and/or statements of account delivered from Slacker to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) since January 1, 2011.

3. To the extent not included in the royalty statements/statements of account produced in response to Request No. 2, documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Slacker reports to its licensors): (1) the number of Slacker subscribers/users at each tier of service and fee level (e.g., users of free tiers versus subscribers for each paid tier and fee level); (2) the number of streams/performances made by Slacker in each tier of service and fee level, including the number of streams on free versus on each paid-subscription tier of the Slacker service, and to mobile devices versus desktop/laptop computers;

(3) the number of on-demand streams versus non-interactive or "push" streams on each tier of service; (4) advertising and other ancillary revenue for each tier of service; (5) subscription revenue for each tier of service; and (6) total payments paid by Slacker to each Record Company or other licensor referred to in Request No. 1 and how those payments were calculated.

4. For each agreement between Slacker and a Record Company or other licensor referred to in Request No. 1, Documents sufficient to show any advances and/or equity grants paid and/or provided by Slacker to the Record Company.

Ex. 2

EX. 2

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR** |

**DECLARATION OF R. BRUCE RICH IN SUPPORT OF PANDORA'S MOTION FOR ISSUANCE OF SUBPOENAS**

I, R. Bruce Rich, under penalty of perjury, declare as follows:

1. I am a member of the law firm Weil, Gotshal & Manges LLP. Our firm has filed a Petition to Participate in the instant proceeding (herein "*Web IV*") on behalf of Pandora Media, Inc. ("Pandora"). This declaration, together with the accompanying Memorandum of Law and supporting Declarations of Christopher Harrison and Todd Larson, is submitted in support of Pandora's Motion for Issuance of Subpoenas so as to enable Pandora meaningfully to prepare its written direct statement.

**Introduction**

2. As the Judges fully appreciate, the *Web IV* proceeding will be of enormous consequence to the participants. Led by Pandora, streaming digital music services have become an integral part of the United States entertainment landscape. Consumers are increasingly turning to such services, with listening metrics increasing year-on-year at an impressive rate. For example, Pandora recently announced that in the month of February 2014, its listening hours reached over 1.5 billion, an increase of 9% from the previous year. Pandora's active listenership reached 75.3 million, an 11% increase from February 2013. Pandora's listenership now

represents approximately 8.9% of all U.S. radio listening. *See* Press Release: Pandora Announces February 2014 Audience Metrics, *available at* http://press.pandora.com/phoenix.zhtml?c=251764&p=irol-newsArticle&ID=1906775&highlight=.

3. This significant growth in the digital music sector shows no sign of slowing, and has been a boon to the record industry. According to its most recent annual report, SoundExchange collected more than a half-billion dollars in Section 112 and 114 statutory royalties in its 2012 fiscal year – an increase of some 35% over 2011 alone. SoundExchange expected to pay out over $500 million in 2013, five times more than the $100 million it paid out in 2008. Pandora's 2013 royalty payments alone amount to more than half of that total. With its sound recording license payments currently amounting to nearly 50% of its revenues, the importance to Pandora of the rate determination to be made in this proceeding cannot be overstated. More generally, it is no exaggeration to state that the future vitality of this sector of commerce stands to be materially affected by the Judges' ultimate rate determination here.

4. In announcing the commencement of this proceeding, the Judges aptly observed that the ultimate determination will be "best served if the participants, their economic witnesses, and their counsel craft arguments in a manner that assists the Judges in identifying and applying the optimal economic analysis when establishing rates and terms pursuant to the [Copyright] Act." *See* Copyright Royalty Board, Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (*Web IV*), 79 Fed. Reg. 412 (Jan. 3, 2014) ("*Web IV Notice*"). In a nutshell, "a judge will, for the most part, be limited by what the parties serve up to her." *Id.* (citing Patricia Wald, *Limits on the Use of Economic Analysis in Judicial Decisionmaking*, 50 DUKE J.L. & CONTEMP. PROB. 225, 228 (1987)).

5. To assist in that determination, the *Web IV Notice* poses a series of questions to Participants that the Judges invite to be addressed in the parties' proffers of "evidence, testimony and argument." Those questions probe potential economic variations "among buyers and sellers" in the digital music marketplace, taking account of differences in "sophistication, economic resources, business exigencies, and myriad other factors." The Notice goes on to inquire as to the import of such variation for rate-setting, including the desirability of differential pricing within the commercial webcaster market segment as well as alternative potential rate structures. *Id.* at 413-14.

6. The Judges' invitation to consider these complex matters is consistent with Pandora's interest in fully exploring such issues as it prepares for this consequential proceeding. What Pandora has come to realize, however, is that it is unable meaningfully to do so without the benefit of basic marketplace information reflecting agreements between the record industry and digital music services – which agreements are for the most part non-public in nature. The instant motion is directed at rectifying that dearth of information. It seeks leave to obtain presently, via subpoenas, targeted information about a number of the voluntary license agreements likely to be viewed by one or more Participants, as well as the Judges, as constituting potential benchmarks for the rates to be paid by Pandora and/or other Participants under the statutory license. Only by being afforded access to such information in time for it to be thoroughly analyzed and considered, including along the lines suggested by the *Web IV Notice,* will Pandora be able properly to prepare its case for submission to the Judges and, ultimately, for trial.

7. The relief sought by the instant motion also is dictated by fundamental fairness, insofar as the information to be elicited by the subpoenas is that which is already known to the record companies that will serve as witnesses for SoundExchange. Indeed, as described in the

accompanying Harrison Declaration, SoundExchange's counsel (and likely its economists) are already in possession of this very type of information and are actively analyzing it for purposes of formulating the record industries' rate proposals for Pandora.

**Relevant Experience**

8. Over the past 35 years, my firm and I have counseled clients and litigated a number of the leading cases in the music copyright field, with a particular specialization in judicial proceedings valuing public performances of musical works (so-called "rate court" proceedings transpiring in federal court under the auspices of government antitrust consent decrees partially regulating the activities of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music Inc. ("BMI")), as well as in proceedings valuing non-commercial uses of musical works and digital audio transmissions of sound recordings (and associated ephemeral uses of such works) before the Copyright Royalty Board ("CRB") and its predecessor Copyright Arbitration Royalty Panels ("CARPs"). Firm clients in such proceedings have included the ABC, CBS and NBC television networks; the nation's commercial local radio and television broadcast stations; the Public Broadcasting Service ("PBS"), National Public Radio ("NPR"), and the Corporation for Public Broadcasting; cable program services such as ESPN, MTV, Showtime, USA Networks and The Disney Channel; commercial music service providers such as Muzak LLC and DMX, Inc.; new media and webcasting companies including AOL, RealNetworks, MTVi, Yahoo! and Pandora; and satellite radio provider Sirius XM Radio Inc. ("Sirius XM").

9. Our firm's CARP representations have included litigating two CARP proceedings through final Determinations: (a) under Section 118 of the Copyright Act, rates and terms for PBS and NPR for the period 1998 to 2002; and (b) under Sections 112 and 114 of the Act, rates

and terms for various FCC-licensed broadcasters, as well as a number of webcasters and DMX, in the *Webcasting I* proceeding.

10. Our firm also has litigated three CRB proceedings through final Determinations and appeals thereof to the D.C. Circuit: rates and terms under Sections 112 and 114 for (a) entities represented by the Digital Media Association ("DiMA"), including numerous commercial webcasters, in the *Webcasting II* proceeding; (b) XM Satellite Radio in the *Satellite I* proceeding; and (c) Sirius XM in the *Satellite II* proceeding.

11. In addition, in 2002 and 2003, I was invited to provide congressional testimony concerning proposals for modifying then-CARP practice, and both provided written testimony and appeared before House subcommittees studying those issues. *See* Copyright Royalty and Distribution Reform Act of 2003: Hearing on H.R. 1417 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 108th Cong. (2003) (statement of R. Bruce Rich); Copyright Arbitration Royalty Panel (CARP) Structure and Process Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 107th Cong. 22-29 (2002) (statement of R. Bruce Rich).

12. This extensive experience has enabled me and my colleagues to become intimately familiar with both the technical processes governing, as well as the practical dynamics animating, CARP and now CRB ratemaking proceedings. These proceedings share in common with ASCAP and BMI rate court proceedings the goal of creating trial records enabling the respective jurists to determine "reasonable" fees for prescribed time periods. For webcasters, the aspirational "reasonable fees" in each of these fora are those approximating the fees that would be agreed upon in a hypothetical, effectively competitive market for the licensing of the rights at issue.

13. Further in terms of commonality, the determination as to what constitutes a reasonable fee does not lend itself to precise calibration; it is instead arrived at through the Judges' careful review of what are typically a host of proffered fee comparators – "benchmarks" – offered by the parties during the trial or hearing process. These benchmarks generally take the form of prior agreements between the parties to the proceedings themselves, or, as has been more typical in the CRB context, so-called "voluntary" marketplace agreements entered into between record companies and other non-statutory music users. Such agreements are then adjusted in various ways to account for, among other things, differences between the benchmark services and the services participating in the proceeding and any differences between the grant of rights licensed to the benchmark services and the rights at issue in the proceeding. As the *Web IV Notice* recognizes, the more comprehensive the information available to both sides concerning the merits and demerits of the range of potential benchmarks, the sounder the economic outcome of the proceeding will be.

**The Increasing Significance of CRB Proceedings**

14. At the time the CARP system was put into place in 1993, and even when the CRB replaced the CARP in 2005, it could be contended that the relatively small amounts of commerce at issue in those proceedings justified the format of filing formal rate proposals and supporting testimony in advance of discovery and, thereafter, of a relatively confined scope of, and timetable for, permissible discovery. Even at that, any conception of streamlined, cost-effective litigation proved illusory. In practice, even these earlier statutory license proceedings became endurance contests between typically well-funded litigants deploying large numbers of highly skilled lawyers racing against an inflexible series of short, statutorily-mandated deadlines. The

hearings themselves also proved to be anything but abbreviated, generating massive trial records featuring dozens of witnesses and hundreds of exhibits.

15. The reality concerning the resource expenditures devoted to subsequent CRB litigations has not changed, but the stakes surely have. As the public's appetite for digital media has grown exponentially, so, too, have the royalty dollars in contention. As noted, SoundExchange took in statutory royalties exceeding $500 million in 2012, and Pandora itself paid hundreds of millions in such fees under the current rate structure during 2013. Across the entire range of statutory licensees, the *Web IV* proceeding will involve record industry claims of entitlement to billions of dollars in fees over the 2016-2020 license term.

**The Inadequacy of Prior CRB Practice To Meet The Needs of the Current Proceeding**

16. The enormous stakes facing Pandora and other participants in this proceeding, coupled with the searching inquiry about industry economics Pandora understands the Judges to be seeking, strongly counsel in favor of a modest – but crucially important – departure from prior practice in the conduct of this proceeding.

17. In prior CRB proceedings, participants have submitted written direct testimony of lay and expert economic and other witnesses containing, by statutory requirement, the entirety of those participants' substantive positions as to reasonable rates and terms. Such submissions have been made without the benefit either of any discovery or of knowledge as to the positions of the opposing parties, whose direct case submissions are filed simultaneously. The effect of this practice, from the standpoint of participating services (such as Pandora here), has been to make the foundations and rationales of affirmative rate cases dependent upon either a given service's own prior license experience or such limited publicly available information as may exist regarding the potentially comparable license experience of other statutory and non-statutory

services. That circumstance, virtually by definition, drastically limits the ability of a participating service to take account of the universe of potentially relevant license benchmarks, and accordingly limits its and its economic experts' ability to develop comprehensive analyses of market dynamics in aid of offering optimal benchmarks for the Judges' consideration. A continuation of prior practice in this proceeding would virtually guarantee Pandora's inability to address at the crucial, direct written testimonial phase, many of the questions posed by the *Web IV Notice*, seeking as they do thoughtful comparative economic analyses of the range of commercial agreements in the digital music market.

18. SoundExchange, by comparison, operates under no similar disadvantage: because its members (and witnesses before the CRB) *are* the record companies that enter into such voluntary marketplace agreements, SoundExchange and its economists have essentially unlimited access to the full range of marketplace evidence far in advance of the submission of its written direct statement. As the record of prior CRB proceedings attests, SoundExchange's written direct cases and accompanying rate proposals routinely are built upon its own experts' analyses of a variety of licenses that certain of its member record companies have entered into with entities ranging from download sellers (*e.g.*, iTunes) to ringtone and ringback vendors, to on-demand ("interactive") services (*e.g.*, Rhapsody and Spotify). It is evident that the major record companies, whose agreements dominantly if not exclusively are featured in such analyses, freely share these otherwise non-public agreements with SoundExchange. SoundExchange's experts thereby have the benefit of many months of advance knowledge of the terms of these agreements in preparing the record industry's direct case, including enabling them carefully to sift through the body of such agreements, adopting those most favorable to the industry's case

and rejecting the balance. A recent such example of exclusive-to-the-record-industry data is recounted in the accompanying Harrison Declaration.

19. That informational imbalance is not only highly prejudicial to the participating services; it is suboptimal from the standpoint of a probing and efficient ratemaking process. Not surprisingly, SoundExchange presents the Judges with the marketplace evidence that it and its economists find most helpful to its case (typically reflecting those agreements where the major labels have been able to secure the highest rates). Absent from SoundExchange's testimonial submissions are agreements with services that pay rates below SoundExchange's desired range. (As but one example, in the recent *Satellite II* proceeding, SoundExchange's experts ignored so-called "custom" non-interactive webcasters such as Slacker and Last.fm that were far more comparable to Sirius XM in terms of service functionality and, it turned out, paid rates much lower than SoundExchange's proffered benchmark on-demand services.) Without the petitioning services themselves having access to a similar universe of potential benchmarks, the Judges' resulting exposure solely to such market data as support SoundExchange's case creates the realistic prospect that information with which the Judges should be provided will never see the light of day.

**Pandora's Request for Subpoena Authority**

20. By statute, discovery between opposing participants in a CRB proceeding occurs only after the filing of written direct statements and is constrained by fairly narrow conceptions of relevance. (I discuss these procedures and their limitations in the succeeding section.) The Judges' authority to issue subpoenas is not so limited, however. Unlike adversarial discovery between opposing participants focused on documents and information underlying the parties' respective written testimonial submissions, there is no limitation in the governing regulations as

to the timing for issuing subpoenas, beyond the requirement that, as is now the case, a "proceeding" has been initiated. *See* 17 U.S.C. § 803(b)(6)(C)(ix). Moreover, because the subpoena power is not limited to information related to the written testimony of opposing participants, it rightly extends to critical evidence in the hands of third parties, such as license agreements that may be probative as benchmarks in the proceeding.

21. While not as robust a solution as would be provided were Pandora authorized to initiate pre-written-direct-statement discovery from SoundExchange or its witnesses in the proceeding (relief Pandora is not seeking), affording Pandora the third-party discovery it seeks through the issuance of subpoenas would go a long way towards remedying the informational disadvantage facing Pandora at this stage of the proceedings. The information provided through such subpoenas would enable Pandora timely to learn the economic terms of potentially relevant marketplace agreements, as well as put it on equal footing with SoundExchange. SoundExchange, apparently already in possession of such information, could scarcely claim any cognizable prejudice from affording Pandora such relief. The fact that it would level the discovery and case-development playing field a bit is not an outcome against which the record industry deserves protection.

22. To minimize any potential burden on non-participants, Pandora has endeavored to craft its information requests as narrowly as possible, consistent with affording it the information it requires. Specifically, Pandora's proposed subpoenas (annexed to the accompanying Motion) request documents in the following narrowly circumscribed categories:

- License agreements between certain digital music services and record companies;

- Information regarding usage and subscriber levels under the services' various tiers (*e.g.*, paid subscription, free (ad-supported), on-demand versus non-interactive, etc.);[1] and

- Information regarding payment to the record labels under the agreements, including advances and equity grants.

23. As described in more detail in the accompanying Memorandum of Law and Larson Declaration, the entities on which Pandora proposes to serve subpoenas fall into three basic categories:

- Interactive (On-Demand) Digital Music Services: The royalty rates paid by this category of service have constituted SoundExchange's primary benchmark in the past four proceedings (*Web II*, *Satellite I*, *Satellite II* and *Web III*). While we cannot say whether SoundExchange will proffer the same benchmark in this proceeding, past practice suggests that the interactive service agreements (which now include on-demand video services) are highly likely to play a role here.

- Interactive Video Services: The rates paid by such services have played a role in prior CRB proceedings, a role that may grow given the fact that many consumers now use video services like YouTube and Vevo as primary sources of music listening.

- Non-Interactive Digital Music Services: This category is of obvious relevance as it is the category of service into which Pandora (and other service-side participants) falls. Prior proceedings, most recently *Satellite II*, reveal that certain webcasters (Slacker, Last.fm) have entered into voluntary agreements with record labels, in part because they offer certain features or service tiers that do not allow them to utilize the statutory license. Because SoundExchange has opted not to proffer agreements covering such services as benchmarks, the service-side participants have had to seek access to such agreements via discovery (after filing their written direct statements), and have argued that such services are much more comparable to "statutory" services than the interactive services.

**The Inadequacy of Remaining Discovery Devices**

24. As Pandora interprets the prevailing CRB discovery procedures, apart from the exercise of the Judges' discretionary subpoena power, there is no other mechanism by which Pandora can be afforded timely access to key documents and information that rightfully should

[1] This is necessary because many services now offer multiple tiers of service that presumably have differing royalty rates for each tier. Understanding the fundamental economics of the license agreements requires a basic understanding of usage (and subsequent payments to the labels) under the services' different tiers.

be available to it in formulating its written direct statement and accompanying rate proposal and testimony. Discovery between opposing participants in any given proceeding is specified to begin only *after* the submission of the parties' written direct statements. 17 U.S.C. § 803(b)(6)(C)(ii). By definition, if remitted to that process for securing more complete information as to the range of potentially available marketplace benchmarks, Pandora will have lost the opportunity to consider that evidence in developing and presenting its written direct statement, which itself could be meaningfully prejudicial. What is more, the stricture that post-direct-case document requests be directed solely to such documents as are "directly related" to its adversary's written direct testimony offers the prospect (realistic in my experience) of a service receiving an incomplete subset of potentially relevant documents, namely, solely information concerning those license agreements on which SoundExchange and/or its experts chose to rely.[2]

25. I recognize that the regulations that govern these proceedings provide at least the opportunity for participants to incorporate information obtained during the discovery process into their written direct statements in the form of amended testimony. This window is, however, an extremely narrow one: the deadline for amended testimony is only fifteen (15) days after the close of discovery. Coupled with a typically frenetic discovery period condensing what normally would occupy six or more months of pre-trial activity into a statutorily-prescribed sixty (60) days, there is, as a practical matter, far too little time to meaningfully review, consider, and potentially modify already-committed rate positions in light of this late-provided information.[3] It

[2] While Pandora may eventually obtain access to a somewhat broader group of potentially relevant documents, experience has shown that SoundExchange routinely has resisted their production, necessitating costly and time-consuming motion practice, resulting in case-by-case determinations as to the scope of permissible discovery within the strictures of the inter-party discovery rules.

[3] Based on past experience, there is also the real prospect that amended testimony that would meaningfully attempt to take account of newly-acquired information would be challenged as assertedly falling outside the permissible bounds of such amendments. *See, e.g.*, Docket No. 2011-1, Order

is no secret that the lead-up to written direct submissions is many months of intense preparation, including intricate economic modeling and an effort thoughtfully to compile multiple witness statements into a coherent whole. It is simply unrealistic to assume that such process can be replicated, let alone with any degree of comprehensiveness, in the two-week time frame provided for submitting amended testimony.

26. This problem is exacerbated by the fact that the production of documents, and even depositions of key witnesses, often take place exceedingly late into the statutory discovery period. By the time document productions are reviewed, deficiencies identified, meet-and-confers conducted, motions to compel fully briefed and orders on such motions issued, documents ultimately produced (often containing highly sensitive and probative information) may not be produced until it is too late to incorporate them into amended testimony within the prescribed deadline. Indeed, in past proceedings, productions of documents have been made *after* the discovery period has expired, and even after the deadline to submit amended testimony has passed.

27. Neither does the rebuttal phase of these proceedings serve as a substitute for affording Pandora the limited discovery it seeks. The rebuttal phase is just that: an essentially defensive round of testimony affording the participants an opportunity to critique the other side's case.[4] While, in that context, parties can discuss what direct-case discovery has turned up, that is quite distinct from being afforded full latitude to revise one's own direct case to the extent that agreements that first turned up in direct-phase discovery otherwise might warrant it. Even were it otherwise, as a practical matter, any effort to meaningfully modify one's direct-case fee

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Granting SoundExchange's Motion to Strike Portions of Amended Testimony of Ronald Gertz and Roger Noll (May 4, 2012).

[4] *See* Copyright Royalty Judges, Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order, Feb. 19, 2014, at 3.

positions at the late-in-the-process rebuttal phase is likely to be regarded as too little and/or too late given the extensive direct case record that will already have been established over a multi-month period.

## Conclusion

28. For all the foregoing reasons, as well as those in the accompanying Memorandum of Law and Harrison and Larson Declarations, I respectfully submit that the relief sought by the instant Motion be granted.

I declare under penalty of perjury that the foregoing facts are true and correct. This declaration was executed on the 7th day of March, 2014 in New York, New York.

R. Bruce Rich

Ex. 3

EX. 3

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR** |

**DECLARATION OF TODD LARSON IN SUPPORT OF**
**PANDORA'S MOTION FOR ISSUANCE OF SUBPOENAS**

I, Todd Larson, under penalty of perjury, declare as follows:

1. I am a member of the law firm Weil, Gotshal & Manges LLP, counsel for Pandora Media, Inc. ("Pandora"), which has filed a Petition to Participate in the above-captioned proceeding (herein "*Web IV*"). I submit this declaration in support of Pandora's Motion for Issuance of Subpoenas.

2. The purpose of this declaration is to provide the Judges with relevant background information relating to the digital music services named in the requested subpoenas. As described below, the entities on which Pandora proposes to serve subpoenas fall into three basic service categories, each of which has been offered as a benchmark and/or the subject of extensive testimony in prior proceedings: interactive/on-demand digital music services, interactive video services, and non-interactive digital music services.[1] We note that a supporting

[1] *See, e.g.*, Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084, 24092-93 (May 1, 2007) ("*Web II*") (discussing interactive service benchmark); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4092-93 (Jan. 24, 2008) ("*Satellite I*") (same); Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13026, 13031-32 (Mar. 9, 2011) ("*Web III*") (same); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio

submission to be made by Petitioner National Association of Broadcasters will propose issuance of certain additional subpoenas, including to Apple Inc., as to which counsel for Pandora is not in a position to act potentially adversely.

**Interactive/On-Demand Digital Music Services**

3. Interactive services, also referred to as "on-demand" services, allow their users to select and listen to specific songs and/or albums on demand (as distinguished from non-interactive services that select the particular song for the user). Pandora seeks to subpoena license agreements and related royalty information from the following leading interactive services:

a. **Spotify**: Spotify is the most popular interactive service, with a reported 24 million users worldwide and six million paying subscribers. Spotify expanded to the U.S. in 2011, and offers a free, advertising-supported service tier in addition to a paid premium subscription tier.[2] SoundExchange's expert relied in part on major-label agreements with Spotify in formulating his benchmark in *Satellite II*.[3]

b. **Google Play Music/All Access**: Launched in 2013 by one of the country's most prominent Internet services, Google Music Play All Access is among the most recent

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Radio Services, 78 Fed. Reg. 23054, 23062 (Apr. 17, 2013) ("*Satellite II*") (discussing interactive and non-interactive service benchmarks).

[2] *See* Mangalindan, JP, *Why Spotify deserves the hype*, FORTUNE (July 14, 2011), http://tech.fortune.cnn.com/2011/ 07/14/spotify-whats-the-big-deal/; Bertoni, Steven, *Is Spotify Shaking Its Entire Business Model?*, FORBES (Dec. 6, 2013), http://www.forbes.com/sites/stevenbertoni/ 2013/12/06/is-spotify-shaking-up-its-entire-business-model/. True and correct copies of these articles are attached as Exhibit A hereto.

[3] *See Written Direct Statement of SoundExchange*, Testimony of Janusz Ordover, Docket No. 2011-1 CRB PSS/ Satellite II, at 19-20 (Nov. 29, 2011) (hereinafter "Ordover *Satellite II* Testimony"), *available at* http://www.loc.gov/crb/proceedings/2011-1/pss/sx_vol_2.pdf.

interactive services to launch –and therefore, it appears, one of the most recent to negotiate license terms with various record companies.[4]

c. **Beats Music**: Beats Music is an interactive service co-founded by Jimmy Iovine, the chairman of Interscope Geffen A&M at Universal Music Group. As recently reported in *The New York Times*, Beats will launch in early 2014, and has teamed with AT&T to distribute the service packaged with AT&T mobile subscriptions.[5] Beats is a successor to MOG, whose label agreements were among those SoundExchange offered as benchmarks in *Satellite II*.[6]

d. **Rhapsody**: Rhapsody is one of the longest running interactive music services in the industry. Started in 2001, the company has more than one million subscribers and allows its users to access music online via monthly subscriptions.[7] Sound Exchange has offered agreements with Rhapsody as benchmarks in the *Web II*, *Satellite I*, *Web III*, and *Satellite II* proceedings.[8]

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[4] Barker, Andrew, *Google Launches Music Streaming Service*, VARIETY (May 15, 2013), http://variety.com/2013/music/news/google-launches-music-streaming-service-1200481556/; Sydell, Laura, *Google Launches A Streaming Music Service*, NATIONAL PUBLIC RADIO (May 15, 2013), http://www.npr.org/blogs/therecord/2013/05/15/184249904/google-launches-a-streaming-music-service. True and correct copies of these articles are attached as Exhibit B hereto.

[5] Pham, Alex, *Beats Music Streaming Service Launching January 21*, BILLBOARD (Jan. 11, 2014), http://www.billboard.com/articles/news/5869549/beats-music-streaming-service-launching-january-21; Sisario, Ben, *Algorithm for Your Personal Rhythm*, NEW YORK TIMES (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/arts/music/beats-music-enters-online-streaming-market.html?_r=1. True and correct copies of these articles are attached as Exhibit C hereto.

[6] *Written Direct Statement of SoundExchange*, Testimony of Stephen Bryan, Docket No. 2011-1 CRB PSS/ Satellite II, at 9 (Nov. 29, 2011) (hereinafter "Bryan *Satellite II* Testimony") *available at* http://www.loc.gov/crb/proceedings/2011-1/pss/sx_vol_2.pdf.

[7] Moscaritolo, Angela, *Rhapsody Launches Ad-Free Radio for Subscribers*, PC MAGAZINE (Nov. 1, 2013), http://www.pcmag.com/article2/0,2817,2426686,00.asp; Sisario, Ben, *Rhapsody in Deal to Expand in Latin America*, NEW YORK TIMES (Oct. 16, 2013), http://www.nytimes.com/2013/10/17/business/media/rhapsody-in-deal-to-expand-in-latin-america.html. True and correct copies of these articles are attached as Exhibit D hereto.

[8] See n.1, *supra*; *see also* Ordover *Satellite II* Testimony at 19-20 (Nov. 29, 2011).

e. **Muve Music**: Offered by Cricket Wireless, Muve Music is a mobile interactive service bundled with mobile phone service that offers users unlimited on-demand music and phone service for a single monthly fee. With over two million subscribers, it is one of the most popular on-demand music subscription services.[9] Cricket Wireless and Muve Music were the subject of in-depth testimony by one of SoundExchange's record-company witnesses in *Satellite II*.[10]

f. **Rdio** is an interactive service created by the founders of Skype. Originally a subscription-only service, Rdio now offers a free version for non-subscribers.[11] Rdio's agreement was used by SoundExchange as a benchmark in *Satellite II*.[12]

**Interactive Video Services**

4. The category of interactive digital music services now includes on-demand video services in addition to audio-only services like those identified above. SoundExchange presented testimony about such services in the *Satellite II* proceedings.[13] Pandora moves the Judges to issue subpoenas to each of the following video services:

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[9] Dolcourt, Jessica, *Muve Music's 2M subscribers: Music to Cricket's ears*, CNET (Oct. 3, 2013), http://reviews.cnet.com/8301-6452_7-57605866/muve-musics-2m-subscribers-music-to-crickets-ears/; Sisaro, Ben, *A Digital Music Option Thrives, Though Quietly*, NEW YORK TIMES (Aug. 29, 2012), http://www.nytimes.com/2012/08/29/business/media/muve-music-for-mobile-users-thrives-in-shadow-of-competitors.html. True and correct copies of these articles are attached as Exhibit E hereto.

[10] *See Written Rebuttal Statement of SoundExchange*, Testimony of Aaron Harrison, Docket No. 2011-1 CRB PSS/ Satellite II, at 5-8 (July 2, 2011), *available at* http://www.loc.gov/crb/proceedings/2011-1/rps/sx_vol_2.pdf; *Written Rebuttal Statement of Sirius XM*, Testimony of Roger G. Noll, Docket No. 2011-1 CRB PSS/ Satellite II, at 7, 14-15 (July 2, 2011), *available at http://www.loc.gov/crb/proceedings/2011-1/rps/sxm_vol_3.pdf.*

[11] Mitchell, Dan, *Rdio partners with Cumulus -- but will it be enough?*, FORTUNE (Sept. 17, 2013), http://tech.fortune.cnn.com/2013/09/17/cumulus-rdio/; Sisaro, Ben, *For Many Digital Music Services, Free Is Not a Choice*, NEW YORK TIMES (Jan. 28, 2013), http://mediadecoder.blogs.nytimes.com/2013/01/28/for-many-digital-music-services-free-is-not-a-choice/. True and correct copies of these articles are attached as Exhibit F hereto.

[12] *See* Ordover *Satellite II* Testimony at 19-20 (Nov. 29, 2011).

[13] *See* Bryan *Satellite II* Testimony at 13 (describing Warner's license agreements with YouTube and Vevo and identifying them as the two services that "dominate" the market).

a. **YouTube (Google)**: YouTube, the best-known video service, was reported recently to be the largest single source of music listening for teens, and claims to have paid over $1 billion in royalties to the recording industry.[14] In addition to its longstanding free video service, which mixes user-generated-content with videos provided directly by record labels and recording artists, YouTube has announced plans to offer a more comprehensive on-demand music streaming service offering record label-provided content to both free users and paid subscribers. This new service reportedly will be tailored to mobile devices, and has reportedly already entered into licensing deals for the new service (above and beyond agreements covering the existing YouTube video service) with a variety of record companies, including Sony, Universal, and Warner.[15]

b. **Vevo**: Vevo is an interactive music video service partially owned by Universal Music Group and Sony Music Entertainment, two of the major record companies. The service reportedly streams about three billion views a month via its 15,000 YouTube channels, and is also accessible through other platforms, including its own website and mobile application; recording artists' Facebook pages; websites such as AOL, Disney Interactive, Univision, Viacom, and Yahoo Music; and integrations with various internet-

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[14] *See, e.g.*, *Music Discovery Still Dominated by Radio, Says Nielsen Music 360 Report*, NIELSEN.COM (Aug. 14, 2012), *available at* http://www.nielsen.com/us/en/press-room/2012/music-discovery-still-dominated-by-radio--says-nielsen-music-360.html; Pham, Alex, *YouTube Has Paid Out $1 Billion to Music Industry In Last Few Years*, BILLBOARD (Feb. 3, 2014), http://www.billboard.com/biz/articles/news/digital-and-mobile/5893900/youtube-has-paid-out-1-billion-to-music-industry-in. True and correct copies of these articles are attached as Exhibit G hereto.

[15] Pham, Alex, *Youtube Close to Launching Subscription Music Service*, BILLBOARD (Oct. 23, 2013), http://www.billboard.com/biz/articles/news/digital-and-mobile/5763268/youtube-close-to-launching-subscription-music-service; Sisaro, Ben, *YouTube Said to Introduce Paid Service for Music*, NEW YORK TIMES (Oct. 24, 2013), http://www.nytimes.com/2013/10/25/business/media/youtube-said-to-introduce-paid-music-service.html; Stedman, Alex, *Spotify, Rdio face a new competitor planning both free and premium tiers*, VARIETY (Oct. 23, 2013), http://variety.com/2013/digital/news/youtube-to-release-music-subscription-service-1200756553/. True and correct copies of these articles are attached as Exhibit H hereto.

connected televisions. Vevo reportedly has licensing agreements with record labels including UMG, Sony Music Entertainment, EMI Music, CBS Interactive Music Group, Hollywood Records, and Walt Disney Records.[16] As noted above, Mr. Bryan testified about Warner's agreement with Vevo in the *Satellite II* proceeding.

**Non-Interactive Digital Music Services**

5. Testimony from prior CRB proceedings and recent public news reports suggest that certain non-interactive webcasters (*i.e.*, those who determine the playlists offered to users rather than allowing users to select songs on-demand) have entered into voluntary agreements with record labels rather than relying on the statutory license. Pandora moves the Judges to issue a subpoena to one such service, **Slacker Radio**. Founded in 2006, Slacker is a popular online streaming service which recently reported gaining an additional six million users after a mid-2013 redesign and the launch of an on-demand service tier in addition to its traditional non-interactive radio product (which was offered in both free and paid subscription versions).[17] Slacker Radio's licensing agreements were relied upon by both SoundExchange and Sirius XM in the recent *Satellite II* proceeding.[18]

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[16] Sisaro, Ben, *Vevo, a Music Video Web Site, Wants to Get Into Television*, NEW YORK TIMES (Dec. 20, 2011), http://mediadecoder.blogs.nytimes.com/2011/12/20/vevo-a-music-video-web-site-wants-to-get-into-television/; Spangler, Todd, *Vevo Will Block YouTube's Offline-Video Viewing Feature*, VARIETY (Sept. 20, 2013), http://variety.com/2013/digital/news/vevo-will-block-youtubes-offline-video-viewing-feature-1200654278/. True and correct copies of these articles are attached as Exhibit I hereto.

[17] Barker, Andrew, *Slacker Radio adds competitive features*, VARIETY (May 17, 2011), http://variety.com/2011/music/news/slacker-radio-adds-competitive-features-1118037226/; Sisaro, Ben, *A Smaller Rival Takes Aim at Pandora*, NEW YORK TIMES (Feb. 12, 2013), http://www.nytimes.com /2013/02/13/business/media/small-rival-music-service-takes-aim-at-pandora.html; Milot, Stephanie, *Slacker Radio Pulls in 6M New Users After Redesign*, PC MAG (May 9, 2013), http://www.pcmag.com/article2/0,2817,2418739,00.asp. True and correct copies of these articles are attached as Exhibit J hereto.

[18] *See* Ordover *Satellite II* Testimony at 17-20; *Written Direct Statement of Sirius XM Radio Inc.*, Revised Amended Testimony of Roger G. Noll, Docket No. 2011-1 CRB PSS/ Satellite II, at 69-79, Appendices I-L & Table 2 (May 17, 2012).

I declare under penalty of perjury that the foregoing facts are true and correct. This declaration was executed on the 7th day of March, 2014 in New York, New York.

Todd Larson

Todd Larson

Ex. 4

EX. 4

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

| | | |
|---|---|---|
| **In The Matter Of:** | ) | |
| **Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)** | ) | **14-CRB-0001-WR (2016-2020)** |

**THE NATIONAL ASSOCIATION OF BROADCASTERS' CONSOLIDATED (1) JOINDER IN PANDORA'S MOTION FOR ISSUANCE OF SUBPOENAS AND (2) MOTION FOR ISSUANCE OF SUBPOENAS TO APPLE INC. AND THE THREE MAJOR RECORD LABELS**

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Dated: March 12, 2014

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## INTRODUCTION AND SUMMARY

The National Association of Broadcasters ("NAB") hereby joins Pandora Media, Inc.'s ("Pandora's") Motion for Issuance of Subpoenas and requests that the documents subject to Pandora's subpoenas be made available to NAB as well. Pandora's motion should be granted because the Copyright Royalty Judges' ("Judges'") determination in this proceeding will be substantially impaired if only a single party representing licensors has comprehensive access to the core evidence – privately negotiated license agreements for the public performance of sound recordings – on which rates in all three of the prior litigated webcasting proceedings were based.

NAB also asks the Judges to issue similar subpoenas to (1) Apple Inc., which has entered into direct licenses for its iTunes Radio service but was excluded from Pandora's motion only because of Pandora's counsel's inability to take a position potentially adverse to Apple, and (2) the three major record labels, which (a) inevitably have knowledge of agreements with services making public performances of sound recordings other than those identified by Pandora and (b) are a logical and efficient source of sound recording license agreements that they have entered.[1]

Absent access by the services to the agreements sought by Pandora and NAB in time to analyze them and incorporate them as appropriate into their direct cases, the Judges would be forced to base their determination on a skewed and imbalanced evidentiary record including:

(a) a direct case by SoundExchange that discusses and presents economic analysis regarding only those agreements selected by (and favoring) SoundExchange, based on its comprehensive knowledge of available agreements between its member labels and statutory as well as interactive services; but

(b) incomplete direct cases by individual services that discuss and present economic analysis regarding only the narrow set of agreements known separately by each service and that cannot analyze the broader market.

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[1] NAB has followed Pandora's subpoena form by providing subpoenas listing the Copyright Royalty Board as the issuing party. If the Judges prefer, counsel for NAB is available to effectuate service of the subpoenas at the Judges' instruction. NAB is serving Apple and the major labels with a copy of these moving papers.

This fundamental imbalance and deficiency in the direct cases presented to the Judges will not be cured by the limited opportunity to file a post discovery update or by a rebuttal case.

The Judges have the necessary authority to prevent this substantial impairment by issuing the requested subpoenas, thereby enabling the Judges to base their determination on a record where the positions and underlying supporting evidence of both sides of the "willing buyer willing seller" equation are fully and fairly presented. Pandora's and NAB's motions should be granted and the subpoenas should be issued in time to require responses by May 1, 2014 so that the services' economic experts have the opportunity to assess the significance of the produced information and the services have the opportunity to provide the Judges with direct cases that fairly take this evidence into account from the buyer-side perspective.

## ARGUMENT

### I. ABSENT ISSUANCE OF THE REQUESTED SUBPOENAS, THE JUDGES' DETERMINATION WILL BE SUBSTANTIALLY IMPAIRED BECAUSE IT WILL BE BASED ON A SKEWED AND INCOMPLETE EVIDENTIARY RECORD.

Pandora provided ample reasons supporting issuance of its targeted subpoenas; NAB supports those arguments. NAB writes separately to emphasize that the statutory "substantial impairment" standard for issuing the subpoenas is met.

As the United States Supreme Court has stated, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 540 n.25 (1987) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (alteration in original)). "Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other." *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 205 (2d Cir. 1987). Permitting the requested subpoenas will ensure

that the proceeding is fair to all parties so that "basic justice" is served and the Judges can perform their statutory function. Indeed, a key purpose of granting subpoena power in the Copyright Royalty and Distribution Reform Act was to provide the Judges a mechanism to ensure a complete and balanced record to enable them to make a fair and balanced decision. *See* H.R. Rep. No. 108-408, at 33, 100 (2004) (criticizing the prior Copyright Arbitration Royalty Panel's discovery process with no subpoena power as one in which "the arbitrators are left with no real mechanism to gain the information they often need to make a fair and balanced decision") (statement of Rep. Smith).

Similarly, the Judges themselves have expressed the desire to receive evidence from all parties and their economic experts to help the Judges employ an "optimal economic analysis" in determining rates and terms in this proceeding:

> The Judges are best served if the participants, their economic witnesses, and their counsel craft arguments in a manner that assists the Judges in identifying and applying the optimal economic analysis when establishing rates and terms pursuant to the Act.

*Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV): Notice Announcing Commencement of Proceeding*, 79 Fed. Reg. 412, 413 (Jan. 3, 2014). In each of the three litigated webcasting proceedings to date, the economic analyses that the Judges (and previously, the Copyright Arbitration Royalty Panel ("CARP")) found to be "optimal" – and from which they determined their rates – were based on negotiated license agreements for the public performance of sound recordings, either statutory or non-statutory. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 67 Fed. Reg. 45,240, 45,245 (July 8, 2002) ("*Web I Decision*") (relying on agreement between RIAA and Yahoo!, Inc.); *Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and*

*Order*, 72 Fed. Reg. 24,084, 24,095 (May 1, 2007) ("*Web II Decision*") (relying on agreements between the major record labels and certain interactive on-demand services); *Determination After Remand of Rates and Terms for Royalty Years 2011-2015, Docket No. 2009-1 CRB (Webcasting III)*, at 65-66 (Jan. 9, 2014) ("*Web III Remand*") (relying, in part, on agreements between the major record labels and certain interactive, on-demand services). Moreover, SoundExchange repeatedly has relied on such license agreements in support of its rate proposal in prior proceedings. *See, e.g.*, *Web II Decision* at 24,092; *Web III Remand* at 48.

Given the central role that sound recording performance license agreements historically have played and the Judges' own expressed desire to receive "optimal economic analysis" from all participants, the Judges need to have a comprehensive evidentiary record before them regarding the full range of these agreements and how both buyers (webcasting services) and sellers (record companies) view them. But absent issuance of the requested subpoenas, such a record will not exist. Specifically, SoundExchange, as the representative of the entire recording industry, with each of the three major labels as well as independent labels represented on its Board, likely has access to the vast majority, if not all, of these agreements, between its member labels and both noninteractive and interactive services. Pandora has submitted testimony attesting to SoundExchange's ready access to these agreements. *See* Decl. of Christopher Harrison ¶¶ 4-5 (Mar. 10, 2014) ("Harrison Decl.") (attesting to SoundExchange's access to license agreements between Apple and the major record labels); Decl. of R. Bruce Rich in Supp. of Pandora's Mot. for Issuance of Subpoenas ¶¶ 7, 18 (Mar. 10, 2014) ("Rich Decl.") ("It is evident that the major record companies . . . freely share these otherwise non-public agreements with SoundExchange."). This access is confirmed by SoundExchange's economic testimony and rate proposals in prior proceedings, each of which was based on numerous such agreements that

had been provided to its economic experts before written direct cases were due and the 60-day document discovery period had commenced. *See, e.g.*, *Web II Decision* at 24,092; *Web III Remand* at 48; Rich Decl. ¶ 18.

The services, by contrast, do not have such access. Rather, each service will have in its possession only a small slice of the universe, consisting of the agreements, if any, that it has signed itself and the handful of agreements that are a matter of public record. Moreover, given the nature of NAB's radio broadcaster members' streaming, NAB will have no access to interactive service agreements, upon which SoundExchange repeatedly has relied in past proceedings, including Web II, Web III and the two prior satellite radio cases.

As a result, unless the Judges issue the requested subpoenas, they will not receive robust licensing evidence and accompanying economic analyses that fully and fairly take into account the volume and range of privately negotiated agreements. Rather, as history has demonstrated, the Judges will receive the agreements SoundExchange selects, entered into by the major record labels with selected types of services, supporting the rates sought by the recording industry. The services, on the other hand, will not have the complete picture of the market necessary to present the Judges with the evidence and economic analysis that would enable the Judges to render a balanced and accurate decision. By definition, such a one-sided evidentiary record will not approach the "optimal economic analysis" that the Judges seek and thus will significantly impair the Judges' ability to determine the rates that would prevail in an effectively competitive market, which is their congressionally assigned task. *See* 17 U.S.C. § 114(f)(2)(B); *CARP Report*, Docket No. 2000-9 CARP DTRA 1 & 2, at 25 (Feb. 20, 2002) ("[T]he Panel construes the statutory reference . . . as the rates to which, absent special circumstances, most willing buyers

and willing sellers would agree."); *Web III Remand* at 45 n.37 (affirming that statutory rate-setting standard requires an "effectively competitive market").

Apart from the statutorily authorized subpoena process, the webcasting services have no effective way to obtain the broad range of interactive and non-interactive sound recording license agreements for use in their written direct cases. As Pandora observed, the 15-day amendment process is ineffective, as the information produced during the non-subpoena discovery process will arrive too late to be analyzed and meaningfully included in any amendment, and the requests for information about agreements other than those selectively relied upon by SoundExchange are likely to be the subject of extended motions practice, further delaying – or perhaps even denying – the services' access to them. Pandora's Mot. for Issuance of Subpoenas 15 (Mar. 10, 2014) ("Pandora Mot.").

Nor is the rebuttal phase a substitute for presentation of a comprehensive direct case. Rebuttal cases historically have been viewed by the Judges as directed towards rebutting the direct cases presented by adverse parties rather than developing new affirmative theories, and the parties often have resisted efforts by their adversaries to expand that scope. *See, e.g.*, *Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order* 3 (Feb. 19, 2014) ("[T]he Judges remind parties that Written Rebuttal Statements shall be limited to rebuttal testimony of witnesses and legal memoranda addressing solely and directly issues raised in the direct case and remaining for the Judges to hear and determine."). Moreover, as a practical matter, the rebuttal phase is highly compressed, which limits the ability to develop and present affirmative theories, and it comes only at the very end of the case, when it is likely to be very difficult to overcome impressions that already have been formed by the preceding months of litigation. *See* Pandora Mot. at 16. It is thus essential that the services gain access to the

requested agreements through the subpoena process at this stage of the proceeding so that they have sufficient time to assess the economic significance of these agreements and prepare and provide to the Judges direct cases that fully and fairly reflect "buyers' side" economic analyses based on existing marketplace evidence.

## II. GRANTING THE SUBPOENAS ALSO WILL ENCOURAGE SETTLEMENT, AN IMPORTANT GOAL OF THE LEGISLATION ESTABLISHING THE COPYRIGHT ROYALTY JUDGES.

As an added benefit, requiring production of the requested agreements and related information may promote settlement of this proceeding, which is an important goal of the legislation establishing the Copyright Royalty Judges. *See, e.g.*, 17 U.S.C. § 801(b)(7)(A) (granting the Judges authority to adopt settlement agreements "as a basis for statutory terms and rates"); *id.* § 803(b)(6)(C)(x) (requiring the Judges to "order a settlement conference among the participants in the proceeding to facilitate the presentation of offers of settlement among the participants" after the close of discovery). In the related legislative report, the House Judiciary Committee emphasized the importance of promoting settlements, stating that it "intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates." H.R. Rep. No. 108-408, at 30, 33. The Committee described the benefits of such settlements as "reduc[ing] the need to conduct full-fledged ratesetting and distribution proceedings," which "will generate savings while expediting the disposition of proceedings." *Id.* at 24.

The discovery sought by Pandora and NAB will increase the likelihood of such settlement. Parties are more likely to settle, and to settle earlier, when they have equal access to relevant information. Information deficits promote litigation, in part to cure the deficit. Congress understood this characteristic, "recogniz[ing] that information obtained during the discovery process may alter a pre-discovery position, making the affected party more likely to

engage in settlement negotiations." *Id.* at 33-34. The requested subpoenas should be issued to foster this important goal.

## III. THE JUDGES HAVE AUTHORITY TO ISSUE THE REQUESTED SUBPOENAS.

There should be no question that the Judges have the necessary authority to issue the subpoenas. The statute authorizes issuance of document subpoenas to "a participant or witness" where the Judges' determination "would be substantially impaired by the absence of such . . . documents." 17 U.S.C. § 803(b)(6)(C)(ix). In the prior webcasting proceeding, the Register found that "witness" "includes anyone who knows something that is relevant" and "includes witnesses who are nonparticipants, including those who have not previously been designated by a participant as a witness as well as those whose testimony has not been filed as part of a written direct statement." *Mem. Op. on Material Questions of Substantive Law*, Docket No. 2009-1 CRB Webcasting III, at 5 (Feb. 22, 2010). "[T]he Register conclude[d] that the CRJs do have the authority to subpoena a witness to . . . produce and permit inspection of documents or tangible things even when that witness is not a participant in the proceeding and his or her testimony has not yet been submitted in the proceeding." *Id.* at 8. Because the "substantial impairment" standard is met, as set forth in Part I, above, the Judges have authority to issue the requested subpoenas to the identified companies.[2]

## IV. SUBPOENAS SHOULD BE ISSUED TO APPLE AND THE THREE MAJOR RECORD LABELS IN ADDITION TO THE SERVICES IDENTIFIED BY PANDORA.

In addition to joining Pandora's request, NAB requests that the Judges issue the four attached subpoenas to Apple Inc. and the three major record labels – *i.e.*, Sony Music Entertainment, Universal Music Group, and Warner Music Group. *See* Exs. A-D. Apple has

[2] NAB would work with all parties to this proceeding to ensure that an appropriate protective order is proposed to the Judges well before the response date for the subpoenas and to minimize unwarranted burdens to the subpoenaed entities.

petitioned to participate in this proceeding, and the three major labels will be deeply involved. Each of the major labels has participated in rate proceedings before the Judges, providing testimony on behalf of SoundExchange. *See, e.g.*, *Web III Remand* at 12 (noting testimony by witness from Warner Music Group); *Web II Decision* at 24,084-85 (noting testimony by witnesses from Sony BMG, Universal Music Group, North American, Universal Music Enterprises, Universal eLabs, Warner Music Group, and Atlantic Records Group). In any event, Apple and the major labels are "witnesses" who have entered into sound recording licenses that will be relevant in this proceeding.

It has been widely reported in the press that Apple has entered into sound recording performance agreements with each of the major record labels as well as certain independent labels for its iTunes Radio service.[3] The rates and terms of these agreements have not been publicly released by Apple.[4] Given Apple's prominence and size, the services (including their economic experts) should have the opportunity to review such agreements and address them in their affirmative cases, particularly given that SoundExchange already is aware of the contents of those agreements. *See* Harrison Decl. ¶¶ 4-5. By permitting such access, the Judges will be able to obtain economic analyses of those agreements from both the buyers and sellers in the marketplace, thus fostering a fairer and more balanced evidentiary record.

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[3] *See* Ryan Bradley, *Apple enters the streaming music game*, Fortune (June 11, 2013, 12:57 PM), http://tech.fortune.cnn.com/2013/06/11/itunes-radio-pandora/; Hannah Karp & Jessica E. Lessin, *Apple Spells Out iTunes Radio Terms*, Wall St. J. (June 26, 2013, 7:50 PM), http://blogs.wsj.com/digits/2013/06/26/apple-spells-out-itunes-radio-terms-for-record-labels/; Ben Sisario, *With iTunes Radio, Apple Takes Aim at Pandora*, N.Y. Times (Sept. 10, 2013), http://www.nytimes.com/2013/09/11/business/media/with-itunes-radio-apple-takes-aim-at-pandora.html?_r=0. True and correct copies of these articles are attached as Exhibit E.

[4] A form of agreement that Apple was allegedly making available to independent labels was previously leaked but is no longer publicly available. Moreover, the status of that document has never been authenticated, and the actual terms and related payments and reports under Apple's agreements with independent and major labels have never been published.

Similarly, the three major record labels likely have entered into agreements with services other than those identified by Pandora. Rather than requiring the services to speculate about the existence of such agreements, the record companies are a logical and efficient source of (a) sound recording license agreements that they have entered and (b) the payment and reporting information related to those agreements.

## CONCLUSION

For the foregoing reasons, Pandora's motion should be granted, and the produced documents should be made available to NAB and other participants in addition to Pandora. In addition, the attached subpoenas should be issued. NAB respectfully requests that the subpoenas be issued in time to require responses by May 1, 2014 to give the services' economic experts the opportunity to assess the significance of the produced information and to give the services the opportunity to provide the Judges with direct cases that fairly take this evidence into account from the buyer-side perspective.

Respectfully submitted,

Bruce G. Joseph (D.C. Bar No. 338236)
bjoseph@wileyrein.com
Karyn K. Ablin (D.C. Bar No. 454473)
kablin@wileyrein.com
Michael L. Sturm (D.C. Bar No. 422338)
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WILEY REIN LLP
1776 K St. NW
Washington, DC 20006
Phone: 202-719-7000
Facsimile: 202-719-7049

*Counsel for the National Association of Broadcasters*

Dated: March 12, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2014, I caused a copy of the foregoing document to be served by first-class mail, with a courtesy copy via electronic mail, on:

Catherine Gellis
P.O. Box 2477
Sausalito, CA 94966
cathy@cgcounsel.com
P: 202-642-2849

*Counsel for College Broadcasters Inc.*

and by overnight courier, with courtesy copies via electronic mail, on the following parties:

| | |
|---|---|
| Cynthia Greer<br>Sirius XM Radio, Inc.<br>1500 Eckington Place, NE<br>Washington, DC 20002<br>cynthia.greer@siriusxm.com<br>P: 202-380-1476<br>F: 202-380-4592<br>*Sirius XM Radio Inc.* | Patrick Donnelly<br>Sirius XM Radio, Inc.<br>1221 Avenue of the Americas<br>36th Floor<br>New York, NY 10020<br>patrick.donnelly@siriusxm.com<br>P: 212-584-5100<br>F: 212-584-5200<br>*Sirius XM Radio Inc.* |
| Christopher Harrison<br>Pandora Media, Inc.<br>2101 Webster Street, Suite 1650<br>Oakland, CA 94612<br>charrison@pandora.com<br>P: 510-858-3049<br>F: 510-451-4286<br>*Pandora Media, Inc.* | R. Bruce Rich<br>Todd Larson<br>Weil, Gotshal & Manges LLP<br>767 Fifth Avenue<br>New York, NY 10153<br>r.bruce.rich@weil.com<br>todd.larson@weil.com<br>P: 212-310-8170<br>F: 212-310-8007<br>*Counsel for Pandora Media, Inc.* |

| | |
|---|---|
| C. Colin Rushing<br>Bradley Prendergast<br>SoundExchange, Inc.<br>733 10th Street, NW, 10th Floor<br>Washington, DC 20001<br>P: 202-640-5858<br>F: 202-640-5883<br>crushing@soundexchange.com<br>bprendergast@soundexchange.com<br>*SoundExchange* | Glenn Pomerantz<br>Kelly Klaus<br>Anjan Choundhury<br>Munger, Tolles & Olson LLP<br>355 S. Grand Avenue, 35th Floor<br>Los Angeles, CA 90071-1560<br>Glenn.Pomerantz@mto.com<br>Kelly.Klaus@mto.com<br>Anjan.Choudhury@mto.com<br>P: 213-683-9100<br>F: 213-687-3702<br>*Counsel for SoundExchange* |
| Janet Malloy Link<br>Clear Channel Communications, Inc.<br>75 Rockefeller Plaza, 23rd Floor<br>New York, NY 10018<br>JanetLink@clearchannel.com<br>P: 210-832-3318<br>F: 210-832-3122<br>*Clear Channel Communications, Inc.* | Mark Hansen<br>Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.<br>1615 M Street, NW, Suite 400<br>Washington, DC 20036<br>Mhansen@khhte.com<br>P: 202-326-7900<br>F: 202-326-7999<br>*Counsel for Clear Channel Communications, Inc.* |
| David Golden<br>Constantine Cannon LLP<br>1301 K Street, NW, Suite 1050 East<br>Washington, DC 20005<br>dgolden@constantinecannon.com<br>P: 202-204-3500<br>F: 202-204-3501<br>*Counsel for College Broadcasters Inc.* | James Duffett-Smith<br>Jared Grusd<br>Spotify USA Inc.<br>45 W. 18th Street, 7th Floor<br>New York, NY 10011<br>james@spotify.com<br>jared@spotify.com<br>P: 917-565-3894<br>F: 917-207-3543<br>*Spotify USA Inc.* |

| | |
|---|---|
| Kenneth Steinthal<br>Joseph Wetzel<br>King & Spaulding LLP<br>101 Second Street, Suite 2300<br>San Francisco, CA 94105<br>ksteinthal@kslaw.com<br>jwetzel@kslaw.com<br>P: 415-318-1200<br>F: 415-318-1300<br>*Counsel for Beats Music, LLC, Amazon.com, Inc., and Rhapsody International, Inc.* | Lisa Widup<br>Apple Inc.<br>1 Infinite Loop<br>Cupertino, CA 95014<br>lwidup@apple.com<br>P: 408-974-4954<br>F: 408-974-9105<br>*Apple Inc.* |
| Lee Knife<br>Digital Media Association (DiMA)<br>1050 16th Street, NW<br>Washington, DC 20036<br>lknife@digmedia.org<br>P: 202-639-9509<br>F: 202-639-9504<br>*Digital Media Association* | Thomas Cheney<br>idobi Network LLC<br>1941 Vermont Avenue, NW<br>Washington, DC 20001<br>tom@idobi.com<br>P: 202-297-6977<br>*idobi Network LLC* |
| Denise Leary<br>National Public Radio, Inc. (NPR)<br>1111 North Capital Street, NE<br>Washington, DC 20002<br>dleary@npr.org<br>P: 202-513-3021<br>*National Public Radio, Inc.* | David Rahn<br>Custom Channels.net, LLC<br>2569 Park Lane, Suite 104<br>Lafayette, CO 80026<br>dave@customchannels.net<br>P: 303-588-2824<br>*Custom Channels.net, LLC* |
| Kevin Blair<br>Brian Gantman<br>Educational Media Foundation<br>5700 West Oaks Boulevard<br>Rocklin, CA 95765<br>kblair@kloveair1.com<br>bgantman@kloveair1.com<br>P: 916-251-1600<br>F: 916-251-1731<br>*Educational Media Foundation* | David Oxenford<br>Wilkinson Barker Knauer, LLP<br>2300 N Street, NW, Suite 700<br>Washington, DC 20037<br>doxenford@wbklaw.com<br>P: 202-383-3337<br>F: 202-783-5851<br>*Counsel for Digitally Imported Inc., AccuRadio, LLC, and Educational Media Foundation* |

| | |
|---|---|
| Brendan Collins<br>Triton Digital, Inc.<br>15303 Ventura Boulevard, Suite 1500<br>Los Angeles, CA 91403<br>Brendan.collins@tritondigital.com<br>P: 818-528-8867<br>*Triton Digital, Inc.* | Ari Shohat<br>Digitally Imported Inc.<br>3457 Ringsby Court, Suite 212<br>Denver, CO 80216<br>ari@di.fm<br>P: 303-997-2202<br>F: 303-997-1058<br>*Digitally Imported Inc.* |
| Rusty Hodge<br>SomaFM.com LLC<br>2180 Bryant Street, Suite 208<br>San Francisco, CA 94110<br>rusty@somafm.com<br>P: 415-552-7662<br>*SomaFM.com LLC* | David Porter, Chief Executive Officer<br>8tracks, Inc.<br>51 Sharon Street<br>San Francisco, CA 94114<br>dp@8tracks.com<br>P: 415-948-4216<br>*8tracks, Inc.* |
| Jeff Yasuda<br>Feed Media, Inc.<br>3979 Freedom Circle, Suite 610<br>Santa Clara, CA 95054<br>jeff@feed.fm<br>P: 650-479-4881<br>F: 415-449-6947<br>*Feed Media, Inc.* | Gary Greenstein<br>Wilson Sonsini Goodrich & Rosati<br>1700 K Street, NW, 5th Floor<br>Washington, DC 20006<br>ggreenstein@wsgr.com<br>P: 202-973-8849<br>F: 202-973-8899<br>*Counsel for CMN, Inc., 8tracks, Inc., and Feed Media, Inc.* |
| Nick Krawczyk<br>Chief Executive & Creative Officer<br>CMN, Inc.<br>7201 Wisconsin Avenue, Suite 780<br>Bethesda, MD 20814<br>nick@crystalmedianetworks.com<br>P: 240-223-0846<br>*CMN, Inc.* | William Colitre<br>Music Reports, Inc.<br>21122 Erwin Street<br>Woodland Hills, CA 91367<br>bcolitre@musicreports.com<br>P: 818-558-1400<br>F: 818-558-3484<br>*Music Reports, Inc.* |

| | |
|---|---|
| David Israelite<br>Danielle Aguirre<br>National Music Publishers Association (NMPA)<br>975 F Street, NW, Suite 375<br>Washington, DC 20004<br>disraelite@nmpa.org<br>daguirre@nmpa.org<br>P: 202-393-6672<br>F: 202-393-6673<br>*National Music Publishers Association* | William Malone<br>9117 Vendome Drive<br>West Bethesda, MD 20817<br>Malone@ieee.org<br>P: 301-365-1175<br>*Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.* |
| George Johnson<br>GEO Music Group<br>23 Music Square East, Suite 204<br>Nashville, TN 37203<br>george@georgejohnson.com<br>P: 615-242-9999<br>*GEO Music Group* | Jeffrey Harleston<br>Executive Vice President and General Counsel<br>Jeffrey.Harleston@umusic.com<br>Universal Music Group Inc.<br>2220 Colorado Avenue<br>Santa Monica, CA 90404 |
| Paul M. Robinson<br>Executive Vice President and General Counsel<br>Paul.Robinson@wmg.com<br>Silda Palerm<br>VP and Senior Litigation Counsel<br>Silda.Palerm@wmg.com<br>Warner Music Group Corp.<br>75 Rockefeller Plaza<br>New York, NY 10019 | Julie Swidler<br>Executive VP of Business Affairs and General Counsel<br>Julie.Swidler@sonymusic.com<br>Wade Leak<br>Senior VP, Deputy General Counsel<br>Wade.Leak@sonymusic.com<br>Sony Music Entertainment Inc.<br>550 Madison Ave<br>New York, NY 10022 |

Karyn K. Ablin

# EXHIBIT A

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

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| **DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | ) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY JUDGES TO:** | *(name and address of person being subpoenaed)*<br>Apple Inc.<br>c/o C T Corporation System<br>818 West Seventh Street<br>Los Angeles, CA 90017 |
| 1. At the Request of: *(party name)*<br>**The National Association of Broadcasters** | *(name, address, and telephone of contact person)*<br>Michael L. Sturm<br>Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>202-719-7008<br>msturm@wileyrein.com |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| | |
|---|---|
| Place:<br>Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>(or a place to be mutually agreed upon by the parties) | Date and Time:<br>May 1, 2014 at 9:00am (EDT) |

| | |
|---|---|
| Issuing Officer Signature and Title: | Date: |

| Issuing Officer's Name, Address, and Telephone Number: |
|---|
| |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## REQUESTS FOR DOCUMENTS

1. Each agreement relating to Apple's iTunes Radio service that includes a grant of the right to make public performances of sound recordings in effect or entered into during the Period between Apple and (a) a Record Company; (b) a distributor affiliated with or owned by one or more Record Companies (*e.g.*, ADA, Red Associated Labels, Caroline); or (c) entities such as BMG, Orchard, Merlin, and IODA that represent and enter into agreements on behalf of independent Record Companies or artists.

2. For each agreement produced or requested to be produced in response to Request No. 1, each royalty statement, statement of account, and any other report (other than logs of specific recordings performed) provided from Apple to the Record Company or other licensor for each quarterly reporting period (or other regular reporting period specified by the agreement) during the Period.

3. To the extent not included in the statements and reports produced in response to Request No. 2, Documents sufficient to show, on a monthly basis (or quarterly basis if that is the shortest basis on which Apple reports to its licensors) during the Period: (1) the number of performances of sound recordings made by or over the iTunes Radio service that are streamed to subscribers to iTunes Match; (2) the number of performances of sound recordings made by or over the iTunes Radio service to listeners that are not subscribers to iTunes Match; (3) the number of performances of sound recordings made by or over the iTunes Radio service to mobile devices; (4) the number of performances of sound recordings made by or over the iTunes Radio service to desktop/laptop computers; (5) the dollar amounts of any (a) advertising revenue, (b) subscription revenue, and (c) other revenue (each as required to be computed under the

agreements, *e.g.*, net of commissions); and (6) total dollar amounts paid by or on behalf of Apple in connection with its iTunes Radio service to each Record Company or other licensor of sound recordings and how those payments were calculated.

4. For each agreement produced or requested to be produced in response to Request No. 1, Documents sufficient to show any advances and equity grants paid or provided by Apple to the Record Company.

## SCHEDULE B

## DEFINITIONS

1. "Apple," "you," and "your" means Apple Inc. and its subsidiaries and affiliates.

2. "Document" and "Documents" have the same meaning as the term "document" in Rule 34(a) of the Federal Rules of Civil Procedure and include electronically stored information.

3. "Period" means the time period from January 1, 2010 to the present.

4. "Record Company" means any person or entity that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels.

5. The term "any" includes and encompasses the words "each" and "all." The terms "each" and "all" include and encompass the word "any."

6. The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request, definition, or instruction inclusive rather than exclusive.

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event that Apple becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Apple is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your users) in the United States. To the extent responsive Documents pertain to activities both within and outside the U.S., they should be produced in full.

3. These requests are intended to include all requested Documents in your possession, custody, or control or that are otherwise available to you, including Documents in the possession, custody, or control of your attorneys, agents, officers, employees, accountants,

consultants, representatives, or any other person acting or purporting to act on your behalf, wherever located and by whomever prepared.

4. A request for any Document shall be deemed to include a request for any transmittal sheets, cover letters, exhibits, enclosures, or attachments to such Document, in addition to the Document in its full and unexpurgated form.

5. If there are no Documents responsive to any particular request, please so state in writing.

# EXHIBIT B

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

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| **DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | ) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY JUDGES TO:** | *(name and address of person being subpoenaed)*<br>Sony Music Entertainment Inc.<br>c/o Wade Leak, Business and Legal Affairs Department<br>550 Madison Ave<br>New York, NY 10022 |
| 1. At the Request of : *(party name)*<br>**The National Association of Broadcasters** | *(name, address, and telephone of contact person)*<br>Michael L. Sturm<br>Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>202-719-7008<br>msturm@wileyrein.com |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| Place: | Date and Time: |
|---|---|
| Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>(or a place to be mutually agreed upon by the parties) | May 1, 2014 at 9:00am (EDT) |

| Issuing Officer Signature and Title: | Date: |
|---|---|
| | |

| Issuing Officer's Name, Address, and Telephone Number: |
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| |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## REQUESTS FOR DOCUMENTS

1. Each agreement that includes a grant of the right to make public performances of sound recordings in effect or entered into during the Period between Sony Music and any Webcasting Service.

2. For each agreement produced or requested to be produced in response to Request No. 1, each royalty statement, statement of account, and any other report (other than logs of specific recordings performed) provided regarding the agreement to Sony Music from a Webcasting Service for each quarterly reporting period (or other regular reporting period specified by the agreement) during the Period.

3. For each agreement produced or requested to be produced in response to Request No. 1, Documents sufficient to show any advances and equity grants paid or provided by a Webcasting Service (or other related entity) to Sony Music.

## SCHEDULE B

## DEFINITIONS

1. "Document" and "Documents" have the same meaning as the term "document" in Rule 34(a) of the Federal Rules of Civil Procedure and include electronically stored information.

2. "Period" means the time period from January 1, 2010 to the present.

3. "Sony Music," "you," and "your" means Sony Music Entertainment Inc. and its subsidiaries and affiliates.

4. "Webcasting Service" means any service that makes public performances of sound recordings over the Internet or over wireless, mobile, cellular, or other digital networks, including services engaged in non-interactive streaming and services engaged in interactive or "on demand" streaming.

5. The term "any" includes and encompasses the words "each" and "all." The terms "each" and "all" include and encompass the word "any."

6. The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request, definition, or instruction inclusive rather than exclusive.

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event that Sony Music becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, Sony Music is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your licensees) in the United States. To the extent responsive Documents pertain to activities both within and outside the U.S., they should be produced in full.

3. These requests are intended to include all requested Documents in your possession, custody, or control or that are otherwise available to you, including Documents in the possession, custody, or control of your attorneys, agents, officers, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf, wherever located and by whomever prepared.

4. A request for any Document shall be deemed to include a request for any transmittal sheets, cover letters, exhibits, enclosures, or attachments to such Document, in addition to the Document in its full and unexpurgated form.

5. If there are no Documents responsive to any particular request, please so state in writing.

# EXHIBIT C

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

| | | |
|---|---|---|
| **In the Matter of**<br><br>**DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

## SUBPOENA DUCES TECUM
## TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS

| | |
|---|---|
| **THE COPYRIGHT ROYALTY JUDGES TO:** | *(name and address of person being subpoenaed)*<br>Universal Music Group, Inc.<br>c/o C T Corporation System<br>111 Eighth Avenue<br>New York, NY 10011 |
| 1. At the Request of: *(party name)*<br><br>**The National Association of Broadcasters** | *(name, address, and telephone of contact person)*<br>Michael L. Sturm<br>Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>202-719-7008<br>msturm@wileyrein.com |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A**.

| | |
|---|---|
| Place:<br>Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>(or a place to be mutually agreed upon by the parties) | Date and Time:<br>May 1, 2014 at 9:00am (EDT) |

| | |
|---|---|
| Issuing Officer Signature and Title: | Date: |

| Issuing Officer's Name, Address, and Telephone Number: |
|---|
| |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## REQUESTS FOR DOCUMENTS

1. Each agreement that includes a grant of the right to make public performances of sound recordings in effect or entered into during the Period between UMG and any Webcasting Service.

2. For each agreement produced or requested to be produced in response to Request No. 1, each royalty statement, statement of account, and any other report (other than logs of specific recordings performed) provided regarding the agreement to UMG from a Webcasting Service for each quarterly reporting period (or other regular reporting period specified by the agreement) during the Period.

3. For each agreement produced or requested to be produced in response to Request No. 1, Documents sufficient to show any advances and equity grants paid or provided by a Webcasting Service (or other related entity) to UMG.

## SCHEDULE B

## DEFINITIONS

1. "Document" and "Documents" have the same meaning as the term "document" in Rule 34(a) of the Federal Rules of Civil Procedure and include electronically stored information.

2. "Period" means the time period from January 1, 2010 to the present.

3. "UMG," "you," and "your" means Universal Music Group, Inc. and its subsidiaries and affiliates.

4. "Webcasting Service" means any service that makes public performances of sound recordings over the Internet or over wireless, mobile, cellular, or other digital networks, including services engaged in non-interactive streaming, and services engaged in interactive or "on demand" streaming.

5. The term "any" includes and encompasses the words "each" and "all." The terms "each" and "all" include and encompass the word "any."

6. The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request, definition, or instruction inclusive rather than exclusive.

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event that UMG becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, UMG is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your licensees) in the United States. To the extent responsive Documents pertain to activities both within and outside the U.S., they should be produced in full.

3. These requests are intended to include all requested Documents in your possession, custody, or control or that are otherwise available to you, including Documents in the possession, custody, or control of your attorneys, agents, officers, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf, wherever located and by whomever prepared.

4. A request for any Document shall be deemed to include a request for any transmittal sheets, cover letters, exhibits, enclosures, or attachments to such Document, in addition to the Document in its full and unexpurgated form.

5. If there are no Documents responsive to any particular request, please so state in writing.

# EXHIBIT D

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

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| **DETERMINATION OF RATES AND TERMS FOR DIGITAL PERFORMANCE IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS (WEB IV)** | ) | **Docket No. 14-CRB-0001-WR**<br>**CRB Web IV** |

**SUBPOENA DUCES TECUM**
**TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS**

| | |
|---|---|
| **THE COPYRIGHT ROYALTY JUDGES TO:** | *(name and address of person being subpoenaed)*<br>Warner Music Group Corp.<br>c/o Silda Palerm, Vice President & Senior Litigation Counsel<br>75 Rockefeller Plaza<br>New York, NY 10019 |
| 1. At the Request of: *(party name)*<br>**The National Association of Broadcasters** | *(name, address, and telephone of contact person)*<br>Michael L. Sturm<br>Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>202-719-7008<br>msturm@wileyrein.com |

**YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection or copying of the material requested in the attached **Schedule A.**

| | |
|---|---|
| Place:<br>Wiley Rein LLP<br>1776 K Street, NW<br>Washington, DC 20006<br>(or a place to be mutually agreed upon by the parties) | Date and Time:<br>May 1, 2014 at 9:00am (EDT) |

| | |
|---|---|
| Issuing Officer Signature and Title: | Date: |

| Issuing Officer's Name, Address, and Telephone Number: |
|---|
| |

| PROOF OF SERVICE | | | |
|---|---|---|---|
| SERVED | Date | Place | |
| Served on (Print Name) | | | Manager or Service |
| Served by (Print Name) | | | Title |

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on this ___ day of ___, 20___

_____
Signature of Server

_____
Address of Server

## SCHEDULE A

## REQUESTS FOR DOCUMENTS

1. Each agreement that includes a grant of the right to make public performances of sound recordings in effect or entered into during the Period between WMG and any Webcasting Service.

2. For each agreement produced or requested to be produced in response to Request No. 1, each royalty statement, statement of account, and any other report (other than logs of specific recordings performed) provided regarding the agreement to WMG from a Webcasting Service for each quarterly reporting period (or other regular reporting period specified by the agreement) during the Period.

3. For each agreement produced or requested to be produced in response to Request No. 1, Documents sufficient to show any advances and equity grants paid or provided by a Webcasting Service (or other related entity) to WMG.

## SCHEDULE B

## DEFINITIONS

1. "Document" and "Documents" have the same meaning as the term "document" in Rule 34(a) of the Federal Rules of Civil Procedure and include electronically stored information.

2. "Period" means the time period from January 1, 2010 to the present.

3. "Webcasting Service" means any service that makes public performances of sound recordings over the Internet or over wireless, mobile, cellular, or other digital networks, including services engaged in non-interactive streaming.

4. "WMG," "you," and "your" means Warner Music Group Corp. and its subsidiaries and affiliates.

5. The term "any" includes and encompasses the words "each" and "all." The terms "each" and "all" include and encompass the word "any."

6. The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request, definition, or instruction inclusive rather than exclusive.

## INSTRUCTIONS

1. These requests are continuing in nature, and in the event that WMG becomes aware of additional responsive information or Documents at any time through the conclusion of this proceeding, WMG is requested promptly to provide such additional information or Documents.

2. These requests seek information related only to your activities (or the activities of your licensees) in the United States. To the extent responsive Documents pertain to activities both within and outside the U.S., they should be produced in full.

3. These requests are intended to include all requested Documents in your possession, custody, or control or that are otherwise available to you, including Documents in the possession,

custody, or control of your attorneys, agents, officers, employees, accountants, consultants, representatives, or any other person acting or purporting to act on your behalf, wherever located and by whomever prepared.

4. A request for any Document shall be deemed to include a request for any transmittal sheets, cover letters, exhibits, enclosures, or attachments to such Document, in addition to the Document in its full and unexpurgated form.

5. If there are no Documents responsive to any particular request, please so state in writing.

# EXHIBIT E

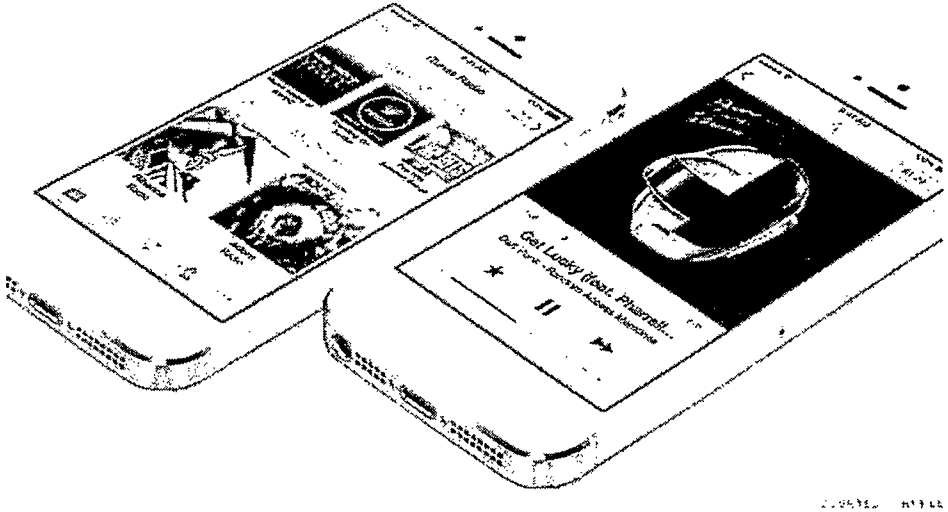
# Apple enters the streaming music game

June 11, 2013: 12:57 PM ET

Recommend 7

**iTunes radio will work a lot like Pandora, but is the company too late to the big music party in the cloud?**

By Ryan Bradley, senior editor




FORTUNE -- The short answer to the above question is no, the longer answer is maybe, and -- if you really want to speculate and think long-term -- the ultimate answer may be that iTunes, in terms of music listening, is irrelevant. Let's back up and break this down.

No, iTunes radio isn't late to the streaming music game at all. It's still early days, in fact, and Apple is a mighty big player and has signed direct deals with all the major labels for its radio station, a feat Pandora (P) -- currently the most heavily

used streaming radio service -- has not managed. Speaking of Pandora -- this is terrible news for Pandora. Digital Music News has an excellent **five-point argument** for why Pandora will be gone by 2018. The first point, related to all others, has to do with direct licensing. Pandora almost certainly **cannot afford to make deals** like Apple can, because for Apple, iTunes has only ever been about pushing its devices. iTunes was essential for the iPod and, today, the iPhone, but the revenues from its music sales have been minuscule but **vital to the music industry**. When all your company does is stream music, well, so far this has not proven to be a great business model.

**MORE: 5 questions surrounding Apple's new streaming music platform**

Maybe, however, Apple (**AAPL**) is offering something we're already used to doing elsewhere. Maybe it is, in fact, late to the streaming music game. The reality is that iTunes is a terribly bloated Chimera of a program that many have abandoned as a listening service. Still, today, 63% of all digital music purchased in the U.S. is done so through iTunes, but nearly 100 million (and many more worldwide) don't purchase individual tracks or albums digitally anymore. We're streaming, and we're streaming somewhere else. Further, if you were one of the poor suckers who signed up for iTunes match in the hopes that you could stream your entire library anywhere, you soon realized this barely worked and abandoned it for something else. If you catch a whiff of spite it's because I *was* one of those poor suckers. Now, since I'm paying for a service I never use, I'll get to try out iTunes radio ad-free. This would be exciting for me if hearing the words "iTunes match" didn't immediately incite violent thoughts.

**LISTEN: Fortune Brainstorm Podcast on streaming music**

Yes, it's late, because there are now way better ways to listen to music. Spotify, Microsoft's Rhapsody (**MSFT**), the terribly named Google Music Play All Access (**GOOG**), and -- as I rhapsodized about on *Fortune's* podcast -- Rdio, already offer something akin to the passive, radio-like listening experience. TuneIn is a very popular app that patches users in to radio stations all over the world. People are paying for these services, though not in very significant numbers. Not yet, anyway.

It goes back to the initial problem, which is turning a streaming music service into a business. Apple doesn't have to, so it doesn't have to worry as much about the fact that, for music, iTunes isn't what it used to be (the be all end all, basically). But if someone else did become popular enough, and lucrative enough, maybe then Apple would worry. A big if, sure, but it's early days in the streaming game.

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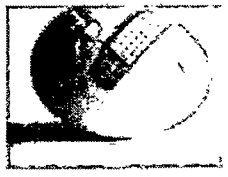

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THE WALL STREET JOURNAL.
WSJ.com

June 26, 2013, 7:50 PM ET

# Apple Spells Out iTunes Radio Terms

*By Hannah Karp and Jessica E. Lessin*

Ahead of its launch of an online radio service Apple circulated terms to independent record labels last week, many of them more generous to the music companies than what rival Pandora Media currently pays.

Apple intends to pay royalties to labels based on a blend of how many times listeners hear their songs and how much advertising Apple sells, according to the terms, which were reviewed by The Wall Street Journal.

During iTunes Radio's first year, Apple will pay a label 0.13 cents each time a song is played, as well as 15% of net advertising revenue, proportionate to a given label's share of the music played on iTunes. In the second year, that bumps up to 0.14 cents per listen, plus 19% of ad revenue.

That compares to the 0.12 cents Pandora pays labels per listen on its free service. Apple is also offering music publishers more than twice as much in royalties than Pandora does.

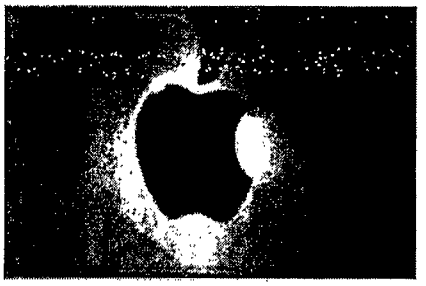
Apple won't have to pay royalties for some performances of songs that are already in listeners' iTunes libraries, or songs that might be on an album that a listener owns just part of. Similarly, "Heat Seeker" tracks selected by iTunes for special promotions, are also exempted. Apple also doesn't have to pay for songs listeners skip before 20 seconds have elapsed. The company only gets to avoid paying royalties for two songs per hour for any given user.

The terms for independent labels are similar but not identical to those given to the three major record companies – Vivendi SA's Universal Music Group, Access Industries Inc.'s Warner Music Group and Sony Corp.'s Sony Music Entertainment – which are expected to receive cash advances against future royalties.

An Apple spokeswoman declined to comment.

Pandora was criticized by members of the band Pink Floyd in a recent USA Today opinion piece for complaining it pays too much in royalties to make a profit and asking artists to support its efforts to get a law passed that would cut the fees it pays.

Pandora founder Tim Westergren said Wednesday that it isn't fair to compare Apple's royalty rates with Pandora's because the services work differently, and that different features on the two services could trigger different royalty payments.



"It's apples and oranges," said Mr. Westergren, referring to the two services.

The ad revenue iTunes Radio generates might not necessarily be more significant than Pandora's. People familiar with Apple's thinking said the company is primarily hoping that iTunes Radio will encourage listeners to buy the tracks they like at the iTunes Store and help the tech giant sell more iPhones, iPods and other hardware.

Though music sales are slipping fast across the industry with the growth of subscription streaming services that offer unlimited music for a monthly fee, Apple is likely to stick for now to its business model of selling songs on iTunes. That business has become marginally profitable in recent years, these people said – as long as that model remains sustainable.

The new radio service gives Apple a venue to develop its iAd system – a mobile advertising platform for Apple devices that allows third-party developers to embed their apps with ads, these people added.

The iTunes Radio licensing document also includes several references to terms for the use of music in talk, weather, sports and news programming on the new service. The agreement said Apple wouldn't have to pay the independent labels royalties for snippets of music used in the background of those sorts of programs. But it's unlikely Apple will invest much in creating such programming, given that it has long shied from creating its own content.

Clear Channel Communications Inc. Chief Executive Bob Pittman said recently that only a tiny fraction of the people who listen to iHeartRadio, Clear Channel's digital service, listen online to such programming.

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The New York Times

September 10, 2013

# With iTunes Radio, Apple Takes Aim at Pandora

By BEN SISARIO

A decade ago, Apple transformed the music business with its iTunes store. Now what the music industry expects from Apple is less of a revolution than a helping hand.

Apple's newest music feature, iTunes Radio, will be released on Sept. 18 as part of its iOS 7 system update, the company announced on Tuesday. The service is a sleek take on Internet radio, and Apple's ability to place the app on millions of its devices gives it an enormous potential audience from Day 1.

"It's a huge opportunity on a global basis to accelerate the transition of radio listeners and advertising dollars from terrestrial to digital," said Stephen Bryan, the executive vice president for digital strategy at the Warner Music Group, which releases music by Green Day, Bruno Mars and hundreds of other acts.

The service is a threat to Pandora Media, which dominates Internet radio. But music and advertising executives say that the magnitude of that threat is unclear, given Apple's relatively late entry into streaming music and Pandora's strong market position. Both offer free streams of music tailored to a user's taste and supported by advertising. In August, Pandora had 72.1 million active users — almost all in the United States — who streamed 1.35 billion hours of music, according to data released by the company.

"At this point Pandora is one of the leading recipients of mobile advertising revenue, and is one of the most popular apps, period, across devices," said Clark Fredricksen, a vice president at eMarketer, a research firm. "It's tough to see it getting killed."

Instead, record labels and music publishers hope that Apple's immense marketing power will attract more advertisers and help popularize Internet radio around the world. ITunes Radio will at first be available only in the United States, but it is expected to be introduced internationally soon. Apple operates iTunes stores in 119 countries.

"It's hard to say that Pandora hasn't helped make Internet radio mainstream already," said Glenn Peoples, the senior editorial analyst at Billboard. "But iTunes Radio can help it grow and can change the impressions of it in the minds of advertisers and sponsors."

Apple is the single largest retailer of music, its downloads providing labels a crucial source of revenue as sales of CD's drop. One feature of iTunes Radio that music companies are particularly grateful for is a prominent button to buy a song as it streams. Subscribers to Apple's iTunes Match feature, for $24.99 a year, will be able to sync both newly purchased songs and any other songs in their library, such as those imported from CDs, and use the iTunes Radio service ad-free.

In the economy of digital music, one 99-cent download can be worth more than hundreds of streams. Apple's deals with labels call for it to pay 0.13 cents for every song streamed on iTunes Radio during its first year of operation, according to reports in Billboard and elsewhere based on Apple's licensing contracts. That is more than Pandora's current rate of 0.12 cents, and Apple will also pay music companies a portion of the service's advertising revenue.

Apple is entering an already crowded Internet radio market, which besides Pandora includes Clear Channel Communications' iHeartRadio app; radio functions offered by on-demand services like Spotify; and others like Songza that supply ready-made playlists for various occasions, like working out or hosting a dinner party. This week Microsoft expanded its Xbox Music service, which includes a radiolike function, to work on Apple and Android devices.

So far Pandora's investors have not fled. Since news of Apple's plans first emerged a year ago, Pandora's stock has roughly doubled. On Tuesday it closed at $20.35, up 1 percent for the day.

*This article has been revised to reflect the following correction:*

***Correction: September 26, 2013***

*An article on Sept. 11 about the new iTunes Radio service misstated the options subscribers would get for $24.95 a year. They will be able to sync both newly purchased songs and any songs in their libraries, including those imported from CDs, and will be able to use the iTunes Radio service ad-free. ITunes users can already instantly link songs through the cloud to all of their Apple devices free; that feature does not require a $24.95 yearly payment.*

Ex. 5

EX. 5

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

| | | |
|---|---|---|
| **In The Matter Of:** | ) | |
| **Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV)** | ) | **14-CRB-0001-WR (2016-2020)** |

**THE NATIONAL ASSOCIATION OF BROADCASTERS' REPLY IN SUPPORT OF ITS MOTION FOR ISSUANCE OF SUBPOENAS TO APPLE INC. AND THE THREE MAJOR RECORD LABELS**


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*Counsel for the National Association of Broadcasters*


Dated: March 24, 2014

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## INTRODUCTION AND SUMMARY

The opposition filed by SoundExchange to NAB's subpoena motion does not dispute that the four intended recipients of NAB's limited subpoenas are participants or witnesses within the meaning of the Register's February 22, 2010 decision and therefore are properly subject to subpoenas. SoundExchange also does not dispute that the subpoenas concern a limited number of documents that were the core type of documents used in every past proceeding to set webcasting rates and thus are potentially highly relevant to the determination to be made by the Judges in this proceeding, including the questions propounded by the Judges in their January 3, 2014 commencement notice. While SoundExchange hurls pejoratives about allegedly "unfettered" and "burdensome" discovery, SoundExchange makes no particularized showing of burden, undue or otherwise. Moreover, any contention with respect to burden would be refuted by the proposed subpoenas themselves, Exhibits A-D to NAB's motion, which are limited to four or fewer requests that themselves are narrow in scope.

Because SoundExchange cannot show that the Judges lack authority to issue subpoenas to the affected parties or that the subpoenas themselves are improper, its opposition instead is founded almost exclusively on a single legal premise: that Congress itself, or the Judges through a prior ruling, categorically precluded the issuance of subpoenas prior to the filing of written direct cases. That premise is false. In granting subpoena authority to the Judges in 17 U.S.C. § 803(b)(6)(C)(ix), Congress did not limit that power to a particular stage of the proceedings; rather, the Judges can exercise their subpoena power whenever they find that their resolution of the case "would be substantially impaired" in the absence of the requested documents. Likewise, in the *Web III* determination upon which SoundExchange relies, "the Judges "disagree[d] with SoundExchange that the absence of a corresponding subpoena provision in the discovery provision for rate adjustment proceedings prohibits them from issuing a subpoena at that stage,

or any stage, of the proceeding." Order Denying Issuance of Subpoenas for Nonparty Witnesses, Docket No. 2009-1 CRB Webcasting III, at 2 n.1 (Mar. 5, 2010) (emphasis added, citation omitted). While the Judges denied issuance of the subpoenas in that particular case, they made clear that they were not foreclosed from issuing a subpoena prior to receipt of oral testimony if "substantial impairment" were demonstrated. *Id.* at 1-2.

Here, the statutory "substantial impairment" standard has been satisfied by NAB and not refuted by SoundExchange. The centrality of the requested documents – essentially, potential benchmark sound recording licenses in the interactive and non-interactive markets and reports showing payments and use thereunder – to this proceeding is self-evident and not seriously questioned by SoundExchange. SoundExchange's position that the Judges' determination will not be impaired so long as the requested documents may surface sometime before the conclusion of the proceeding is inconsistent with the Judges' commencement notice and unsupported by precedent or logic. By identifying the issues of concern in their commencement notice, the Judges recognized that a more focused and informed presentation of evidence, particularly in the direct cases, would best serve the Judges in making their determination. SoundExchange also never even acknowledges, let alone responds to, the Supreme Court and other precedent in NAB's motion establishing that basic fairness in the litigation process and the effectiveness of that process require equivalent access to critical information. Consistent with this precedent, keeping one set of parties in the dark – while the other side enjoys full access to information – will substantially impair the cases presented and the Judges' ultimate determination.

SoundExchange's remaining arguments are insubstantial. SoundExchange cannot seriously contend that it and its battalion of lawyers will be so preoccupied by three of its members responding to narrow subpoenas that it will be unable to participate in settlement

negotiations. If SoundExchange wishes to engage in meaningful settlement discussions, as opposed to posturing for litigation, it surely can find time to do so. NAB certainly will. Second, the contention that, if the motion is granted, SoundExchange will retaliate by seeking leave to serve subpoenas requesting the proverbial kitchen sink simply underscores the focused nature of the subpoenas that NAB seeks to serve. In sum, apart from maintaining SoundExchange's current information advantage, SoundExchange has no substantial basis for opposing the subpoenas at issue. Significantly, none of the four intended NAB subpoena recipients has filed any opposition, despite having been timely served with this motion in accordance with the Judges' rules. NAB's motion should be granted.[1]

## ARGUMENT

### I. NEITHER THE GOVERNING STATUTE, ITS LEGISLATIVE HISTORY, NOR THE JUDGES' PRIOR DECISION PRECLUDES ISSUANCE OF THE REQUESTED SUBPOENAS SO LONG AS THE STATUTORY "SUBSTANTIAL IMPAIRMENT" STANDARD IS SATISFIED.

From reading SoundExchange's opposition, one would gather that the governing statutory language says that "after the parties have filed written direct cases, the Judges may issue subpoenas." *See* SoundExchange Opp. at 6-7. The actual language, however, says nothing of the sort:

> In proceedings to determine royalty rates, the Copyright Royalty Judges may issue a subpoena commanding a participant or witness to appear and give testimony, or to produce and permit inspection of documents or tangible things, if the Copyright Royalty Judges' resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents or tangible things. Such subpoena shall specify with reasonable particularity the materials to be produced or the scope and nature of the required testimony. Nothing in this clause shall preclude the Copyright Royalty Judges from requesting the production by a nonparticipant of information or materials relevant to the resolution by the Copyright Royalty Judges of a material issue of fact.

[1] NAB has joined in Pandora's corresponding motion and also joins in the arguments in Pandora's reply.

17 U.S.C. § 803(b)(6)(C)(ix). This language includes no restrictions on when subpoenas may be issued and thus contrasts sharply with other subsections of the statute, which contain express time restrictions or sequencing requirements. *See, e.g.*, 17 U.S.C. § 803(b)(3)(A)(i) ("Promptly after the date for filing of petitions to participate in a proceeding, the Copyright Royalty Judges shall make available . . . a list of . . . participants and shall initiate a voluntary negotiation period among the participants . . . ."); *id.* § 803(b)(6)(C)(i) (requiring written direct statements to be filed at a time set by the Judges "not earlier than 4 months, and not later than 5 months, after the end of the voluntary negotiation period"). Under ordinary principles of statutory construction, it would be improper to read a time or sequencing limitation into the statute that Congress plainly did not include. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation and quotation marks omitted)); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) (interpreting statute as applying only when 100 "persons" to bring suit, as opposed to "100 or more named or unnamed real parties in interest" because, "[h]ad Congress intended the latter, it easily could have drafted language to that effect").[2]

SoundExchange also points to the related legislative history, but it mischaracterizes both the purpose and the effect of the legislation in doing so. A key reason raised in the hearings for conferring subpoena power was the decisionmaker's inability to obtain the very type of

[2] SoundExchange also relies on the structure of the statute to argue that Congress implicitly imposed a time constraint on subpoenas. SoundExchange Opp. at 7. But the scope of the supposed limitation is unclear, even to SoundExchange. In consecutive sentences, SoundExchange first argues that subpoenas are expected "sometime after discovery has begun" but immediately thereafter claims that subpoenas are "expected to issue after discovery has concluded." *Id.* (emphasis added). SoundExchange's inability to articulate what the purported limitation says belies its claim that any such limitation exists.

information that NAB's and Pandora's subpoenas seek here – information regarding proposed benchmark agreements:

> A case in point is the just-concluded § 112/114 Proceeding, in which the linchpin of the recording industry's case was 26 license agreements reached between the Recording Industry Association of America and various webcasters. While the Panel and the user-parties to the proceeding were interested in securing testimony from as many of these 26 entities as possible, the absence of subpoena power left the Panel with no recourse but to "invite" these parties to testify voluntarily. Not surprisingly, while a handful agreed, most did not.

*See* Decl. of Melinda Lemoine Ex. A at 26-27 (Mar. 16, 2014) ("Lemoine Decl."). Moreover, the effect of the legislation was not – as SoundExchange claims (Opp. at 8-10) – to minimize discovery expenses regardless of competing considerations but to expand significantly the available discovery tools to provide the Judges with the information they need to reach a fair and balanced decision. *Compare* 37 C.F.R. § 251.45(b), (c) (2004) (permitting 45-day period for discovering only "underlying documents"), *with* 17 U.S.C. § 803(b)(6)(C)(iv), (v), (vii), (ix) (permitting 60-day period for not only discovering documents "directly related" to written cases but also permitting subpoenas, interrogatories, and depositions). SoundExchange's mischaracterization is particularly ironic given that the recording industry's own lawyer at the time unsuccessfully argued that "serious consideration should be given to eliminating discovery altogether." *See* Lemoine Decl. Ex. A at 21 (emphasis added).[3] Thus, the legislative history provides no support for SoundExchange's attempts to avoid the issuance of subpoenas.[4]

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[3] SoundExchange's attempt to dismiss the accompanying committee report based on the slight change in the subpoena standard from "relevant and material" to "substantial impairment" (Opp. at 9) is meritless. Black's Law Dictionary defines a "material fact" as one that is "significant or essential to the issue or matter at hand" and one that is "necessary to determine the issue" and "upon which outcome of litigation depends" – a standard that differs very little from the "substantial impairment" standard in the final legislation. *See* Black's Law Dictionary 670 (9th ed. 2009); Black's Law Dictionary 976-77 (6th ed. 1990).

[4] SoundExchange elsewhere posits a dichotomous choice between full Federal Rules discovery and a system in which subpoenas are a backup "safety valve" allowed only after the completion of the 60-day discovery period in 17 U.S.C. § 803(b)(6)(C)(iv). *See* SoundExchange Opp. at 1. But that is not the choice. Plainly, the system described in 17 U.S.C. § 803(b)(6)(C) does not contemplate full Federal Rules discovery. The relevant point here, however, is

SoundExchange also relies upon a 2010 subpoena decision in the *Web III* proceeding that it claims either "disfavors" or "compels the denial" of NAB's motion. *See* SoundExchange Opp. at 4 (citing *Order Denying Issuance of Subpoenas for Nonparty Witnesses*, Docket No. 2009-1 CRB Webcasting III (Mar. 5, 2010) ("*Web III Subpoena Order*")). In fact, while the Judges expressed some skepticism as to whether the requisite "substantial impairment" standard could be met at an early stage of a proceeding, based on the record before them, they did not purport to rule categorically that subpoenas could not or would not be issued at specific stages in the proceeding. To the contrary, the Judges rejected SoundExchange's contention that Judges' regulations prohibited them from issuing a subpoena at "that stage, or any stage, of the proceeding." *Web III Subpoena Order* at 2 n.1.

SoundExchange also relies on a statement in the *Web III Subpoena Order* (at 3) that "[s]ubpoenas are not permitted for purposes of building one or more party's direct cases." In context, this dictum must be taken to mean that a party's mere showing that its direct case would benefit from issuance of a subpoena is insufficient standing alone; rather, a party seeking to justify a subpoena must show the Judges that the Judges' determination will be substantially impaired in the absence of the requested documents. SoundExchange's preclusive reading of this language would improperly rewrite the statute, which premises the issuance of subpoenas solely on substantial impairment of the Judges' determination and imposes no restrictions on the timing of when such subpoenas may be issued. In sum, the *Web III Subpoena Order* does not change the dispositive question framed by the governing statute: whether the Judges' determination will be substantially impaired in the absence of production of the requested

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that rather than imposing some timing constraint on subpoenas, Congress imposed a substantive standard – the "substantial impairment" test – that must be met before any subpoena can be issued.

documents. 17 U.S.C. § 803(b)(6)(C)(ix). As set out below, SoundExchange failed to refute NAB's showing on this issue.

## II. SOUNDEXCHANGE FAILED TO REFUTE NAB'S SHOWING THAT THE JUDGES' RESOLUTION WILL BE SUBSTANTIALLY IMPAIRED IF THE REQUESTED SUBPOENAS ARE NOT ISSUED.

SoundExchange does not and cannot dispute how important the subpoenaed documents are to this proceeding. Unless SoundExchange suddenly changes course from its practice in every webcasting and satellite radio proceeding to date, these are the kind of statutory and non-statutory sound recording licenses that SoundExchange will advance as benchmarks and that the Judges will consider in making their determination.

SoundExchange's position appears to be that, so long as the subpoenaed agreements and related documents may eventually be disclosed some time before the end of the process, the Judges' determination cannot be substantially impaired. SoundExchange Opp. at 1 ("[U]ltimately all relevant information . . . is exchanged . . . .").[5] But the Judges already have recognized that the quality of the evidence and argument that is presented to them necessarily affects the Judges and the quality of their determination:

> [T]he Judges are best served if the participants, their economic witnesses, and their counsel craft arguments in a manner that assists the Judges in identifying and applying the optimal economic analysis when establishing rates and terms pursuant to the Act.

*Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (Web IV): Notice Announcing Commencement of Proceeding*, 79 Fed. Reg. 412, 413 (Jan. 3, 2014). By identifying these important issues at the outset, the Judges enabled the parties

[5] Unfortunately, "may" is the operative word. SoundExchange will not rely upon agreements with unfavorable rates and terms in its written direct case, and there is no guarantee that the services will be able to obtain such agreements in discovery. Highlighting this serious problem, SoundExchange euphemistically describes such unfavorable agreements as "non-public information that the record companies may not consider relevant." SoundExchange Opp. at 15.

on both sides to present more informative direct cases, to the benefit of the process and the ultimate determination. Under SoundExchange's contrary view, it would have been equally effective for the Judges to have kept the parties in the dark through the filing of the direct cases and simply asked some questions from the bench at some point in the proceeding. The Judges, however, decided that that resolution of the case would be facilitated by a substantive notice at the outset.

The concept that more informed and prepared parties will lead to a better reasoned and more just determination is not unique to the Judges; it is a fundamental principle in American jurisprudence. As noted in NAB's motion, the Supreme Court has stated that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 540 n.25 (1987) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (alteration in original)); *see also In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 205 (2d Cir. 1987) ("Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other."). SoundExchange offers no response to this precedent, which underscores the direct correlation between timely availability of critical information and the quality and fairness of the ultimate determination in the judicial process.

SoundExchange also argues that the services can somehow overcome the critical information disparity by sharing information among themselves. *See* SoundExchange Opp. at 11-12. This assertion is false. As the Judges are aware, the vast majority of privately negotiated sound recording licenses include a nondisclosure provision. Thus, the services are not generally at liberty to exchange such licenses. Even then, these licenses would only be one limited subset

of the licenses that would be available. In contrast, as demonstrated in past proceedings, SoundExchange consistently has been able to supply its experts with a plethora of privately negotiated licenses. *See* NAB Mot. at 4 (citing evidence that SoundExchange has access to major label sound recording license agreements for use in litigation). SoundExchange does not dispute this. Thus, contrary to SoundExchange's claims, a substantial information disparity will exist unless the subpoenas are issued.

## III. SOUNDEXCHANGE'S REMAINING ARGUMENTS FOR DENYING ISSUANCE OF THE REQUESTED SUBPOENAS ARE INSUBSTANTIAL.

SoundExchange makes three additional arguments for denial of the motion. None is persuasive.

First, and perhaps most remarkably, SoundExchange claims that issuing the narrow subpoenas to Apple and the three major labels may result in "stifling potential settlement discussions with discovery distractions." SoundExchange Opp. at 13. It is unclear why SoundExchange could be distracted at all, insofar as it is not the recipient of any Pandora or NAB subpoena. To the best of NAB's knowledge, SoundExchange will have no involvement whatsoever in responding to the Pandora subpoenas to various services and the NAB subpoena to Apple. And, presumably, the three labels and their legal departments will have principal responsibility for responding to the subpoenas directed to them. But even if those labels were to delegate full responsibility for responding to SoundExchange, the suggestion that SoundExchange lacks sufficient corporate bandwidth to respond to these narrow subpoenas and at the same time discuss settlements defies credulity.[6] As SoundExchange is well aware from its

[6] SoundExchange suggests that the labels are somehow exempt from the subpoena process due to their affiliation with SoundExchange. But each of the labels plainly is a "participant or witness" within the meaning of 17 U.S.C. § 803(b)(6)(C)(ix) as it has been interpreted by the Register. *See Mem. Op. on Material Questions of Substantive Law*, Docket No. 2009-1 CRB Webcasting III, at 5 (Feb. 22, 2010). Moreover, the major labels have consistently appeared as witnesses in CRB rate setting proceedings. Other than accusing NAB of "gamesmanship" (SoundExchange Opp. at 11), SoundExchange provides no rationale for its exemption claim.

recurrent participation in these proceedings, parties and their lawyers (not to mention the Judges) frequently are required to attend to more than one task at a time. SoundExchange's implicit assertion that it is institutionally incapable of doing so should be recognized for exactly what it is: the weakest possible excuse for attempting to avoid issuance of proper subpoenas. And, if SoundExchange is seriously interested in reaching a settlement, as opposed to quashing subpoenas, it should know that, as Congress recognized, providing information "may alter a pre-discovery position, making the affected party more likely to engage in settlement negotiations." H.R. Rep. No. 108-408, at 33-34 (2004). The requested subpoenas will therefore promote settlement, not hinder it, as SoundExchange claims.

SoundExchange's second argument is that, if the subpoenas requested by NAB are issued, SoundExchange will have "no choice" but to seek "reams of material" through its own subpoenas. SoundExchange Opp. at 17. But SoundExchange's list of explicitly retaliatory discovery (principally various internal analyses) simply highlights the gulf between the narrow subpoenas proposed by NAB and SoundExchange's threatened retribution. Significantly, not one of SoundExchange's document categories calls for potential benchmark agreements – SoundExchange already has them. Comparison of the categories in the NAB subpoenas with the categories in SoundExchange's retaliatory discovery shows that there is a discernible line between full-bore discovery involving "reams" of information and the provision of limited, critical information in response to a subpoena without which the Judges' determination will be substantially impaired.

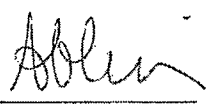
Finally, SoundExchange makes an attenuated claim that the subpoenas at issue are overly broad. SoundExchange Opp. at 19. The narrow scope of the subpoenas, however, is evident on their face. And the only NAB subpoena issue about which SoundExchange specifically

complains is one category in the subpoena to Apple (Exhibit A to NAB's motion), a party to which SoundExchange stands in an adversarial relationship. NAB represents, however, that if a subpoenaed party or its designee has an issue with the breadth of a certain category, NAB will work in good faith to resolve it. But given the facially narrow and appropriate scope of the subpoenas at issue, purported overbreadth does not constitute a basis for denial of the request to issue subpoenas under the Judges' statutory authority.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in the initial motion papers, Pandora's motion should be granted, and the produced documents should be made available to NAB and other participants in addition to Pandora. In addition, the subpoenas attached to NAB's motion should be issued so as to require responses by May 1, 2014 and thereby give the services' economic experts the opportunity to assess the significance of the produced information and to give the services the opportunity to provide the Judges with direct cases that fairly take this evidence into account from the buyer-side perspective.

Respectfully submitted,



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*Counsel for the National Association of Broadcasters*

Dated: March 24, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, I caused a copy of the foregoing document to be served by first-class mail, with a courtesy copy via electronic mail, on:

Catherine Gellis
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*Counsel for College Broadcasters Inc.*

and by overnight courier, with courtesy copies via electronic mail, on the following parties:

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| Kevin Blair<br>Brian Gantman<br>Educational Media Foundation<br>5700 West Oaks Boulevard<br>Rocklin, CA 95765<br>kblair@kloveair1.com<br>bgantman@kloveair1.com<br>P: 916-251-1600<br>F: 916-251-1731<br>*Educational Media Foundation* | David Oxenford<br>Wilkinson Barker Knauer, LLP<br>2300 N Street, NW, Suite 700<br>Washington, DC 20037<br>doxenford@wbklaw.com<br>P: 202-383-3337<br>F: 202-783-5851<br>*Counsel for Digitally Imported Inc., AccuRadio, LLC, and Educational Media Foundation* |

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| Jeff Yasuda<br>Feed Media, Inc.<br>3979 Freedom Circle, Suite 610<br>Santa Clara, CA 95054<br>jeff@feed.fm<br>P: 650-479-4881<br>F: 415-449-6947<br>*Feed Media, Inc.* | Gary Greenstein<br>Wilson Sonsini Goodrich & Rosati<br>1700 K Street, NW, 5th Floor<br>Washington, DC 20006<br>ggreenstein@wsgr.com<br>P: 202-973-8849<br>F: 202-973-8899<br>*Counsel for CMN, Inc., 8tracks, Inc., and Feed Media, Inc.* |
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| George Johnson<br>GEO Music Group<br>23 Music Square East, Suite 204<br>Nashville, TN 37203<br>george@georgejohnson.com<br>P: 615-242-9999<br>*GEO Music Group* | Jeffrey Harleston<br>Executive Vice President and General Counsel<br>Jeffrey.Harleston@umusic.com<br>Universal Music Group Inc.<br>2220 Colorado Avenue<br>Santa Monica, CA 90404 |
| Paul M. Robinson<br>Executive Vice President and General Counsel<br>Paul.Robinson@wmg.com<br>Silda Palerm<br>VP and Senior Litigation Counsel<br>Silda.Palerm@wmg.com<br>Warner Music Group Corp.<br>75 Rockefeller Plaza<br>New York, NY 10019 | Julie Swidler<br>Executive VP of Business Affairs and General Counsel<br>Julie.Swidler@sonymusic.com<br>Wade Leak<br>Senior VP, Deputy General Counsel<br>Wade.Leak@sonymusic.com<br>Sony Music Entertainment Inc.<br>550 Madison Ave<br>New York, NY 10022 |
| David Rahn<br>Custom Channels.net, LLC<br>2569 Park Lane, Suite 104<br>Lafayette, CO 80026<br>dave@customchannels.net<br>P: 303-588-2824<br>*Custom Channels.net, LLC* | |

Karyn K. Ablin

Ex. 6

EX. 6

RESTRICTED – Subject to Protective Order in
Docket No. 14 – CRB – 001 – WR (2016-2020)(Web IV)

Ex. 7

# EX. 7

RESTRICTED – Subject to Protective Order in
Docket No. 14 – CRB – 001 – WR (2016-2020)(Web IV)

Ex. 8

EX. 8

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

| | | |
|---|---|---|
| In re<br><br>DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*) | ) | Docket No. 14-CRB-0001-WR (2016-2020) |

## DECLARATION OF TODD D. LARSON

1. I am a Partner in the law firm of Weil, Gotshal & Manges LLP. I am counsel for Pandora Media, Inc. ("Pandora") in the above-captioned proceeding. I respectfully submit this declaration in support of the motion by Pandora, iHeartMedia, Inc., the National Association of Broadcasters, the National Religious Broadcasters Noncommercial Music License Committee, and Sirius XM Radio Inc. to compel SoundExchange, Inc. to produce negotiating documents directly relating to its written direct statement. I have personal knowledge of the facts stated herein.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts of SoundExchange, Inc.'s Responses and Objections to Licensee Participants' First Set of Requests for Production of Documents, dated November 7, 2014.

3. On November 19, 2014, counsel for SoundExchange, Inc. and several of the Licensee Participants met and conferred via teleconference. During that call, counsel for SoundExchange indicated that SoundExchange would be willing to consider producing

negotiating documents from a narrow list of specific services if the Licensee Participants proposed such a list.

4. On November 25, 2014, I e-mailed SoundExchange's counsel a list of ten specific services for which Pandora, NAB, and Sirius XM were requesting production of internal and external negotiating documents. SoundExchange's counsel replied to my e-mail on November 26, 2014. Attached hereto as Exhibit B is a true and correct copy of those e-mails.

5. Attached hereto as Exhibit C is a true and correct copy of an excerpt showing Request No. 15 from SoundExchange's First Set of Requests for Production of Documents to Pandora Media, Inc. In response to SoundExchange's requests, Pandora conducted a thorough document collection and privilege review and produced, *inter alia*, over 38,000 pages of information related to its direct license with Merlin, including non-privileged internal documents discussing the negotiation and implementation of that agreement.

6. Attached hereto as Exhibit D is a true and correct copy of the Motion to Compel SoundExchange to Produce Negotiating Documents Related to Its Direct Statement, Docket No. 2005-1 CRB DTRA (Mar. 6, 2006)).

7. Attached hereto as Exhibit E is a true and correct copy of the Motion to Compel SoundExchange to Produce Label License Agreements and Related Negotiation Documents, Docket No. 2006-1 CRB DSTRA (April 27, 2007).

8. Attached hereto as Exhibit F is a true and correct copy of SoundExchange, Inc.'s Responses and Objections to the First Set of Interrogatories From the Licensee Participants, dated November 8, 2014.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: December 8, 2014
New York, NY

Todd D. Larson /JMH

Todd D. Larson
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-8000
Fax: (212) 310-8007
todd.larson@weil.com

*Counsel for Pandora Media, Inc.*

# Exhibit B

## Collins, Reed

**From:** Ehler, Rose <Rose.Ehler@mto.com>
**Sent:** Wednesday, November 26, 2014 2:31 PM
**To:** Larson, Todd; Anjan.Choudhury@mto.com; LeMoine, Melinda
**Cc:** Paul M. Fakler; Jackson Toof; bjoseph@wileyrein.com; Perelman, Sabrina; Jacob Ebin; Rich, Bruce; kablin@wileyrein.com; jthorne@khhte.com; Evan T. Leo; msturm@wileyrein.com; Mark Pacella; Chris Mills; Kelly.Klaus@mto.com; glenn.pomerantz@mto.com; Olasa, Kuruvilla
**Subject:** RE: License agreements

**Follow Up Flag:** Follow up
**Flag Status:** Flagged

Todd,

Thank you for your proposal. We believe this request would pose an undue burden, especially as none of SoundExchange's experts reviewed negotiating documents to support its economic assessment of the case and several of the services for which you're seeking documents are not benchmarks in SoundExchange's direct case. We therefore think much of what you are requesting is not "directly related" to SoundExchange's written direct testimony. We further object to the production of internal negotiating documents as far too burdensome given the substantial volume of this request and the time and expense of conducting a privilege review. We also object to collecting additional negotiating documents, beyond those already produced, from Beggars Group and Secretly Group as both are independent record labels with limited resources and extensive discovery burdens would discourage them and similar independent labels from agreeing to participate in the CRB proceedings.

Of course, as discussed in our call, we are amenable to compromise. We'd like to offer to collect, review and produce external negotiating documents from the majors related to the following five services:

Beats
Nokia MixRadio
Rdio
Slacker
Spotify

Please let us know if you agree.

Thanks,
Rose

Rose Leda Ehler | Munger, Tolles & Olson LLP
560 Mission Street | San Francisco, CA 94105
Tel: 415.512.4071| Rose.Ehler@mto.com | www.mto.com

***NOTICE***
*This message is confidential and may contain information that is privileged, attorney work product or otherwise exempt from disclosure under applicable law. It is not intended for transmission to, or receipt by, any unauthorized person. If you have received this message in error, do not read it. Please delete it without copying it, and notify the sender by separate e-mail so that our address record can be corrected. Thank you.*

-----Original Message-----
From: Larson, Todd [mailto:Todd.Larson@weil.com]
Sent: Tuesday, November 25, 2014 3:35 PM

To: Ehler, Rose; Choudhury, Anjan; LeMoine, Melinda
Cc: Paul M. Fakler; Jackson Toof; bjoseph@wileyrein.com; Perelman, Sabrina; Jacob Ebin; Rich, Bruce; kablin@wileyrein.com; jthorne@khhte.com; Evan T. Leo; msturm@wileyrein.com; Mark Pacella; Chris Mills
Subject: License agreements

Rose,

I'm writing to follow up on our call last week where we discussed SoundExchange's production of license agreements, reports of use, and negotiating documents related to license agreements between record companies and digital music services. On that call, we offered to propose a narrower set of agreements as to which we would request negotiating documents for your consideration. Accordingly, please let us know promptly whether SoundExchange would agree to produce negotiating documents related to agreements between the major record companies (and Beggars Group and Secretly Group to the extent they exist) and the following services:

Beats
iTunes Radio (incl. iMatch/iCloud)
MySpace
Nokia MixRadio
Rdio
Slacker
Spotify
Turntable.fm
Vevo
YouTube

To the extent not covered in the list above, we would also seek negotiating documents related to any services Mr. Harrison is referring to in his discussion of negotiations at paragraphs 19, 20, and 23 of his testimony. Finally, to be clear, our request includes not just documents that pass between the negotiating parties, but also documents internal to the record companies (e.g., deliberations, analyses, and other discussions related to the negotiations).

This request is made on behalf of Pandora, Sirius XM, and NAB.

Thank You.

---

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Ex. 9

EX. 9

RESTRICTED – Subject to Protective Order in
Docket No. 14 – CRB – 001 – WR (2016-2020)(Web IV)

Ex. 10

# EX. 10

RESTRICTED – Subject to Protective Order in
Docket No. 14 – CRB – 001 – WR (2016-2020)(Web IV)

Ex. 11

# EX. 11

**RESTRICTED – Subject to Protective Order in Docket No. 14 – CRB – 001 – WR (2016-2020)(Web IV)**

Ex. 12

EX. 12

## Olasa, Kuruvilla

**From:** Leo, Evan T. <eleo@khhte.com>
**Sent:** Wednesday, February 25, 2015 2:18 PM
**To:** Choudhury, Anjan
**Cc:** Pomerantz, Glenn; Klaus, Kelly; Olasa, Kuruvilla; Bryant, Jennifer; Thorne, John; Larson, Todd; Rich, Bruce; Joseph, Bruce; Fakler, Paul; Ebin, Jacob; Perelman, Sabrina
**Subject:** Corrected Rubinfeld Testimony

Anjan,

SoundExchange's Notice of Submission of Corrected Written Rebuttal Testimony of Daniel Rubinfeld states "As a result of the contents of the written rebuttal submissions, the contractual prohibitions relating to the submission of these agreements are no longer applicable." Please provide the basis for this statement, including by identifying the written rebuttal submissions to which you are referring.

Thanks,
Evan

Evan T. Leo
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036
Tel: (202) 326-7930 | Fax: (202) 326-7999

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Ex. 13

EX. 13

## Olasa, Kuruvilla

**From:** Larson, Todd <Todd.Larson@weil.com>
**Sent:** Wednesday, February 25, 2015 4:03 PM
**To:** Leo, Evan T.
**Cc:** Choudhury, Anjan; Pomerantz, Glenn; Klaus, Kelly; Olasa, Kuruvilla; Bryant, Jennifer; Thorne, John; Rich, Bruce; bjoseph@wileyrein.com; Fakler, Paul; Ebin, Jacob; Perelman, Sabrina
**Subject:** Re: Corrected Rubinfeld Testimony

Consider Mr. Leo's request seconded by Pandora. We would also like to know your basis for submitting the new testimony two days after the rebuttal filing deadline.

Thanks.

On Feb 25, 2015, at 5:17 PM, Leo, Evan T. <eleo@khhte.com> wrote:

> Anjan,
>
> SoundExchange's Notice of Submission of Corrected Written Rebuttal Testimony of Daniel Rubinfeld states "As a result of the contents of the written rebuttal submissions, the contractual prohibitions relating to the submission of these agreements are no longer applicable." Please provide the basis for this statement, including by identifying the written rebuttal submissions to which you are referring.
>
> Thanks,
> Evan
>
> Evan T. Leo
> Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
> 1615 M Street, N.W.
> Suite 400
> Washington, DC 20036
> Tel: (202) 326-7930 | Fax: (202) 326-7999
>
> NOTICE: This transmission is intended only for the use of the addressee and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately via reply e-mail, and then destroy all instances of this communication. Thank you.

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Ex. 14

EX. 14

## Olasa, Kuruvilla

**From:** Joseph, Bruce <BJoseph@wileyrein.com>
**Sent:** Wednesday, February 25, 2015 4:34 PM
**To:** Larson, Todd; Leo, Evan T.
**Cc:** Choudhury, Anjan; Pomerantz, Glenn; Klaus, Kelly; Olasa, Kuruvilla; Bryant, Jennifer; Thorne, John; Rich, Bruce; Fakler, Paul; Ebin, Jacob; Perelman, Sabrina
**Subject:** RE: Corrected Rubinfeld Testimony
**Attachments:** mg_info.txt

Anjan and Glen,

Please add NAB to the list of parties joining in Mr. Leo's request.

Bruce

---

**From:** Larson, Todd [Todd.Larson@weil.com]
**Sent:** Wednesday, February 25, 2015 7:03 PM
**To:** Leo, Evan T.
**Cc:** Anjan.Choudhury@mto.com; glenn.pomerantz@mto.com; Kelly.Klaus@mto.com; Olasa, Kuruvilla; Bryant, Jennifer; Thorne, John; Rich, Bruce; Joseph, Bruce; Fakler, Paul; Ebin, Jacob; Perelman, Sabrina
**Subject:** Re: Corrected Rubinfeld Testimony

Consider Mr. Leo's request seconded by Pandora. We would also like to know your basis for submitting the new testimony two days after the rebuttal filing deadline.

Thanks.

On Feb 25, 2015, at 5:17 PM, Leo, Evan T. <eleo@khhte.com> wrote:

> Anjan,
>
> SoundExchange's Notice of Submission of Corrected Written Rebuttal Testimony of Daniel Rubinfeld states "As a result of the contents of the written rebuttal submissions, the contractual prohibitions relating to the submission of these agreements are no longer applicable." Please provide the basis for this statement, including by identifying the written rebuttal submissions to which you are referring.
>
> Thanks,
> Evan


Evan T. Leo
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
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Ex. 15

EX. 15

RESTRICTED – Subject to Protective Order in
Docket No. 14 – CRB – 001 – WR (2016-2020)(Web IV)

Ex. 16

EX. 16

**Before the**
**UNITED STATES COPYRIGHT ROYALTY JUDGES**
**THE LIBRARY OF CONGRESS**
**Washington, D.C.**

| | | |
|---|---|---|
| **In re**<br><br>**DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)** | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Docket No. 14-CRB-0001-WR (2016-2020)** |

**FIRST SET OF REBUTTAL-PHASE DOCUMENT REQUESTS TO SOUNDEXCHANGE, INC. FROM LICENSEE PARTICIPANTS**

Pursuant to Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et seq., 37 C.F.R. § 351.5, the Copyright Royalty Judges' Scheduling Order dated December 10, 2014, and the Parties' agreement concerning the discovery schedule, you are required to respond to the following Document Requests propounded by the licensee participants in this proceeding. Pursuant to the Parties' agreement, your written responses and documents responsive to these Requests must be delivered to counsel for Pandora Media Inc., iHeart Media, Inc., the National Association of Broadcasters, Sirius XM Radio Inc., and the National Religious Broadcasters Noncommercial Music License Committee on or before March 19, 2015.

**DEFINITIONS**

1. "Digital Service" means any service providing users with access to digital audio transmissions or digital phonorecord deliveries of full-length sound recordings and/or full-length music videos, whether for free or by subscription, whether by streaming or download (either permanent or temporary), whether offering a single type of music service or bundling together different music services (e.g., streaming and downloads), and whether available on a personal

computer, television, receiver, set-top box, mobile/cellular phone, other mobile device (iPad, smartphone, tablet computer, laptop, etc.), or any other device or platform. Digital Services include but are not limited to services offering digital downloads, cloud services, interactive streaming services (e.g., Rhapsody, Napster, Spotify, Mog, Rdio), all statutory, non-interactive, and customized varieties of internet radio/webcasting (e.g., Pandora, Slacker, Last.fm, radio station simulcasters, iHeart Radio, 8Tracks, Turntable.fm), music video providers (e.g., YouTube, Vevo), and mobile/cellular providers (e.g., Verizon, AT&T). Digital Services shall not include preexisting subscription services (e.g., Music Choice) or Business Establishment Services (e.g., Muzak, DMX, PlayNetwork).

2. "Document" or "Documents" shall have the same meaning as the term "document" in Rule 34(a)(1) of the Federal Rules of Civil Procedure and shall include all such items, including electronically-stored information, that would be subject to inspection and copying under that Rule, including the original and any non-identical copy of, any written, printed, typed, photographed or recorded materials, including, but not limited to, writings, notes, memoranda, agreements, contracts, drafts, mark-ups, redlined materials, proposals, offers, meeting minutes, agendas, reports, calendar or diary entries, drawings, graphs, charts, logs, photographs, phone records, tape recordings, computer disks, computer printouts or tape, email or any other data compilations from which information can be obtained or translated. The term "Document" also means every copy of a document where such copy is not an identical duplicate of the original, whether because of deletions, underlinings, showing of blind copies, initialing, signatures, receipt stamps, comments, notations, differences in stationary or any other difference or modification of any kind.

3. "GEO Music Group" means Geo Music Group and its predecessors, including its directors, officers, board members, committee members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

4. "Noncommercial Broadcaster means a Noncommercial Digital Service that owns or operates one or more noncommercial terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission or otherwise meets the definition at 47 U.S.C. § 397(6), (7), (11), or (12).

5. "Noncommercial Digital Service" means a Digital Service that meets the requirements of 17 U.S.C. § 114(f)(5)(E)(i)(I), (II), or (III).

6. "Record Company" means any SoundExchange member company (as contrasted to recording artist members) that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels, and including, but not limited to, Sony, UMG, and WMG. Any references to a Record Company specifically by name (for example, the employer company of a witness who submitted a statement as part of SoundExchange's written direct statement) shall likewise be construed to include any and all subsidiary and/or affiliate recording companies and/or labels owned by the parent company.

7. "Recording Industry Association of America" or "RIAA" mean the Recording Industry Association of America, Inc. and its directors, officers, shareholders, employees, personnel, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on their behalf.

8. "Sony" shall mean Sony Music Entertainment and its predecessors (including Sony BMG Music Entertainment), including its directors, officers, board members, committee

members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

9. "Statutory Licenses" are the licenses available under 17 U.S.C. § 114(d)(2) and § 112(e) for services offering eligible digital audio transmissions. "Statutory Licensees" or "Statutory Services" are services making digital audio transmissions pursuant to the Statutory Licenses.

10. "SoundExchange," "you" and "your" mean SoundExchange, Inc., SoundExchange Witnesses and their respective employer companies, and SoundExchange's directors, officers, board members, committee members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

11. "SoundExchange Witness" means any of the witnesses who have supplied and/or will supply testimony on behalf of SoundExchange in this proceeding, including, but not limited to, the witnesses listed by SoundExchange in its "Index of Witness Testimonies."

12. "Warner" and "WMG" means Warner Music Group Corp and its directors, officers, board members, committee members, employees, subsidiaries (including but not limited to Atlantic Recording Corp. ("Atlantic") and Elektra Records ("Elektra")), parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

13. "Universal" and "UMG" means Universal Music Group and its directors, officers, board members, committee members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

14. Whenever appropriate in these requests, the singular form shall include the plural and vice-versa. The connectors "and" and "or" are terms of inclusion and not exclusion, and shall be construed as necessary to bring within the scope of each request each document and things that if construed otherwise might be considered to be outside of its scope. "Including" means "including, but not limited to,." The terms "any" and "all" shall be mutually interchangeable and shall not be construed to limit any Document Request.

## INSTRUCTIONS

1. These requests are intended to supplement the production by SoundExchange of all materials that were relied upon by SoundExchange Witnesses in the creation of their written testimony, as ordered by the Judges. The absence of specific requests for materials relied upon by SoundExchange witnesses in formulating each contention in their written testimony does not waive the licensee participants' right to such materials; to the extent the licensee participants find it necessary to assert follow-up requests for such relied-upon materials, those requests shall not count against the 50 request limit on document requests as agreed by the participants.

2. These requests are continuing in nature, and in the event SoundExchange becomes aware of additional responsive information or documents at any time through the conclusion of this proceeding, SoundExchange is requested promptly to provide such additional information or documents.

3. The responses to each request shall include Documents that are within the possession, custody or control of SoundExchange, RIAA, or any Record Company related to testimony provided by witnesses from such Record Company, including, without limitation, Documents that are in the possession, custody or control of SoundExchange's, RIAA's or such Record Company's attorneys, agents, directors, officers, employees, representatives, or any other

persons or entities directly or indirectly employed by or connected with SoundExchange, RIAA or such Record Company.

4. Each request should be answered separately and in order.

5. If SoundExchange objects to any request or sub-part thereof on a claim of any privilege, including an assertion of the attorney-client privilege or a claim that responsive Documents constitute attorney work product, SoundExchange is hereby requested to provide at the time of production the basis for the asserted privilege or immunity, set forth for each withheld document, including the following information: (i) the date of the Document; (ii) the name of the Document's originator, the name of the person(s) to whom it is addressed, the names of all person(s) who were shown copies or to whom copies were distributed and the names of each person participating in the preparation of the document or in whose name the document was prepared; (iii) a general physical description of the type of Document, and the subject matter to which it pertains; (iv) the Document's current custodian; and (v) a statement of the precise basis upon which the document has been redacted or withheld, including the specific nature of the privileged or immunity claimed and the detailed ground for claiming such privilege or immunity.

6. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

7. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

8. Each of the foregoing definitions and instructions is hereby incorporated by reference into, and shall be deemed a part of, each and every other definition and instruction contained herein as well as each specific request set forth below.

9. Unless otherwise stated, the period covered by these requests is from January 1, 2009 to the present.

10. The terms "any," "each," or "all" shall be construed as terms of inclusion, not as exclusion.

## REQUESTS FOR DOCUMENTS

**Document Requests Related to the Written Rebuttal Testimony of Multiple Witnesses**

1. Each document that any witness created, considered, reviewed, or relied upon in preparing his or her rebuttal testimony, including any workpapers, backup to numerical calculations and other statements, updated royalty payment and reporting information, license agreements, analyses (including reanalyses to direct testimony being rebutted), surveys (including all available underlying data, questionnaires, and output data), and computer code used to generate data discussed in his or her testimony.

2. To the extent not previously produced, each document in the possession of any Record Company, SoundExchange, or SoundExchange rebuttal witness, including communications, memoranda, and internal analyses, constituting, comprising, memorializing, discussing, reflecting, or analyzing the negotiation or valuation of *any Record Company's* agreement (or amendment to such agreement) with any of the interactive or non-interactive services whose agreements with Record Companies are referenced in, or attached as exhibits to, the rebuttal testimony of SoundExchange's witnesses. Such documents may include, but are not limited to:

a. all drafts of the agreement or its amendments;
b. all term sheets describing the proposed terms of the agreement;
c. all analyses and projections of expected and actual compensation under the agreement or value provided by the agreement or specific terms thereof, both before and after the agreement was executed, whether prepared by the Record Company, the counterparty, or a third party; and
d. all documents pertaining to the negotiation of the agreement, including all communications between the Record Company and the counterparty, communications internal to the Record Company, and communications with third parties.
e. all payment records, royalty reports, and other reports provided by the licensee.

3. Each document from any record label that provided a rebuttal witness that constitutes, comprises, memorializes, discusses, reflects, or analyzes the promotional or substitutional effects of terrestrial radio airplay on any source of record company revenue, artist exposure, or sound recording discovery, including all analyses, research, studies, or surveys performed constituting, comprising, memorializing, discussing, or analyzing such promotional or substitutional effects.

4. Documents sufficient to show the amounts spent and costs incurred for each year from 2011 to the present by each record label that provided a rebuttal witness and each Sony sublabel to promote artists or sound recordings to radio stations, including without limitation, all costs associated with: manufacturing and shipping promotional sound recordings; independent or other outside promotion; in-house promotional staff; advertising directed to radio stations or their programmers; providing artists for appearances at radio stations; promotional concerts and tours directed to radio stations; giveaways and other incentives provided to radio stations other than promotional sound recordings; all overhead associated with or allocable to such promotion; and any other promotional costs not included in the above

5. Each document in the possession of Merlin, Beggars' Group, Secretly Group, or Concord, including communications, memoranda, and internal analyses, that constitutes, comprises, memorializes, discusses, reflects, or analyzes the negotiation of the Pandora-Merlin agreement, including but not limited to the valuations of that agreement by Pandora, Merlin, Beggars' Group, Secretly Group, or Concord; decisions by Beggars' Group, Secretly Group, or Concord whether to opt in to the agreement, implementation of the agreement after signing; and/or identification of which Merlin members and recordings were covered by the agreement.

**Document Requests Directly Related to the Written Rebuttal Testimony of Dennis Kooker**

6. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the statement on page 4 of Mr. Kooker's testimony that, on iHeartRadio's simulcast service, "a user can use the general search function to search for an artist" or to search for "music genre or a geographic region," including documents regarding both the searches that were performed and reported in Mr. Kooker's rebuttal testimony (at pp. 5-9), including each document regarding any searches performed that were not reported in Mr. Kooker's rebuttal testimony and each document that supports the contention that consumers actually use simulcast services in the manner described by Mr. Kooker.

7. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes Sony's efforts to promote Meghan Trainor's music, including, but not limited to, marketing and promotion plans, documents reflecting visits to iHeartMedia radio stations, documentation of plays on iHeartMedia's terrestrial radio stations and iHeartRadio, documentation of impressions generated by iHeartRadio, and documents memoralizing, discussing, reflecting, or analyzing whether these promotion efforts were successful. *See* Kooker at page 4.

8. Documents sufficient to show each occasion on which a record label has agreed to lower its license fee rate or rate proposal in negotiations with an interactive or non-interactive service based on, or because of, a competing proposal from another label, including documents

sufficient to show (i) the label that lowered its demand and by how much, (ii) the label whose proposal resulted in the lowered rate or rate proposal, (iii) the service at issue, (iv) the terms that were ultimately agreed to by the label and service, if any, and (v) how the label identified in (i) became aware of the proposal from the label identified in (ii).

9. Documents sufficient to show each occasion on which a label lowered its rates in negotiations with an interactive or non-interactive service based on considerations of piracy, including documents sufficient to show (i) the label that lowered its demand and by how much, (ii) the service at issue, and (iii) the terms that were ultimately agreed to by the label and service, if any.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Ron Wilcox**

10. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the agreement between iHeartMedia and Warner Music Group from the files of Rob Wiesenthal. *See* Wilcox ¶¶ 3-24.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Aaron Harrison**

11. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes whether users of interactive services desire features that editorialize, curate, or recommend music, or that such users want to listen to "service-programmed plays," including any data, communications or other information regarding the share of programmed plays on such services and (or as compared to ) the share of user-selected plays on such services – including, but not limited to, Spotify, Rdio, Rhapsody, Google Play All Access, Amazon Prime, and Slacker (Harrison ¶¶ 10-11).

12. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the ability of interactive services to "steer" plays toward or away from particular record labels, including each document concerning UMG's attempt in negotiation with [redacted] and other services to maintain its market share and mitigate the risk of steering. (Harrison ¶¶ 3, 14)

13. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes efforts or resources expended by UMG in working with on-demand digital music services to ensure they feature UMG content to "drive streams and revenue" (Harrison ¶ 17)

14. Each document, including internal analyses and negotiation documents, that constitutes, comprises, memorializes, discusses, reflects, or analyzes the failed negotiations between (i) UMG and Amazon regarding its Prime music service, as discussed at ¶ 27 of Mr. Harrison's rebuttal testimony, and (ii) UMG's failed negotiations with iHeart Media, as described at ¶¶ 32-35 of Mr. Harrison's rebuttal testimony.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Jennifer Fowler**

15. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the statement in Paragraph 12 of Ms. Fowler's testimony that "the shift in the market toward access models has created a critical shift in the way our labels approach marketing and promotion," including each document relating to promotion on non-interactive services such as through "strategic placement on partner homepages, social channels, in recommendation features, and in marketing communications," and also through other "editorial features that garner exposure for . . . artists."

16. All correspondence between Sony and Pandora discussing the Jack White concert at Madison Square Garden sponsored by Pandora, or discussing other promotional efforts related to that concert, as described in paragraph 7 of Ms. Fowler's testimony, as well as any internal analyses with Sony or its labels assessing, measuring, or discussing the value or impact of Pandora's streaming of the concert.

17. Each document describing or reflecting Sony's efforts to advertise for its artists through Pandora, Google, Bing, Facebook, YouTube, Twitter, or Shazam, as described in paragraph 10 of Ms. Fowler's testimony, including but not limited to the "click-through rate[s]" for ads on each of those services.

18. Each document describing or reflecting Sony's artist promotional campaigns [redacted] or the results of such campaigns, [redacted] as described in Paragraphs 13 and 15 of Ms. Fowler's testimony.

19. All documents reflecting how or to what extent Filtr "encourages users to continue streaming performances" on "the Spotify service and other directly licensed partners," including but not limited to documents describing Filter's functions and features, any agreements between Sony or any other Record Company and Filt, any agreements between Filtr and any interactive music services, and any reports quantifying Filtr's effects. (Fowler ¶ 14)

20. Each document constituting, comprising, memorializing, discussing, reflecting, or analyzing the use and effect of online predictive music research (*e.g.*, HitPredictor, Shazam) on the promotion of artists and their music (Fowler p. 10).

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Jim Burruss**

21. All correspondence between any Columbia Records employee and any music streaming service, including simulcasters, concerning music Columbia Records has released in the past twelve months or will release in the next twelve months. *See* Burruss at ¶16 ("Our radio promotion staff does not promote to streaming services, including simulcasters.")

22. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes whether Columbia Records will or will not promote to music streaming services. *See* Burruss at ¶16 ("The size of the simulcast audience, however, does not justify independent promotional efforts."); *id.* ("In the case of custom webcasting . . . computer algorithms, rather

than program managers and editorial personnel, drive programming decisions. As a result, there is little that our programming staff can do to expose the service to new artists or releases.").

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Jim Burruss and Sarah Butler**

23. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes similarities or differences between radio simulcast services and (a) terrestrial radio or (b) other statutory webcasters.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Charlie Lexton and Simon Wheeler**

24. Documents sufficient to identify the Merlin members in [redacted] as that term is used by Mr. Lexton in his written testimony, including the number of tracks in the repertories of [redacted] and their share of all tracks licensable by Merlin.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Simon Wheeler**

25. Each document constituting, comprising, memorializing, analyzing, discussing, or reflecting which music platforms Beggar's considers "as being an extension of terrestrial radio" or "promotional" and which Beggars' considers to "creat[e] cannibalization of consumption from other streams of revenue." (Wheeler WRT¶ 22).

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Michael Huppe**

26. From January 1, 2008 to the present, each document constituting, comprising, memorializing, analyzing, discussing, or reflecting the negotiation of the 2009 Webcaster Settlement Act ("WSA") agreements between SoundExchange and (a) SiriusXM or (b) the National Association of Broadcasters, including documents reflecting any discussion of whether to make the rates in either of these agreements precedential or non-precedential.

27. From January 1, 2008 to the present, each document constituting, comprising, memorializing, analyzing, discussing, or reflecting the valuation of the 2009 WSA agreements between SoundExchange and (a) SiriusXM or (b) NAB by SoundExchange or any record company that has provided rebuttal witness testimony on behalf of SoundExchange.

28. Each document constituting, comprising, memorializing, analyzing, discussing, or reflecting Sony's, Warner's, EMI's, Universal's, or A2IM's negotiation of "a series of waivers of the statutory license conditions" (Huppe WRT ¶ 17) with NAB and valuation of those waivers by any record company or SoundExchange.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Doria Roberts**

29. Each document constituting, comprising, memorializing, discussing, reflecting, or analyzing revenue earned by Doria Roberts or Hurricane Doria Records from all sources, including royalties on statutory services and Spotify, from 2004 to the present, including tax returns.

**Document Requests Directly Related to the Written Rebuttal Testimony of**
**SoundExchange Expert Witnesses (Rubinfeld, Talley, Blackburn, Butler, Lys, Rysman)**

30. Each document constituting a report, testimony (whether in deposition, trial or hearing, including exhibits), opinion, published or unpublished scholarly article or draft, book or chapter of a book, paper under review, working paper, presentation, or course materials written in whole or in part by any of SoundExchange's testifying expert witnesses, and any document constituting or reflecting the substance of any lecture, conference, presentation, seminar or other event that was participated in, moderated, written, or co-authored by any of SoundExchange's testifying expert witnesses, that discusses or otherwise relates to any of the subjects discussed in their rebuttal testimony, as well as any relating to terrestrial radio, any Digital Service, satellite radio, difference among types of Digital Services, alleged convergence between noninteractive and interactive services, the promotional or substitutional effect of Digital Services or terrestrial radio, the efforts of record companies to obtain play on any Digital Service or terrestrial radio, the sound recording digital performance right, the role of technology improvements in the alleged growth of Digital Services, benchmarking analysis of any type, definition of a relevant market, reasonable interchangeability of products, cross-elasticity of demand, and the potential convergence of two products or markets into a single relevant market.

31. Each document constituting or reflecting meetings, discussions or other communications between any of SoundExchange's testifying expert witnesses and record company personnel or record company representatives, including any meetings discussed or referenced in an expert's rebuttal testimony

32. Each document constituting or reflecting any communication between any of SoundExchange's testifying expert witnesses and any SoundExchange fact witness or any non-lawyer member or employee of SoundExchange pertaining to the subject matter of this proceeding or the subject matter of the expert's testimony or any assertion therein.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Daniel Rubinfeld**

33. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the statement in Paragraphs 118 and 122 of Professor Rubinfeld's testimony that Amazon was able to launch an on-demand service without the catalogs of all the majors, and in particular UMG, including documents regarding any negotiations between Amazon and UMG.

34. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the statement in Paragraph 127 of Professor Rubinfeld's testimony that "independent

labels with substantially smaller catalogs than the majors have [redacted]

35. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the statement in Paragraph 155 of Professor Rubinfeld's testimony that "[i]nteractive services also have the ability to steer listeners to featured playlists, in which the service itself would have the discretion to choose which labels' content to feature on such playlists."

36. Documents sufficient to show Warner's distribution of any revenues received from iHeartMedia pursuant to the [redacted] and any amendment thereto (collectively, the "Agreement"), including, without limitation, [redacted] *See* Rubinfeld ¶¶ 52-53. This request includes, but is not limited to, any statement of account or report of use provided by Warner to Sound Exchange that relates to performances of Warner's music on iHeartMedia's custom, simulcast, or terrestrial stations, including any report of use titled "Clear Channel-WMG (Simulcast)" or "Clear Channel-WMG (Non-Simulcast Webcast)."

37. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the [redacted] on Warner's allocation and distribution of revenues from the Agreement to artists, to SoundExchange, or to recoupment of artist advances. *See* Rubinfeld ¶¶ 52-53.

38. For every agreement between any Record Company and Apple or any of the other services discussed in Dr. Rubinfeld's rebuttal testimony (including Beats "The Sentence"; Spotify Free; Nokia Mix Radio; and Rhapsody UnRadio, among others), each document in the possession of any Record Company, SoundExchange, or Dr. Rubinfeld, including communications, memoranda, and internal analyses, constituting, comprising, memorializing, discussing, reflecting, or analyzing the negotiation or valuation of the agreement (or amendment to such agreement). Such documents may include, but are not limited to:

a. all drafts of the agreement or its amendments;

b. all term sheets describing the proposed terms of the agreement;

c. all analyses and projections of expected and actual compensation under the agreement or value provided by the agreement or specific terms thereof, both before and after the agreement was executed, whether prepared by the Record Company, the counterparty, or a third party;

d. all documents pertaining to the negotiation of the agreement, including all communications between the Record Company and the counterparty, communications internal to the Record Company, and communications with third parties; and

e. all payment records, royalty reports, and other reports provided by the licensee.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Mark Rysman and Thomas Lys**

39. Each document reflecting or informing Professor Rysman's or Professor Lys's analysis, consideration, or understanding, with respect to radio simulcasting, of customization, network effects, economies of scale, seller learning, switching costs, economic cycle, targeted advertising, or cost structure as those terms are used by those professors.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Thomas Lys**

40. Each document that supports, undermines, or otherwise relates to Professor Lys's assertions, or that Professor Lys considered with respect to his assertions, that "from a functional perspective, there is no real difference between a noncommercial and a commercial broadcaster" and that "[f]rom an end-user's perspective, the listeners are likely to be indifferent as to whether their music is being streamed by a noncommercial or commercial webcaster," including any surveys, studies, or analyses.

41. Each document comparing, analyzing, or discussing noncommercial broadcasters and commercial broadcasters, including documents memorializing, analyzing, discussing, or comparing any similarities or differences between such broadcasters regarding any aspect of their operations, business or non-profit objectives, finances, listener base, programming, or sources of funding.

42. Each document that supports, undermines, or otherwise relates to Professor Lys's assertions, or that Professor Lys considered with respect to his assertions, that "there is no valid economic reason to provide a competitive advantage to small noncommercial broadcasters versus small commercial broadcasters" and that "there is no valid economic reason to raise the listening cap that allows a service to qualify for the minimum fee."

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of David Blackburn**

43. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes the Nielsen SoundScan data cited in Figure 6 and Table 1 of Dr. Blackburn's testimony.

44. Each document that constitutes, comprises, memorializes, discusses, reflects, or analyzes Dr. Blackburn's econometric analysis of iHeart Media data as discussed at ¶¶ 39-50 of Dr. Blackburn's rebuttal testimony, including, but not limited to, all programs or code used to perform the analysis and any other documents necessary to recreate the analysis.

45. Each document demonstrating the extent to which, if any, concerns about piracy have lowered royalty rates in agreements between the record labels and interactive services providers.

**Document Requests Directly Related to the**
**Written Rebuttal Testimony of Sarah Butler**

46. All documents and data related to the design, conduct, results, or analysis of the surveys and studies described in Sarah Butler's written rebuttal testimony, including, for each of the surveys and studies: all documents and data referenced in 37 C.F.R. § 351.10(e) (including "any alternative courses of action considered"); the screening process; a url link to active versions of the surveys and studies; demographic information of survey or study participants; all questions asked to any participant who completed any portion of the survey or study; all choice sets shown to participants; all responses provided by participants (including those that did not complete the survey or study); survey or study results and compilations of results; survey or study data in electronic form; all software programs used to process, "clean," or otherwise analyze data collected from the survey or study; analysis of the survey or study results; and all programming instructions used in the survey or study.

**Document Requests Directly Related to SoundExchange's**
**Rate Proposal, Including and Proposed Rates and Terms for NPR**

47. Each document constituting, comprising, memorializing, analyzing, or reflecting (1) the negotiation of (a) the agreed-upon rates and terms that SoundExchange, National Public Radio, Inc., and the Corporation for Public Broadcasting submitted to the Copyright Royalty Judges on February 24, 2015 or (b) the reporting requirements that those entities negotiated along with the submitted rates and terms and (2) SoundExchange's, Sony's, Warner's, or Universal's valuation of any of those rates and terms.

48. Each document constituting, comprising, memorializing, analyzing, or reflecting the number and identity of "Originating Public Radio Stations" covered by the SoundExchange-NPR proposed rates and terms (as that term is used in the proposal), the number and identity of "repeater stations" covered by the SoundExchange-NPR proposal (as that term is used in the proposal), the number of any other public radio stations covered by the SoundExchange-NPR proposal, each such covered station's monthly and annual Aggregate Tuning Hours ("ATH") (as that term is used in the proposal), each such station's monthly or annual Music ATH (as that term is used in the proposal), the number of sound recordings transmitted on average in each Music ATH, and any statements of account, reports of use, or other reports submitted to SoundExchange by NPR, CPB, American Public Media, Public Radio International, Public Radio Exchange, or any covered radio station.

February 26, 2015

Respectfully submitted,

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*Counsel for the National Religious Broadcasters Noncommercial Music License Committee*

## CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2015, I caused a copy of the foregoing PUBLIC document to be served by e-mail and first-class mail to the participants listed below:

| | |
|---|---|
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| Mark C. Hansen<br>John Thorne<br>Evan T. Leo<br>Scott H. Angstreich<br>Kevin J. Miller<br>Caitlin S. Hall<br>Igor Helman<br>Leslie V. Pope<br>Matthew R. Huppert<br>Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.<br>1615 M Street, NW, Suite 400<br>Washington, DC 20036<br>mhansen@khhte.com<br>jthorne@khhte.com<br>eleo@khhte.com<br>sangstreich@khhte.com<br>kmiller@khhte.com<br>chall@khhte.com<br>ihelman@khhte.com<br>lpope@khhte.com<br>mhuppert@khhte.com<br>Tel: 202-326-7900<br>Fax: 202-326-7999<br><br>*Counsel for iHeartMedia, Inc.* | Donna K. Schneider<br>Associate General Counsel, Litigation & IP<br>iHeartMedia, Inc.<br>200 E. Basse Road<br>San Antonio, TX 78209<br>donnaschneider@iheartmedia.com<br>Tel: 210-832-3468<br>Fax: 210-832-3127<br><br>*iHeartMedia, Inc.* |

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| William Malone<br>40 Cobbler's Green<br>205 Main Street<br>New Canaan, Connecticut 06840<br>malone@ieee.org<br>Tel: 203-966-4770<br><br>*Counsel for Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.* | Frederick Kass<br>367 Windsor Highway<br>New Windsor, NY 12553<br>ibs@ibsradio.org<br>IBSHQ@aol.com<br>P: 845-565-0003<br>F: 845-565-7446<br><br>*Intercollegiate Broadcasting System, Inc. (IBS)* |

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/s/ Reed Collins
Reed Collins

Ex. 17

EX. 17

**Before the**
**UNITED STATES COPYRIGHT ROYALTY JUDGES**
**THE LIBRARY OF CONGRESS**
**Washington, D.C.**

| | | |
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| **In re** | ) | |
| **DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)** | ) | **Docket No. 14-CRB-0001-WR (2016-2020)** |

**SUPPLEMENTAL REBUTTAL-PHASE DOCUMENT REQUESTS TO SOUNDEXCHANGE, INC. FROM IHEARTMEDIA, INC.**

Pursuant to Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et seq., 37 C.F.R. § 351.5, the Copyright Royalty Judges' Scheduling Order dated December 10, 2014, the Parties' agreement concerning the discovery schedule, and SoundExchange's February 26, 2015 letter regarding its February 25, 2015 Notice of Submission of Corrected Written Rebuttal Testimony, you are required to respond to the following Document Requests propounded by iHeartMedia, Inc. in this proceeding. Pursuant to the parties' agreement, your written responses and documents responsive to these Requests must be delivered to counsel for iHeartMedia, Inc. on or before March 19, 2015.

iHeartMedia, Inc. believes the subject matter of these Supplemental Requests is covered by previously served requests, including the licensee participants' Rebuttal Request No. 38, but is filing these Supplemental Requests to avoid any doubt over the scope of the previous requests and in light of Professor Rubinfeld's corrected rebuttal testimony. In the case of iHeartMedia, Inc., these Supplemental Requests may therefore take the place of the licensee participants' Rebuttal Request No. 38. In serving these supplemental requests, iHeartMedia does not consent

to SoundExchange's attempt to file corrected rebuttal testimony after the date such testimony was due, and reserves all rights with respect to challenging such testimony as improperly filed.

## DEFINITIONS

1. "Apple" means Apple Inc. and its directors, officers, board members, committee members, employees, subsidiaries (including but not limited to Beats Electronics), parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

2. "Digital Service" means any service providing users with access to digital audio transmissions or digital phonorecord deliveries of sound recordings and/or music videos, whether for free or by subscription, whether by streaming or download (either permanent or temporary), whether offering a single type of music service or bundling together different music services (e.g., streaming and downloads), and whether available on a personal computer, television, receiver, set-top box, mobile/cellular phone, other mobile device (iPad, smartphone, tablet computer, laptop, etc.), or any other device or platform. Digital Services include but are not limited to services offering digital downloads, cloud services, providers of ringtones, mastertones and ringbacks, interactive streaming services (e.g., Rhapsody, Napster, Spotify, Mog, Rdio), all statutory, non-interactive, and customized varieties of internet radio/webcasting (e.g., Pandora, Slacker, Last.fm, radio station simulcasters, iHeart Radio, 8Tracks, Turntable.fm), music video providers (e.g., YouTube, Vevo), and mobile/cellular providers (e.g., Verizon, AT&T). Digital Services shall not include PSS's (e.g., Music Choice) or Business Establishment Services (e.g., Muzak, DMX, PlayNetwork).

3. "Document" or "Documents" shall have the same meaning as the term "document" in Rule 34(a)(1) of the Federal Rules of Civil Procedure and shall include all such

items, including electronically-stored information, that would be subject to inspection and copying under that Rule, including the original and any non-identical copy of, any written, printed, typed, photographed or recorded materials, including but not limited to writings, notes, memoranda, agreements, contracts, drafts, mark-ups, redlined materials, proposals, offers, meeting minutes, agendas, reports, calendar or diary entries, drawings, graphs, charts, logs, photographs, phone records, tape recordings, computer disks, computer printouts or tape, email or any other data compilations from which information can be obtained or translated. The term "Document" also means every copy of a document where such copy is not an identical duplicate of the original, whether because of deletions, underlinings, showing of blind copies, initialing, signatures, receipt stamps, comments, notations, differences in stationary or any other difference or modification of any kind.

4. "Record Company" means any SoundExchange member company (as contrasted to recording artist members) that owns sound recording copyrights, including any and all subsidiary or affiliate recording companies and labels, and including but not limited to Sony, UMG, and WMG. Any references to a Record Company specifically by name (for example, the employer company of a witness who submitted a statement as part of SoundExchange's written direct statement) shall likewise be construed to include any and all subsidiary and/or affiliate recording companies and/or labels owned by the parent company.

5. "Recording Industry Association of America" or "RIAA" mean the Recording Industry Association of America, Inc. and its directors, officers, shareholders, employees, personnel, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on their behalf.

6. "Sony" shall mean Sony Music Entertainment and its predecessors (including Sony BMG Music Entertainment), including its directors, officers, board members, committee members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

7. "Statutory Licenses" are the licenses available under 17 U.S.C. § 114(d)(2) and § 112(e) for services offering eligible digital audio transmissions. "Statutory Licensees" or "Statutory Services" are services making digital audio transmissions pursuant to the Statutory Licenses.

8. "SoundExchange," "you" and "your" mean SoundExchange, Inc., SoundExchange Witnesses and their respective employer companies, and SoundExchange's directors, officers, board members, committee members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

9. "SoundExchange Witness" means any of the witnesses who have supplied and/or will supply testimony on behalf of SoundExchange in this proceeding, including, but not limited to, the witnesses listed by SoundExchange in its "Index of Witness Testimonies."

10. "Warner" and "WMG" means Warner Music Group Corp and its directors, officers, board members, committee members, employees, subsidiaries (including but not limited to Atlantic Recording Corp. ("Atlantic") and Elektra Records ("Elektra")), parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

11. "Universal" and "UMG" means Universal Music Group and its directors, officers, board members, committee members, employees, subsidiaries, parent corporations, divisions, affiliated companies, agents, servants and anyone else acting on its behalf.

12. Whenever appropriate in these requests, the singular form shall include the plural and vice-versa. The connectors "and" and "or" are terms of inclusion and not exclusion, and shall be construed as necessary to bring within the scope of each request each document and things that if construed otherwise might be considered to be outside of its scope. "Including" means "including but not limited to." The terms "any" and "all" shall be mutually interchangeable and shall not be construed to limit any Document Request.

## INSTRUCTIONS

1. These requests are intended to supplement the production by SoundExchange of all materials that were relied upon by SoundExchange Witnesses in the creation of their written testimony, as ordered by the Judges. The absence of specific requests for materials relied upon by SoundExchange witnesses in formulating each contention in their written testimony does not waive iHeartMedia, Inc.'s right to such materials; to the extent iHeartMedia, Inc. finds it necessary to assert follow-up requests for such relied-upon materials, those requests shall not count against the limit on document requests as agreed by the participants.

2. These requests are continuing in nature, and in the event SoundExchange becomes aware of additional responsive information or documents at any time through the conclusion of this proceeding, SoundExchange is requested promptly to provide such additional information or documents.

3. The responses to each request shall include Documents that are within the possession, custody or control of SoundExchange, RIAA, or any Record Company related to testimony provided by witnesses from such Record Company, including, without limitation, Documents that are in the possession, custody or control of SoundExchange's, RIAA's or such Record Company's attorneys, agents, directors, officers, employees, representatives, or any other

persons or entities directly or indirectly employed by or connected with SoundExchange, RIAA or such Record Company.

4. Each request should be answered separately and in order.

5. If SoundExchange objects to any request or sub-part thereof on a claim of any privilege, including an assertion of the attorney-client privilege or a claim that responsive Documents constitute attorney work product, SoundExchange is hereby requested to provide at the time of production the basis for the asserted privilege or immunity, set forth for each withheld document, including the following information: (i) the date of the Document; (ii) the name of the Document's originator, the name of the person(s) to whom it is addressed, the names of all person(s) who were shown copies or to whom copies were distributed and the names of each person participating in the preparation of the document or in whose name the document was prepared; (iii) a general physical description of the type of Document, and the subject matter to which it pertains; (iv) the Document's current custodian; and (v) a statement of the precise basis upon which the document has been redacted or withheld, including the specific nature of the privileged or immunity claimed and the detailed ground for claiming such privilege or immunity.

6. If, for any reason other than a claim of privilege, you refuse to respond to any request herein, state the grounds upon which such refusal is based with sufficient particularity to permit a determination of the propriety of such refusal.

7. If, in answering these requests, you claim that any request, or a definition or instruction applicable thereto, is ambiguous, do not use such claim as a basis for refusing to respond, but rather set forth as a part of the response the language you claim is ambiguous and the interpretation you have used to respond to the individual request.

8. Each of the foregoing definitions and instructions is hereby incorporated by reference into, and shall be deemed a part of, each and every other definition and instruction contained herein as well as each specific request set forth below.

9. Unless otherwise stated, the period covered by these requests is from January 1, 2009, to the present.

10. The terms "any," "each," or "all" shall be construed as terms of inclusion, not as exclusion.

## REQUESTS FOR DOCUMENTS

**Document Requests Related to the Corrected Written Rebuttal Testimony of Daniel Rubinfeld**

1. All agreements in effect or entered into since January 1, 2009, between any Record Company and Apple, including any amendments, extensions, or renewals of such agreements, irrespective of whether the express terms of the agreement relate directly to any Apple webcasting service. For the avoidance of doubt, this request encompasses all agreements authorizing Apple or any related entity to make use of a Record Company's sound recordings, including, but not limited to, any agreement authorizing Apple or any related entity to make the Record Company's sound recordings available for audio streaming, video streaming, downloading, or retrieval from cloud storage.

2. For each agreement responsive to Request No. 1, all documents, including communications, memoranda, and internal analyses, constituting, comprising, memorializing, discussing, reflecting, or analyzing the negotiation or valuation of the agreement (or amendment to such agreement). Such documents may include, but are not limited to:

a. All drafts of the agreement or its amendments;

b. All term sheets describing the proposed terms of the agreement;

c. All analyses and projections of expected and actual compensation under the agreement or value provided by the agreement or specific terms of thereof, both before and after the agreement was executed, whether prepared by the Record Company, the counterparty or a third party (including but not limited to any other Record Company);

d. All documents pertaining to the negotiation of the agreement, including all communications between the Record Company and the counterparty, communications internal to the Record Company, and communications with third parties (including but not limited to any other Record Company); and

e. All payment records, royalty reports, and other reports provided by the licensee.

February 28, 2015

Respectfully submitted,

By: /s/ Evan T. Leo

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*Counsel for iHeartMedia, Inc.*

Ex. 18

EX. 18

UNITED STATES COPYRIGHT ROYALTY JUDGES

Washington, D.C.

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| In the Matter of: | ) | |
| Determination of Rates and Terms | ) | Volume XII |
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Washington, D.C.

Tuesday, August 14, 2012

The following pages constitute the proceedings held in the above-captioned matter, held at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before Susan L. Ciminelli, CRR, RPR, Court Reporter, of Capital Reporting, a Notary Public in and for the District of Columbia, beginning at 10:35 a.m.

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1 PROCEEDINGS
2 JUDGE BARNETT: We are back on the record
3 this morning with court reporter Sue Ciminelli. Did
4 I say it right? And I believe the first order of
5 business is to hear from SoundExchange in response to
6 the oral motion to strike portions of --
7 MR. HANDZO: Yes. That's correct.
8 MR. FAKLER: Would the Court mind if we
9 just revisited the Dr. Crawford issue very briefly,
10 with a court update?
11 JUDGE BARNETT: Not at all.
12 MR. FAKLER: Thank you, Your Honor. My
13 understanding, I'll tread lightly here because I
14 don't like to characterize the other side, but I
15 think we have an agreement that Dr. Crawford will
16 testify by video conference. SoundExchange will
17 prefer not to do it this week. They need a little
18 more time to deal with how they get their documents,
19 their end of it. I believe that their first choice
20 would be to actually do Dr. Crawford's testimony next
21 Friday, which would be after the scheduled hearing,
22 so that the video conference --

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1 likely its rivals will benefit. So if SiriusXM is
2 hampered, the rivals benefit and the disruption on
3 their side is likely to be positive as opposed to
4 negative. And I perhaps inadequately interpreted
5 the -- that statement to really be confined to the
6 firm that's likely to suffer direct and substantial
7 harm from rates that might be otherwise sustainable
8 or otherwise appropriate. Sorry.
9 JUDGE WISNIEWSKI: That's all I have.
10 JUDGE BARNETT: Any follow-on questions?
11 MR. HANDZO: No, Your Honor.
12 MR. RICH: No, Your Honor.
13 JUDGE BARNETT: Thank you, Dr. Ordover.
14 THE WITNESS: Thank you.
15 MR. HANDZO: May I just take one moment to
16 walk the Doctor out?
17 JUDGE BARNETT: Certainly.
18 MR. HANDZO: We have moved to strike
19 certain portions of Dr. Noll's testimony on the
20 ground that it's certainly not rebuttal and in
21 particular pages we are asking to strike and
22 actually, let me just pause for a moment because I

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1 think the version of Dr. Noll's report that I was
2 working from was the red line copy. And if you have
3 a non-redline copy of the amended testimony here, I
4 probably ought to look at it to make sure I'm not
5 moving on the wrong pages. Red line.
6 MR. RICH: We do.
7 MR. HANDZO: Can I trouble you for a copy?
8 Thank you.
9 JUDGE BARNETT: What we have here is a
10 clean red line.
11 MR. HANDZO: The portions which we would
12 move to strike, Your Honor, are pages 2 and 3. In
13 particular on page 2, I'm looking at the non-redlined
14 version. Page 2 starting with the heading
15 appropriate benchmarks. Through a portion of page 3
16 that ends just before the heading proposed
17 interactive services benchmark. And then further
18 starting on page 29 --
19 JUDGE WISNIEWSKI: I have to ask
20 Mr. Handzo because I had a recollection that you had
21 no problem with the first sentence of that
22 appropriate benchmarks in your motion.

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1 MR. HANDZO: That is correct.
2 JUDGE WISNIEWSKI: Thank you.
3 MR. HANDZO: And that further page 29
4 beginning after the heading SiriusXM direct license
5 benchmark through page 33 to the end of the last full
6 paragraph. And to be clear, it would also relate to
7 any associated exhibits. And the basis for the
8 motion is fairly simple. This is simply not rebuttal
9 testimony. It is an effort by Dr. Noll to bolster
10 his original written direct testimony and I think
11 that's fairly clear just from a straightforward
12 reading of this.
13 In the sections that I have highlighted,
14 Dr. Noll simply addresses his own benchmark analysis
15 with respect to direct licenses and his own benchmark
16 with respect to non-interactive webcasting and
17 similarly on pages 29 through 35, indeed as the
18 headings make clear, he is talking about the SiriusXM
19 direct license benchmark and that's all that this
20 section addresses.
21 And he goes through and reiterates what he
22 believes to be the virtues of that benchmark and he

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1 goes through and reiterates testimony that he gave in
2 his direct testimony about what he believes to be the
3 efforts of SoundExchange and other industry
4 competition who interfere with that. All of that was
5 in his --
6 JUDGE WISNIEWSKI: You said page 29
7 through --
8 MR. HANDZO: 33.
9 JUDGE WISNIEWSKI: I heard you say 35.
10 MR. HANDZO: I did say 35, but I was
11 looking at the redlined version. Ending at the end
12 of the last -- last full paragraph. So the --
13 JUDGE ROBERTS: It says ensures this
14 result?
15 MR. HANDZO: Yes. Correct. A lot of that
16 section in pages 29 to 33 talks about -- again, talks
17 about the direct licenses but also talks about the
18 alleged interference by SoundExchange. It's all
19 putting forth emails that were produced in discovery
20 in the first round. He talked about this stuff in
21 the first round in his direct testimony. Now he is
22 simply trying to augment that testimony and as the

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1 Court will recall, there was certainly no testimony
2 offered by SoundExchange in the direct phase of, in
3 the opening phase of the case about the direct
4 licenses.
5 Indeed the only thing I think
6 SoundExchange said about that was Dr. Ordover's
7 footnote in his testimony that he wasn't aware of
8 those direct licenses. So this is all clearly not
9 rebuttal to anything that SoundExchange offered into
10 evidence in the direct phase. The most that could be
11 said about it is that it is an attempt to bolster the
12 case and respond to things that were challenged in
13 their case in cross-examination. That has never in
14 my experience in this Court been a basis for any
15 entity to offer rebuttal testimony.
16 The only exception I think we've ever made
17 to that was if the judges had a specific question and
18 had specifically invited a party to provide
19 information in response to those questions, but the
20 mere fact that a witness gets questioned about the
21 witness's testimony in the direct phase doesn't mean
22 that responding to that questioning is appropriate

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1 rebuttal. It is not. There is simply nothing in
2 here that is responsive to SoundExchange's direct
3 case, which is what rebuttal is all about, so I don't
4 want to belabor the point. I think it's fairly
5 straightforward. We do not believe this is rebuttal
6 testimony.
7 JUDGE BARNETT: Mr. Rich?
8 MR. RICH: Thank you, Your Honors. As our
9 opposition papers, which I hope finally arrived to
10 your chambers, provides in much greater detail, this
11 is classic rebuttal testimony. Pages 2 and 3 are
12 summaries of what follows actually, headlines of what
13 follows. And what follows, the body of what
14 SoundExchange is objecting to is a very focused
15 response to extensive issue joinder during the direct
16 case with respect to the representativeness of the
17 direct licenses, to the allegations of interference.
18 Professor Noll was cross-examined multiple
19 times at length as we set forth in our brief in note
20 11 on page 16 on the topic of the direct
21 representativeness of the licenses. Professor
22 Ordover volunteered testimony as we cite at our

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1 opposition on page 5 on that subject. Your Honors
2 yourselves asked a series of questions and set forth
3 in pages 6 and 7 of our opposition expressing an
4 understandable interest in what is core to the direct
5 license modeling.
6 Even if there were nothing else, the
7 notion that there shouldn't be a full record
8 developed on what is our core benchmark in this case
9 let alone the ability of our principal economist to
10 respond to challenges in the representativeness would
11 seem to undermine the very purpose of these
12 proceedings, which is once and for all, we get a
13 coalition joinder on the core economic theories of
14 the parties.
15 Much of the passage which is the primary
16 basis for the motion to strike, recounts evidence
17 from among the documents I just examined Professor
18 Ordover on which is a little glib and quick to say
19 they were produced during the direct case as is
20 acknowledged in the footnote in the SoundExchange
21 motion, they were produced only after motions to
22 compel and produced out of time for us during the

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1 direct case to use them. They were beyond the time
2 of any opportunity to amend and one of the more
3 interesting footnotes I've read lately which is
4 footnote four to the SoundExchange brief, which is we
5 are not seeking to leave out of time and without
6 permission to belatedly file amended direct testimony
7 to deal with it, serves as a basis for precluding its
8 use in issue joinder as to what are critically
9 important documents in the case seems to us again to
10 miss the mark in terms of what we are all about here.
11 The Court has -- can exercise its sound
12 discretion as to how to complete a full and adequate
13 record here, but this is not tangential testimony.
14 This is testimony that supports the core theories
15 issue joinder here. They believe this case should be
16 decided on the benchmark that Professor Ordover
17 supports. We've got a primary benchmark and a
18 secondary benchmark and it seems to us that Professor
19 Noll was extremely concise and limited in the amount
20 of space he spent in rebuttal and found himself
21 responding in good faith to what we saw as the
22 combination of attacks on his own testimony on his

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1 own cross-examination, as well as that of Mr. Frear
2 and Mr. Gertz.
3 Professor Ordover has volunteered
4 testimony about how unrepresentative the direct
5 licenses are, and Your Honors' own questions really
6 probing and asking, I think, is not irrelevant that
7 Your Honors yourselves ordered SoundExchange to
8 provide an update of industry communications during
9 this discovery phase so that we would have a full and
10 comprehensive and current record of what the
11 environment is in which these still developing direct
12 licenses are occurring. And so for those reasons
13 supplemented by the much more comprehensive briefing,
14 we would ask that the motion be denied.
15 JUDGE BARNETT: Brief rebuttal,
16 Mr. Handzo.
17 MR. HANDZO: Thank you. On the points
18 that the witness should be able to respond to issues
19 that were raised in cross, I think the answer is the
20 witness's opportunity to respond to issues raised in
21 cross is during the cross. Witnesses get asked
22 questions on cross, the witness has a chance to

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1 answer.
2 What rebuttal is not about is allowing the
3 witness to then come back and give the answers that
4 the witness wishes the witness had given on cross,
5 but perhaps didn't think of at the time. That just
6 doesn't seem to me to be a focus of rebuttal.
7 Documents were produced somewhat later after the
8 amended testimony was filed, but that doesn't mean a
9 party can't ask to use them in the direct phase.
10 If they had asked to use them in the
11 direct phase, I'm fairly confident the Court would
12 have allowed them to use them under circumstances.
13 That doesn't open up the door to using them in
14 rebuttal. Mr. Rich has used some of those documents
15 on his cross of Dr. Ordover, so I think that's a
16 little bit of a red herring.
17 JUDGE ROBERTS: Do you acknowledge that
18 the documents were produced late? Just how late were
19 they?
20 MR. HANDZO: I don't recall because nobody
21 let's me get involved in discovery issues, but maybe
22 we can get an answer to that.

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1 JUDGE ROBERTS: You're saying it was
2 reasonable at the time for SiriusXM to in the direct
3 phase of this proceeding seek to present these
4 documents. It seems timing was somewhat in order.
5 MR. HANDZO: As best we can see, the
6 documents would have been produced in early April and
7 the direct phase hearing began, I believe, in June.
8 JUDGE ROBERTS: What's your response to
9 that?
10 MR. RICH: The direct phase hearings were
11 scheduled to begin April 16th, Your Honor. The rules
12 made no provision whatsoever to amend in that
13 situation and we simply didn't assume it would be
14 proper even to make the effort at that point. More
15 than anything, it seemed to us our burden to --
16 initially, at a time when we were a week away from
17 trial, but even thereafter, to untimely seek to amend
18 the direct case and we assumed again obviously nobody
19 knows the direct case here, but it simply didn't
20 appear to us that we had any basis within the rules
21 to do it, and we didn't attempt to do it. It's not
22 we were ignoring it.

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1 JUDGE ROBERTS: Well, it's information you
2 found in discovery. Amendments occur all the time
3 within the bounds of discovery.
4 MR. RICH: But the statutory time frame
5 had passed at that point in time. I can't
6 reconstruct every moment when we are frantically
7 preparing for a trial a week away. The last thing we
8 would do was go back to our economist a week after
9 trial saying let's try to amend your testimony again.
10 I'm thinking real time, that wasn't realistic. They
11 were fairly consequential documents. It was
12 certainly not something that could have been feasibly
13 done on the timing of what's involved in getting
14 ready for the proceeding of this sort. And we
15 didn't.
16 JUDGE ROBERTS: So your position,
17 Mr. Handzo, is maybe it wasn't -- there wasn't enough
18 time for him to amend and meet the April 16th
19 deadline but because we had a delay, that's when it
20 should have occurred.
21 MR. HANDZO: First of all, I'm really not
22 sure that I would agree that there is no time to do

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1 this. Let's face it. In this case, the parties are
2 filing motions up until the day or two before trial
3 all the time.
4 JUDGE WISNIEWSKI: We would like to talk
5 to you about that.
6 MR. HANDZO: I understand, but that is the
7 reality.
8 JUDGE BARNETT: Have some serious
9 conversations, please.
10 MR. HANDZO: Nobody has been shy about
11 filing motions right up until the time of trial. We
12 have all done it. I apologize, but it does happen
13 and so I -- frankly, I'm a little hard pressed to
14 believe that Weil Gotschal can't get it together to
15 file a motion even on fairly short notice.
16 Second of all, you can just do it orally
17 at the trial. Frankly, if you stood up and said,
18 Judge, I got these documents after the time to amend
19 had closed, I'd like to use them with the witness,
20 the Court would have considered it. I suspect the
21 Court would have allowed it, but then when you add on
22 to that the fact that we did have an adjournment and

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1 we did have time between the original scheduled date
2 and June, there was certainly ample time at that
3 point to go back and make whatever motion anybody
4 wanted.
5 MR. RICH: Just a little bit of the
6 quality of the orphan pleading for mercy. I mean,
7 this was not of our doing. These documents were
8 provided extremely late in the process. This is a
9 very active and massive project for all of us. And
10 it's not a trivial matter to work with what would
11 have been multiple witnesses considering the import
12 of these documents, redoing testimony, creating a
13 motion before Your Honor and making it happen.
14 We just didn't think it was the
15 appropriate thing to do with everything else going
16 on. I would still urge beyond that, you know,
17 passing that issue, I still think this is classic
18 issue joinder on what is a core benchmark to our
19 case. And the core is the driving premises of this
20 case, and we couldn't possibly contemplate every
21 conceivable rejoinder to our direct case that would
22 be put in by SoundExchange until an issue was joined

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1 on it as we reported in our briefing.
2 And Dr. Noll is doing his responding and
3 bolstering our principal benchmark here which I think
4 is absolutely classic -- a classic rebuttal. He is
5 not going off on some tangent. These are arguments
6 that they are familiar with, that they have taken
7 depositions on, that they have gotten early discovery
8 on. There is zero surprise here. There is
9 absolutely no surprise about any of this and the idea
10 that Dr. Ordover could testify to documents that are
11 important in this case that Dr. Noll somehow cannot
12 and then we can't get the ultimate issue rejoinder
13 would, I think, exalt formality over what I think is
14 prudent in terms of creating the kind of record that
15 we want and should have here.
16 And I again ask the judges simply acting
17 in your sound discretion to recognize that there was
18 a probative value to these. They are relevant. They
19 are not cumulative. Nobody is prejudiced by it. No
20 surprise to the other side in cross-examination. And
21 I think the notion that somehow we had some
22 extraordinary burden to jump through hoops to get

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1 these into the direct case as a penalty to us for
2 SoundExchange having held back and having us litigate
3 to get there and then produce them as late as they
4 did would be remarkably unfair to our client.
5 (Recess.)
6 JUDGE WISNIEWSKI: I thank the gentleman
7 for arguments that you made. The judges find that
8 while substantial parts of the material in question
9 may well be repetitive and cumulative and not be
10 classically within the confines of our rules on what
11 is proper rebuttal testimony, nevertheless, we find
12 that that testimony as offered is arguably responsive
13 to the subject matter raised in direct testimony by
14 SoundExchange. For example, the questions concerning
15 proper weight to be given in this proceeding to the
16 direct licenses negotiated by SiriusXM, therefore we
17 will hear that testimony. As a consequence,
18 SoundExchange's motion to strike is denied.
19 MR. RICH: Thank you, Your Honor.
20 JUDGE BARNETT: You're going to begin with
21 Dr. Noll.
22 MR. RICH: I'm just raising this. I'm

1 actually has the policy effect of causing these guys
2 to be put out of business who came into business
3 under the assumption they were going to have a
4 different property rights regime.
5 MR. RICH: That concludes my direct
6 examination. Thank you, and thank you for your
7 patience.
8 JUDGE BARNETT: Thank you. We will
9 continue then cross-examining Dr. Noll tomorrow
10 morning. We will convene at 9:30. Just so we can
11 get the wheels in motion, is it Dr. Crawford,
12 Dr. Crawford's testimony, we will have to make that
13 work on Thursday. Our inclination would be to have
14 him be the first witness on Thursday even if we have
15 to interrupt someone else because of the time delay.
16 But given his family situation, if it's
17 more convenient for him to do it later in the day,
18 you just talk with him about it. We are not
19 dictating that he be the first witness, merely that
20 we think that for his -- because of the time delay it
21 might be easier for him to take him first.
22 MR. FAKLER: That's very much appreciated,



1 Your Honor. I'll report first thing in the morning
2 on that.
3 MR. RICH: Is that a week from Thursday?
4 JUDGE BARNETT: A week from Thursday. The
5 last Thursday of the hearings.
6 (Whereupon, at 5:02 p.m., the hearing
7 recessed, to be reconvened at 9:30 a.m. on
8 Wednesday, August 15, 2012.)
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1 CERTIFICATE OF REPORTER
2
3 I, SUSAN L. CIMINELLI, CRR, RPR, Court
4 Reporter and Notary Public, certify that I was
5 authorized to and did stenographically report the
6 proceedings IN RE: The Determination of Rates and
7 Terms, pages 3239 through and including 3482; pages
8 3295 through and including 3372; and pages 3398
9 through and including 3491; that the transcript is a
10 true record of my stenographic notes.
11 I further certify that I am not a
12 relative, employee, attorney, or counsel of any of
13 the parties, nor am I a relative or employee of any
14 of the parties' attorneys or counsel connected with
15 the action, nor am I financially interested in the
16 action.
17 Dated this 15th day of August, 2012.
18
19 _____
SUSAN L. CIMINELLI, Shorthand Reporter
20 Notary Public in and for the
District of Columbia
21
22

Ex. 19

EX. 19

UNITED STATES COPYRIGHT ROYALTY JUDGES

Washington, D.C.

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Washington, D.C.

Wednesday, August 15, 2012

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JUDGE WILLIAM ROBERTS
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| 5 RONALD GERTZ | 3678 | 3705 | | |
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1 PROCEEDINGS
2 JUDGE BARNETT: Are we going to have
3 cross-examination today?
4 MR. HANDZO: We are going to have
5 cross-examination today.
6 JUDGE BARNETT: Mr. Handzo.
7 MR. HANDZO: Before I begin, just one
8 scheduling matter, if I might. We had anticipated it
9 would take all week to get through the service's
10 witnesses. Given that we have moved Dr. Crawford
11 now, we anticipate that would create a gap on
12 Thursday so we are trying to figure out how we can
13 fill it. We believe we can move Mr. Bender to
14 Thursday. The caveat there, though, that I should
15 alert you to is that Mr. Bender is not available on
16 Monday. So the only way we can put him in on
17 Thursday is if we think we can finish him on
18 Thursday. We just wanted to give you the latest
19 update.
20 JUDGE BARNETT: We'll see how Wednesday
21 and Thursday pan out. Whether it gets finished or
22 not is not really within our control, only to a

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1 MR. RICH: We do, Your Honor.
2 JUDGE BARNETT: We'll take five minutes
3 before we hear that motion.
4 (Recess.)
5 JUDGE BARNETT: There was a motion to
6 strike certain portions of Mr. Gertz's testimony.
7 Mr. Freedman, are you going to argue that?
8 MR. FREEDMAN: Yes, Your Honor.
9 JUDGE BARNETT: Okay.
10 MR. FREEDMAN: So we are moving to strike
11 as improper rebuttal the new -- Mr. Gertz has
12 submitted revised testimony so we are now moving to
13 strikes paragraphs 6 to 10 and the corresponding
14 exhibits to those paragraphs of his new testimony.
15 Those are Exhibits 29 to 36, so it's paragraph 610
16 and Exhibits 29 to 36. These are the paragraphs of
17 his testimony that relate to the alleged interference
18 by groups, including SoundExchange for the direct
19 licenses.
20 First of all, these paragraphs repeat and
21 expand on what Mr. Gertz and other witnesses said in
22 the direct case. There is no new issue here. Second

3674

1 of all, it's not rebutting anything in
2 SoundExchange's direct case. The only witness who
3 testified about the direct licenses in our direct
4 case was Mr. Van Arman who testified about his own
5 experience at his one label with the direct license.
6 And I would just add -- and so Mr. Gertz's
7 testimony is not rebutting Mr. Van Arman's testimony.
8 And I would add finally that this is different than
9 the motion that Dr. Noll in the following respect. I
10 understand with Dr. Noll, there was some issue of
11 when documents were produced by us in discovery such
12 that he was -- he was able to use them or not.
13 Here with Mr. Gertz, he is relying on
14 documents obtained from SiriusXM's own files. There
15 is no issue here that they didn't have these
16 documents. And in fact, in paragraphs six and seven,
17 he is using documents that, using documents and
18 talking about events that predate the filing of the
19 written direct case.
20 So not only is it not rebutting anything
21 in our case but this is about things that happened
22 before the direct case was even filed. And so for

3675

1 all those reasons, we don't think this is proper
2 rebuttal. We would move to strike those paragraphs
3 in the exhibits.
4 JUDGE BARNETT: Miss Singer.
5 JUDGE ROBERTS: I see that I have
6 Mr. Gertz's testimony. Can I see a copy of the
7 rebuttal testimony?
8 MS. SINGER: We happen to have a couple of
9 those right here.
10 JUDGE ROBERTS: I thought you did.
11 MS. SINGER: So Your Honors, paragraph 6
12 through 10 of Mr. Gertz's testimony are a discussion
13 of some of the independent labels' responses to the
14 SiriusXM direct license offer, and they talk about
15 the influence of SoundExchange and certain of the
16 other record industry organizations.
17 And this is really as Mr. Rich discussed
18 yesterday, this is really classic rebuttal.
19 SoundExchange has attacked the representativeness of
20 the direct licenses, has attacked the number of them
21 and -- and the representativeness of the labels who
22 entered into them. And all we are trying to do is

3676

1 point out that here are some of the reasons why there
2 are the numbers that there are, and some of the
3 different factors that went into it.
4 It responds to Ordover's challenge to the
5 representativeness. It responds to some of Your
6 Honors' questions about the representativeness of the
7 license. There is some questions asked of various
8 SiriusXM witnesses during the direct phase about the
9 representativeness of these licenses. There is
10 nothing in these that prejudice SoundExchange at all.
11 They have had these documents for months. They were
12 attached to Mr. Gertz's testimony. They knew we were
13 using them. They had the opportunity to
14 cross-examine him on them at his deposition.
15 And they really respond to the claims that
16 have been put forward by SoundExchange, so it's
17 really irrelevant that a few of them do predate the
18 testimony. And notably several of them actually
19 postdate the direct, the November 29th deadline for
20 the filing of the direct case. And given that when
21 Mr. Gertz -- we tried to put in amended testimony
22 that included some things in the direct phase that

3677

1 postdated that November date, SoundExchange actually
2 moved to strike and the judges granted the motion to
3 strike, saying that anything that came out of our
4 files wasn't properly from the -- didn't properly
5 count as coming during the discovery process.
6 So essentially, what they are doing is
7 saying -- trying to freeze our case in pre-November
8 of 2011 saying you can't put in any additional
9 documents.
10 JUDGE ROBERTS: Ms. Singer, as with
11 yesterday's testimony concerning the direct licenses
12 and circumstances and negotiations of direct
13 licenses, you're asking for consideration, particular
14 consideration in allowing that testimony because of
15 the -- this central aspect of that to your case.
16 MS. SINGER: I am, Your Honor.
17 JUDGE ROBERTS: I just don't want it to be
18 viewed or considered either in this proceeding or in
19 other proceedings that proper rebuttal includes
20 rebutting someone else's rebuttal testimony. But I
21 understand your concern here of the special
22 circumstances.

3678

1 JUDGE BARNETT: Any questions? In light
2 of your response to Judge Roberts, motion is denied.
3 MS. SINGER: Thank you.
4 JUDGE BARNETT: Mr. Gertz may testify.
5 WHEREUPON,
6 RONALD GERTZ,
7 called as a witness, and having been first duly
8 sworn, was examined and testified as follows:
9 (SiriusXM Rebuttal Trial Exhibit No.
10 8 was marked for identification.)
11 DIRECT EXAMINATION
12 BY MS. SINGER:
13 Q. Mr. Gertz, in front of you hopefully is a
14 document that's been marked as SiriusXM Rebuttal
15 Trial Exhibit 8. Do you have that?
16 A. I do.
17 Q. And can you identify this exhibit?
18 A. It's my rebuttal testimony.
19 Q. And is that your signature on page 8?
20 Doesn't have a page number, but the page after page
21 7?
22 A. Yes, it is.

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1 MS. SINGER: Your Honor, we would move
2 SiriusXM Rebuttal Trial Exhibit 8 into evidence.
3 MR. FREEDMAN: No objection.
4 MR. CUNNIFF: No objection.
5 JUDGE BARNETT: Admitted.
6 (SiriusXM Rebuttal Trial Exhibit No. 8
7 was admitted into evidence.)
8 BY MS. SINGER:
9 Q. Mr. Gertz, after you did your written
10 direct testimony in this case in November of 2011,
11 did MRI continue to negotiate direct licenses on
12 behalf of SiriusXM?
13 A. Yes, we did.
14 Q. And were any direct licenses signed
15 between November 2nd and July 22nd, 2012?
16 A. Yes.
17 Q. How many?
18 A. 23.
19 Q. And those are the 23 licenses that are
20 attached to Trial Exhibit 8 as Exhibits 5 through 27?
21 A. Yes, they are.
22 Q. How many direct licenses are there today?

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1 A. A total of 95.
2 Q. And what are the royalty rates for these
3 more recent direct licenses?
4 A. They are within the range of -- for the
5 rates that we negotiated previously, either each of
6 the labels gets their share of a royalty pool of 5, 6
7 or 7 percent of revenue.
8 Q. You mentioned a royalty. Well, how do you
9 calculate each label's share of that royalty?
10 A. It's simply their share based on plays on
11 the SDARS systems.
12 Q. Is that share, the allocation, is that
13 weighted at all for listenership?
14 A. No. It isn't.
15 Q. Why not?
16 A. Listenership data is not available for the
17 SDARS services.
18 Q. Now, are the direct licensor independent
19 labels, are they aware of the methodology of the
20 allocation?
21 A. Yes. They are.
22 Q. And during the negotiations, was that a

1 CERTIFICATE OF REPORTER
2
3 I, SUSAN L. CIMINELLI, CRR, RPR, Court
4 Reporter and Notary Public, certify that I was
5 authorized to and did stenographically report the
6 proceedings IN RE: The Determination of Rates and
7 Terms, pages 3492 through and including 3529; pages
8 3544 through and including 3686; pages 3705 through
9 and including 3716; pages 3723 through and including
10 3724; and that the transcript is a true record of my
11 stenographic notes.
12 I further certify that I am not a
13 relative, employee, attorney, or counsel of any of
14 the parties, nor am I a relative or employee of any
15 of the parties' attorneys or counsel connected with
16 the action, nor am I financially interested in the
17 action.
18 Dated this 16th day of August, 2012.
19
20 _____
SUSAN L. CIMINELLI, Shorthand Reporter
21 Notary Public in and for the
District of Columbia

Ex. 20

EX. 20

# Transcript of:

**Date:** August 15, 2007
**Volume:**

**Case:** Adjustment of Rates for Pre-Existing Subscriptions

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Before the
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Washington, D.C.

| | |
|---|---|
| In the Matter of:<br><br>Adjustment of Rates and Terms for Preexisting Subscription Services<br><br>and<br>Satellite Digital Audio Radio Services | Docket No. 2006-1<br>CRB DSTRA |

Room LM-408
Library of Congress
First Street and
Independence Ave., S.E.
Washington, D.C. 20540

Wednesday,
August 15, 2007

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge



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I-N-D-E-X


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1 P-R-O-C-E-E-D-I-N-G-S
2 (9:31 a.m.)
3 CHIEF JUDGE SLEDGE: Good morning.
4 We will come to order. Mr. Rich?
5 MR. RICH: Good morning, Your
6 Honor. As their first rebuttal witness,
7 Sirius and XM call Professor William W.
8 Fisher, III to the stand.
9 CHIEF JUDGE SLEDGE: All right.
10 Mr. Freedman?
11 MR. FREEDMAN: Your Honor, as you
12 know, we filed a motion to strike Professor
13 Fisher's testimony as inadmissible. I would
14 ask if the Court would be willing to hear us
15 on that motion before Professor Fisher takes
16 the stand.
17 CHIEF JUDGE SLEDGE: Please
18 proceed.
19 MR. FREEDMAN: Your Honor,
20 Professor Fisher is a law professor. He's not
21 an economist. In his written rebuttal
22 testimony on page 26, he expressly --





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1 And, similarly, by 2011, the model
2 assumes that the stock price will continue to
3 rise beyond that to clear the $5.30 conversion
4 price so that in that year, instead of those
5 bond holders asking for the $230 million back,
6 that they would again exchange the bond for
7 shares of stock, which they would sell in the
8 marketplace for a greater value.
9 Q And how much is involved in the
10 2011 convertible notes?
11 A It's $230 million.
12 Q And the conversion price on those
13 is what?
14 A $5.30.
15 Q Going back to exhibit 58, on the
16 second page, third line from the bottom, there
17 is "End of period, EOP, cash." Do you see
18 that?
19 A Yes.
20 Q What would that look like in 2009
21 if the stock is below 441 so the notes did not
22 convert to equity?



1 A We would have to pay off the $300
2 million. So that would fully utilize the 200
3 million of cash seen there and require us to
4 seek $100 million elsewhere.
5 MR. STURM: Your Honor, I have a
6 few questions that I need to go into specific
7 numbers that are contained within this model.
8 So I would ask that the protective order be
9 applied and the courtroom be sealed for a few
10 moments so I can ask these few questions.
11 CHIEF JUDGE SLEDGE: What
12 questions?
13 MR. STURM: Your Honor, we are
14 going to talk about when the model shows it
15 becoming free cash flow positive, which is not
16 something that is publicly disclosed.
17 CHIEF JUDGE SLEDGE: This is on
18 58?
19 MR. STURM: Yes, Your Honor, 58,
20 second page.
21 CHIEF JUDGE SLEDGE: Where on the
22 second page? I don't see that.



1 MR. STURM: The free cash flow is
2 the second line from the bottom, Your Honor.
3 CHIEF JUDGE SLEDGE: All right.
4 Any objections to protective order for
5 questions on the free cash flow on exhibit 58?
6 MR. SCHNEIDER: No, Your Honor.
7 CHIEF JUDGE SLEDGE: Without
8 objection, the motion is granted.
9 MR. STURM: And, Your Honor, I
10 will also intend to ask some questions about
11 net income as well. Based on the same model,
12 it's actually the net loss line that appears
13 somewhat above.
14 CHIEF JUDGE SLEDGE: All right.
15 (Whereupon, the foregoing matter went
16 off the record at 12:07 p.m., to
17 reconvene in closed session, as
18 follows.)
19
20
21
22



1 BY MR. STURM:
2 Q We have talked about some of the
3 differences between exhibit 58 and Mr.
4 Butson's old model. You are aware he has
5 presented a new model in the rebuttal case,
6 right?
7 A Yes.
8 Q What are the main differences
9 between exhibit 58 and Mr. Butson's new model?
10 MR. SCHNEIDER: Objection. Two
11 objections. Beyond the scope of the relevant
12 testimony. And, second, it's not appropriate
13 rebuttal because I guess you would call it
14 rebuttal of rebuttal, which is not within the
15 scope of rebuttal.
16 CHIEF JUDGE SLEDGE: Response?
17 MR. STURM: Your Honor, Mr. Frear
18 has put in a model. And it would help to --
19 testimony explaining how his model is similar
20 to or different from another model is really
21 just part of explaining his model.
22 I think the other thing is that if





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1 you have two conflicting models and no
2 testimony explaining the differences, that is
3 not going to be very helpful to the Judges in
4 trying to resolve which model is more
5 credible.
6 And Mr. Schneider's point I assume
7 is that when Mr. Butson testifies, that he
8 shouldn't be able to say anything about Mr.
9 Frear's model. I think that what would be
10 more helpful is to allow the witnesses to
11 engage and explain where the differences are
12 so they will be clear.
13 CHIEF JUDGE SLEDGE: Which,
14 carried to its logical extension, means you
15 would never end your trial.
16 MR. STURM: Well, Your Honor, I
17 think the trial is going to end on August
18 30th, no matter what ruling there is on this.
19 CHIEF JUDGE SLEDGE: We will
20 recess on the objection.
21 (Whereupon, the foregoing matter
22 went off the record at 12:14 p.m.



1 and went back on the record at
2 12:17 p.m.)
3 CHIEF JUDGE SLEDGE: Let's come to
4 order. The grounds of the objection are
5 correct. However the judges exercise
6 discretion on matters that they wish to hear
7 and with that discretion, the objection's
8 overruled.
9 MR. STURM: All right, so Mr.
10 Frear, the question was what are the biggest
11 differences between Exhibit 58 and Mr.
12 Butson's new -- new model?
13 THE WITNESS: There are three --
14 three principal areas I'd like to highlight.
15 One is, is that much as we saw in the October
16 model where Mr. Butson appears to be assuming
17 a consistent increases in -- in, sorry Mr.
18 Schneider, you standing up or --
19 MR. SCHNEIDER: No, I apologize.
20 THE WITNESS: Thank you. That he
21 seems to be --
22 CHIEF JUDGE SLEDGE: Please



1 refrain from making a comment like that. If
2 you --
3 THE WITNESS: I'm -- I apologize,
4 sir. I thought he was standing up.
5 CHIEF JUDGE SLEDGE: So what if he
6 is -- that's not part of your responsibility.
7 THE WITNESS: I apologize. Mr.
8 Butson appears to be retaining his increase in
9 prices. So it -- they seem to be going up
10 about three percent a year and as I stated
11 earlier, the -- we don't see that as tenable
12 in the marketplace.
13 The -- he also appears to be
14 having some difficulty, it's not clear to me
15 what it is, with the revenue share calculation
16 that the revenue share is one of the most
17 important components of the cost side of our
18 variable cost side of P&L.
19 And Mr. Butson's assumptions
20 substantially understate what that cost would
21 be, so in essence in the aggregate, over the
22 course of the model that there's a



1 $377,000,000.00 understatement of -- of the
2 revenue share payments to be made in the lines
3 that Mr. Sturm asked me about earlier.
4 And then, you know, he's got a --
5 JUDGE ROBERTS: That's over the
6 whole projected period?
7 THE WITNESS: Yes, it's largest in
8 the last year which I'll come back to in a
9 moment.
10 The way that his model works is he
11 gets to about the same total revenues but he
12 gets there a different way that actually
13 biases the royalty cost down.
14 So because he's got a price
15 increase up, you know, in there, that he
16 actually gets the same revenue numbers with
17 fewer subscribers and because the
18 SoundExchange proposal is subscriber dependent
19 in terms of when it steps up in rate, that he
20 actually has a lower royalty rate that's --
21 that's running throughout the -- the model so
22 if you were to -- what that produces is it





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Ex. 21

EX. 21

# Transcript of:

**Date:** August 23, 2007
**Volume:** XXII

**Case:** Adjustment of Rates for Pre-Existing Subscriptions

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Before the
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Washington, D.C.

| | |
|---|---|
| In the matter of:<br><br>Adjustment of Rates and Terms for Preexisting Subscriptions Services,<br><br>and<br>Satellite Digital Audio Radio Services | Docket No. 2006-1<br>CRB DSTRA |

Room LM-408
Library of Congress
First and Independence Avenue, S.E.
Washington, D.C. 20540

Thursday,

August 23, 2007

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge



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1 PROCEEDINGS
2 9:35 a.m.
3 CHIEF JUDGE SLEDGE: Good morning,
4 we'll come to order.
5 Mr. Rich?
6 MR. RICH: Good morning, Your
7 Honor. As our next and final witness on the
8 rebuttal cases of XM and Sirius, we call Dr.
9 John Woodbury to the stand.
10 (Pause.)
11 CHIEF JUDGE SLEDGE: Mr. Woodbury,
12 will you raise your right hand?
13 WHEREUPON,
14 JOHN WOODBURY
15 WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE
16 SERVICES AND, HAVING FIRST BEEN DULY SWORN,
17 WAS EXAMINED AND TESTIFIED AS FOLLOWS:
18 CHIEF JUDGE SLEDGE: Thank you.
19 Please be seated.
20 (Pause.)
21 CHIEF JUDGE SLEDGE: All right,
22 with Dr. Woodbury's testimony we have





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1 initially the motion to strike by
2 SoundExchange and then if that motion is not
3 granted, then we'll proceed to consider the
4 motion filed by Music Choice on the
5 application of the protective order for Dr.
6 Woodbury's testimony.
7 MR. HANDZO: Your Honor, may I be
8 heard on the SoundExchange motion?
9 CHIEF JUDGE SLEDGE: Please.
10 MR. HANDZO: Thank you.
11 CHIEF JUDGE SLEDGE: Just a
12 moment, Mr. Handzo.
13 (Pause.)
14 CHIEF JUDGE SLEDGE: Thank you.
15 MR. HANDZO: Thank you, Your
16 Honor. Your Honors, Section 2 of Dr.
17 Woodbury's written rebuttal testimony from
18 paragraphs 13 through 47 and the associated
19 exhibits which are SDARS Woodbury 24 through
20 28 are an effort to bolster Dr. Woodbury's
21 original direct written testimony. It's not
22 proper rebuttal. It doesn't respond to any



1 evidence submitted by SoundExchange during
2 the direct phase of this case.
3 Proper rebuttal is a response to
4 evidence that is submitted in the direct case
5 and we've cited numbers of cases from Federal
6 District Courts for that proposition and in
7 their response I think the Services don't even
8 attempt to argue that Section 2 of Dr.
9 Woodbury's testimony is a response to evidence
10 submitted during the direct phase by
11 SoundExchange. I think the Services effective
12 concede that it isn't rebuttal to
13 SoundExchange evidence.
14 Instead, what they try and do in
15 their response is really expand the definition
16 of rebuttal in a way that I think is
17 inconsistent with case law and inconsistent
18 with this Court's rulings.
19 First, of all the Services argue
20 that Section 2 of Dr. Woodbury's report
21 responds to questions asked by the Court
22 during Dr. Woodbury's oral direct testimony.



1 And the first thing to say about that is
2 actually it's not quite true. As best as I
3 can tell, paragraphs 22 through 31 of Section
4 2 were not written in response to anyone's
5 questions, not mine, and not the Court's.
6 Paragraphs 13 through 21 were written in
7 response to questions I asked on cross, not
8 questions from the Court and actually Dr.
9 Woodbury himself says so at paragraph 16. He
10 says "as SoundExchange suggested during my
11 cross examination" and then he goes on from
12 there.
13 So of the portion that we're
14 moving to strike, only paragraphs 32 to 47
15 were written in response to questions from
16 the bench. Now that said, I don't think that
17 even questions from the Court asked of a
18 witness testifying on direct give the witness
19 a blank check to write rebuttal testimony.
20 This Court has specifically held in the
21 webcasting case that questions during cross
22 examination do not open the door to rebuttal.



1 The Court ruled that the testimony of Jim
2 Griffin was not proper rebuttal and that was
3 in the webcasting case and the fact that Mr.
4 Griffin was responding to questions raised
5 during the direct phase did not make it proper
6 rebuttal. And there's just no reason in the
7 world in this case to adopt a different ruling
8 or adopt a new policy.
9 I would venture to guess that
10 there are very few witnesses in this case
11 during the direct phase who didn't get at
12 least a few questions from the Court. Does
13 that mean that every witness gets a chance to
14 come back for an encore performance? Does
15 every witness get a second bite at the apple?
16 I would submit that the time for witness to
17 respond to the Court's questions is at the
18 time the Court asks him, not later on in the
19 rebuttal phase. And letting everybody do
20 that, letting everybody come back and respond
21 in rebuttal to the Court's questions just
22 seems like a policy that means the case will





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1 never end.
2 I certainly recognize that there
3 are situations where the Court is going to
4 specifically ask a witness to produce at a
5 later date a particular piece of evidence and
6 obviously the Court has discretion to do that.
7 But that's not the nature of the questions
8 that were put to Dr. Woodbury during his
9 direct. And it simply shouldn't be the case
10 that any and every question from the Court
11 opens the door to a rebuttal filing, and again
12 most of this isn't even a response to that.
13 But that shouldn't do it.
14 The second argument that the
15 Services make is that Section 2 of Dr.
16 Woodbury's rebuttal testimony relies on facts
17 that he learned only after filing his opening
18 written testimony. The problem with that
19 argument, among others, is that the rules of
20 this Court permit the parties to file amended
21 written testimony within 15 days after the
22 close of discovery. If a party files written



1 testimony during the direct case and learns of
2 new evidence, either during the direct phase,
3 that party can amend the testimony to
4 incorporate the new evidence. SoundExchange
5 did exactly that with both Dr. Pelcovits and
6 Dr. Wind.
7 Everything that the Services point
8 to as newly discovered evidence is something
9 that they either knew before the filing of the
10 direct cases, learned from the filings in the
11 direct cases, or learned during direct case
12 discovery. They could have incorporated that
13 into amended testimony and they didn't. To
14 permit them to incorporate that now in
15 rebuttal would really be an end run around the
16 regulation that permits the filing of amended
17 testimony.
18 Section 351.4 of the regulation
19 sets a deadline for filing amended testimony.
20 It says 15 days after the close of discovery.
21 If a party can ignore that deadline and then
22 use that evidence in its rebuttal filing,



1 essentially they can just end run that
2 regulation and end run that deadline, which I
3 would submit shouldn't be permitted. There is
4 nothing here that couldn't have been part of
5 the direct case filing and we would submit
6 that Section 2 of Dr. Woodbury's testimony
7 should be stricken.
8 That's all I have, Your Honor.
9 Obviously we have briefed it as well. I don't
10 know that I have touched on everything, but I
11 assume the Court has read these pleadings and
12 otherwise if the Court has questions, I am
13 happy to answer them. Thank you.
14 CHIEF JUDGE SLEDGE: All right.
15 Response? Mr. Rich?
16 MR. RICH: Thank you, Your Honors.
17 Section 351.11 of the rules and procedures
18 governing this matter governs rebuttal
19 proceedings. That section, which is brief,
20 does not specifically prescribe the boundaries
21 of rebuttal testimony. I think it is rather
22 clear, as frankly all the case law cited by



1 both sides would suggest, that the scope of
2 the proceeding and the scope of permitted
3 testimony is remitted to the sound discretion
4 of this Court.
5 SoundExchange's position is
6 formalistic. They basically assert that
7 unless rebuttal testimony responds to one
8 species of evidence from the direct case,
9 namely that physically appearing in the
10 written direct submissions from one or more
11 SoundExchange witnesses, it is per se
12 inadmissable as rebuttal.
13 But in reality, the scope of the
14 direct case evidence was far more
15 encompassing. As Section 351.10(b) of the
16 rules makes clear, evidence in this case
17 comprises not only the written direct
18 testimony submitted by the parties, but oral
19 examinations, cross examinations, redirects,
20 and by definition would incorporate the
21 colloquy between members of this Court and the
22 various witnesses.





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1 Classic rebuttal testimony
2 responds to the direct case evidentiary
3 records, such as it is and however it is
4 developed. That is exactly what Dr. Woodbury
5 has done. Dr. Woodbury more specifically
6 principally addresses issues raised by one or
7 more members of this Court concerning his so-
8 called functionality adjustment. In a number
9 of colloquies, one or another of Your Honors
10 specifically said to one or another witness
11 please be sure to address something or other
12 on rebuttal.
13 CHIEF JUDGE SLEDGE: Cite that. I
14 didn't find that.
15 MR. RICH: Judge Roberts, for
16 example, Your Honor, indicated that he wanted
17 a submission concerning the Section 111
18 proceedings involving claims by broadcasters,
19 for example.
20 CHIEF JUDGE SLEDGE: That was with
21 this witness?
22 MR. RICH: No, it wasn't. I'm



1 saying more generally.
2 CHIEF JUDGE SLEDGE: Oh, okay.
3 MR. RICH: I wasn't asserting
4 here, Your Honor. I am saying more generally.
5 CHIEF JUDGE SLEDGE: And that's
6 something Mr. Handzo acknowledged that if
7 there is a request by the Court for
8 information, then that's a difference.
9 MR. RICH: The point I am making
10 is it seems that litigants ought not to be at
11 their peril of waiting for a specific,
12 explicit instruction where to be responsive to
13 the totality of a direct case and to issues
14 that are raised. And where those are part of
15 the direct case record, per 351.10(b), where
16 they affirmatively and in aid of the process
17 respond to colloquies with the Court whether
18 or not there is an explicit or rather, as we
19 might interpret it, implicit suggestion which
20 is that it would be useful to the process to
21 get issue joined and resolved to respond to
22 those.



1 CHIEF JUDGE SLEDGE: Do you agree
2 that there was no request by the Court for
3 additional testimony as included in the
4 rebuttal?
5 MR. RICH: My review of those
6 passages of the record does not show any
7 explicit statement to that effect, Your Honor.
8 So it was interpretive on the part of counsel
9 and our expert witnesses.
10 Secondly --
11 CHIEF JUDGE SLEDGE: Your argument
12 filed is not as restrained as your statement
13 just now. Your argument filed seems to
14 exaggerate that point to say that there was a
15 specific request by the Court.
16 MR. RICH: If so, it was
17 inadvertent and we apologize if it misled in
18 any way, Your Honor.
19 CHIEF JUDGE SLEDGE: We've heard
20 exaggerations before this Court before.
21 MR. RICH: It was not intentional.
22 CHIEF JUDGE SLEDGE: I don't say



1 that amusingly. I say it seriously.
2 MR. RICH: Well, we apologize if
3 there was any unintentional misleading, Your
4 Honor.
5 Second point to be made is that
6 the balance of the Section 2B testimony really
7 addresses not only issues raised during cross
8 examination as to Music Choice, but
9 specifically items that the witness could not
10 reasonably have responded to on cross
11 examination. For example, testimony
12 confronting him with what was a per subscriber
13 rate paid by Music Choice. I won't identify
14 it in open Court out of respect for
15 confidentiality. That was only part of the
16 post written case of filing.
17 And similarly, if you were to look
18 at the empirical corroboration which Dr.
19 Woodbury offers in support of the viability of
20 his approach, it incorporates not only that
21 new information that post dated his written
22 direct testimony, but also incorporates the





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1 results of the so-called Zoomerang study which
2 was presented only in its direct case and
3 therefore is rebuttal presented by Dr.
4 Pelcovits, one of SoundExchange's witnesses.
5 So it assembles only newly available data,
6 unavailable to Dr. Woodbury at the time he
7 constructed his original model, directly
8 responsive to subjects in which the Court
9 expressed an interest about the stability of
10 this ratio over time, incorporating and
11 relying on data unavailable to the witness
12 previously and which we construed as
13 absolutely within the spirit and letter, for
14 that matter, of Section 351.10(b) which again
15 indicates that the scope of direct case
16 evidence encompasses the totality of the
17 record developed, not simply written
18 submissions, but the entirety of oral
19 argument, oral examinations as it puts it,
20 cross examinations, redirects, and the record
21 that's built on the same.
22 I would conclude by indicating



1 that Dr. Woodbury, I think, hasn't abused
2 either the letter or the spirit of rebuttal.
3 He's very focused with his rebuttal comments.
4 They're directly responsive to core issues in
5 the case. He has taken no more liberties, I
6 would suggest, than any other rebuttal
7 witnesses appearing for the second time and we
8 think this is information which in the Court's
9 discretion which is what ultimately governs
10 this matter, is probative of rate setting in
11 this case and should be allowed in as
12 evidence.
13 Thank you.
14 CHIEF JUDGE SLEDGE: Thank you.
15 All right, we'll recess to consider the
16 motion.
17 (Off the record.)
18 CHIEF JUDGE SLEDGE: Thank you.
19 We will come to order.
20 The pleadings filed by the parties
21 were helpful in resolving this matter. After
22 hearing and reading, we are persuaded that the



1 Section 2 of Dr. Woodbury's written rebuttal
2 statement is not consistent with the standards
3 of rebuttal testimony. We are further
4 persuaded that in our discretion we will
5 permit him to give that testimony. The motion
6 to strike is denied.
7 MR. RICH: May I proceed, Your
8 Honor?
9 CHIEF JUDGE SLEDGE: No, sir.
10 (Pause.)
11 CHIEF JUDGE SLEDGE: All right,
12 we'll proceed with the Music Choice motion.
13 MS. STARK: Good morning, Your
14 Honor.
15 CHIEF JUDGE SLEDGE: Good morning.
16 MS. STARK: Thank you for hearing
17 this. I'm here because -- my name is Julie
18 Stark, Moses & Singer for Music Choice.
19 I'm here because the written
20 submissions of both the Services and
21 SoundExchange contain some of Music Choice's
22 confidential and private financial



1 information, including its average rate per
2 customer and also financial information that
3 was prepared specifically for this proceeding
4 which included revenues, expenses, losses,
5 projections, and basically what we like to
6 refer to as the crown jewels of the company.
7 And the company is private. This information
8 is not released, even to investors. It's
9 competitively sensitive. Obviously, XM and
10 Sirius are competitors. There are also other
11 competitors such as Musak, MTV.
12 If our average rate per customer
13 were made public, it would certainly hurt us
14 in our negotiations with our various
15 subscribers. It's an average. Some of our
16 subscribers pay more. Some pay less. But it
17 would definitely hurt us in future
18 negotiations with them.
19 It would also help our competitors
20 to undercut our services. Most of our
21 competitors are better capitalized than we are
22 and for them to have this sensitive





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Ex. 22

EX. 22

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

| In the Matter of:<br><br>Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services | Docket No. 2011-1<br>CRB PSS/Satellite II |
|---|---|

**SIRIUS XM'S OPPOSITION TO SOUNDEXCHANGE'S MOTION TO STRIKE PORTIONS OF SIRIUS XM'S TESTIMONY AS IMPROPER REBUTTAL**

Sirius XM Radio Inc. ("Sirius XM") hereby respectfully submits this opposition to SoundExchange's Motion to Strike Portions of Sirius XM's Testimony As Improper Rebuttal (the "Motion to Strike") filed August 3, 2012.

## INTRODUCTION

SoundExchange premises the majority of its Motion to Strike on the meritless argument that Sirius XM's submission of testimony concerning its direct licenses is somehow improper rebuttal. As SoundExchange acknowledges in its Motion to Strike, "[t]he purpose of the rebuttal phase is to respond to claims made by opposing parties." Motion to Strike at 2. The challenged portions of the rebuttal testimony of David Frear, Ronald Gertz and Roger Noll are proper rebuttal because each of these submissions is directly responsive not only to the very crux of SoundExchange's direct case – its rate proposal and supporting benchmarks, as well as its proposed revision to the regulatory definition of Gross Revenue – but also to specific evidence and arguments presented by SoundExchange and questions posed by the Judges themselves during the direct phase of this proceeding.[1]

[1] SoundExchange's suggestion in its Motion to Strike that rebuttal testimony must be tied specifically to an identified piece of SoundExchange's written direct testimony finds no basis in the governing

That Sirius XM also included testimony concerning its direct licenses in support of its direct case is of no moment – the inclusion of evidence during the direct phase should not preclude further testimony on a related subject when it is the legitimate subject of rebuttal. The Judges acknowledged just this reasoning in their recent Order Granting In Part And Denying In Part Music Choice's Motion To Strike, dated August 3, 2012: "Mere reference to [a] subject . . . in [a witness's] written direct testimony does not disqualify rebuttal testimony on the same subject where the rebuttal testimony attempts to show a nexus between the subject in question . . . and a purported shortcoming in the approach taken" by an adversary as part of its direct case. *See* Exhibit 1, attached hereto. Any other rule would lead to the absurd result where no direct-phase witness could reappear on rebuttal to testify on any subject related to his or her initial testimony. Moreover, such a rule would establish peculiar incentives for the parties to hold back certain evidence during the direct phase so that it could be submitted on rebuttal – surely not a result that was envisioned by the regulations or that would be equitable for either party.

Although SoundExchange paints its motion as a straightforward application of the governing regulations, it actually is only the latest attempt to prevent the Copyright Royalty Judges from considering probative evidence – indeed, the *best* evidence – in this proceeding: the fact that Sirius XM has numerous direct licenses, and in fact, has secured another 23 in the past seven months the elapsed between the filing if its direct and rebuttal cases. As each of the challenged portions of Sirius XM's written rebuttal statement is proper rebuttal, SoundExchange's attempt to block this probative and responsive testimony should be rejected, including its baseless attempt to strike clearly proper rebuttal testimony from Professor Salinger

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regulations. Indeed, there is no provision in the governing regulations or the Judges' previous orders requiring Sirius XM to make such a showing (although many of the complained-of portions of Sirius XM's rebuttal testimony actually do so).

responding to Dr. Ordover's flawed interpretation of the "relative contribution" rate-setting factor and Professor Sidak's faulty Tobin's q analysis.[2]

## ARGUMENT

## I. SIRIUS XM'S REBUTTAL TESTIMONY RELATING TO ITS DIRECT LICENSING INITIATIVE IS PROPER REBUTTAL

### A. Sirius XM's Rebuttal Testimony Regarding Direct Licenses Is Directly Responsive To Numerous Aspects Of SoundExchange's Direct-Phase Case Presentation

#### *1. Sirius XM's Rebuttal Testimony Responds To SoundExchange's Interactive Service Benchmark And Rate Proposal*

In its direct case, primarily through the testimony of Dr. Janusz Ordover and Stephen Bryan, SoundExchange proposed that the best benchmark for rate-setting in this proceeding is the rates paid by interactive streaming services to major record companies. Professor Ordover – the primary sponsor of the interactive benchmark – premised his use of that benchmark in part on the fact that he was "aware of no direct evidence on what rates might be negotiated between Sirius XM and copyright holders in an arms' length setting for access to a record company's entire catalog of music for use on Sirius XM's satellite radio service." Written Direct Testimony of Janusz Ordover ("Ordover WDT") ¶ 7.[3] On that basis, SoundExchange has proposed rates starting at 12% and rising to 20% over the course of the coming license term.

Sirius XM's testimony regarding its 85 direct licenses – which feature rates between 5-7% – is a direct rebuttal to SoundExchange's position. As Professor Noll explains in his

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[2] For reasons unrelated to the instant Motion To Strike, and per Sirius XM's Response Mooting SoundExchange's Motion to Strike the Play Share Analysis From the Rebuttal Testimony of Ronald H. Gertz, David Frear and Roger Noll filed earlier today, Sirius XM is withdrawing certain of the testimony that is challenged in the Motion, obviating the need to respond to SoundExchange's argumentation concerning same. That testimony relating to the percentage of plays on Sirius XM accounted for by direct licenses, constitutes: portions of ¶¶ 8-10 of the Written Rebuttal Testimony of David J. Frear ("Frear WRT"); Written Rebuttal Testimony of Ronald H. Gertz ("Gertz WRT") ¶¶ 8-9; and portions of pages 2, 32-34 and 37 of the Written Rebuttal Testimony of Roger G. Noll ("Noll WRT").

[3] Professor Ordover admitted on the stand that he had become aware of Sirius XM's direct licenses after he submitted his written testimony.

testimony, SoundExchange's proposed benchmarks involve different buyers of rights, different and additional rights to those at issue in this proceeding, and different types of services (interactive versus non-interactive), among other differences, each of which requires significant adjustments for the resulting royalty rates to be applied to Sirius XM's SDARS service. Sirius XM's direct licenses with independent labels, by contrast, involve the same buyers, the same sellers, the same rights, and the same service as are at issue in this proceeding, and therefore require no adjustments whatsoever for the rates encompassed in those licenses to be applied to Sirius XM's SDARS. All these attributes coalesce in licenses whose rates illustrate the extreme impropriety and inapplicability of the rates proposed by Professor Ordover and SoundExchange. The full force of that argument requires that Sirius XM present the total number of direct licenses that have been executed to date (as opposed merely to the group that signed as of the time the direct case filings were made), the ongoing efforts with respect to the direct license initiative, and the fact that, since 2011, several extremely significant independent labels have signed direct licenses.

### 2. *Sirius XM's Rebuttal Testimony Responds To SoundExchange's Proposed Revenue Definition*

Sirius XM's discussion in its written rebuttal statement addressing its direct licenses also rebuts the written and live direct testimony of SoundExchange COO Jonathan Bender, who advocated for the elimination of certain exclusions in the regulatory definition of Gross Revenue. As Mr. Frear's written rebuttal testimony describes in detail (in sections that, notably, SoundExchange does not challenge in its current Motion), SoundExchange's proposed revisions to the Gross Revenue definition as set forth in its direct case would eliminate the existing exclusion for separately-licensed works, resulting in double-payment by Sirius XM to SoundExchange for each work it licenses directly from the copyright owner. Hence, every

additional direct license (including each new direct license executed after the submission of Sirius XM's written direct case in November 2011), would merely compound this double-payment penalty. Discussion of the new licenses signed by Sirius XM since the direct phase and the prominence of the labels is clearly relevant to this point – indeed the new licenses best reveal the shortcomings of SoundExchange's punitive proposal (which SoundExchange itself has acknowledged by offering to revise its revenue definition);[4] to appreciate the full extent of the penalty requires a full understanding of all the direct licenses signed, and their prominence, not just the subset signed as of last November.

### *3. Sirius XM's Rebuttal Testimony Responds To Critiques Of The Direct Licenses Raised By SoundExchange During The Direct-Phase Hearings*

Certain of the challenged portions of Sirius XM's rebuttal testimony also are directly responsive to claims put forth by SoundExchange during the direct-phase hearings. For example, contrary to SoundExchange's contentions, at least one of its witnesses did address what he viewed as shortcomings of the direct-license benchmarks, including a supposed lack of representativeness of the direct licenses executed: SoundExchange's principal economics expert, Janusz Ordover, went out of his way to volunteer his opinion – in response to a question that did not call for it – that the direct licenses were not representative of the overall market, stating that "there are many, many, many independent labels that did not avail themselves of" the direct licenses.[5] *See* 6/14/2012 Tr. at 2315:14-2316:14 (Ordover).[6] Additionally, SoundExchange placed the existence of an alleged "informational imbalance" between Sirius XM and

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[4] Mr. Frear will be prepared to respond to this proposed revised SoundExchange position during his live testimony.

[5] As the transcript of this colloquy makes clear, Dr. Ordover volunteered this opinion on cross examination absent any question on the topic, but that unsolicited opinion on the representativeness of Sirius XM's direct licenses remains a part of the direct-phase record.

[6] All excerpts of the direct-phase hearing transcripts cited herein are attached hereto as Exhibit 2.

independent labels, discussed in Mr. Frear's rebuttal testimony, at issue at multiple points during the direct-phase hearings. 6/5/2012 Tr. at 174:1-20 (SoundExchange opening statement) ("[A]ll of the indies who signed these deals are very small players, none of them have ever participated in proceedings before [the Judges], and *they are very ill-equipped to make that judgment about what rates may come out of this proceeding.*"); 6/6/2012 Tr. at 337:8-340:16 (cross examination of Roger Noll). It would be manifestly unfair to prevent Sirius XM from responding to such clear assertions that now sit on the direct-phase record.[7]

#### *4. Sirius XM's Rebuttal Testimony Responds To Questions Posed By The Judges During The Direct-Phase Hearings*

Sirius XM's rebuttal testimony also responds directly to express inquiries from the Judges on various issues relating to the direct licenses, which even SoundExchange concedes is a proper basis for rebuttal. Motion to Strike at 3 ("Sirius XM is entitled to submit testimony at this stage responding to specific questions raised by the" Judges). SoundExchange incorrectly suggests, however, that those questions were limited to "the market share of plays on the SDARS service presented by the direct license labels," or "the same record company direct licenses that had been discussed in Sirius XM's direct case." *Id.* at 3-4, 8. In reality, the Judges' questions posed to Mr. Frear, Mr. Gertz and Professor Noll relate to a broad spectrum of issues concerning the direct licenses – from their representativeness and significance of directly licensed labels to negotiations and deviations from Sirius XM's initial offer. For example, the Judges asked Sirius XM's witnesses about:

- the negotiation of direct licenses, including potential licensors' requests for terms varying from Sirius XM's initial offer, *see* 6/7/2012 Tr. at 677:17-681:19 (Frear) (Judge Roberts inquiring into terms of negotiations; Judge Wisniewski asking

[7] Indeed, in previous proceedings, the Judges have relied on arguments of counsel in reaching their determinations. *See, e.g.*, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2006-1 CRB DSTRA ("*Satellite I*"), Fed. Reg. Vol. 73, No. 16, p. 4098 (citing counsel's closing argument).

about the length of the license terms, early opt-out options and the stability of rates); *id.* at 948:1-951:7 (Judge Roberts asking Mr. Gertz about negotiations of direct licenses and whether any label attempted to negotiate different terms);

- potential licensors' requests for most favored nations clauses, *see* 6/6/2012 Tr. at 318:6-14, 475:8-476:9 (Noll); 6/7/2012 Tr. at 677:17-679:5 (Frear); *id.* at 949:5-950:13 (Gertz);
- whether any direct licenses were "outliers" from Sirius XM's initial offer, *see id.* at 679:6-21 (Frear);
- whether any potential direct licensor gave Sirius XM a counteroffer during negotiations, *see id.* at 806:18-807:12 (Frear);
- the representativeness of the direct licenses and significance of labels that had entered into direct licenses, *see* 6/7/2012 Tr. at 685:20-687:1 (Frear); *id.* at 853:13-854:8 (Gertz); *id.*at 905:10-907:1 (Gertz); and
- Sirius XM's going-forward commitment to the direct license initiative, *see* 6/7/2012 Tr. at 688:18-690:10 (Frear).

As much of Sirius XM's testimony concerning the direct license initiative comprises responses to these inquiries from the Judges, such submission is proper rebuttal.

### B. Rebuttal Testimony From David Frear And Ron Gertz Regarding Sirius XM's Continuing Direct Licensing Efforts Is Proper Rebuttal

Based on the foregoing principles, each of the portions of the testimony of Mr. Frear and Mr. Gertz challenged in SoundExchange's Motion to Strike is proper rebuttal and should be accepted by the Judges.

#### *1. Mr. Frear And Mr. Gertz Both Respond To SoundExchange's Benchmarks And Rate Proposals (Frear WRT ¶¶ 3-4, 8; Gertz WRT ¶¶ 2, 5)*

Paragraph 3 of Mr. Frear's rebuttal testimony contains an express rebuttal to Professor Ordover's stated preference for using interactive services as the benchmark to set rates in this proceeding, offering a number of reasons why the direct license benchmarks are far more appropriate. Paragraph 4 of Mr. Frear's testimony is a continuation of the paragraph that precedes it, expanding the explanation of why direct licenses comprise a much more appropriate

benchmark as compared to those put forward by SoundExchange and Professor Ordover. Testimony regarding the additional licenses Sirius XM has executed, and the fact that they are representative of the quality and variety of sound recordings performed on Sirius XM's SDARS service, is a further important aspect of the direct licenses' better suitability as a benchmark than SoundExchange's interactive services proposals. It also directly addresses SoundExchange's punitive direct case rate proposal, which would no longer have allowed Sirius XM to exclude revenue from such performances under such licenses – the more recent of which include some of the larger indie labels in the business.

Along the same lines, paragraphs 2 and 5 of Mr. Gertz's testimony explains that there have been 23 additional direct licenses executed since the submission of the written direct statements, and describes some of the more prominent labels to have signed since the close of the direct case, their well-known artists, and their chart successes. These facts support the contentions of Mr. Frear and Professor Noll on the propriety and robustness of the direct licenses as benchmarks, and is proper rebuttal because, among other things, it (a) rebuts the contention that interactive services are the best benchmark; (b) demonstrates the impact of the elimination of the direct-license credit under SoundExchange's proposed Gross Revenue definition revision; and (c) responds to the Judges' questions and Professor Ordover's volunteered opinion regarding the representativeness of the direct licenses. Under even SoundExchange's own interpretation of proper rebuttal (*i.e.*, testimony that "respond[s] to claims made by opposing parties," Motion to Strike at 2), patently this discussion in Mr. Frear's and Mr. Gertz's testimony is proper rebuttal.

Mr. Frear's additional clarification in paragraph 8 of Mr. Frear's rebuttal testimony regarding other waivers and direct licenses signed by Sirius XM – including Metropolitan Opera, Book Radio and Radio Margaritaville – responds directly to SoundExchange's proposed revenue

definition by explaining that that these agreements, too, cover "separately licensed" performances the revenue for which would no longer be excluded under SoundExchange's proposal. The brief discussion of these licenses was included to show the punitive effect of SoundExchange's proposed changes to the regulatory definition. The notion that the discussion of these other direct licenses somehow represents an "entirely new theory," Motion to Strike at 8, is spurious. SoundExchange fails to identify in what way the identification of additional direct licenses constitutes an "impermissible change in legal theory." *Id.* at 10. Such licenses are not used as a benchmark, and Sirius XM has not contended that the rates to be set in this proceeding should be based in any way on these additional licenses.

### 2. *Mr. Frear And Mr. Gertz Respond to Allegations Of Informational Imbalance And Requests For Information On The Negotiations Of Directly Licensed Labels (Frear WRT ¶¶ 5-6; Gertz WRT ¶¶3-5)*

As already noted, Mr. Frear's discussion in paragraph 5 of his rebuttal testimony concerning the supposed informational balance that SoundExchange has contended exists between independent labels and Sirius XM responds directly to SoundExchange's injection of this issue into the direct phase of the case. *See* 6/5/2012 Tr. at 174:1-20; 6/6/2012 Tr. at 337:8-340:16 (Noll). Paragraph 6 of Mr. Frear's testimony is a continuation of the response discussed in the preceding paragraph.

The further discussion in paragraph 6 of Mr. Frear's testimony concerning direct license negotiations and the inclusion of provisions not offered in Sirius XM's initial direct license proposal, in addition to addressing this supposed disparity in bargaining power, also is directly responsive to the Judges' questions on precisely these issues, as discussed above. *See supra* pp. 6-7. Likewise, paragraphs 3-5 of Mr. Gertz's testimony identify the rates in the new licenses, the variations in terms in certain of the executed licenses, and the prominent independent record companies who negotiated those terms, all of which responds to the Judges' inquiries and to

SoundExchange's allegations that such independent labels were "ill-equipped" to negotiate deals with Sirius XM. Mr. Frear's and Mr. Gertz's testimony explains that the direct licenses were heavily negotiated and provides examples of sophisticated direct licensors that were successful in obtaining license provisions that were not included in Sirius XM's form license.

### *3. Discussion In Mr. Frear's and Mr. Gertz's Testimony Of Failure Of Major Labels To Engage In Negotiations And Other Industry Interference In The Direct License Initiative Are Proper Rebuttal (Frear WRT ¶¶ 9-11; Gertz WRT ¶¶ 10-14)*

SoundExchange's attempts to differentiate or minimize the independent labels that signed direct licenses must be viewed in context. Accordingly, paragraphs 9-11 of Mr. Frear's testimony, which discuss the facts that major record companies did not meaningfully respond to Sirius XM's direct license offers and that certain independent labels' relationships with majors effectively foreclosed them as direct-license candidates, provides this necessary context. In paragraphs 10-14 of his testimony, Mr. Gertz discusses the fact that, although the licenses already executed are representative of the value of Sirius XM's performances of sound recordings, nevertheless even more direct licenses would have been executed had it not been for record industry interference. This testimony and the exhibits referenced therein, particularly when viewed in conjunction with the testimony of Mr. Frear and Professor Noll, clearly is proper rebuttal testimony. Specifically, these challenged portions of Mr. Gertz's testimony are directly responsive to SoundExchange's challenges to the propriety of the direct licenses as benchmarks due to their supposed lack of representativeness, as well as specific questions from the Judges relating to representativeness. *See supra* pp. 5-7.

SoundExchange's contention that the citation in Mr. Gertz's testimony to documents gleaned from MRI's own files is somehow improper on rebuttal falls flat. First, the fact that certain of the communications discussed in and attached to Mr. Gertz's testimony (*i.e.*, Exhibits

30-32 and 34) happen to predate the submission of the direct case is irrelevant; the discussion of the evidence of industry interference in Sirius XM's rebuttal case is proper for all the reasons discussed above, including its direct responsiveness to the issue of representativeness raised by the Judges and SoundExchange's own witnesses, irrespective of the date of the documents referenced therein. Indeed, MRI would not have had any reason to include such documents in its direct testimony, and their relevance became clear only as rebuttal to challenges to these direct licenses raised in SoundExchange's direct case and the direct-phase hearings.

Moreover, with respect to Exhibits 33 and 35 (communications further exhibiting industry interference with the direct license initiative that post-date the submission of the direct cases), SoundExchange's argument that "[i]f Mr. Gertz wished to discuss these communications, the time to do so was plainly during the direct phase" is specious at best. Motion to Strike at 10. At a minimum, this contention is flatly inconsistent with the position SoundExchange took in moving to strike certain of Mr. Gertz's proposed amended written direct testimony when Mr. Gertz attempted to do just that. Having challenged testimony that would have updated the number of direct licenses signed – on the premise that such documents came from MRI's own files and were not obtained "through the discovery process," *see generally* SoundExchange's Motion to Strike Portions of the Amended Testimony of Ronald Gertz and Roger Noll, dated April 4, 2012 – SoundExchange should not now be heard to argue that that Exhibits 33 and 35 could have been used to amend Mr. Gertz's written direct testimony. Put together, SoundExchange's previous arguments and its current contentions, taken to their logical conclusions, would put Sirius XM in the untenable position of freezing the evidentiary record as of eight months ago and preventing Sirius XM from *ever* being able to address extremely

probative evidence of industry interference,[8] while leaving SoundExchange free to address the very same issues. Such an outcome cannot be what was envisioned by the regulations governing this proceeding.

#### *4. Mr. Frear's Testimony Regarding The Provision Of Data On Direct Licenses To Sirius XM Programmers Is Proper Rebuttal (Frear WRT ¶ 12)*

Paragraph 12 of Mr. Frear's testimony explains Sirius XM's significant ongoing process of making available to programmers information ("flags") in its software so that programmers may identify and begin to feature directly licensed sound recordings. This testimony responds directly to Judge Roberts's questions regarding Sirius XM's going-forward commitment to the direct license effort (which is discussed in the very next paragraph of Mr. Frear's testimony, and which SoundExchange does not challenge). *See* 6/7/2012 Tr. at 688:18-690:10 (Frear) ("JUDGE ROBERTS:. . . [W]hen our decision comes out in December, I'm wondering to what extent you anticipate you will still be actively in negotiations."). Clearly, this programming effort is not one Sirius would undertake if it were not committed to continuing with its direct license initiative.

### C. Professor Noll's Testimony Relating to Sirius XM's Direct License Initiative Is Proper Rebuttal (Noll WRT pp. 2-3, 29-38)

SoundExchange's request to strike all of Professor Noll's testimony that relates to direct licenses is baseless and should be denied. First, the subsection in Professor Noll's "Summary and Conclusions" regarding the "Appropriate Benchmarks," at Noll WRT pp. 2-3, includes an overview of his testimony that he disagrees with SoundExchange's proposed benchmarks and believes that the direct licenses entered into between Sirius XM and independent labels are the most appropriate benchmark in this proceeding. As is evidenced by the very first sentence

[8] As SoundExchange apparently recognizes, the exhibits attached to Mr. Gertz's testimony are some of the most damning evidence of the record industry's interference in the direct license initiative. For example, Exhibit 35 reflects an email chain in which a SoundExchange board member actually convinced a direct licensor to attempt to back out of its deal with Sirius XM.

within the challenged section, this discussion is an obvious response to the analysis of Janusz Ordover and is therefore proper rebuttal. *See* Noll WRT at 2 ("*I disagree with Professor Ordover* that the appropriate benchmarks for setting a statutory rate for . . . . [SDARS] are the rates that are paid by mobile interactive music services.") (emphasis added). The fact that even more direct licenses have been executed since the submission of Sirius XM's written direct statement is of clear relevance to this overarching point, as is Professor Noll's discussion of the representativeness of the direct licenses and the fact that the rates contained in those licenses reflect those that would be found in a competitive market, including major record companies.

Likewise, Professor Noll's discussion of non-interactive subscription mobile Internet-based streaming services also clearly rebuts Professor Ordover's analysis. In short, Professor Noll's testimony explains that if the Judges were to use any Internet-based streaming service as a benchmark in this proceeding (as opposed to the direct licenses), then Professor Ordover's choice of interactive services is clearly undercut and rebutted by the existence of a superior benchmark in a category of services Professor Ordover simply ignores. As discussed, the fact that these alternative benchmarks were discussed in Sirius XM's written direct statement does not necessitate the conclusion that it cannot therefore be legitimate rebuttal; indeed, there is no principled reason why a party should be blocked from revisiting such material where it is directly responsive to another party's direct case as well.

In the section of his testimony entitled "The Sirius XM Direct License Benchmark," Noll WRT at pp. 29-38, Professor Noll contrasts the adjustments that would be necessary to create a viable benchmark from interactive streaming services on which Professor Ordover relies with the Sirius XM direct licenses, which would not require any adjustments since they involve the same buyers, the same sellers and the same rights. Additionally, as described above, Professor Noll

discusses the independent labels that have not signed direct licenses, and the related industry interference with the direct license initiative on pages 29-32, and discusses whether the direct licenses that have been executed are too small or specialized to form a sufficiently representative benchmark on pages 35-38. This testimony is all responsive to the Judges' inquiries and to Professor Ordover's benchmark: to identify the direct licenses as a better benchmark than SoundExchange's, Professor Noll must be able to argue that his own benchmark is representative, and a discussion of the reasons why additional independent labels would have been disincentivized to enter into more direct licenses – *i.e.*, as a result of the interference of SoundExchange and other record industry actors – is a natural outgrowth of those inquiries.

SoundExchange's suggestion that, although it concededly did not produce communications evidencing industry interference (a sample of which are attached to Professor Noll's testimony as Exhibits 37-41) until well after the deadline to file amended testimony – and then only in response to an order compelling their production – it was somehow incumbent on Sirius XM to seek leave to file untimely amended testimony for Professor Noll on the basis of those documents, is nothing short of extraordinary.[9] There is no rule *requiring* Sirius XM to use documents produced in the direct phase as part of its direct case, and as SoundExchange itself has done, Sirius XM was fully entitled to use such direct-phase documents in support of its proper rebuttal testimony. Indeed, as the Judges recently acknowledged, "notwithstanding the availability of discovered information, an expert witness would have to be blessed with extraordinary prescience to be able to offer *responsive opinions in advance* of the completion of the direct testimony and examination of the witnesses opposite." Exhibit 1 at 2 (emphasis in original).

[9] The untestable premise that SoundExchange would not have opposed any such request by Sirius XM to file untimely amended testimony, when at the same time it had moved to strike certain portions of the amended testimony Sirius XM had filed, is dubious at best.

### D. The Judges Should Use Their Broad Discretion To Accept The Proffered Testimony Regarding Sirius XM's Direct License Initiative

Even were the Judges to determine that any portion of the written rebuttal testimony of Messrs. Frear or Gertz or Professor Noll did not, strictly speaking, fall within the parameters of "rebuttal" testimony under the governing regulations, nonetheless CRB precedent and sound policy counsel in favor of allowing the testimony to be heard. The Judges have used their wide discretion to allow such testimony on at least two occasions in recent proceedings. SoundExchange's Motion to Strike mentions only one such instance, and does so by excerpting a citation in order to suggest that, in a decision in the *Webcasting II* proceeding, the Judges "sustain[ed] an objection to . . . testimony that responded to issues raised only on cross-examination." Motion to Strike at 6 (citing In re Digital Performance Rights in Sound Recordings and Ephemeral Recordings, Docket No. 2005-1 CRB DTRA, 11/22/06 Tr. Vol. 43 at 79:15-81:5) (attached as Exhibit A to the Motion to Strike). What SoundExchange fails to mention is that, in the very same cited passage, the Judges expressly considered the arguments in favor of striking the challenged testimony as improper rebuttal, but ultimately *exercised their discretion to accept* otherwise non-rebuttal testimony, particularly because it served to update the post-direct statement submissions. *See id.* at 80:21-81:5.[10] The same result obtained, over SoundExchange's objections, during the *Satellite I* proceeding, where the Judges were "persuaded in [their] discretion [to] permit [Dr. Woodbury] to give" what had been determined not to be strictly proper rebuttal testimony. *See* In re Adjustment of Rates and Terms for

[10] Indeed, SoundExchange also conveniently disregards the fact that in *Web II*, it defended against a motion to strike by advocating in favor of a broader understanding of acceptable "rebuttal" testimony. In so doing, SoundExchange argued that such a result is appropriate where the regulations are silent as to the definition of the term "rebuttal" and the issues addressed in the challenged testimony were responsive to, among other things, cross examination in the direct-phase hearings. We find ourselves in the rare position of being in agreement with SoundExchange on this score.

Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 CRB DSTRA, 8/23/07 Tr. at 19:18-20:6 (attached hereto as Exhibit 3).

Although both of these decisions were orders issued from the bench and did not elucidate the Judges' reasoning for permitting the challenged testimony to be submitted, it is clear that the Judges may exercise broad discretion to accept testimony even where it may not fit squarely within the parameters of traditional "rebuttal" testimony. This result is particularly appropriate, per the Judges' previous orders, where the arguments addressed by rebuttal witnesses were previewed on cross during the direct phase,[11] and where the later testimony had the effect of updating the record after the close of the record on the direct phase of the proceeding. Were the rebuttal testimony challenged here to be struck, Sirius XM would be prejudiced by being constrained to a frozen record as of more than eight months ago, while SoundExchange would be free to address up-to-the-minute evidence on the very same subjects – the very epitome of an "informational imbalance."

In short, SoundExchange's proposal to the contrary would be unfair and prejudicial to Sirius XM, while to permit the testimony will not prejudice SoundExchange in any way, having now taken depositions of all three witnesses and having received the benefit of complete discovery during the rebuttal phase. Accordingly, even if the Judges were to find any section of

[11] Here, contrary to SoundExchange's contention that only limited cross examination referenced the subjects challenged in the current motion, examples of cross examination on the representativeness of the direct licenses and the negotiations Sirius XM and MRI had with independent labels abound in the direct-phase hearing transcript. *E.g.*, 6/6/2012 Tr. at 307:17-308:5, 309:17-311:3 (Noll) (referencing number of labels who accepted or turned down direct license offers); *id.* at 347:15-349:20 (Noll) (discussing incentives presented to labels approached with direct license offers and economic incentives for accepting or rejecting offers); *id.* at 350:9-354:18, 355:1-9 (Noll) (inquiring whether direct licenses are "representative of the larger group of record labels who did not sign direct licenses"); 6/7/2012 Tr. at 703:12-22 (Frear) (referencing number of labels approached with direct license offers); *id.* at 892:3-16, 896:20-899:21 (Gertz) (referencing number of labels approached with direct license offers; examining airplay share analysis and noting that direct licensors' shares add up to small percentage).

the challenged testimony is not proper rebuttal, they should exercise their discretion to allow the testimony into the record.

## II. PROFESSOR SALINGER'S TESTIMONY IN APPENDIX C IS PROPER REBUTTAL TO THE DIRECT TESTIMONY OF JANUSZ ORDOVER AND GREGORY SIDAK

SoundExchange's claim that paragraphs C9 through C19 of Appendix C to Professor Salinger's rebuttal testimony ("Salinger WRT") "does nothing more than revise calculations offered by Sirius XM during the direct phase in an attempt to strengthen Sirius XM's own direct-phase testimony" evidences either a fundamental lack of understanding of Professor Salinger's analysis or, a purposeful mischaracterization. *See* Motion to Strike at 2. As is plainly spelled out in Professor Salinger's Appendix C, its purpose is to rebut Professor Ordover's flawed interpretation of the Section 801(b)(1) factors and to address one of the many flaws in the direct testimony of SoundExchange witness Gregory Sidak in his calculation of Tobin's q. *See* Salinger WRT ¶¶ 34, 60, C1. Tellingly, SoundExchange makes no mention in its motion of the first of these two purposes even though Professor Salinger clearly articulated these twin purposes again in response to a question at his deposition (the same day that SoundExchange filed its motion to exclude it). *See* Salinger Dep. at 110:23-113:3.[12]

Specifically, in addition to rebutting Mr. Sidak's Tobin's q calculation, Appendix C serves to rebut Section III.D of Professor Ordover's written direct testimony. In that section, Professor Ordover asserts that "[t]o the extent the Court finds the investment in satellites relevant, [he] believe[s] that the issue appropriately is addressed under the rubric of the fourth policy objective." Ordover WDT ¶ 23(b). As support for this conclusion, Professor Ordover argues that"[i]n a competitive market, no seller is assured that it will earn the risk-corrected, expected cost of capital." *Id.* at ¶ 22. In brief, Professor Ordover argues that to the extent that

[12] All referenced excerpts of Prof. Salinger's deposition testimony are attached hereto as Exhibit 4.

Sirius XM's investments in satellites are "sunk," the CRJs should consider them only with respect to the fourth statutory factor – disruption.

As Professor Salinger explains in his testimony, Professor Ordover has not presented an economically sound interpretation of the 801(b)(1) factors. *See* Salinger WRT ¶¶ 32-36. As Professor Salinger discusses, one of Sirius XM's principal contributions is its investment in satellite technology and the distribution network it provides. *Id.* at ¶ 33. Given this fact, it simply cannot be the case, as Professor Ordover asserts, that these costs should be ignored under the third statutory factor – the relative contribution factor. More generally, Professor Salinger explains that recognizing that a portion of the Sirius XM monthly subscriber fee is needed to contribute to Sirius XM's sunk investments does not, contrary to Professor Ordover's supposition, guarantee Sirius XM a competitive rate of return on its investments. *Id.* at ¶ 34. Professor Salinger's Appendix C lays out the economic model on which he bases the above discussed arguments. It demonstrates that Professor Ordover's failure to account for the long-run economic costs associated with Sirius XM's sunk investments in its satellites and terrestrial repeaters is not only a theoretical mistake, but is also one that has a substantial dollar consequences.

While it is true that Professor Salinger does compare his calculations to those presented by Professor Noll, Professor Salinger has done this simply to point out that his estimates cover only a portion of the costs that Professor Noll addresses. Nowhere does Professor Salinger suggest that his calculations should replace those presented by Professor Noll in his direct testimony. Indeed, when asked at his deposition for the takeaway from Appendix C's calculations, Professor Salinger explained that he did not suggest that the results of Appendix C should be used in "a precise way." *See* Salinger Dep. at 114:4-115:10. Instead, he stated that

Appendix C simply illustrates that Sirius XM's contribution came at significant cost and it would be error to credit any rate setting methodology – *i.e.*, Professor Ordover's – that simply ignores these substantial costs. *Id.*

## CONCLUSION

For all the foregoing reasons, and subject to footnote 2 herein, SoundExchange's Motion To Strike Portions Of Sirius XM Testimony As Improper Rebuttal should be denied in its entirety.

Dated: August 10, 2012

Respectfully submitted,

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Ex. 23

EX. 23

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

| In the Matter of:<br><br>Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services | Docket No. 2011-1<br>CRB PSS/Satellite II |
|---|---|

**SOUNDEXCHANGE'S MOTION TO STRIKE PORTIONS OF SIRIUS XM TESTIMONY AS IMPROPER REBUTTAL**

Sound Exchange respectfully moves this Court to strike portions of Sirius XM's rebuttal case on the basis that it is improper rebuttal testimony.

This Court has made clear in this proceeding and in prior proceedings that rebuttal testimony is not an opportunity to submit new direct testimony; rather, rebuttal testimony must respond to issues raised by the direct testimony of an opposing party. *See, e.g.*, *Order Granting in Part and Denying in Part Music Choice's Motion To Strike*, Docket No. 2011-1 CRB PSS/Satellite II, at 2 (Aug. 3, 2012) (striking rebuttal testimony for "stray[ing] so far from focusing on the . . . direct testimony it is offered to rebut as to be nothing more than an untimely addition to [the witness's] written direct testimony"); *In re Digital Performance Rights in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 11/22/06 Tr. Vol. 43 at 79:15-81:5 (sustaining an objection to testimony that "does not address matters raised by the Services in their direct case") (attached hereto as Ex. A). Here, portions of the rebuttal testimony of four Sirius XM witnesses violate this requirement and must be struck.

First, SoundExchange moves to strike the following sections of Mr. Frear's, Mr. Gertz's, and Prof. Noll's rebuttal testimony that deal with the direct licenses between Sirius XM and independent music labels:

- Written Rebuttal Testimony of Mr. Frear ("Frear WRT"): ¶¶ 3–6 and 8–12;
- Written Rebuttal Testimony of Mr. Gertz ("Gertz WRT"): ¶¶ 2–5, the portions of ¶ 8 that deal with licenses other than licenses of the type discussed in Sirius XM's direct testimony, and ¶¶ 9–14;
- Written Rebuttal Testimony of Prof. Noll ("Noll WRT"): the sections entitled "Appropriate Benchmarks" (except the first sentence) and "The Sirius XM Direct License Benchmark" (pp. 2–3, pp. 29-38).[1]

Second, SoundExchange moves to strike paragraphs C9 to C16 of Appendix C to Professor Salinger's Written Rebuttal Testimony ("Salinger WRT") because this section does nothing more than revise calculations offered by Sirius XM during the direct phase in an attempt to strengthen Sirius XM's own direct-phase testimony. The purpose of the rebuttal phase is to respond to claims made by opposing parties. Because the aforementioned testimony does not rebut anything in SoundExchange's direct case and SoundExchange would be severely prejudiced by its admission at this stage of the proceeding when it serves only to buttress Sirius XM's own direct case, it should be struck.

[1] In this motion, SoundExchange is not moving to strike as improper rebuttal Mr. Gertz's ranked market share analysis, which was performed at the request of the Copyright Royalty Judges ("CRJs"), or Mr. Frear's claim that Sirius XM will continue to seek direct licenses after this proceeding, which responds to a question from the CRJs.

## ARGUMENT

### I. Direct License Testimony

In their written rebuttal testimony, Mr. Frear (Frear WRT at 1–5), Mr. Gertz (Gertz WRT at 1–14), and Prof. Noll (Noll WRT at 32–38) engage in extensive discussions about the direct licenses between independent labels and Sirius XM. While Sirius XM is entitled to respond to this Court's explicit request to present the top twenty-five labels played on Sirius XM's satellite radio service, *see* 6/7/12 Tr. 686:19-687:1 (Frear), these witnesses' testimony exceed the scope of that request. They present an elaborate defense of the representativeness of the independent labels, the sophistication of the negotiations, the variations to the standard license permitted by Sirius XM, and the appropriateness of these licenses as a benchmark – all of which fails to respond to any element of SoundExchange's direct case.

Indeed, the only mentions of direct licenses during SoundExchange's direct case were Prof. Ordover's acknowledgment that he had become aware of the direct licenses through reading Prof. Noll's direct testimony, *see* 6/14/2012 Tr. 2252:2-11, and Mr. Van Arman's (Jagjaguwar) explanation of his reasons for not accepting the direct license offered to his labels, *see* 6/15/2012 Tr. 2552:11-2555:20. But Sirius XM's "rebuttal" testimony does not even attempt to respond to that testimony. Instead, it is offered only to bolster Sirius XM's own direct testimony and as preemptive sur-rebuttal of attacks on the direct licenses anticipated by Sirius XM.

Moreover, while Sirius XM is entitled to submit testimony at this stage responding to specific questions raised by the Court, that does not grant Sirius XM wholesale authority to provide amended direct testimony on issues not responsive to the Court's questions. For example, during the direct phase, Sirius XM's witnesses were questioned about the market share

of plays on the SDARS service represented by the direct license labels. At that hearing, Mr. Gertz asserted that the prior market share analysis performed by MRI, which formed the basis of Sirius XM's direct license initiative, was "several years old. And it wasn't an authoritative analysis. . . . So the best data for doing what you're doing would probably be the most—analysis of most current royalty data." 6/7/2012 Tr. 906:6-20 (Gertz). Judge Roberts then suggested that "that would certainly be something worthy in the rebuttal phase." *Id.* at 906:21-207:1. But a suggestion or question by the Court of the kind made by Judge Roberts does not open the door to the extensive revisiting of the direct licensing initiative that appears in Sirius XM's rebuttal testimony.

Rebuttal is defined as "the giving of evidence in a legal suit to destroy the effect of evidence introduced by the other side in the same suit." *Webster's Third New International Dictionary* (1993). Proper rebuttal responds to the other side's evidence rather than bolstering the original argument of the party offering the rebuttal testimony. *See, e.g., Peals v. Terre Haute Police Dept.*, 535 F.3d 621, 630 (7th Cir. 2008) ("'The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party.' Testimony offered only as additional support to an argument made in a case in chief, if not offered 'to contradict, impeach or defuse the impact of the evidence offered by an adverse party,' is improper on rebuttal.") (quoting *United States v. Grintjes*, 237 F.3d 876, 879 (7th Cir. 2001)); *United States v. Allard*, 464 F.3d 529, 535 (5th Cir. 2006) ("[I]t is well settled that the purpose of rebuttal testimony is to explain, repel, counteract, or disprove the evidence of the Adverse party. . . ."); *United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004) (same); *La Esperanza de P.R., Inc. v. Perez y Cia. de Puerto Rico, Inc.*, 124 F.3d 10, 20 n.6 (1st Cir. 1997) ("The purpose of rebuttal is to meet and reply to any new evidence offered by an opponent."); *United States v.*

*Carter*, 70 F.3d 146, 149 (DC Cir. 1995) ("Rebuttal evidence is admitted for the purpose of explaining or refuting evidence offered by the other side.").

In their discussion of direct licenses, Mr. Frear, Mr. Gertz, and Prof. Noll fail to meet this elementary requirement. Indeed, these witnesses make no attempt to tie their discussions to specific aspects of SoundExchange's direct case; instead, they reiterate Sirius XM direct testimony or rely on generalized references to SoundExchange's "suggest[ions]," "questions," or "contentions," without any citations to the record. *See* Frear WRT at ¶ 5; Gertz WRT at ¶ 1.

**A. Frear**

Mr. Frear writes in his rebuttal testimony, "I understand that SoundExchange suggested during the direct phase hearing that there is some sort of informational imbalance as between Sirius XM and the independent labels with which it has reached direct licenses." Frear WRT at ¶ 5. A search for any such suggestion in the direct testimony, whether written or oral, of SoundExchange witnesses would be fruitless. It was Mr. Frear himself who referred during his direct examination to "independent labels, who, you know, some people think—seem to think are unsophisticated." 6/7/2012 Tr. 675:11-14. Later in his direct examination, counsel for Sirius XM specifically elicited testimony as to whether Mr. Frear had "form[ed] any impression of the sophistication of the counterparties that you dealt with." He answered, "Yeah. Yeah. These guys know their business, you know, so—not only the ones who sign the licenses, but even the ones who don't, and so that we have real business discussions with people who understand where we fit in—you know, in their business—business scheme." 6/7/2012 Tr. 683:22-684:8.

If any other "suggest[ion]" regarding the informational gap between the direct licensors and Sirius XM arose during the direct phase hearing, it surfaced not during the presentation of SoundExchange's direct evidence, but during cross-examination of Prof. Noll. Counsel for

SoundExchange asked if Prof. Noll knew whether any of the direct licensors had participated in proceedings before the Copyright Royalty Board, and Prof. Noll answered that "the chances that any of them have a witness here is zero." 6/6/2012 Tr. 337:8-338:2. Then counsel for SoundExchange asked Prof. Noll to contrast that answer with Sirius XM's participation in both the *SDARS I* and *SDARS II* proceedings. *Id.* at 338:3-8. Prof. Noll later stated defensively, "It's not that there was an information-impacted environment here. There were lots of people telling them what they thought the outcome of this process would be." *Id.* at 340:4-7.

The fact that a "suggest[ion]" of informational asymmetry arose on cross-examination of another Sirius XM witness does not open the door for Sirius XM to submit rebuttal testimony on that subject. *See* Ex. A, *In re Digital Performance Rights in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 11/22/06 Tr. Vol. 43 at 79:15-81:5 (sustaining an objection to SoundExchange testimony that responded to issues raised only on cross-examination); *Peals v. Terre Haute Police Dept.*, 535 F.3d at 630 (holding that where "the testimony that [the plaintiff] sought to introduce on rebuttal was responsive to the defendants' cross-examination of him during his case in chief, not to the defendants' case," such testimony "was clearly not an appropriate subject for rebuttal" and the district court had properly excluded it). This rule serves the adversarial process because it encourages rigorous testing of the direct-case theories of the opposing party without the cross-examining party thereby inviting retooled and unrebuttable testimony on the same subject during the rebuttal phase. Moreover, it keeps the rebutting party from mischaracterizing the other party's position—a distinct risk when rebutting parties attempt to parse the cross-examination questions of their opponents. Because Mr. Frear's WRT ¶ 5 responds only to issues raised by himself on direct examination and on cross-examination of Prof. Noll, it should be struck.

Similar deficiencies are present in Mr. Frear's discussion of direct licenses in WRT ¶¶ 3, 4, 6, and 8-12 (though not ¶¶ 7 and 13, which respond to questions from the Copyright Royalty Judges).

*Paragraph 3.* Paragraph 3 does not even hint at an issue raised on cross examination, but merely reiterates Prof. Noll's contention from the direct phase that the direct licenses represent the most appropriate benchmark because they feature the same buyer, sellers, and rights as the statutory license. *See* Noll Revised Amended Written Direct Testimony ("Noll WDT") at 49 ("Unlike the benchmarks that have been used in all prior proceedings before the Copyright Royalty Board, these agreements include the same rights for the same buyer from the same sellers as the licenses that are at issue in this proceeding.").

*Paragraph 4.* In ¶ 4, Mr. Frear refers vaguely to SoundExchange's "attempts to denigrate the direct licenses as outliers that do not inform the value of the statutory licenses that is in issue here," Frear WRT at 2, but SoundExchange's direct case contains no such "denigrat[ion]." As previously discussed, SoundExchange's direct case did not so much as name any particular direct licensor. Rather, the only challenge to the probative value of the direct licenses during the direct phase came during cross-examination questions addressing the miniscule market share represented by the direct licensors, *see, e.g.,* 6/7/2012 Tr. 899:6-21 (Gertz); *id.* at 905:6-9, and the fact that at least one direct licensor represented to MRI that his artist contracts did not require him to share royalties with artists, *id.* at 888:6-20.

Paragraph 4 also reiterates Sirius XM's dubious direct-phase assertions that SoundExchange somehow prevented parties from entering into direct licenses. *See* Frear WDT at 26–29; Noll WDT at 49–55. These assertions were never addressed in SoundExchange's direct case, though counsel for SoundExchange did elicit testimony from Prof. Noll on cross-

examination to the effect that Prof. Noll did not have a problem with trade associations' public estimates about the likely outcome of this proceeding. 6/7/2012 Tr. 339:11-341:9 (Noll).

*Paragraphs 6 and 8-12.* Mr. Frear's ¶ 6 is devoted to the deviations from the direct license that certain direct licensors secured, while ¶¶ 9–11 renew complaints about the fact that the major record labels declined to enter into direct licenses; neither topic was addressed in SoundExchange's direct case. Paragraph 12 discusses Sirius XM's implementation of mechanisms that favor direct licensed sound recordings. Clearly, SoundExchange did not and could not have given direct evidence on this subject.

Although Sirius XM is entitled to put on evidence specifically requested by the Copyright Royalty Judges (as Mr. Frear does in ¶¶ 7 and 13), the market share discussions in ¶ 8 and all but the last sentence of ¶ 10 go beyond the question asked by Judge Roberts of Mr. Gertz during the direct-phase hearing. Rather than analyze the same record company direct licenses that had been discussed in Sirius XM's direct case, using the actual data from royalty statements made to those direct licensors (statements that Mr. Gertz had argued would provide the "best data"), MRI produced a new analysis from whole cloth that takes into account the market share of other licenses between Sirius XM and disparate content owners (for example, content broadcast on the Metropolitan Opera channel, Jimmy Buffet's Margaritaville, and Book Radio). Frear WRT at 4 & n.2. This is not a response to Judge Roberts's question, but is instead an alternative and entirely new theory that affects everything from Prof. Noll's benchmark analysis to the specific numbers discussed by Mr. Frear and Mr. Gertz. Moreover, by introducing new "direct licenses" that are entirely separate from the previously discussed direct licensing initiative, this testimony hamstrings SoundExchange's ability to provide effective rebuttal testimony.

Unsurprisingly, federal courts have held that such midstream changes in legal theory constitute improper rebuttal. In *Allen v. Prince George's County, Md.*, 737 F.2d 1299 (4th Cir. 1984), the Fourth Circuit affirmed a district court's refusal to admit in rebuttal the plaintiffs' offer of a revised statistical analysis adopting a timeframe that mirrored that of their opponents' statistical analysis—even though the district court had accepted the original timeframe of the opponents and rejected that of the plaintiffs. *Id.* at 1305–06. Citing *Wigmore on Evidence*,[2] the Fourth Circuit approved of the district court's reasoning that "the appellants had had a chance to decide before trial what statistics to use, [ ] they had elected to include pre-1972 hires, and [ ] they should not be allowed to change their litigation strategy on rebuttal." *Id.* at 1305. The same reasoning applies to Sirius XM. If Sirius XM wanted to present analysis including the Book Radio licenses as relevant direct licenses in its written direct testimony it had the chance to present and defend this legal theory during the direct phase. In rebuttal, however, this alternate legal theory constitutes improper rebuttal that would unfairly prejudice SoundExchange, and the testimony should therefore be struck.

**B. Mr. Gertz**

Mr. Gertz's rebuttal testimony on the topic of direct licenses is improper for the same reasons and to the same extent as Mr. Frear's. Paragraphs 2 through 5 merely renew Sirius XM's direct-phase arguments about the representativeness of the direct licensors (¶ 2, ¶ 5) and defend the quality and results of negotiations with various direct licensors (¶ 3 & nn.2–4, ¶ 4). None of these topics was addressed in SoundExchange's direct case. Paragraphs 6–7 and the market share analysis in Table 1 respond to Judge Roberts' request (although the table does not

[2] The Fourth Circuit ultimately relied on evidentiary rules specific to Title VII cases, *see Allen*, 737 F.2d at 1305, but its primary discussion is devoted to the common law of evidence. *See also Tramonte v. Fireboard Corp,* 947 F.2d 762, 764 (5th Cir. 1991) (citing *Allen*'s holding on new legal theories in rebuttal in the context of a tort suit).

employ MRI's royalty data or provide estimates for Sirius XM's satellite radio service), but the statistics in ¶ 8 and footnote 6 suffer from the same impermissible change in legal theory identified in Mr. Frear's testimony, above. Any discussion of numbers that do not derive from Sirius XM's direct licenses with independent record labels is impermissible rebuttal and should be struck. Moreover, ¶ 9 of Mr. Gertz's testimony parrots Mr. Frear's rehashing of his own direct testimony about the purported unwillingness of the major labels to negotiate with Sirius XM in the guise of offering yet another new way to analyze the paltry market share of the direct license labels.

Like ¶ 4 of Mr. Frear's testimony, Mr. Gertz's assertions about supposed SoundExchange interference with direct licenses in ¶¶ 10–14 merely expands on testimony from Sirius XM's direct case rather than responding to SoundExchange's evidence. *See* Frear WDT at 26–29; Noll RAWDT at 49–55; Gertz WDT ¶¶ 17-18. It is telling that nearly all of the communications that Mr. Gertz discusses and attaches as Exhibits are communications with MRI *prior* to the filing of the written direct case. *See, e.g.*, Exhibits 30, 31, 32, 34.[3] This testimony is nothing short of a blatant attempt to amend and bolster Mr. Gertz's prior testimony regarding SoundExchange's alleged interference. *See* Gertz WDT ¶¶ 17-18. Indeed, Mr. Gertz does not even pretend to respond to any of SoundExchange's testimony. If Mr. Gertz wished to discuss these communications, the time to do so was plainly during the direct phase. Mr. Gertz's testimony on SoundExchange "interference" fails to respond to SoundExchange's evidence and is thus improper on rebuttal.

[3] All of the communications discussed by Mr. Gertz are MRI and Sirius XM's own documents. That a handful of these communications were received by MRI shortly after the direct case was filed does not grant Sirius XM authority to amend its written direct testimony through rebuttal testimony.

### C. Prof. Noll

Prof. Noll rehearses his direct-case arguments about the appropriateness of his direct-license benchmark from page 2 (beginning with "I continue to believe the most appropriate benchmarks . . .") to page 3 (the end of the section), and from page 29 (the section titled "The Sirius XM Direct License Benchmark") through page 38 (ending with "I conclude that these licenses are representative of the industry in coverage of music and rates paid"). These sections should be struck because they repeat and expand upon Prof. Noll's direct testimony and because they do not respond to anything in SoundExchange's direct case.

Prof. Noll's central argument pertains to the "representativeness" (p. 32) of the direct licensors (pp. 32 to 38). This argument played a critical role in the Revised Amended Written Direct Testimony of Roger G. Noll. See Noll WDT at 39–45. Under the heading "The Similarity of Sirius XM's Licensees [sic] to Other Record Companies" (WDT at 39), Prof. Noll's direct testimony analyzed the "type and quality" (WDT at 42) of the recordings owned by the direct licensors, concluding that "the recordings of the companies that have signed direct licenses with Sirius XM are representative of the type and quality of recordings that are released by a major record company" (WDT at 45). SoundExchange made no mention of the representativeness of the direct licensors in its direct case.

Prof. Noll also devotes a great deal of rebuttal testimony to "market rejection" (pp. 30-32) of the direct licenses. While counsel for SoundExchange elicited testimony on the proportion of independent record labels that declined the direct-license offer during cross-examination, *see* 6/6/2012 Tr. 309:17–310:9 (Noll), neither the number of direct licensors nor the number of labels that rejected the direct license appeared in SoundExchange's direct case. Moreover, this testimony is based on a handful of documents that were produced by

SoundExchange well in advance of the direct trial in this case and that could have been used by Prof. Noll in amending his testimony.[4] In fact, at least one of the emails was featured in Sirius XM's opening statement. *See* 6/5/2012 Tr. 48:9-18 (Sirius XM Opening). Testimony that responds only to issues raised on cross-examination or simply bolsters direct testimony is improper rebuttal and should be struck.

## II. Prof. Salinger on Depreciation

In the body of his rebuttal testimony, Prof. Salinger superficially attempts to rebut Mr. Sidak's calculation of Tobin's q. In fact, Prof. Salinger uses the majority of his Appendix C to amend Mr. Frear's direct testimony about the depreciation and amortization expenses that Sirius XM incurred in 2010 (p. 12, ¶ 29, Frear WDT), and in turn to revise Mr. Noll's direct testimony about the annualized costs per user of satellite radio transmission (p. 85 & Appendix C, Noll WDT). As ¶ C16 of Prof. Salinger's testimony illustrates, the ultimate thrust of his argument is an upward revision to Prof. Noll's estimate of the average cost per user of Sirius XM's distribution system. *See* Salinger WRT at 15, ¶ C16 ("My estimates of $2.54 and $3.13 should be compared with the sum of these two portions of Prof. Noll's total, or $0.63. They show that Prof. Noll was intentionally conservative in his treatment of capital costs. My estimates indicate the true economic costs per subscriber month of Sirius XM's satellite network are almost $2.00 higher than he estimated, and that is just for a small portion ($.63 out of $5.11 of the total costs used in his adjustments[.]"). This testimony, whether seen as an untimely correction or a blatant

[4] SoundExchange acknowledges that the direct license communications were not produced until after the deadline for filing amended testimony during the direct phase. In light of the significant time period between the production of the documents and the start of the direct phase hearing, however, Sirius XM could have sought permission from the Court to file untimely amended testimony on the basis of those documents. But Sirius XM's failure to do so should not excuse its attempt to introduce these documents and communications by means of rebuttal testimony that fails to rebut any aspect of SoundExchange's direct testimony.

attempt to bolster direct testimony, cannot be sustained as rebuttal. This Court should strike paragraphs C9 to C16.

Mr. Sidak's discussion of Tobin's q provides a wholly inadequate basis to sustain Prof. Salinger's alternate calculation of Sirius XM's costs per user. The only connection between Mr. Sidak's testimony and Prof. Salinger's Appendix C is the fact that Mr. Sidak calculated Tobin's q using Sirius XM's publicly reported financial documents. As Mr. Frear's direct testimony reflects, Sirius XM has chosen to use straight-line depreciation, a technique that is consistent but not required by GAAP. In calculating Tobin's q for Sirius XM, Mr. Sidak used the book value of the firm's assets, a figure that naturally reflects the depreciation method employed by Sirius XM itself. Other than the implicit reference to depreciation contained within this calculation, Mr. Sidak did not refer to or discuss any particular depreciation method.

Nonetheless, Prof. Salinger uses an alternate depreciation method as a springboard to conduct a thorough, fifteen-page "cost and asset value analysis" in Appendix C.[5] As paragraphs C9 to C16 make clear, Prof. Salinger is not actually interested in recalculating depreciation based on his methodology. Rather, this testimony is entirely devoted to bolstering Prof. Noll's analysis on the monthly cost per subscriber for Sirius XM's satellite network, a topic never discussed in any of SoundExchange's direct testimony. This testimony fails to respond to any aspect of SoundExchange's direct case; instead, it is untimely amended testimony in the guise of rebuttal and should be struck.

## CONCLUSION

For the foregoing reasons, SoundExchange respectfully moves this Court to strike the portions of Sirius XM's Written Rebuttal Testimony identified on Page 2.

---

[5] It is telling that Prof. Salinger does not even bother to recalculate the Tobin's q figures with what he deems to be a more accurate calculation of depreciation.

Respectfully submitted,

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August 3, 2012

## CERTIFICATE OF SERVICE

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# EXHIBIT A

# Transcript of:

**Date:** November 22, 2006
**Volume:** 43

**Case:** Digital Performance Rights

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Before the
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| | |
|---|---|
| In the Matter of:<br><br>The Digital Performance Right in Sound Recordings and Ephemeral Recordings<br><br>(Webcasting Rate Adjustment Proceeding) | Docket No. 2005-1 CRB DTRA |

Volume 43

Room LM-414
Library of Congress
First Street and
Independence Avenue, S.E.
Washington, D.C. 20540

Wednesday,
November 22, 2006

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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1 P-R-O-C-E-E-D-I-N-G-S
2 9:33 A.M.
3 CHIEF JUDGE SLEDGE: Mr. Handzo?
4 MR. HANDZO: Good morning, Your
5 Honor.
6 CHIEF JUDGE SLEDGE: Good morning.
7 MR. HANDZO: Our witness this
8 morning is going to be Jim Griffin. Before I
9 put Mr. Griffin on, I wonder if the Court
10 would like to take a minute just to talk about
11 schedule. The one thing we don't have
12 scheduled yet is the submission of findings of
13 fact and conclusions of law by the parties.
14 CHIEF JUDGE SLEDGE: That's right.
15 MR. HANDZO: I've had some
16 conversations at least with Mr. Joseph about
17 that and we can make a proposal to the Court.
18 I don't know if you would like it orally or
19 what we were going to propose is that the
20 findings be submitted on December 15 which I
21 believe is a Friday, that we have rebuttal
22 findings, if any, submitted on the following



1 Tuesday which would be the 19th.
2 CHIEF JUDGE SLEDGE: The first day
3 is what?
4 MR. HANDZO: The 15th of December.
5 CHIEF JUDGE SLEDGE: All right.
6 MR. HANDZO: Rebuttal findings on
7 the 19th and closing argument on Thursday, the
8 21st and I should also add that Mr. Joseph
9 agrees with two-thirds of that proposal. He
10 agrees that we should submit findings of fact
11 on the 15th and have closing argument on the
12 21st. He's less enthusiastic about the notion
13 of rebuttal findings.
14 MR. JOSEPH: His views speaking
15 for himself, Your Honor, being that the
16 parties and the Court would be just as well
17 served if we take that time to prepare for the
18 closing and deliver any response that we have
19 in the written findings and orally in the
20 closing.
21 CHIEF JUDGE SLEDGE: All right.
22 We will try to let you know something early



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1 central to its fundraising prospects." It
2 goes on for another couple of paragraphs.
3 (Pause.)
4 CHIEF JUDGE SLEDGE: Overruled.
5 BY MR. HANDZO:
6 Q Mr. Griffin, since we're at that
7 part of your testimony, let me ask you to turn
8 to NPR's Blueprint for Growth which I believe
9 Exhibit 231 to your testimony.
10 A I have it in front of me.
11 Q And looking in particular at let's
12 say the third page of this document, bottom
13 paragraph, does that support your view that
14 public radio stations like NPR use music to
15 draw the crowd?
16 A Sure. It's very clear. Not just
17 the crowd, but the same crowd that others are
18 attempting to reach.
19 Q Let me ask you to flip a few more
20 pages. I think it's the sixth page. Sixth
21 page where the NPR's "Blueprint for Growth"
22 describes a new music service. Do you see



1 that?
2 A I do. The last paragraph on the
3 page.
4 Q And again, does that support your
5 view that they're using music to draw the
6 crowd?
7 A Well, sure. They call it the
8 poster child. So I think use of the word
9 "poster" would indicate draw a crowd.
10 Q Do you know if NPR, in fact, has
11 plans to offer a new digital music service?
12 A I believe they do. I don't
13 personally have direct knowledge, but
14 reviewing these documents, I believe they are.
15 Q Well, when we talked about these
16 documents, let's talk about one in particular.
17 Let me ask you to go to Exhibit 212.
18 A Yes.
19 Q Does that --
20 A Sure, it's a press release from
21 NPR.
22 Q About what?



1 A Saying they're developing a new
2 digital music service. That's their claim.
3 Q And do you see reference there in
4 the third paragraph to the importance of music
5 to NPR?
6 A Sure. They call it a cornerstone.
7 Q Just one other question on this
8 topic of public radio stations, Mr. Griffin.
9 You mentioned earlier that commercial stations
10 are starting to offer side channels or
11 additional channels besides their terrestrial
12 radio program. Do commercial stations do the
13 same? I'm sorry, noncommercial stations do
14 the same?
15 A Yes, in fact, they do. I mean one
16 of the examples I gave earlier of XPN in
17 Philadelphia adding Y100, we could similarly
18 point to KCRW and I believe it has three side
19 channels in addition to its primary signal.
20 Q Mr. Griffin, let me turn to a
21 different topic which is the second part of
22 your testimony, it discusses wireless



1 technology?
2 A Yes.
3 Q I have a few questions for you
4 about that. First question I guess is why
5 does wireless technology matter to webcasters
6 or in this case?
7 CHIEF JUDGE SLEDGE: Mr. Joseph?
8 MR. JOSEPH: Your Honor, I think
9 we were told that they were going to move to
10 rebuttal testimony. Actually, as I look at
11 part two of Mr. Griffin's testimony, there's
12 absolutely nothing that it's rebutting and I
13 would object to rebuttal testimony on a
14 subject that isn't rebuttal.
15 CHIEF JUDGE SLEDGE: Mr. Handzo?
16 MR. HANDZO: Your Honor, I think
17 there was a fair amount of testimony in the
18 opening case about wireless technology and
19 whether it's important to webcasters and
20 whether it's sort of pie in the sky in the
21 future or whether it's going to come during
22 the current license term and what it means for



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1 webcasting. I can't cite to you a page and a
2 line number, but I do believe that there was
3 testimony about that and the point of this is
4 simply to address that testimony and to show
5 this wireless technology is something that has
6 made advances and is even in the time that
7 we've been in trial in this case, has made
8 progress that Mr. Griffin can talk about.
9 JUDGE ROBERTS: Are you saying,
10 Mr. Handzo that the broadcasters or the
11 webcasters put the technology question into
12 evidence in the direct case?
13 MR. HANDZO: I think in the first
14 instance, we put it into evidence in the case,
15 but I think in the course of cross
16 examination, there were questions raised that
17 I think we are entitled to respond to in
18 rebuttal.
19 JUDGE ROBERTS: Can you describe
20 to me generically what those questions are?
21 MR. HANDZO: I think generically
22 the questions are how soon is wireless



1 technology coming. I think there were
2 questions raised about whether it is coming
3 soon enough to have any impact on this
4 proceeding. I think there were also questions
5 raised about whether it matters to webcasting,
6 what impact it has on it. Does it affect the
7 finances of the webcasters and therefore what
8 rate the Board might consider setting in this
9 case and I think certainly both of those
10 things came up in cross examination during the
11 opening phase of the trial.
12 CHIEF JUDGE SLEDGE: Mr. Joseph?
13 MR. JOSEPH: Your Honor, I think
14 Mr. Handzo is correct when he says that the
15 issue of wireless transmission is a
16 SoundExchange argument and a SoundExchange
17 point in support of their fee proposal. There
18 may have been cross examination on the
19 subject, but that doesn't turn the testimony
20 that's offered here into rebuttal of anything
21 that the broadcasters or the webcasters put
22 into evidence.



1 The parties should have the right
2 to cross examine a witness that's been
3 proffered on a subject to test that subject
4 without thereby opening the door to
5 essentially the resubmission of a direct case
6 on rebuttal.
7 Everything that's in here is
8 material that but for a question perhaps of
9 timing, may or may not have been available at
10 the time of their direct case, but it all goes
11 to the fundamental issue raised in their
12 direct case. They could have put it in in
13 their direct case. They could have put it in
14 in their direct case.
15 CHIEF JUDGE SLEDGE: I'm trying to
16 remember the three factors that we've
17 addressed. Does timing play a role in what is
18 rebuttal?
19 MR. JOSEPH: Is that directed to
20 me, Your Honor?
21 CHIEF JUDGE SLEDGE: Yes.
22 MR. JOSEPH: Frankly, I'm not sure



1 which three factors you're referring to when
2 you say the three factors we've addressed.
3 CHIEF JUDGE SLEDGE: I think
4 you're right. I'm recollecting the three
5 factors that we've identified on motions for -
6 - that are incorrectly called reconsideration
7 and that's not relevant here.
8 What is the significance then of
9 your comment of timing as to whether this is
10 rebuttal?
11 MR. JOSEPH: I was simply arguing,
12 Your Honor, that the fact that there may have
13 been -- we may now be what a year later than
14 when the direct cases were submitted, doesn't
15 change that which isn't rebuttal into
16 rebuttal. That was the only significance of
17 my point.
18 CHIEF JUDGE SLEDGE: All right,
19 Mr. Taylor?
20 MR. TAYLOR: I would just simply
21 note that the Public Radio joins the
22 Broadcasters in the motions and point out that



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1 in the section there is absolutely no citation
2 to or reference to any claim made by any of
3 the service's witnesses and therefore we
4 believe that SoundExchange is taking the
5 opportunity just to amplify their direct case
6 at this point.
7 CHIEF JUDGE SLEDGE: Mr. Handzo?
8 MR. HANDZO: Your Honor, it seems
9 to me that what's being advocated here is a
10 highly cramped notion of what rebuttal is that
11 I don't think would hold anywhere.
12 As I recall the Board's
13 regulations, it does not define what rebuttal
14 is. It simply says you submit a rebuttal
15 case, but it actually doesn't say anything at
16 all about particular requirements that have to
17 be met. So technically, under the
18 regulations, I certainly don't think there's
19 any violation here. But I also think that it
20 is really a far too restricted notion to say
21 if there are issues that are addressed in the
22 opening phase, whether they come up in the



1 direct examination or whether they come up on
2 cross examination, the notion that you can't
3 respond to them in the rebuttal case seems to
4 me to be far too narrow a definition of
5 rebuttal.
6 Nobody is contesting that these
7 issues were raised and were discussed and
8 issues came up in the opening phase. The only
9 question is who brought them up. That doesn't
10 seem to me to have anything whatsoever to do
11 with whether this is proper rebuttal.
12 JUDGE ROBERTS: It's what you're
13 responding to, I guess, Mr. Handzo, is the
14 question that I have in my mind. The way I'm
15 seeing it is that Mr. Griffin made a number of
16 statements in his direct presentation about
17 wireless services. Certainly, there was some
18 cross examination on that. I acknowledge that
19 probably some of it is well, you know, really
20 how developed is it and is it really coming,
21 Mr. Griffin? And now the testimony, some of
22 it seems to be oh yes, it really is coming,



1 but at the same time a lot of it does seem to
2 be a repeat of what was in the direct case.
3 In the interest of moving things
4 along, we would be interested in hearing
5 testimony that oh yes, it's really coming and
6 here's why.
7 MR. HANDZO: Let me put those
8 questions to the witness, Your Honor. And
9 I'll move it along.
10 CHIEF JUDGE SLEDGE: All right,
11 we'll take a 10-minute recess in which we'll
12 consider the objections.
13 MR. HANDZO: Thank you.
14 (Off the record.)
15 CHIEF JUDGE SLEDGE: After
16 deliberation and review of the statement in
17 Section 2, the Court concludes that the
18 section does not address matters raised by the
19 Services in their direct cases and the
20 objections are sustained.
21 Further, the Court exercises its
22 discretion to be able to solicit evidence and



1 using that discretion, the Court directs
2 SoundExchange to proceed with questions,
3 limited to evidence that has occurred
4 subsequent to the submission of the direct
5 written statements.
6 BY MR. HANDZO:
7 Q Mr. Griffin, let's go back to the
8 subject of wireless technology and I want to
9 ask you some questions about the growth of
10 wireless networks. And again, as you've just
11 heard the Court's ruling, so what I want to
12 focus you on is the growth of wireless
13 networks that has occurred since the time that
14 you submitted your original testimony in this
15 case back in October a year ago. Okay?
16 A Yes.
17 Q And let me just ask you broadly,
18 what has happened in terms of the growth of
19 wireless networks since that time?
20 A Well, there's been a number of
21 significant developments. I'd say probably
22 one of the most relevant for this proceeding



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Ex. 24

EX. 24

**PUBLIC VERSION**

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

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| In the Matter of | ) | |
| DETERMINATION OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES | ) | Docket No. 2011-1<br>CRB PSS/Satellite II |

# WRITTEN REBUTTAL STATEMENT OF SIRIUS XM RADIO INC.

## Revised Witness Testimony for Roger G. Noll

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PUBLIC VERSION

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

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| **DETERMINATION OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES** | ) | **Docket No. 2011-1**<br>**CRB PSS/Satellite II** |

**Revised Written Rebuttal Testimony of Roger G. Noll**

**(On behalf of Sirius XM Radio Inc.)**

Previously I submitted written and live direct testimony in this matter. My educational background, professional experience and publications are described in my prior testimony.

## ASSIGNMENT

Attorneys for Sirius XM have asked me to review and, where necessary, respond to the testimony of the witnesses for SoundExchange in this proceeding. To undertake this assignment, I read the direct written and live expert testimonies of Professor Janusz Ordover and Mr. J. Gregory Sidak, the direct written and live testimonies of the industry representatives, Jonathan Bender, Stephen Bryan, Charles Ciongoli, Raymond M. Hair and Darius van Arman, and the *Proposed Rates and Terms of SoundExchange, Inc.* I also considered additional material that is cited in footnotes in this report or is listed in Appendix A.

This report contains the results of my analysis. Because SoundExchange is expected to submit additional testimony, I reserve the right to alter my analysis and conclusions on the basis of the evidence and analysis that is contained in that testimony.

## SUMMARY AND CONCLUSIONS

After reviewing the testimony and other submissions by SoundExchange and additional information that is cited in this testimony, I see no reason to change the analysis and conclusions in my direct testimony. This section summarizes the analysis in this report, and subsequent sections fill in the details of my analysis.

### *Appropriate Benchmarks*

I disagree with Professor Ordover that the appropriate benchmarks for setting a statutory rate for satellite digital audio radio services (SDARS) are the rates that are paid by mobile interactive music services. I continue to believe that the most appropriate benchmarks are the direct licenses between Sirius XM and independent record labels. As of July 1, 2012, Sirius XM has negotiated 85 direct licenses with independent labels. The independent labels that have negotiated licenses offer a broad range of content that is comparable to the content offered by other labels.

There is no basis for believing, as SoundExchange has suggested, that the royalty rates for these independent labels are below the rates that would be obtained by other labels, including the majors, in a competitive market. Current industry practice is that rates do not depend on the size of the label. Differences in royalty payments among labels arise primarily from differences in the size of the catalog and the frequency with

which the catalog is played, not from differences in royalty rates.

Among Internet music services, the most appropriate benchmarks are not the rates in licenses for interactive services, as proposed by SoundExchange, but the rates in negotiated direct license agreements between record distribution companies and non-interactive subscription mobile Internet music services that have the least amount of user control of content. While these services provide the best benchmarks for SDARS rates among all Internet music services, the royalty rates for these services are higher than the appropriate rates for SDARS because even the least customized mobile Internet music services have features that satellite services do not offer. Notwithstanding these enhanced features, the negotiated rates for these services yield royalty payments that are comparable to the payments arising from the rates in the direct licenses that have been negotiated between Sirius XM and independent labels.

***The Proposed Interactive Services Benchmark***

Professor Ordover's proposed benchmark is the negotiated rates between the four major record companies and interactive mobile Internet music services. The problems with using these rates as benchmarks are: (1) the interactive services licenses grant broader rights than the performance rights in the statutory SDARS license; and (2) the interactive rates apply to services that differ from satellite radio services in several commercially significant ways that affect negotiated royalty rates. Because these rights and services are not similar, complex adjustments to the interactive services rates are necessary to produce an appropriate royalty rate for SDARS services.

Professor Ordover makes no attempt to adjust the royalty rates for interactive

services to account for differences in either the rights that are conveyed or the features of the services. Professor Ordover offers three methods for calculating a royalty rate for SDARS from the rates for interactive services. All three methods reduce algebraically to the same calculations: the royalty payment equals the royalty rate for interactive services (around 60 percent) multiplied by the implicit price of the music component of Sirius XM services, and the SDARS statutory royalty rate is the ratio of this royalty payment to the retail sticker price of the standard "Select" Sirius XM service. These three methods differ only in how the royalty rate for interactive services and the implicit price of the music component of satellite services were estimated.

The validity of Professor Ordover's proposed methods for calculating the SDARS royalty rate hinges on three crucial assumptions that are not supported by any evidence.

The first assumption is that royalty rates that emerge from competitive markets are the same for all services, ranging from permanent downloads to pre-programmed music with no user control of content. If this assumption were true, the benchmark royalty rate would not need to be adjusted to account for differences in service characteristics between interactive services and SDARS. I reject this assumption because the actual royalty rates that arise from market negotiations differ substantially. Services that offer less user control of content pay lower royalty rates.

The second assumption is that royalty rates do not differ depending on whether a service with music content is sold in a bundle that includes the system for delivering content to the user (the platform). I reject this assumption because negotiated rates are lower for bundled services and because imposing rates that do not take into account the cost of the platform are economically inefficient and harm the competitive process.

The third assumption is that negotiated rates for non-interactive services that do not qualify for the statutory rate should not be considered because those rates are affected by "regulatory overhang," which means a spillover effect from the statutory rate. I reject this assumption because the standard for setting the statutory rate for non-interactive services is the competitive market rate and because no evidence has been presented that the Copyright Royalty Judges systematically set statutory rates for non-interactive services below the rates that are required by the Copyright Act.

Professor Ordover uses two procedures to estimate the implicit retail price of music on Sirius XM. One is half the sticker price of the Sirius XM Select service and the other is an average price of five non-interactive mobile music services. Both of these procedures are economically invalid.

The correct starting point for the first procedure is average revenue per user (ARPU), not the sticker price. In addition, the implicit price of music should take into account the implicit price of the platform for delivering satellite radio services.

The method for calculating average prices of non-interactive services is invalid because: (1) the calculation is an unweighted average that does not take into account the relative popularity of services (the cheaper services have more customers); (2) Professor Ordover double-counts or triple-counts the three services with the three highest prices; and (3) Professor Ordover does not take into account commercially important differences among these services that affect their prices.

***Section 801(b) Adjustments***

Professor Ordover concludes that the Section 801(b) factors are satisfied by a rate

that would emerge from negotiations in a competitive market, with the proviso that the fourth factor – disruption – might justify a temporary departure from the competitive rate to give a start-up firm a chance to develop a position in the market. Professor Ordover's analysis amounts to an assertion that, as a matter of economics, prices for an established product never should depart from the competitive level. This assertion constitutes an expression of Professor Ordover's values but not a conclusion that is derived from economic analysis. Moreover, his interpretation of the 801(b) factors provides no possible explanation for why the Copyright Act describes different rate-making standards for different digital services, especially if the meaning of these standards is the same.

For both SDARS and pre-existing services, the present system for establishing statutory rates was imposed after investments were made to enter the market. The four Section 801(b) factors are special considerations that must be taken into account so that a new legal institution (the system for setting statutory rates) will not undermine the ability of these services to serve their customers. In addition, competitive markets do not always maximize social welfare. Concerns about third-party effects, financing public goods, and distributive justice could lead an economically informed, rational policy maker to over-ride market outcomes in favor of the four factors in Section 801(b).

***The Sirius XM Monopoly***

Mr. Sidak's testimony concludes that Sirius XM has monopoly power in a market for satellite radio services. My direct testimony explains why this conclusion is irrelevant and incorrect.

Mr. Sidak's conclusion is irrelevant because the extent of competition in the

product market for satellite radio services has no necessary connection to the extent of competition in the market for performance rights for sound recordings. The latter is the relevant issue for determining whether direct licenses are a valid market benchmark for the statutory license, and the evidence supports the conclusion that Sirius XM has no market power in the rights market.

Mr. Sidak's conclusion is incorrect because his analysis of this issue does not use the methods that economists developed and government agencies adopted to define markets and measure monopoly power. Mr. Sidak does not appropriately analyze whether Internet music services and terrestrial radio constrain the prices of Sirius XM or whether Sirius XM earns more than a competitive return on its investments. When these issues are analyzed correctly, the results support the conclusions reached by the federal government that the merger between Sirius and XM did not create a monopoly.

***The Proposed Comprehensive Royalty Rate***

SoundExchange proposes that Sirius XM pay the statutory royalty rate on nearly all of its revenue. The proposed revenue base includes sales, leases and rentals of car radios (including shipping costs), and allows no adjustments or exclusions for direct licenses between Sirius XM and record companies.[1]

The proposal regarding revenues from equipment is inconsistent with standard commercial practice in the industry. For example, the Cricket licenses adjust the standard royalty rate for interactive services to reflect the monthly cost of Cricket's

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1. The testimony submitted by David Frear discusses other changes in the definition of gross revenues that have been proposed by SoundExchange.

mobile platform and do not apply to the sale of smart phones by Cricket that are used to access Cricket's on-demand music service. As Mr. Bryan testified (*Hearing Transcript*, pp. 1984-7), [redacted].

The proposal that Sirius XM pay SoundExchange for all plays of sound recordings would force Sirius XM to pay twice for playing sound recordings for which it has a direct license. This proposal eliminates the incentive for both labels and Sirius XM to negotiate direct licenses. In so doing, the proposal guarantees that SoundExchange and the labels will face no competition in rates or plays. This proposal effectively grants SoundExchange an exclusive right to license sound recordings from all record companies to SDARS and assures that an unregulated competitive market will never develop.

## PROFESSOR ORDOVER'S BENCHMARK

Professor Ordover uses negotiated rates for mobile interactive Internet music services as benchmarks for setting an SDARS rate. Professor Ordover has three methods for determining the Sirius XM rate, but all three boil down to setting the royalty rate for music content on Sirius XM equal to the average royalty rate paid by interactive services. Depending on how the royalty rate for interactive services and the value of music on Sirius XM are estimated, the benchmark rates calculated by Professor Ordover are in the range of 22.4 to 32.5 percent.

The rates proposed by Professor Ordover are far above reasonable rates for several reasons, the most important of which are: (1) the market royalty rate for interactive services is far above the royalty rate that would emerge in a competitive

market for rights for a mobile non-interactive service like Sirius XM, and (2) Professor Ordover's estimated price of music content on satellite radio is unreasonably high. When appropriate adjustments are made to Professor Ordover's calculations, the resulting rates are similar to the rates that I found to be reasonable in my direct testimony.

***Reasons for Selecting Interactive Services***

Professor Ordover offers five reasons[2] for selecting interactive services as the appropriate benchmark for SDARS: (1) both are subscription services; (2) both offer digital channels that use the same recordings; (3) both provide mobility; (4) both allow unlimited use; and (5) the rates for interactive services are "free of regulatory overhang" (*Ordover Testimony*, p. 14). According to Professor Ordover (*Hearing Transcript,* pp. 2380-83), the only criterion that differentiates interactive services from non-interactive subscription music services that are available on mobile devices is Item (5). Professor Ordover does not consider another important criterion for selecting a benchmark: (6) both services use the same or similar performance rights to offer the same or similar services. Item (6) is not satisfied by the interactive services benchmark.

A disadvantage of the interactive benchmark is that it requires adjustments in the benchmark rate to account for commercially significant differences between interactive service and a pure non-interactive streaming service with no user control of content, such as satellite radio. In the previous proceeding the benchmark was interactive music services, which required adjustment for interactivity. To make this adjustment, Professor

2. *Third Corrected and Amended Testimony of Janusz Ordover*, June 13, 2012, pp. 14, 18-19. Henceforth I use the convention of referring to written direct testimony as the author's last name followed by testimony, an example being *Ordover Testimony*.

Ordover used the differences in royalties between non-interactive and interactive music video services.

The disadvantage of using benchmarks from services that use different rights to provide different features was unavoidable in 2006 because non-interactive mobile Internet services were only beginning to emerge and because no direct licenses existed between a satellite radio service and a record company. Today there is no need to continue to use licenses for interactive services, audio or video, because licenses for more similar services have become available.

If interactive services were selected as an appropriate benchmark today, the only reasonable procedure is to make three complex adjustments: (1) account for the fact that Sirius XM, but not interactive Internet services, offers substantial non-music content; (2) account for differences in rights and service attributes between interactive and satellite radio services; and (3) account for the fact that satellite radio bundles programs with a delivery platform. Professor Ordover accepts the first adjustment, but not the other two. Professor Ordover's assertion that the other differences do not affect the percentage royalty rates that are negotiated in a competitive market is not correct for reasons that are discussed below. Consequently, adjustments (2) and (3) must be made to arrive at a reasonable royalty rate for SDARS.

Some of the problems in adjusting benchmark rates can be avoided by using non-interactive mobile Internet services as the benchmark. Professor Ordover believes that negotiated rates for non-interactive services that do not qualify for a statutory license should be ignored because the rates are affected by the statutory rate. I agree with Professor Ordover that these negotiated rates are affected by statutory rates. For

example, Mr. Bryan said that [redacted] *Hearing Transcript*, pp. 1991-93).

This logic applies to *all* rates, not just the rate for mobile non-interactive services. The incremental charge that consumers will pay for an unregulated service is, at most, its incremental value compared with a service that qualifies for a statutory rate. As a result, the statutory rate affects rates for all ways that consumers can listen to music on a mobile device. The difference between the statutory rate and the maximum rate that a service can charge is the maximum that the service will pay to add features rather than to offer only a service that qualifies for the statutory rate. This maximum royalty that a service will pay is derived from the amount that consumers will pay for these features.

Professor Ordover's reason for not taking into account negotiated rates for non-interactive services that do not qualify for the statutory rate is unclear. Unlike the rates for SDARS and pre-existing services, for which the rate-setting standard is Section 801(b), the statutory rate for non-interactive services is the competitive market rate and is derived by applying the "willing buyer, willing seller" principle that Professor Ordover seeks to implement here. If the principles set forth in the Copyright Act are followed, the statutory rate is a competitive rate, and there is no reason to be concerned that "regulatory overhang" affects negotiated rates for related services with features that are not permitted under the statutory license.

Professor Ordover provides neither facts nor analysis to support his position that all rates that are affected by regulation should be ignored. The only basis for excluding negotiated rates that are affected by the statutory rate would be evidence that the

Copyright Royalty Judges, contrary to the rate-making standards for Internet music services that are set forth in the Copyright Act, systematically set statutory rates below the rates that would emerge in a competitive market. Only if the statutory rate is below the competitive rate will negotiated rates be below competitive rates for services with additional features that are not permitted under the statutory license.

As discussed in my direct testimony, independent scholarly research concludes that regulation tends to set prices above competitive levels for reasons that are rooted in administrative procedures. Economics research provides no reason to believe that statutory rates are too low, and hence that negotiated rates for non-interactive services that do not qualify for a statutory license are below competitive market rates.

Even if the statutory rate for non-interactive services is too low, Professor Ordover does not take into account the economic reality that, whatever he might think of statutory rates, direct competitors of services that pay a statutory rate cannot survive in the market if they are required to pay substantially more than competing regulated services. While Professor Ordover testified that Sirius XM competes directly with non-interactive subscription mobile Internet music services (*Hearing Transcript*, p. 2373), he did not consider the effect on the viability of Sirius XM if it is required to pay substantially higher royalties than its closest competitors pay.

***The Proposition that All Rates Are the Same***

The general principle for using benchmark rates to set a regulated rate is to adjust the benchmarks for differences in the attributes of the products that plausibly affect their market prices. Professor Ordover starts with the assumption that the benchmark royalty

rate for interactive services is in the range of 60 to 65 percent. Why he uses a range is not clear. His other calculations are based on unweighted averages. The unweighted average royalty rate for the interactive services in Table One of the *Ordover Testimony* is 60.7 percent and the unweighted average royalty payment divided by the average price of interactive services is 59.6 percent. Professor Ordover's calculations would have been just as accurate and much more transparent had he just used 60 percent as the average percentage royalty rate for interactive services.

Professor Ordover argues that technical characteristics of services affect the *amount* of royalty that each service will pay, but not the *percentage rate* for calculating royalties that would be negotiated in a market. According to Professor Ordover, "...there is no reason to expect that a hypothetical negotiation between Sirius XM and a major record label would culminate in a percentage-of-revenue rate that differs materially from the observed rates agreed to by the record companies and Microsoft, Rhapsody, and other interactive streaming providers" (*Ordover Testimony,* p. 18). Thus, Professor Ordover concludes that no adjustments to the percentage royalty rate for interactive services are necessary to take into account the technical attributes of the service.

Contrary to Professor Ordover's assertion, economic theory provides "no reason to expect" that all royalties that are negotiated in a competitive market will be the same percentage rate of revenue. Sound recordings are inputs to many services, including many more than Professor Ordover considers: elevator music, hip-hop DJs, karaoke bars. The idea that the price of an input is the same percent of revenues of the output for which it is used is obviously incorrect. For example, the price of a grocery bag does not depend on whether the consumer bought steak or hamburger, and the price of a bolt for mounting

an engine on a chassis does not depend on variations in the price of the auto model due to differences in optional equipment. The cost of an input as a fraction of revenues depends on the number and cost of other inputs that are also used to produce a product.

For satellite radio, non-music content is an important input. Professor Ordover is willing to take the proportion of non-music content into account in calculating a royalty rate for satellite radio. But Professor Ordover is not willing to take into account the cost of the platform that is used to deliver and to play the music if the platform is bundled with the content. SoundExchange implements this concept by proposing that Sirius XM pay royalties on sales and rentals of satellite radios as well as the portion of the price of a satellite radio service that pays for the platform.

Professor Ordover and SoundExchange have no basis for applying the percentage royalty rate to the price of the platform, whether sold separately or as part of a bundle. In actual commercial practice percentage royalty rates for music content are not applied to separate equipment sales, and are adjusted to take into account platform costs. For example, people do not pay different amounts for digital downloads from the iTunes Store depending on whether their iPod is a $49 2gb shuffle or a $399 64gb touch.[3] Indeed, the price of downloads is the same if the consumer does not own an iPod. When a platform is bundled with a music service and a percentage royalty rate is imposed, the rate is lower than the rate for a comparable unbundled service. My written direct testimony used the contracts between the major labels and Cricket to illustrate that royalty rates for services than bundle content and the delivery platform have lower rates that reflect this cost difference. Mr. Bryan testified that Warner did not seek royalties on

3. These are the current prices on the on-line Apple Store.

sales of the mobile device that Slacker sold, and more generally does not seek royalties for platform costs (*Hearing Transcript*, pp. 1976-77, 1984-87). Most digital music services are not bundled with the delivery of content over the Internet to the user's mobile receiver. These charges are paid separately by the user to an equipment vendor and an Internet access provider.

As discussed elsewhere, the most pernicious aspect of Professor Ordover's error and SoundExchange's proposal to include equipment sales in the revenue base for calculating royalties is that it undermines competition in digital music services. Services that bundle content and the platform will be punished compared to services that do not. There is no rational basis for advantaging one competitor over another by using regulation to impose higher costs on one.

Another factor that leads to differences in royalties among services is that some music services promote sales of CDs and digital downloads, while others are substitutes for these products. Content that is not controlled by the user is more likely to include recordings that the customer does not know and so is more likely to generate a sale than a service that allows user control of content. The incentive to generate sales of CDs and downloads creates an incentive for a label to cut royalties to pre-programmed services for two reasons. First, a lower royalty will create an incentive for the service to grant the label more plays. Second, because the profit-maximizing price of services depends on the royalty rate, a lower royalty will lead to a lower service price, and hence more subscribers, and hence more sales of CDs and downloads. This logic implies that pre-programmed services will pay a lower percentage royalty than services with extensive user control of content.

Just as economic theory does not support Professor Ordover's assertion that all percentage royalties should be the same, the evidence that Professor Ordover offers to justify this assertion actually refutes his claim. The rates just for interactive services in 2011 (*Ordover Testimony*, Table One, p. 21) vary between [redacted] and ten of the 24 rates for 2011 (over 40 percent of the contracts) fall outside his "cluster in a narrower range of 60% to 65%" (*Ordover Testimony*, p. 20). The other types of services that provide user-control of content *all* have ranges of rates that fall above (permanent downloads) or below (ringtones, ringback tones, interactive subscription to non-portable devices) the 60-65 percent range that Professor Ordover adopts as the norm. The percentage rates for ringtones/ringback tones are between [redacted] (*Ordover Testimony*, Table Two, p. 26), which is well below his "cluster" of rates. Rather than undertake an economic analysis to ascertain why different services have different royalties, Professor Ordover simply asserts that these rates are similar enough to support 60-65 percent as an appropriate benchmark rate.

Professor Ordover does not analyze the royalties for non-interactive services that do not qualify for the statutory license, rejecting them because they are affected by regulation. Regardless of whether these rates are depressed by the statutory rate, these contracts show that the "equal royalty rate" hypothesis is false. Some contracts that were used by Professor Ordover in analyzing royalties for interactive services also contain rates for non-interactive services that do not qualify for the statutory rate. If Professor Ordover were correct that all difference in royalty payments among broadly similar services would be due solely to differences in retail prices, with no differences in percentage rates, then the percentage rates for all non-interactive services would be the

same, but such is not the case. Tables 2.1 and 2.2 in my revised amended written direct testimony show substantial variations among four non-interactive and interactive tiers that are described in the licenses between the major record companies and two Internet music services providers, Last.fm and Slacker. All of the rates for non-interactive services are above the statutory rate but below the rate for interactive service.

These differences demonstrate that royalty rates are not the same for all services, but vary according to service attributes. Professor Ordover does not explain why percentage royalty rates for different non-interactive services differ. Examination of the contracts shows that royalties are higher as user control of content increases, just as economic theory predicts.

***Calculating the SDARS Rate from the Benchmark***

The methods that Professor Ordover proposes for calculating the SDARS royalty rate are basically the same:[4] a royalty rate derived from interactive service (60 or 65 percent) is applied to an estimate of the retail price of the music component of satellite radio service, and the result is divided by the sticker price ($12.95) of Sirius XM Select.

Although Professor Ordover superficially may appear to be using the same approach that he used in the 2006 proceeding, in fact he is not. In 2006 Professor Ordover began with the royalty payment for an interactive service ($7.50 per subscriber per month, compared to $5.95 in his current testimony). He then adjusted this rate for

4. Professor Ordover testified (*Hearing Transcript*, pp. 2419-23) that his three methods are completely different, but he is in error. The only differences in the rates from his three methods arise from slight differences in how the interactive royalty rate and the implicit price of music on Sirius XM were calculated.

interactivity using the per-play royalty rates for music video services. He formed the ratio of rates for non-interactive and interactive music video services (.0015/.0080), and multiplied this ratio by $7.50 to obtain a royalty payment of $1.40. He then adjusted this royalty by an "immediacy" factor by forming the ratio of download prices for delivery to a mobile device and to a personal computer (1.25/.70), yielding a royalty of $2.51. Note that in 2006 Professor Ordover made adjustments for service characteristics (mobility and interactivity). His new procedure makes adjustments only for retail prices, and as a result does not take into account the effect of differences in the characteristics of services on the percentage royalty rate.

Professor Ordover presents three procedures that perform the same calculation.

**Method One.** Professor Ordover's first method attributes half of the price of content on Sirius XM to music. Professor Orover then applies this allocation of the value of content to the retail sticker price ($12.95) of Sirius XM Select, producing an estimated retail price of music content equal to $6.48. Professor Ordover then calculates 60 and 65 percent of this number as royalty payments, then divides these amounts by $12.95, producing royalty rates of 30 and 32.5 percent. A more transparent way to produce the same result is to calculate the proposed percentage rate for satellite services as half of 60 and 65 percent. Multiplication of the royalty rate by the implicit price of music content and division by the sticker price are superfluous.

My comparable method for estimating the retail price of music content on satellite radio service multiplies the fraction of content that is accounted for by sound recordings (I used 55 percent) by the difference between the price of the bundled service and the forward-looking average cost of the platform. For the price of the bundled service, I used

average revenue per user (ARPU), not the sticker price. This method produces an estimated implicit retail price of sound recordings of $3.48, which is much lower than Professor Ordover's estimate of $6.48. For reasons given in my direct testimony, this procedure understates the cost adjustment that ought to be made for the platform because it does not include a competitive return on forward-looking investments. Hence, the true implicit price of music content on SDARS is below $3.48 and far below $6.48.

To illustrate the differences between Professor Ordover's procedures and my own, I calculate the percentage royalty rate for SDARS services that would result if one switches from Professor Ordover's adjustments to mine. I first accept his interactive services benchmark rate of 60 percent, but alter the estimate of the market price for the music content on Sirius XM Select service, taking into account the adjustment to the price of Sirius XM's service that is necessary to account for the implicit price of the platform. I then make a further adjustment to take into account the differences in rates between interactive and non-interactive services. The end result is that when Professor Ordover's procedures are altered to take these two adjustments into account, his Method One yields a percentage royalty rate of 7 percent, which is in the range of the rates that I find to be reasonable.

Following Professor Ordover's procedures for Method One, the implicit price of music content is multiplied by 60 percent (the interactive services rate without adjusting for interactivity) and the result is divided by $12.95. If my estimate of the price of music content ($3.48) that is derived from subtracting the forward-looking costs of investments is substituted for Professor Ordover's estimate ($6.48), the implied royalty rate as a

percentage of revenue is 16.1 percent, compared to Professor Ordover's 30 percent rate.[5] Thus, not taking into account my lower bound estimate of the implicit price of the platform causes the royalty rate roughly to double.

The next step in reconciling our calculations is to make an adjustment for interactivity. The average royalty rate from the non-interactive service with the least user control among the direct licenses that can be used (Last.fm) is 26.1 percent. Multiplying this rate by my estimate of the price of music content ($3.48) yields a royalty payment of $0.908, which is 7.0 percent of the sticker price of $12.95. Again, failing to adjust for interactivity also roughly doubles the estimated royalty rate. Thus, if Professor Ordover's approach is adjusted to adjust for platform costs and interactivity, it produces a rate equal to the top of the range that I concluded was reasonable.[6]

The differences between Professor Ordover's Method One and the most comparable method that I use are due to our treatments of platform costs and our estimates of the market price of music content. I now turn to an analysis of these differences and explain why I prefer my procedure.

Both Professor Ordover and I start with the bundled price of Sirius XM Select and attempt to disaggregate this price into to its component parts. The difference between us is that he does not allocate any of the bundled price to the platform. As a matter of

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5. I doubt that Professor Ordover disagrees that ARPU, not sticker price, is the correct basis for calculating royalties. In this case his implied value of music is half of $11.38, or $5.69, which is still much larger than my estimate, but the implied royalty rate remains 30 to 32.5 percent. The implied rate based on a price of $3.48 rises to 18.3 percent.

6. The choice of a starting point for making multiple adjustments to a benchmark rate is arbitrary. If one first adjusts for interactivity, the royalty payment is 26.1 percent of $6.48, or $1.69. The royalty rate is 13.1 percent of the sticker price of Sirius XM Select, compared to 30 percent from Professor Ordover's calculation. If this royalty is then adjusted to my market price of music content of $3.48, the royalty rate is 7.0 percent.

economic theory, Professor Ordover's approach is incorrect.

The argument that has been put forth to ignore platform costs in calculating a price for music content as a portion of the price of the bundled service is that the platform is valueless without content. Logically, the Sirius XM delivery system would have no value without content, but that does not imply that the cost of the platform should be ignored. *All* platforms are valueless without content, so this argument cannot possibly explain why royalties are adjusted to account for platform costs for other music content that are bundled with a platform.

Economic theory provides a clear explanation for why the argument for ignoring platform costs is incorrect. I illustrate this point through a commonly used mathematical representation of a production process, the Cobb-Douglas function, in which output, Q, is assumed to be determined by the amount of inputs, say K (for capital investment) and L (for labor), according to the following equation:

$$Q = AK^{a}L^{b},$$

where A, $a$ and $b$ are constants and $a$ and $b$ are less than one.[7] If either K or L is zero, output is zero, just as Sirius XM would have zero subscribers if it lacked either content or a platform. If a firm acquires K and L to maximize profits, the shares of each factor in total revenue are $a$ for capital and $b$ for labor. A more capital-intensive technology has a higher value of $a$ relative to $b$, which means that a higher share of revenue goes to investment, even though output still is zero if no labor is used.

In some cases (e.g., restaurants and satellite radio), Q is produced by a firm and the combined product is sold to consumers. In other cases (e.g., home-cooked meals and

7. A common assumption is that $a + b = 1$, in which case the production function exhibits constant returns to scale – that is, a doubling of inputs doubles outputs.

Internet music services), Q is produced by the consumer after acquiring the components from separate vendors. This difference does not alter the fact that all inputs must receive a share of the total revenue for Q in order to remain viable, even though each input may be valueless all by itself. Thus, no progress can be made on solving the problem of allocating revenue among inputs by observing that no output can be produced unless a particular input is present.

**Method Two.** The second method that Professor Ordover proposes begins by observing that half of the sticker price of Sirius XM ($6.48), which is his estimate of the implicit price of music content on Sirius XM Select, is substantially less than the sticker price of interactive services ($9.99). Professor Ordover then calculates the average royalty payments from all interactive services, $5.95, and multiplies this number by the ratio of 6.48 to 9.99, or 64.8 percent, as an adjusted estimate of the proper royalty payment from Sirius XM.

Professor Ordover states that Method Two adjusts for differences in service characteristics, but it does not. The royalty rate that Professor Ordover uses for SDARS is exactly the same as the interactive services royalty rate. Method Two simply applies this rate to the retail price of Professor Ordover's estimate of the implicit price of music content on Sirius XM Select. The key to understanding this method is to recognize that $5.95 is 59.6 percent of $9.99, so this calculation is identical to applying a royalty rate of 59.6 percent to the estimated price of music of $6.48.

The result of Professor Ordover's calculation is a royalty of $3.86. When divided by $12.95, the implied percentage royalty rate is 29.8 percent. This convoluted procedure produces exactly the same result as calculating the unweighted average royalty

rate for interactive services, which is 5.95/9.99 = 59.6 percent, and dividing by two (to account for the division between music and non-music).[8]

The resulting rate of 29.8 percent differs from the rate that arises from Method One because the unweighted average royalty payment is slightly different than the "cluster" of royalty rates for interactive services multiplied by the common price of $9.99. The bottom line is that Method Two is identical to Method One: the proposed royalty rate for SDARS is half of the interactive royalty rate. Because these methods are identical, no useful purpose is served by repeating my analysis of why this result differs from my calculation that adopts the same starting point.

**Method Three.** Professor Ordover's third approach differs from the other two methods only because it uses a different procedure to estimate the market price for music content on Sirius XM. Professor Ordover uses the average retail price of five non-interactive subscription services as a proxy for the retail value of the price of music services on Sirius XM. The services that are used (*Ordover Testimony,* Table Five, p. 34) are Pandora, Last.fm, Live365, Musicovery, and Sky.fm.

Professor Ordover also calls Method Three an adjustment for interactivity, but it is not. The royalty rate for non-interactive services is assumed to be equal to the royalty rate for interactive services, which is still 60 percent. Instead, the estimated price of Sirius XM music content is now assumed to be the average price of five non-interactive services. If done properly, this procedure would adjust for the implicit price of the Sirius XM platform. Because non-interactive services are not bundled with a platform, their prices are solely for content.

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8. Mathematically [(6.475/9.99) x 5.95]/12.95 = ½(5.95/9.99). The left-hand side of the equation is Method Two and the right hand side is Method One.

The average price of non-interactive services as calculated (incorrectly) by Professor Ordover is $4.86. Professor Ordover then takes the ratio of this average to $9.99, multiplies the result by $5.95 (the average royalty for interactive services), and divides by $12.95. When I perform this calculation the implied royalty rate for Sirius XM is 22.4 percent. Again, the easier, more transparent procedure is to take 59.6 percent of $4.86, which is $2.90, and divide by $12.95, which yields the identical royalty rate of 22.4 percent. The key to understanding Method Three is that the benchmark percentage royalty rate is 5.95/9.99 = 59.6 percent, which is then multiplied by the average retail price ($4.86) of the five non-interactive services.

If Professor Ordover had used the average royalty rate of 26.1 percent that was paid by Last.fm for its least customized subscription service, the Sirius XM royalty rate would fall from 22.4 percent to 9.8 percent, even without correcting his error in calculating the implicit price of music content.

Professor Ordover's estimate of the retail price of music on Sirius XM contains two serious errors. The first error is that the method for calculating the average is incorrect. The second error is that the average price of the five services does not measure the retail price of anything because these services have different, commercially significant characteristics that cause differences in retail prices.

The first error arises from Professor Ordover's method for calculating an average price. Professor Ordover lists three prices each for Live365 and Sky.fm, and two prices for Musicovery. The differences among these prices are due solely to the duration of a consumer's commitment to the service. This approach causes the three higher priced services to be counted a total of eight times, while the two less expensive services,

Pandora and Last.fm at $3 per month, are each counted once. This procedure assigns 80 percent of the weight in calculating the average to the three services with higher prices.

The Pandora and Last.fm prices are for a year of service, so a more accurate method for calculating the average price is to include one observation – the price of a year of service – for each of the five services. This procedure cuts the average price to $4.01, the royalty payment to $2.39, and the royalty rate (2.39/12.95) to 18.5 percent.

Professor Ordover applies the royalty rate for interactive services of 59.6 percent to the estimated retail price of music content. If instead the royalty rate that is used for the calculation is cut to 26.1 percent, which is the rate paid by Last.fm (one of the services that he uses for his benchmark price of music content), the royalty payment falls to $1.05 and the royalty rate is 8.1 percent, or roughly the current rate.

Professor Ordover is aware that one problem with his approach is that his average is not weighted by the number of subscribers. Professor Ordover simply ignores this problem rather than attempt to solve it or at least obtain some indicator of the possible magnitude of the error in his estimate. Table 1 contains data that were produced by SoundExchange on the number of plays for the non-interactive subscription services for Pandora, Last.fm and Live 365. Among these three services, Pandora accounts for 87.3 percent of plays and the most expensive service, Live365, accounts for 5.0 percent. Obviously according three times as much weight to Live365 as to Pandora is wildly incorrect. The quantity-weighted average price (using the annual price for Live365 of $5.95) is $3.15, whereas the method used by Professor Ordover (counting Live365 three times, once each for its annual, 6-month and 3-month commitment) produces an average price of $5.37. No data have been produced for the other two services because I

understand that data were requested only for the 25 largest services and, apparently, Musicovery and Sky.fm fell below this threshold. Because these services are smaller than the other three, the results cannot be dramatically changed by including the other two services. Hence, these data strongly indicate that the weighted average price of these services would be near $3.

The effect of Professor Ordover's error in calculating the average price of these services is substantial. If Method Three is implemented by assuming that the average price of non-interactive music services is $3.15 and that the benchmark royalty rate is 26.1 percent, the implied royalty rate on total revenues for Sirius XM is 6.34 percent, which is well within the range of the direct licenses. Note that this calculation does not require any adjustment for the implicit price of the platform. It is a simple application of Professor Ordover's Method Three using the actual average royalty rate for one of the non-interactive services that he uses and the true weighted average price of these services, which also is very close to the actual price of the service for which the royalty applies. These calculations are convincing proof that the direct licenses are an appropriate benchmark, as is Last.fm's non-interactive subscription service.

Professor Ordover's final error in Method Three is that he ignores the fact that these services differ in other respects: the technical quality of the service as measured by bit rates, the number of pre-programmed channels, the extent of customization and the ability to cache programs. Professor Ordover's method amounts to the analog of estimating the price of 15 percent fat hamburger by taking the average of 10 percent fat hamburger, t-bone steak, porterhouse steak, and prime rib. The problematic nature of Professor Ordover's calculation is apparent by applying it to the non-interactive services

that he uses to calculate his estimated price of music content. Suppose that the purpose of the exercise were to set a statutory rate for Pandora and Last.fm. Professor Ordover's rate of 59.6 percent would then be multiplied by his incorrect average price of the three remaining services ($5.33). This calculation yields a royalty of $3.18. Because the retail price of Pandora and Last.fm is $3, this royalty would leave them with an 18 cent loss.

Pandora is the service with attributes that are most like the attributes of Sirius XM's service, and Pandora also has the lowest price. Last.fm, which I identified as the service with market determined rates that was most like Sirius XM, also has a price of $3. Both Pandora and Last.fm allow substantial user control of content, Pandora through the Music Genome Project (a computer program that learns a user's tastes from prior plays, likes and dislikes) and Last.fm through scrobbling, which allows a user to mix a playlist with tracks from their own libraries. Extensive user control combined with comparable content ought to make these services more valuable than the music content on Sirius XM.

Live365 is the only service in Professor Ordover's list that charges more than $4 per month on an annual basis, so its presence on the list explains why Professor Ordover obtains an estimated price for music on Sirius XM that is far above $3. Live365 offers more than 7,000 channels that are pre-programmed by independent entities. Channel programmers often have web sites for their users that offer information about the DJ. Channels also receive a commission for generating subscriptions for the paid Live365 VIP service. Live365 also offers talk channels that do not play sound recordings, which means that the implicit price of music channels on Live365 is less than the sticker price for the service. Live365 also has a feature that recommends channels based on the customer's expressions of likes and dislikes.

Musicovery, which charges $4 per month with an annual commitment, combines music with a social network. Musicovery offers greater user control of content in that it allows users to create playlists within a social network, to ban songs and artists from the recordings that are played on customized channels, to skip songs and to bookmark recordings for future inclusion in a playlist.

Sky.fm allows users to adjust the bit rate of the content stream to fit the technical specifications of the reception device or to control bandwidth use to minimize data charges from a wireless carrier. Sky.fm also allows more user control than Pandora or Last.fm by permitting caching for later listening.

Based on this information, I believe that Pandora is the most important direct competitor to the music content on Sirius XM. Pandora is the dominant non-interactive mobile music service and is aggressively seeking to obtain a physical presence on the dashboard. Pandora also charges only $3 for a service that has considerable user control of content, yet its ad-free subscription service accounts for a tiny fraction of its users. If the vast majority of Pandora users are unwilling to pay $3 to avoid advertising, it follows that advertiser-supported services (terrestrial or mobile Internet) are close competitive substitutes for Pandora – and for Sirius XM. Thus, $3 is a conservative estimate of the implicit market price of music services on Sirius XM.

Note that the relevant concept here is not the value of music to customers, which can be much higher, but instead the price constraints that are imposed by competitive alternatives. Sirius XM must price its services to attract customers from close competitors that give music away for free.

If no change is made to Method Three other than to adopt $3 as the implicit price

of music content on satellite radio service, the royalty payment is 59.6 percent of $3, or $1.79. If this royalty is then divided by $12.95, the royalty rate is 13.8 percent. If instead the benchmark royalty rate is 26.1 percent, the royalty payment is $0.78 and the royalty rate is 6.0 percent, which is in the middle of the range of royalties in the direct license.

*The Sirius XM Direct License Benchmark*

One advantage of using as benchmarks the licenses that Sirius XM has signed with independent labels is that it avoids getting into the weeds of how to adjust the rate from some other service to produce a truly comparable rate for satellite radio. Using the royalty rates in the direct licenses as benchmarks, one avoids having to make adjustments for differences in retail prices and service characteristics. The key issue in evaluating whether the royalty rates in the direct licenses are appropriate benchmarks is whether these rates are representative of the rates that would be negotiated with the labels that have not signed direct licenses.

Three arguments have been made to attack the reliability of the direct licenses with independent labels. The first is that most labels have not signed direct licenses, which indicates that they are unwilling to accept these rates. The second is that the independent labels that have signed licenses are too small and specialized to provide a reasonable benchmark for all labels, and especially the four major labels. The third is that Sirius XM is a monopolist in satellite radio that, by implication, can force small labels to sign licenses at unfavorable terms. Here I deal with the first and second issues. I address the third issue in the next section.

**Market Rejection.** The argument that most labels rejected the rates that Sirius

XM offered must be considered in light of the campaign by SoundExchange and other trade associations to convince independent labels not to sign a direct license with Sirius XM. SoundExchange and other industry organizations sought to prevent labels from signing direct licenses. My direct testimony reviews public statements by these organization and their leaders asserting that the statutory rate that will emerge from this proceeding will be much higher than the current statutory rate, that the industry should present a united front to maximize the statutory rate that it will obtain, and that the direct licenses will cause a lower rate to emerge from this proceeding. These organizations and their leaders also denigrated the normal competitive process, arguing that Sirius XM engaged in bad behavior by offering more plays to labels that signed a direct license.

Discovery of internal documents from SoundExchange has produced more evidence about the scope of SoundExchange's views about direct licenses and it efforts to encourage independent labels not to sign them. A draft document for a board of directors meeting includes an item [redacted]"[9] Among the [redacted] activities was a [redacted] and criticizes [redacted] for programming its [redacted][10] This

9. Bates Nos. SX02 00152378-79, attached as SXM Reb. Ex. 37.

10. Bates No. SX02 00154127, attached as SXM Reb. Ex. 38. The point about the desire to avoid competing on the basis of price is echoed in the *Testimony of Darius van Arman*, who states: "we have a vested interest in doing all that we can to assure that the world of satellite and internet radio continues to program its music… based purely on the merits of

statement reveals both the goal of SoundExchange to protect record companies against competing for play time on the basis of price and the presumption that regulation of royalties is the [redacted] while a market process for negotiating licensing agreements is to be avoided.

A string of e-mails [redacted][11]

An e-mail to [redacted]

A long string of e-mails begins with several attempts by Sirius XM to initiate negotiations with [redacted] concerning a proposed direct license. Two of the messages summarize the proposal from Sirius XM. After many inquiries from Sirius XM seeking to initiate negotiations, [redacted]

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the actual recordings and artists" (p. 7),

11. Bates Nos. SX02 00154089-91 at 89, attached as SXM Reb. Ex. 39.

12. Bates No. SX02 00153983, attached as SXM Reb. Ex. 40.

[redacted][13]

These documents demonstrate that SoundExchange worked to convince labels not to sign direct licenses. The primary argument against direct licenses was that labels should refrain from competing in order to maximize the collective rate that will be set in this proceeding. The fact that labels rejected direct licenses, many without discussing the matter with Sirius XM or MRI, is hardly a test of whether they would have signed licenses if a collective rate-making process were not available to them. The goal of SoundExchange, A2IM and other industry organizations was to "maintain solidarity," to avoid market competition for play time, and to rely on regulation to produce a high, uniform royalty rate. Many labels, including the four major record companies, did not reject the terms that were offered by Sirius XM because the terms were not meaningfully discussed. Instead, the labels, led by SoundExchange, rejected the very concept of using the market to determine royalty rates.

**Representativeness.** The argument that the labels that have signed direct licenses are not representative of the industry requires comparing the combined libraries of the companies that signed licenses with the libraries of the rest of the industry. Table 2 lists the independent labels that had signed direct licenses with Sirius XM as of July 1, 2012. There are 85 licensees, 23 of which have been signed since the original version of my written direct testimony was submitted last November. I understand that Mr. Gertz of MRI is submitting rebuttal testimony concerning the scope and quality of the sound

13. Bates Nos. SX02 00153377-82, attached as SXM Reb. Ex. 41.

recordings that are offered by these labels, so I will not examine that issue here.

According to the testimony of executives from Sirius XM and MRI, the four major labels are unwilling to discuss a direct license. An overwhelming majority of labels that are distributed by a major have followed the lead of their distributor, eschewing the market process and letting SoundExchange represent them in this proceeding. The significance of the resistance of the majors to direct licenses is that the number of labels that actually are willing to consider signing a direct license is severely limited. In 2011, the four major labels owned or distributed labels that account for about 88 percent of industry sales.[14] Given the intransigence of the majors and the campaign against direct licenses by SoundExchange and other industry organizations, Sirius XM has done very well in obtaining as many direct licenses as it has.

The representativeness of the direct licenses also is implicated in the argument that major labels, with larger and more diverse catalogs, including many current hits and classics, have greater bargaining power that can be used to obtain higher rates. A2IM President Rich Bengloff stated that A2IM's core mission was "insuring a fair marketplace for independents" (by which he meant equal royalty rates) and that the statutory license insures this result.[15]

Negotiated royalties do vary among labels. Among the direct licenses between Sirius XM and independent labels, rates vary between 5 and 7 percent. Among the four majors, the negotiated licenses with digital music services that have been produced in this

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14. See www.musicindustrymetrics.com/music-industry-analysis/2012/02/record-label-distribution-market-share-end-2011.html.

15. Rich Bengloff, "The Value of Copyright: A Letter from A2IM's Rich Bengloff," September 12, 2011, at http://a2im.org/2011/09/12/the-value-of-a-copyright/.

case reveal varying market royalty rates for the same service. For example, Professor Ordover's Table One shows that [redacted] The data for Last.fm and Slacker that are reviewed in my direct testimony reveal that labels negotiate different rates for the same service. For my benchmark licenses between the majors and Last.fm, [redacted].

While the contracts show rate variability, the data do not reveal a systematic relationship between the identity of the label and the relative magnitude of its royalty rate. For example, [redacted]. These rates also do not reveal a relationship between the size of a major and its rates. EMI, the smallest major, negotiates rates that are similar to the rates negotiated by Universal, the largest major. Which labels receive high or low rates from a particular service appears to be idiosyncratic, and certainly is not the result of differential size and bargaining power.

A statutory license has the effect of eliminating rate differences among labels, even among the majors. Professor Ordover, with tables showing widely different rates among licenses for largely identical services (such as permanent downloads or ringtones), understandably chose to recommend averages for the four majors as proposed benchmark

royalties, rather than propose separate rates for each major based on the average rates that each has negotiated.

For the purposes of evaluating the representativeness of the rates in the direct licenses, the important point is that the evidence that has been submitted in this proceeding does not support the proposition that the size of the label affects negotiated royalty rates. An inefficiency that is created by setting rates by regulation instead of through markets is that, notwithstanding Mr. Bengloff's views, different suppliers of very similar products often do set different prices. Nevertheless, this inefficiency is not likely to be large in this case because the prices of products that are similar enough to be close competitive substitutes do not generally exhibit wide variation. The licenses that Professor Ordover and I have used in our analysis do contain a few outliers, but rates with the same service generally exhibit a variation of less than ten percent of the average rate. For example, [redacted] Of course, because the identities of the labels with the highest and lowest rates differ among services, the benefits and costs to a label from using an average tend to cancel out when the average rate applies to many services.

Although no licenses with indies have been submitted as evidence in this proceeding, indies do not appear to receive systematically lower royalty rates than majors. Dr. Ordover testified that he expects that indies and majors charge similar percentage rates (*Hearing Transcript*, pp. 2270-71). Mr. Bryan of Warner testified that

[redacted] (*Hearing Transcript*, p. 1998).

Economic analysis provides a reason to believe that indies will be paid the same rates as majors. Indies that are not distributed by one of the four majors account for 12 percent of music sales. If a large indie, such as E1, could receive the Warner rate by agreeing to be distributed by Warner and if the Warner rate were higher than the rate that E1 can negotiate on its own, there would be no independent distributors like E1.

For these reasons, I see no reason to alter my conclusion that a market negotiation with major labels would not produce royalty rates that are higher than the rates commanded by the most important independent labels. I conclude that these licenses are representative of the industry in coverage of music and rates paid.

## THE ASSERTED MONOPOLY POWER OF SIRIUS XM

Mr. Sidak has testified that Sirius XM is a monopoly in satellite radio that has exercised monopoly power in setting prices. He also testified that "there is no doubt in my mind" that the Department of Justice (DOJ) and the Federal Communications Commission (FCC) "got the wrong answer" in rejecting the arguments that he submitted in the merger review and that he also has submitted here (*Hearing Transcript*, p. 2787). The rebuttal testimony of Professors Michael Salinger and David Stowell discuss Mr. Sidak's testimony. I do not duplicate their analysis here, although I agree with their criticisms of the details of Mr. Sidak's testimony regarding Tobin's q, the proper interpretation of the financial performance of Sirius XM, and the extent of competition against Sirius XM. Here I focus on the aspects of Mr. Sidak's testimony that deal with

issues that were discussed in my direct testimony.

*Monopoly and Monopsony*

Professor Sidak's testimony about whether the Sirius XM merger created a monopoly is not relevant to determining an appropriate royalty rate for performances of sound recordings on satellite radio services. This issue was relevant to the DOJ and FCC in considering whether to approve the merger, but re-litigating that issue here is not relevant because it has no bearing on what the market rate for sound recording performance rights ought to be for SDARS.

If Sirius XM enjoys monopoly power in satellite radio services, the source of that market power cannot be its music content because that content is available from many other sources. Instead, the source of monopoly power must be the technology: the satellite distribution system that was created by Sirius and XM and the FCC's spectrum allocation policies that prevent competitive entry. The presence of a monopoly in a unique distribution channel would not have an effect on the competitive price of an input (like music) to that monopoly.

As explained in my direct testimony, the relevant issue for purposes of rate making is whether a monopoly in satellite radio, assuming it were present, would imply market power in acquiring performance rights for sound recordings. While Sirius XM accounts for 100 percent of satellite radio services, it accounts for a small fraction of the market for performance rights for sound recordings. The latter issue is the relevant fact in addressing the question of whether Sirius XM has sufficient buyer (monopsony) power to force royalties below the competitive level.

To prove that Sirius XM has monopsony power in sound recording performance rights requires actually analyzing supply and demand in that market. No such evidence exists. Mr. Sidak's testimony focuses solely on competition among services and does not address the extent of competition in inputs to those services. Moreover, because the labels that have signed direct licenses with Sirius XM could have allowed their rates to be determined in this proceeding, Sirius XM could have exercised monopsony power in the rights market only if the labels expected that the rates that are set in this proceeding will be substantially below the rates that would emerge in a competitive market. Thus, like Professor Ordover, Mr. Sidak's argument makes sense only if he assumes that regulated rates are too low.

***The Absence of Monopoly Power***

In this matter the distinction between monopoly and monopsony is not relevant because the initial premise – the presence of monopoly power – is not true. As discussed in my direct testimony, the reason that the DOJ and FCC gave for allowing the merger to go through is that satellite radio faces sufficient competitive constraints from terrestrial radio and mobile Internet music services to protect consumers from being harmed by the merger through some combination of higher prices and lower quality. Mr. Sidak's conclusion that Sirius XM has monopoly power in a relevant market is unpersuasive because his argument does not use the standard methods that economists have developed and the agencies have adopted for evaluating a merger. Specifically, whether two products are in the same relevant market is determined by whether the demand for one

product is affected by a change in the price of the other.[16] Whether a firm has monopoly power depends on whether its prices are constrained by the prices of other products and whether its profits exceed the competitive return on its investments.

Mr. Sidak's basis for concluding that Sirius XM enjoys monopoly power consists of the following: (1) one SDARS exists (Sirius XM); (2) the operating margin (revenues less operating costs) and net cash flow are positive and rising; (3) Mr. Sidak's calculation of Tobin's q (the ratio of the market value of financial investments [stocks, bonds, loans] to the replacement costs of its assets) exceeds one; and (4) Sirius XM increased its prices, first by passing on licensing costs and then by increasing the sticker price of Sirius XM Select by $1.50 this year. These four facts, if true, would be the beginning, not the end, of an analysis of whether Sirius XM has monopoly power. When the appropriate facts are considered, as they were by the DOJ and the FCC, the only plausible conclusion is that Sirius XM does not possess monopoly power.

**One Service.** Mr. Sidak's first observation is irrelevant unless no other technology is a competitive substitute for Sirius XM satellite services. Functionally, satellite radio is one of several means for gaining mobile access to pre-programmed entertainment channels, and pre-programmed channels on mobile receivers are one of several ways to listen to music while traveling in an automobile. Whether different devices and service for receiving music entertainment while travelling in a car are close enough substitutes that they compete cannot be determined solely by noting that they have different technical and service characteristics. Most consumer goods and services

16. The standard methods for defining markets and determining whether a firm enjoys unilateral (monopoly) market power are set forth in the *Horizontal Merger Guidelines* of the Antitrust Division of the Department of Justice and the Federal Trade Commission, most recently updated in August 2010.

exhibit "product differentiation" (which means that different brands of a product have different attributes). One cannot tell whether one brand's attributes are so unique that it faces no competitors simply by listing its unique attributes. Instead, one must assess whether these different methods compete directly with each other in price and service quality. Mr. Sidak does not analyze the extent to which terrestrial radio and mobile Internet music services create competitive constraints on satellite radio services.

Mr. Sidak observes that satellite radio is advantaged because users of Internet music services must pay a wireless carrier for data usage. This observation is correct, and constitutes an excellent reason for attempting to separate the platform price from the content price for satellite radio. Record labels do not receive royalties on data charges that are imposed by wireless carriers for listening to music over the Internet.

**Price vs. Cost.** Mr. Sidak's observation about the mark-up over average variable cost also is irrelevant because it asks the wrong question (whether price exceeds average variable cost), not whether Sirius XM's mark-up over average variable cost is sufficient to earn even a competitive return, let alone monopoly profits. In an industry with high fixed costs of capital investments and R&D, price *must* exceed average variable cost or a company cannot earn a competitive return on its investments. As discussed in my direct testimony, Sirius XM never has earned even a competitive return on its investments.

**Tobin's q.** Mr. Sidak implements his calculation of Tobin's q by using the book value of assets as a proxy for replacement cost. This substitution is correct only if the methods a firms uses for calculating book value track economic depreciation of assets. In the case of Sirius XM, a massive write-down of assets took place at the time of the merger, which reflected the fact that the market value of the firm was substantially below

the book value of its net assets. Thus, Mr. Sidak's calculations are meaningless.

**Price Increases.** Mr. Sidak asserts that two Sirius XM price increases prove that pricing by Sirius XM is not constrained by competitors. The two price increases were the surcharge for the increase in content costs and the recent price increase after the three-year cap that was applied as a condition for approving the merger was removed.

Both of these events are inconclusive about the presence of monopoly power. To prove that these increases represent the exercise of monopoly power requires assessing whether Sirius XM earns excess profits. As discussed in my written direct testimony, the profits of Sirius XM still are insufficient to produce a competitive return on investment.

The surcharge in response to increases in license fees is not evidence of market power. In all industries, prices must cover costs, so an increase in costs must be accompanied by a price increase or a firm will go out of business. The economic theory of pricing states that a profit-maximizing firm sets price on the basis of marginal cost, so all firms – from monopolies to intensely competitive firms – respond to an increase in marginal cost by raising prices. Royalties are part of marginal cost as they represent an incremental cost that must be paid if an additional subscriber is added. Thus, by itself, the price increase to recover the increase in licensing fees proves nothing about whether Sirius XM has monopoly power.

Mr. Sidak examines the recent price increase on the basis of the change in the sticker price for Sirius XM Select. The change in the sticker price was about 12 percent. But the change in the sticker price does not translate into an immediate increase in prices. To evaluate the true impact of the price increase requires analyzing the change in ARPU. In the first quarter of 2011, ARPU was $11.22, and in the first quarter of 2012, after the

price increase, ARPU was $11.49. The annual rate of increase was 2.4 percent.[17] The reasons that the rate of increase is so low are that the new rates only apply as contract customers renew their subscriptions and many customers receive discounts. Thus the increase in the sticker price will only slowly and incompletely translate to an increase in ARPU. Thus, the percentage increase in the sticker price is a highly inaccurate estimate of the annual rate of increase in effective prices. For this reason, the magnitude of the price increase does not support the conclusion that Sirius XM's prices are not constrained by competition. If prices were not constrained, Sirius XM surely would increase them to at least the level that would enable it to earn a competitive return on its investments.

**SCOPE OF THE LICENSE**

The *Proposed Rates and Terms of SoundExchange, Inc.* (pp. 2-3), include several important changes in the method for calculating royalties under the statutory license. The proposals to expand the revenue base that is covered by the statutory rate would lead to a dramatic increase in the revenue to which the statutory rate applies. The written direct testimony of the Chief Operating Office of SoundExchange, Jonathan Bender, states that the revenues that presently are subject to royalties are about 80 percent of the revenues that would be subject to royalties under the new proposal (*Bender Testimony*, pp. 5-7).

Among the proposals to expand the revenue base are two that are especially anticompetitive. The first is to levy the statutory rate on equipment sales by Sirius XM (*Bender Testimony*, p. 16). The second is to require Sirius XM to pay royalties to SoundExchange for all plays of sound recordings that require a license, even sound

17. *Sirius XM 10-Q*, First Quarter 2012, p. 74. ARPU excludes advertising revenue and a purchase price accounting adjustment.

recordings for which Sirius XM has obtained a direct license, unless the sound recordings are part of separate "services that are provided on a standalone basis" for which satellite radio and standalone subscribers pay the same price (*Bender Testimony*, p. 17).

These two proposals would impose significant economic costs on society beyond the costs imposed on Sirius XM. Both proposals create substantial inefficiency and cause harm to competition. These proposals are about more than simply increasing the income of SoundExchange by applying the statutory rate to a higher revenue base.

***Equipment Sales***

The proposal concerning equipment refers to sales by Sirius XM of satellite reception equipment (primarily radios) that is installed in cars. This proposal is part of a larger effort for SoundExchange to impose royalties on anything that is sold in connection with the use of music. The proposal is equivalent to collecting royalties on the sale of smart phones that are used to receive mobile Internet music services or even personal computers that are used to access music over the Internet. This proposal also is similar conceptually to the proposal made by ASCAP to impose royalties for musical performances on data usage fees of wireless telecommunications carriers that are used to deliver audio and video entertainment to smart phones.[18] This proposal was rejected by both the U.S. District Court and the Court of Appeals for the Second Circuit.[19]

One stated rationale for imposing royalties on both reception equipment and

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18. I testified on behalf of MobiTV, a provider of video content services to wireless carriers, in the proceeding to set rates for performances of musical compositions for these services.

19. *ASCAP v. MobiTV, Inc.*, 681 F.3d 76 (2d Cir. 2012).

telecommunications networks is that all or part of the value of the platform is due to their use to provide music services. As Mr. Bender states the argument, sales of satellite receivers "are just another way Sirius XM makes money from providing a service that consists in large part of music" (*Bender Testimony*, p. 16). Of course, this argument is not limited to satellite radios. As discussed above, the argument that multiple complementary inputs are needed to produce an output does not imply that in a competitive market the supplier of one product can impose a tax on the sale of a complementary product. In particular, many products are just another way for someone to make money from the use of sound recordings.

Stereo equipment would not be valuable without sound recordings, and many retailers sell both CDs and stereo equipment. A record company could not succeed in demanding that, say, Best Buy pay a royalty on sales of stereo equipment and portable audio players because sales of these items are just another way that Best Buy makes money from CDs.

Apple sells both iPods and music downloads, and only Apple portable players (iPods and iPhones) can play music that is downloaded from Apple's iTunes Store. Thus, iPods are just another way that Apple makes money from selling music, but the deals between record companies and Apple concerning music that is sold through the iTunes Store do not require Apple to pay royalties on sales of iPods and iPhones.

The reason for the absence of market licenses that resemble the SoundExchange proposal about equipment is that Apple would not sign such a license because it would disadvantage itself in competing with, say, Samsung in selling portable audio players and smart phones, and Rhapsody in selling downloads and interactive music services. The

only way that a tax like that proposed by SoundExchange could survive in a competitive market is if it were imposed by government by creating a mandatory license for the sale of stereo equipment and portable audio players by firms that also sell music content.

The economic argument against imposing royalties on complementary inputs is that it is inefficient. A royalty on equipment (or data service) causes an increase in its price. As a result services that sell the taxed input lose business to competitors that do not sell both equipment and content for a reason that is unrelated to either the quality or the cost of the equipment and the services that benefit from driving a cost wedge between them and the company that sells both. For example, if a royalty is imposed on satellite radios but not on car radios because radio stations do not sell radios, or personal computers, portable media players and smart phones because Internet music services do not sell them (except for Amazon and Apple), consumers face higher total service costs for subscribing to satellite radio relative to other ways to access music content. Because satellite radios impose no cost on record companies, and indeed provide a benefit, the increase in the relative price of satellite radios creates an inefficient substitution of other sources of music content for satellite radio. This switch benefits record companies because they receive more revenue from extracting higher royalties from satellite radio and from greater royalty payments from Internet services that benefit from the switch from satellite radio. But the result is nevertheless costly to society because the switch of customers was not warranted by the relative real costs and benefits of the services.

Another inefficiency that would arise from this proposal is that it gives Sirius XM an incentive to exit the satellite radio business by selling it to a firm that would not have to pay royalties. The proposed change applies only to sales of equipment by Sirius XM,

so consumers and Sirius XM can evade the royalty if equipment is sold by someone else. There is no reasonable basis for adopting a policy about royalties for performance rights to sound recordings that imposes a financial penalty on firms that sell all of the components of a system for delivering music content to consumers.

*Allocation of Royalties*

SoundExchange provides a non-exclusive license for performance rights to sound recordings on satellite radio. The proposal to require Sirius XM to pay royalties to SoundExchange for all sound recordings that it plays would have the effect of making the statutory license exclusive. This effect would occur because the proposal eliminates the incentive for both Sirius XM and labels to sign direct licenses.

The SoundExchange proposal would impose a double payment on Sirius XM for using a sound recording that is covered by a direct license. Double payments could be avoided if SoundExchange gave Sirius XM a credit for payments to labels, but even if the proposal were revised in this way, it still would create an exclusive statutory license. The reason is that, even with a credit, Sirius XM would pay the statutory rate for all sound recordings. If so, Sirius XM would have no incentive to seek direct licenses. Likewise, labels would have no incentive to compete by offering lower royalties in exchange for more plays. From the documents cited here and in my direct testimony, this outcome is a goal of SoundExchange and A2IM, which seek to eliminate competition among labels.

To eliminate the possibility for direct licenses causes two anticompetitive effects. First, the proposal gives Sirius XM no escape valve, not even a small one, for reducing the cost of the statutory rate by seeking less costly direct licenses. Second, the proposal

prevents a label from offering a lower rate in return for more plays, yielding a net increase in royalty payments and sales through other channels due to the promotional effect of plays on Sirius XM. The latter is especially important to labels that specialize in music genres that are not widely played on terrestrial radio, such as classical and jazz.

**SECTION 801(b) FACTORS**

Professor Ordover argues that the four factors in Section 801(b) do not require an adjustment to the "benchmark rates arrived at by the record companies and digital music distribution services through bargaining in unfettered marketplace settings" (*Ordover Testimony*, p. 5). Professor Ordover argues that only the fourth factor, disruption, could ever require an economically valid adjustment to market-determined rates, and even then a disruption adjustment "should be limited to a temporary facilitation of the ability of nascent and emerging services to gain consumer acceptance and potentially achieve an efficient scale of operation" (*Ordover Testimony*, p. 5).

Professor Ordover asserts that prices that emerge from the market can fail to achieve a valid policy goal only if the market is not competitive or if the product is too new to have firmly established a position in a market. By itself, the "infant industry" argument is not a plausible objective of Section 801(b) and monopoly is not the only circumstance in which a policy maker might have a reason based in economics to want to alter the outcome in a market.

I agree with Professor Ordover that the presence of monopoly is a plausible justification for regulating prices and that this concern adequately is taken into account by setting rates on the basis of the prices that would emerge from a competitive market.

But this is the standard for setting statutory rates for other digital music services. Section 801(b) requires departing from this standard and so it cannot bear any relationship to the goal of controlling monopoly power other than that the starting place for setting rates under Section 801(b) is the competitive market rate.

Section 801(b) also cannot rationally be limited to a concern about infant industries. Section 801(b) does not apply to the services that did not exist at the time it was enacted. Many Internet-based digital music services do not qualify for a statutory license, and for services that do qualify, statutory rates are set according to the standard that Professor Ordover advocates, which is to emulate competitive market outcomes in setting the royalty and to ignore the infant industry issue. This proceeding sets rates for services that were more developed (less infant) than digital Internet services. SDARS had completed a long process of being licensed by the FCC and was about to be launched, and music on cable television channels already was in place. Hence, were Section 801(b) a temporary protection for new services, it would not have applied only to the services that were in place or that were well along the way to being launched. Thus, the Section 801(b) factors do not make sense unless they are about more than simply the desire to promote an infant industry.

For these reasons, Professor Ordover's economic interpretation of Section 801(b) cannot possibly be correct. Here I identify other considerations that are implicated by Section 801(b) and how economics can be used to analyze them.

**Disruption.** According to Professor Ordover the disruption factor could justify an adjustment to a market rate only in the service of an infant industry because "sound competition policy would not regard the fourth objective as advocating protection to an

established service from the rigors of competition…" (*Ordover Testimony*, p. 6). I disagree that disruption only refers to giving a start-up a chance in the market. Here I describe other reasons that a concern about disruption can arise.

A product may serve social values that are not fully reflected in the market. A commonly used example is pure "public goods," which must be provided to everyone or to no one and for which the use by one person does not interfere with the ability of another person to use it. SDARS has public goods characteristics: it must be available almost everywhere or nowhere. Satellite radio service also requires a private good – a car radio that can receive satellite signals – but this private element does not alter the fact that once the satellite distribution system and the library of program content has been put in place to deliver programming to one person, it is available to all. A system like SDARS can fail to become commercially viable simply because no market price for the service can generate enough revenue to pay for the public goods element of the service, yet if the market price were set just to recover the private costs, the service would generate more consumer welfare than the cost of providing the public good.

A related aspect of SDARS is that it delivers many channels of pre-programmed radio to areas that have few or no terrestrial radio stations and no wireless Internet access. If 98 percent of the population can turn to a slightly less preferred method for obtaining digital music, but the remaining two percent cannot, SDARS can fail a market test even if the total economic welfare to all consumers is more than sufficient to justify the investment. Because satellite radio service is mobile, Sirius XM has no way to engage in effective price discrimination so that the two percent who really need the service can pay a lot more than others. Instead, its optimal policy is a uniform price that is enough to

keep the 98 percent of its customers who have a less desirable but reasonable substitute. Whether this circumstance applies to Sirius XM is not known, but the point is that Professor Ordover is incorrect to assert that "economically sound competition policy" does not admit the possibility for a valid concern that an economically desirable product may not be commercially feasible in an unfettered market economy. Professor Ordover and I are entitled to opinions about whether we support delivering services that otherwise would not pass a market test to accommodate, especially, sparsely settled areas, but we cannot as economists state that our preferences are derived entirely from economics.

Professor Ordover's reference to the "unfettered market" is misleading because no such market exists. A variety of legal rules and institutions affect the commercial viability of a business, and a change in the legal environment can threaten to disrupt an entire industry. In the case of SDARS, new rules about copyright liability and the process for determining royalties were adopted for SDARS and other pre-existing services after the decision to enter had been made and after the entrants had made substantial investments in bringing these services to the market. One can have a lively debate about whether a policy to take these issues into account is appropriate, but one cannot legitimately argue that private market transactions fully account for the effects of changes in the legal environment. Changes in copyright rules involving digital technology explicitly were made to enable rights holders to generate revenues from music that was distributed over the Internet, in the wake of the birth of file-sharing services that did not pay royalties for the music that they distributed. Had the Internet never been invented, legislation requiring royalty payments for digital performances probably would not have been enacted because the pre-existing satellite and cable audio services posed no

threat to the incomes of record companies and artists. If so, a valid disruption concern is that these services not be harmed by legal changes that enabled rights holders to monetize the use of sound recordings that are distributed over the Internet.

For these reasons, I do not find plausible that Section 801(b) is only, or even mainly, an instrument for protecting new services during their start-up stages. A more plausible economic view is that 801(b) is intended to distinguish between Internet services and other digital services that were developing and that posed no threat to the record industry, in which case disruption is not a concern that goes away once these industries have had a few years to establish themselves in the market. As discussed below, this conclusion adds considerable clarity to the economic content of the other Section 801(b) factors and overcomes the conundrum arising from Professor Ordover's view, which is that three of the four Section 801(b) factors are redundant.

**Availability.** Professor Ordover implicitly assumes that availability is concerned only with inducing production of creative works. In a market with many competing content producers, the price that maximizes the total number of creative works that are produced is the collusive monopoly price. This key insight about the effect of setting monopoly prices in competitive markets was first discovered by economists who studied airline regulation. By setting air fares above the competitive level, the Civil Aeronautics Board induced competition in service quality, ranging from the quality of in-flight food service to the frequency of flights and the number of empty seats per flight.[20] Applied to sound recordings, the profit from successful recordings is a prize that labels and artists

20. See George Douglas and James C. Miller III, *Economic Regulation of Domestic Air Transport: Theory and Policy*, Brookings Institution, 1974, and George Eads, *The Local Service Airline Experiment*, Brookings Institution, 1972.

compete for by making new recordings. If the prize grows larger because of price collusion, more labels and artists will try to compete for it, causing an increase in the total number of creative products that is accounted for primarily by products that are unsuccessful. Hence, monopoly prices lead to more products but little or no increase in products that generate significant consumer welfare.[21]

Because the goal for setting statutory rates cannot possibly be to maximize the number of unimportant creative works, availability makes economic sense only if it also is concerned with access and usage of works by consumers. If so, availability, like disruption, requires taking into account the fact that satellite services use a ubiquitous national distribution platform that increases access to music. A higher royalty rate may induce the creation of more creative works, but may reduce total access to creative works by consumers because either satellite radio fails or, as a means to avoid copyright liability, satellite radio plays fewer sound recordings. In a circumstance in which creative works have common costs that are sold in many different channels, the royalty rates that will emerge in a competitive market will not necessary accomplish the goal of maximizing the use of content, just as they will not necessarily protect against disruption. Availability refers to considering this trade-off: whether the loss, if any, of creative works arising from a reduction in market royalty rates is offset by increasing the use of creative works by making them available to more people. Because of the public goods attributes of both creative works and satellite radio, there is no reason to believe that a competitive rights market makes the right trade-off between these competing values.

**Fair Return.** Professor Ordover states that economic policy has no connection to

21. For more details, see Sherwin Rosen, "The Economics of Superstars," *American Economic Review* Vol. 71, No. 5 (1981), pp. 845-58.

fairness. Whereas some aspects of fairness are related to non-economic considerations such as justice and liberty, the assertion that fairness has no connection to economics is incorrect. First, economics contains research on the distribution of economic welfare, the effect of the distribution of income, wealth and access to specific goods on economic growth, and the costs of alternative methods for attaining a distributive objective.[22] Second, in regulatory economics a "fair return" is understood to mean the returns that arise if rates recover total costs, including a competitive return on investment.[23] As a practical matter, empirical research on the actual profitability of regulated industries concludes that "the fair rate of return lies somewhere between the profit maximizing rate of return and the market cost of capital."[24] That is, as I discussed in my direct testimony, the procedures that regulatory agencies follow tend to lead to supra-competitive profits.

Changes in copyright law for a service that was developed before the change occurred can change the ability of a participant in a rights market to earn a fair return on investments that were incurred before the change took place. Moreover, policy makers may conclude that a product creates sufficient social value that regulators should guarantee that it continues to be provided, as is the concern with availability and disruption. The fair return factor requires taking these possibilities into account.

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22. For a recent example, see Peter Diamond and Emmanuel Saez, "The Case for a Progressive Tax: From Basic Research to Policy Recommendations," *Journal of Economic Perspectives* Vol. 25, No. 4 (2011), pp. 165-190.

23. This interpretation of "fair return" is a half-century old. See Merton J. Peck and John R. Meyer, "The Determination of a Fair Return on Investment for Regulated Industries," in *Transportation Economics*, Columbia University Press for National Bureau of Economics Research, 1965, pp. 199-244.

24. Paul L. Joskow, "The Determination of the Allowed Rate of Return in a Formal Regulatory Hearing," *Bell Journal of Economics and Management Science* Vol. 3, No. 2 (1972), pp. 632-644.

The fair return factor can be implemented by determining upper and lower bounds for rates that are consistent with providing a competitive return to both sides of the rights market. Here the fair return standard is whether a rate allows both Sirius XM and record companies to remain financially viable in the long run. By this criterion, a rate is not reasonable if it expropriates the investments of Sirius XM while allowing record companies to earn profits in excess of the return that is necessary to be profitable.

Mr. Sidak attempts to establish the upper bound for SDARS rates, but he errs by excluding forward-looking capital costs. SDARS must recover its forward-looking capital costs, including a competitive return on investment, or it will not continue to reinvest. My direct testimony discusses this issue in calculating the minimum implicit price for the SDARS platform that is necessary to induce continued investment in obtaining new subscribers. Because of the high turnover rate of subscribers, a failure to reinvest in radios in new cars would cause Sirius XM to shrink its subscriber base by over 20 percent per year.

Regarding the lower bound, the testimony of Mr. Ciongoli provides data on revenues, costs and margins for Universal. According to Mr. Ciongoli, Universal Music Group took in [redacted] in revenues in 2010 and spent [redacted] "to create, market and distribute recorded music (including compensation to composers)" (*Ciongoli Testimony*, p. 8), leaving a profit of [redacted] (about [redacted] of revenues). Thus, the lower bound on keeping Universal financially viable is a rate that is substantially less than the current rate. Indeed, Universal would be viable if it received no royalties from Sirius XM. From this calculation I conclude that only the upper bound on rates comes into play in taking into account the "fair return" factor.

**Relative Contribution.** Professor Ordover believes that rates negotiated in a competitive market always take into account the relative contributions of rights holders and rights users. Market negotiations do not reflect the sunk costs of either side of the market, such as the costs of creating content or of undertaking research and development and investments to create a new distribution platform. Changes in copyright law could affect the ability of either record companies or SDARS to recover these sunk costs through market negotiations. The relative contribution factor requires taking this issue into account in setting rates.

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

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **DETERMINATION OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES** | ) | **Docket No. 2011-1 CRB PSS/Satellite II** |

**DECLARATION OF ROGER G. NOLL**

I, Roger G. Noll, declare under penalty of perjury that the statements contained in my Revised Written Rebuttal Testimony in the above-captioned matter are true and correct to the best of my knowledge, information and belief. Executed this 12th day of August 2012 at Washington, DC.

Roger G. Noll

# Appendix A

## Documents Relied Upon by Roger Noll

| Document Title | Document Date |
|---|---|
| Sirius XM 10-Q for Quarter Ending March 31, 2012 | April 27, 2012 |
| The Best Streaming Music Services, available at http://www.pcmag.com/article2/0,2817,2380776,00.asp | April 10, 2012 |
| "Record Label / Distribution Market Share End 2011," *Music Industry Analysis*, available at http://www.musicindustrymetrics.com/music-industry-analysis/2012/02/record-label-distribution-market-share-end-2011.html | February 5, 2012 |
| Rich Bengloff, "The Value of Copyright: A Latter from A2IM's Rich Bengloff," available at http://a2im.org/2011/09/12/the-value-of-a-copyright/. | September 12, 2011 |
| Musicovery.com – Interactive Web Radio and Music Discovery Service, available at http://www.rankster.co.za/reviews/musicovery-com | May 19, 2011 |
| Live365 Radio - App Review, available at http://appdictions.com/live365-radio-app-review/ | April 19, 2011 |
| Diamond, Peter and Emmanuel Saez, "The Case for a Progressive Tax: From Basic Research to Policy Recommendations," *Journal of Economic Perspectives*, Vol. 25, No. 4, pp. 165-190 | 2011 |
| Rosen, Sherwin, "The Economics of Superstars," *The American Economic Review*, Vol. 71, No. 5, pp. 845-58 | December, 1981 |
| Douglas, George and James C. Miller III, *Economic Regulation of Domestic Air Transport: Theory and Policy,* Brookings Institution (Washington) | 1974 |
| Eads, George C., *The Local Service Airline Experiment*, Brookings Institution (Washington) | 1972 |
| Joskow, Paul L., "The Determination of the Allowed Rate of Return in a Formal Regulatory Hearing," *Bell Journal of Economics and Management Science*, Vol. 3, No. 2, pp. 632-644 | 1972 |
| Peck, Merton J. and John R. Meyer, "The Determination of a Fair Return on Investment for Regulated Industries," in *Transportation Economics*, National Bureau of Economics Research, pp. 199-244 | 1965 |
| http://store.apple.com/us | |
| http://www.last.fm | |
| http:// www.live365.com | |
| http://musicovery.com/ | |
| http://www.pandora.com | |
| Sky.fm Internet Radio Publisher's Description, available at http://download.cnet.com/SKY-FM-Internet-Radio/3000-2139_4-75617261.html | |
| http://www.sky.fm/premium/ | |
| **Data from Sirius XM and MRI** | |
| Record Labels with Which Sirius XM has Signed Direct Licenses | |
| Play Shares on Sirius XM for the Top 150 Labels | |
| Play Shares of Record Labels with Direct Licenses | |
| **Other Testimony** | |
| SDARS II Proceedings, Live Testimony, Volumes VII-X | June, 2012 |
| Amended and Corrected Testimony of J. Gregory Sidak | March 26, 2012 |

| Document Title | Document Date |
| --- | --- |
| Amended and Corrected Testimony of Janusz Ordover | June 13, 2012 |
| Corrected Testimony of Stephen Bryan | March 21, 2012 |
| Corrected Testimony of Charles Ciongoli | March 21, 2012 |
| Proposed Rates and Terms of SoundExchange, Inc. | November 29, 2011 |
| Testimony of Darius van Arman | November 28, 2011 |
| Testimony of Jonathan Bender | November 28, 2011 |

**Data and Documents from Sound Exchange's Production**

SX02 00019371

SX02 00015826

SX02 00019323

SX02 00152378-79

SX02 00154127

SX02 00153983.

SX02 00154089-91

SX02 00153377-82

Any Other Sources Cited in the Report and Exhibits

# Table 1
**to Roger G. Noll Revised Written Rebuttal Testimony**

**RESTRICTED – SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 2011-1 CRB PSS/SATELLITE II**

PUBLIC VERSION

# Table 2
# Summary of Independent Labels With a Direct License with Sirius XM as of July 1, 2012

| Label | Genre | Royalty Rate |
|---|---|---|
| 101 Records | folk | [redacted] |
| 12K Records | electronic | [redacted] |
| Adjett Productions | country | [redacted] |
| Amherst Records | pop/r&b | [redacted] |
| Angel Air Records | rock | [redacted] |
| Anjunabeats | electronic | [redacted] |
| Ape Machine LLC | rock | [redacted] |
| Average Joe's Entertainment | country | [redacted] |
| Bonsound Records | pop | [redacted] |
| Boyds Tone Records | kids | [redacted] |
| Bullet Tooth / TrustKill Records | punk | [redacted] |
| Bulls Eye Records | bluegrass | [redacted] |
| Bumstead Productions Ltd. | alternative | [redacted] |
| Cameron Productions | Christian | [redacted] |
| Captured Tracks | alternative | [redacted] |
| Centricity Music | Christian | [redacted] |
| Century Media Records | metal | [redacted] |
| Chapter Music | pop/rock | [redacted] |
| Cleopatra Records | rock | [redacted] |
| Cordova Bay Entertainment Group Inc. | rock | [redacted] |
| Dangerbird Records | alternative | [redacted] |
| Delta Groove Productions | blues | [redacted] |
| Earache Records | metal | [redacted] |
| Entertainment One U.S. LP | all genres | [redacted] |
| Fader 4 Music | country | [redacted] |
| Fair Trade Services | Christian | [redacted] |
| FatCat Records USA | alternative | [redacted] |
| Frenchkiss Records | alternative | [redacted] |
| Gotee Records | Christian | [redacted] |
| Grammercy Records | jazz | [redacted] |
| Hep Records | jazz | [redacted] |
| Hippos In Tanks | dance | [redacted] |
| HLC Properties Ltd. | MOR | [redacted] |
| Homeland Entertainment Group | gospel | [redacted] |
| Hybrid Recordings | folk | [redacted] |
| In The Red Records | punk | [redacted] |
| Indica Records | alternative | [redacted] |
| It's Time Child Records | r&b | [redacted] |
| Justice Records | rock | [redacted] |
| Kitchenware Records Ltd | alternative | [redacted] |
| K-Tel Music, Inc. | re-records | [redacted] |
| Labrador Records | alternative | [redacted] |
| Latinum Records | r&b | [redacted] |

| Label | Genre | Royalty Rate |
|---|---|---|
| Les Productions Simon Says | rock | [redacted] |
| Lonesome Day Records | bluegrass | |
| Magnatune | New Age | |
| Main Sequence Ltd. d/b/a Eardrum Records | comedy | |
| Mamanook Music | kids | |
| Mamou Playboy Records | Cajun | |
| Master's Records | Christian | |
| Michael Doughty | alternative | |
| Michael Viola | alternative | |
| Milan Records | soundtracks | |
| Murderecords | alternative | |
| [redacted] | [redacted] | |
| No Big Deal Records | rock | |
| No Sleep Records | metal | |
| NorthernBlues Music | blues | |
| Nu Groove Records | jazz | |
| One Haven Music | pop/rock | |
| Opening Day Entertainment Group, Inc. | classical | |
| Paracadute | alternative | |
| Park The Van Records | alternative | |
| Phase One Communications, Inc. | hip-hop | |
| Phoenix Music International Ltd. (formerly See For Miles Records) | rock | |
| Plug Research Music | alternative | |
| Pravda Records | alternative | |
| PS Classics | Broadway | |
| [redacted] | [redacted] | |
| Reach Records | Christian | |
| Saustex Media | country | |
| SCI Fidelity Records | alternative | |
| [redacted] | [redacted] | |
| Sharp Nine Records | jazz | |
| Shelflife Records | alternative | |
| Smalltown Super Sound | electronic | |
| Sonic Unyon Records | alternative | |
| Star 69 Entertainment LLC | electronic | |
| Stone Table Records | Christian | |
| Sunnyside Records | jazz | |
| Temporary Residence Limited | alternative | |
| Three Keys Music | jazz | |
| TMB Productions | alternative | |
| Tyscot Records | gospel | |
| Yellow Dog Records | blues | |

Source: MRI

# SIRIUS XM REBUTTAL EXHIBITS 037 - 041

## RESTRICTED – SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 2011-1 CRB PSS/SATELLITE II

## CERTIFICATE OF SERVICE

I, Sabrina Perelman, hereby certify that a copy of the foregoing public versions of Sirius XM's Revised Written Rebuttal Testimony for Ronald H. Gertz, David J. Frear, and Roger G. Noll were served on August 21, 2012 via email and overnight mail on the following parties:

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*Counsel for SoundExchange, Inc.*

Sabrina A. Perelman

Sabrina Perelman

Sabrina A. Perelman/HW

Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2015, I caused a copy of the foregoing PUBLIC — **SOUNDEXCHANGE'S OPPOSITION TO LICENSEE SERVICES' MOTION TO STRIKE SOUNDEXCHANGE'S CORRECTED WRITTEN REBUTTAL TESTIMONY OF DANIEL RUBINFELD AND SECTION III.E OF THE WRITTEN REBUTTAL TESTIMONY OF DANIEL RUBINFELD** to be served via electronic mail and United States Mail, first class, postage prepaid addressed as follows:

| | |
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