PUBLIC

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE 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)	Docket No. 14-CRB-0001-WR (2016–2020)

iHEARTMEDIA'S OPPOSITION TO SOUNDEXCHANGE'S MOTIONS IN LIMINE TO STRIKE THE TESTIMONY OF PROFESSORS FISCHEL AND LICHTMAN REGARDING THE iHEARTMEDIA-WARNER AGREEMENT AND TO EXCLUDE THE WRITTEN REBUTTAL TESTIMONY OF TODD KENDALL

INTRODUCTION AND SUMMARY

The Judges recently stressed the "need for a comprehensive record," "in which the parties' admissible facts and expert opinions, and their pertinent arguments" — including "*opposing analysis of th[e] benchmarks*" the parties' propose — are all presented to the Judges as fully as possible."[1] SoundExchange, however, seeks to exclude from the record Professors Fischel and Lichtman's thorough and considered analysis of a key benchmark: the Warner-iHeartMedia agreement, which is the first agreement between a major non-interactive service provider and a major record label, and precisely the kind of agreement that is most persuasive in determining the rate a willing buyer would pay and a willing seller would accept.[2] Properly analyzed, that agreement shows that a willing buyer and a willing seller in a competitive market would agree to a per-performance rate substantially below the current statutory rate. SoundExchange also seeks to exclude from the record Dr. Kendall's expert testimony, based on an analysis of a large data set that shows that use of non-interactive services is far more strongly associated with increased music sales than is use of interactive services.

SoundExchange's basis for both motions is that its experts disagree with iHeartMedia's experts. That is an improper ground for excluding expert testimony in a *jury* trial. It is particularly improper where, as here, the Judges are the fact-finders and the concerns that animate *Daubert* are absent. The Judges should deny these motions to ensure that they "benefit from a comprehensive record" containing "a more complete, informed expert record."[3]

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[1] Order Denying Motion to Strike and Granting Other Relief at 8, 11, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 2, 2015) ("Order Denying Motion to Strike").

[2] *See* Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters at 3, Docket No. 14-CRB-0001-WR (2016–2020) (Apr. 3, 2014) (noting the "important evidentiary value of actual marketplace agreements as potential benchmarks in determining the statutory rates").

[3] Order Denying Motion to Strike at 8-9.

ARGUMENT

I. UNDER THE APPLICABLE LEGAL STANDARD, DISPUTES BETWEEN EXPERTS ARE RESOLVED BY THE FACT FINDER

As SoundExchange acknowledges, the Judges look to federal precedent under *Daubert* and Rule 702 in determining whether to admit expert evidence.[4] The *Daubert* analysis has three components: "qualification, reliability and fit."[5] SoundExchange challenges neither the qualifications of iHeartMedia's experts nor the relevance of their testimony to the issues in this proceeding. Instead, SoundExchange focuses entirely on reliability.

In evaluating reliability, "courts are admonished not to weigh or assess the correctness of competing expert opinions." *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 562 (8th Cir.), *cert. denied,* 135 S. Ct. 489 (2014). Therefore, "[p]roponents of expert testimony need not demonstrate that the assessments of their experts are correct," *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012), and courts "must take care not to transform a *Daubert* hearing into a trial on the merits," *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002). "So long as an expert's scientific testimony rests upon good grounds, based on what is known, it should be tested by the adversarial process, rather than excluded." *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 15 (1st Cir. 2011) (internal quotation marks omitted).

For these reasons, courts have repeatedly denied *Daubert* motions where, as here, the motion reflects a disagreement among experts, because such arguments "go[] to the weight" the fact-finder "should afford [the] testimony, and not its admissibility." *In re Chantix (Varenicline)*

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[4] *See* SoundExchange Fischel/Lichtman Mot. at 4; SoundExchange Kendall Mot. at 5; Order Denying Motion by Sirius XM at 1, Docket No. 2011-1 CRB PSS/Satellite II (May 1, 2012).

[5] *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) (explaining that "[q]ualification refers to the requirement that the witness possess specialized expertise," reliability requires that the opinions "be based on the methods and procedures of science rather than on subjective belief or unsupported speculation"; and fit means that the "expert's testimony must be relevant for the purposes of the case and must assist the trier of fact") (internal quotation marks omitted).

Prods. Liab. Litig., 889 F. Supp. 2d 1272, 1282 (N.D. Ala. 2012) (denying motion based on complaint that expert "did not use all of the data available"); *see Packgen v. Berry Plastics Corp.*, 46 F. Supp. 3d 92, 116 (D. Me. 2014) ("In ruling on a *Daubert* motion, the Court's role is not to ensure that every single variable that could conceivably relate to [the expert's opinion] has been considered by the expert."); *Logan v. Cooper Tire & Rubber Co.*, No. CIV.A. 10-3-KSF, 2011 WL 3267894, at *3 (E.D. Ky. July 29, 2011) ("Any difference between the testing variables and the accident at issue here can be fleshed out during cross examination, but does not justify excluding any of Gilbert's opinions based on these test results."); *Utility Trailer Sales of Kansas City, Inc. v. MAC Trailer Mfg., Inc.*, 267 F.R.D. 368, 372 (D. Kan. 2010) (denying *Daubert* motion based on argument that expert's "prediction . . . turned out to be wrong" and noting that this is an "issue[] . . . for cross-examination"). In short, these courts all hold that the proper way to resolve a disagreement among the experts is through "the traditional methods of testing the weight of an expert's opinion by vigorous cross examination and presentation of contrary evidence," not by excluding one side's experts at the outset. *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1220 (S.D. Cal. 2010); *see Amigo Broad., L.P. v. Spanish Broad. Sys., Inc.*, No. A-05-CA-193-LY, 2006 WL 5503872, at *4 (W.D. Tex. Apr. 21, 2006) (finding that "criticisms about Rea's data and methodology can be adequately addressed at trial on cross-examination").

The cases on which SoundExchange relies are not to the contrary. To the extent the courts in those cases excluded expert testimony, they did so on grounds that are plainly absent here. For example, in one case, the purported expert was a doctor "with no relevant research experience" who offered an opinion that, "by his own admission, does not make biological sense." *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 524 F. Supp. 2d 1116, 1184 (N.D. Cal. 2007). In another, the expert offered an opinion about a defect in a specific chair

"without the ability to inspect the original chair," rendering his opinion "purely speculative." *Macaluso v. Herman Miller, Inc.*, No. 01-cv-11496 (JGK), 2005 WL 563169, *8 (S.D.N.Y. Mar. 10, 2005). In a third, the "elementary statistical error" the expert made was relying on the (false) "idea that . . . employees do not get older as time goes by." *Raskin v. Wyatt*, 125 F.3d 55, 67 (2nd Cir. 1997). None of these cases bears any relation to SoundExchange's argument.

Finally, it is important to recognize that the Judges — and not a jury — will be the fact-finder here. The "main purpose" of *Daubert* is "to protect juries from being swayed by dubious [expert] testimony." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011). Those concerns "are not present" in a bench trial, *Metavante Corp. v. Emigrant Sav. Bank,* 619 F.3d 748, 760 (7th Cir. 2010), as there is "less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Brown*, 415 F.3d 1257, 1268-69 (11th Cir. 2005). For all of these reasons, SoundExchange faces an extremely high burden in seeking to exclude from the record relevant testimony from iHeartMedia's qualified expert witnesses. As shown below, SoundExchange fails to carry that burden.

II. SOUNDEXCHANGE PROVIDES NO BASIS TO EXCLUDE THE TESTIMONY OF PROFESSORS FISCHEL AND LICHTMAN

Professors Fischel and Lichtman analyzed the iHeartMedia-Warner Agreement and concluded that, adjusted to remove the shadow of the statutory rate, the Agreement shows that a willing buyer and willing seller in a competitive marketplace would agree to a per-performance rate of $0.0005. Fischel/Lichtman WRT ¶ 20. They identified substantial additional evidence from other marketplace agreements supporting that rate. *Id.* ¶¶ 20-24.

SoundExchange seeks to exclude their analysis of the iHeartMedia-Warner deal on two grounds. First, SoundExchange complains that Professors Fischel and Lichtman value the deal based on the parties' expectations at the time the agreement was signed, while SoundExchange's

expert "believe[s]" using performance data "is the better approach." Rubinfeld WRT ¶ 26. Second, SoundExchange notes its expert's disagreement with assumptions [[ ]]. As to both, SoundExchange simply identifies disagreements among experts, not departures by Professors Fischel and Lichtman from an accepted methodology. Such disagreement cannot justify the exclusion of expert testimony.

A. SoundExchange asserts that it was "inappropriate" for Professors Fischel and Lichtman to assess the value of the Warner-iHeartMedia deal using the parties' expectations at the time the deal was signed. But by "inappropriate," SoundExchange means only that its own expert prefers a different approach — *not* that Professors Fischel and Lichtman's approach is one that is not accepted among economists. SoundExchange's argument on this point is, in fact, lifted almost verbatim from its expert's testimony, *compare* SoundExchange Fischel/Lichtman Mot. at 6 *with* Rubinfeld WRT ¶¶ 26-32, and that testimony is the only source it cites in support of its argument that reliance on expectations is "inappropriate." Although Dr. Rubinfeld asserts that he "believe[s]" that relying on actual performance data "is the better approach," Rubinfeld WRT ¶ 26, he concedes that "the use of projections can be informative," *id.* ¶ 30. In fact, as Professors Fischel and Lichtman explain in their rebuttal testimony, the "view that expectations at the time of the event in question, and not *ex post* performance, form the relevant framework for analysis is a standard one in law and economics," and Professor Rubinfeld has "cited no economic basis" for departing from this standard practice. Fischel/Lichtman WRT ¶ 104; *see also, e.g.*, *Aqua Shield v. Inter Pool Cover Team*, 774 F.3d 766, 772 (Fed. Cir. 2014) ("expectations govern, not actual results"). Because Professors Fischel and Lichtman used a

well-accepted economic methodology, Dr. Rubinfeld's preference of a different methodology provides no basis to exclude their testimony.

B. SoundExchange's disagreement with certain assumptions [[ ]] is an equally insufficient basis for excluding their testimony. As an initial matter, SoundExchange repeatedly misattributes those assumptions to Professors Fischel and Lichtman. *See* SoundExchange Fischel/Lichtman Mot. at 7-9 ("Professors Fischel/Lichtman incorrectly assume"; "Professors Fischel/Lichtman's assumption"; "Professors Fischel/Lichtman's performance assumptions"). In fact, the model and the assumptions underlying it [[ ]], as Professors Fischel and Lichtman explained in their written direct testimony, *see* Fischel/Lichtman WDT ¶¶ 40-44, their written rebuttal testimony, *see* Fischel/Lichtman WRT ¶ 85, and their deposition, *see* Fischel Dep. Tr. 54:1-11, 64:3-65:24, 73:12-16, 75:17-23.

[[ ]] the model constitutes the best possible evidence of the price a willing buyer (iHeartMedia) would pay for the rights at issue in this proceeding. Implicitly, SoundExchange's argument is that [[ ]]. SoundExchange Fischel/Lichtman Mot. at 6. That argument, however, merely goes to the weight Professors Fischel and Lichtman's analysis should be assigned; it is not an argument that their analysis is based on a flawed methodology. In any event, as Professors Fischel and Lichtman testified at their deposition, [[ ]]

[redacted]

[redacted]]], which establishes a ceiling for the "willing buyer/willing seller" rate that can be determined from the contract. *See* Ex. A (attached hereto); Fischel Dep. Tr. 65:4-24, 73:12-75:7, 76:10-21, 115:6-17, 145:1-23.

III. SOUNDEXCHANGE PROVIDES NO BASIS TO EXCLUDE THE TESTIMONY OF DR. TODD KENDALL

Dr. Kendall's written rebuttal testimony analyzes the effect of listening to online streaming music services on music purchases. He compares the relative promotional effect of interactive and non-interactive services using a standard, well-accepted econometric approach, a "fixed effects" model implemented with a least-squares regression analysis. *See* Kendall WRT ¶¶ 15-17. He found that a 10 percent increase in listening to a non-interactive service is associated with a 0.0070 percent increase in purchasing, and that this effect is statistically significant at the 95 percent level, whereas the promotional effect of listening to an interactive service is statistically indistinguishable from zero. *See id.* ¶ 22 & Ex. D.

SoundExchange mounts two challenges to Dr. Kendall's testimony: that the data set he analyzed is not representative because it does not include mobile users, and that he did not report the results of certain tests of statistical significance. SoundExchange Kendall Mot. at 3-4. Neither provides grounds to exclude Dr. Kendall's testimony.

A. Dr. Kendall's data set was obtained from a well-recognized vendor of this type of information and is extremely robust, including 10,000 users. *See* Kendall Decl. ¶¶ 1-3; Kendall WRT ¶¶ 7-9. The data track each user's online music listening with a personal computer *and* digital music purchases over a six-month period in 2014. *See* Kendall WRT ¶ 8.[6] Dr. Kendall's

[6] Comparable data for mobile device users do not exist. SoundExchange questions this, noting (at 3 n.3) that a recent Pandora investor presentation relied on mobile user data. But the investor presentation cites data tracking the number of minutes consumers spent using particular applications (many of which

results can be extrapolated to the webcasting population as a whole, following standard practice in econometrics, and one that SoundExchange's own experts, Dr. Rubinfeld and Dr. Blackburn, used in their own testimony in this proceeding. *See* Kendall Decl. ¶¶ 5-6.

SoundExchange argues (at 3) that, because the data exclude mobile users, they may not be representative of webcasting users as a whole. As an initial matter, this claim is disingenuous given that SoundExchange's own expert, Dr. Blackburn, performed a similar analysis to Dr. Kendall, extrapolating from data from the same source that also excluded mobile users. *See* Blackburn WRT ¶¶ 39-50; Kendall Decl. ¶ 5. The difference between Dr. Kendall's and Dr. Blackburn's opinion is not the data they use, but the results they reach. Such a disagreement among experts about results is not a ground for excluding one expert's opinions.

In all events, SoundExchange provides no theory or evidence to suggest that the relationship between listening and purchasing is different for users of mobile devices and computer users. As Dr. Kendall notes, he is aware of no such theory or evidence. *See* Kendall Decl. ¶ 4. In the absence of evidence or even a theory indicating such a difference, there is no basis to reject Dr. Kendall's data set as unrepresentative. Courts have held that survey evidence should be excluded only if the "sample of respondents *clearly* does not represent the universe it is intended to reflect." *Big Dog Motorcycles, LLC v. Big Dog Holdings, Inc.*, 402 F. Supp. 2d 1312, 1334 (D. Kan. 2005). Otherwise, issues concerning the sufficiency of the sample go to the weight and not the admissibility of the evidence. *See Harolds Stores, Inc.*, 82 F.3d at 1546.[7]

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do not offer music listening), and does not cite any data tracking the corresponding music purchase behavior of each listener. *See* Kendall Decl. ¶ 4 n.8. In the attached declaration, Dr. Kendall confirms that he sought such data and was told that it does not exist. *See id.*

[7] The one case SoundExchange cites is not to the contrary. In *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749 (6th Cir. 2014), there was undisputed evidence that the survey group on which the expert relied was different from the universe it purported to represent. In particular, "23.8% of the applicants in [the expert's] sample of 1,090 were rejected because of their credit history, whereas only 13.3% of the GIS pool [the relevant universe] of 4,670 were." *Id.* at 752.

B. Dr. Kendall performed two separate regressions: one that evaluated the effect of listening to online streaming services on music purchasing, and one that disaggregated this effect for non-interactive and interactive services separately. *See* Kendall WRT ¶¶ 19, 22, 25 & Exs. D & E. In the latter regression, he calculated the "point estimate" as 0.0070 for non-interactive services, indicating that a 10 percent increase in non-interactive listening is associated with a 0.070 percent increase in purchasing. *See id.* ¶ 22. He calculated the "point estimate" as 0.0027 for interactive services. *See id.* Dr. Kendall determined that the coefficient for non-interactive services representing the relationship between listening and purchasing was statistically significant at the 5 percent confidence level (*i.e.*, a 95-percent certainty), whereas the smaller coefficient for interactive listening was statistically indistinguishable from zero. *See id.*

SoundExchange argues (at 8) that Dr. Kendall should have performed a third statistical significance test, assessing the difference between the two point estimates. But regardless of the results of such a test, it does not affect the "point estimate" that Dr. Kendall calculated, which from an econometric standpoint constitutes the best estimate of the promotion effect of non-interactive services. *See* Kendall Decl. ¶ 10. And as courts have held, *Daubert* does not require experts to perform every type of statistical test that might support a conclusion, only that the methodology an expert did choose is reliable. *See, e.g.*, *In re Neurotonin Mktg.*, 612 F. Supp. 2d 116 (D. Mass. 2009) (holding that, although epidemiologic studies are "powerful evidence of causation," such studies are not required to prove causation when other methods of proof are available); *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313 (D. Conn. 2002) (holding that expert is not required to perform a "differential diagnosis" where that question at issue "may be established by other theories."); *see also EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451 (S.D.N.Y 2004) (holding that a party may "rebut a statistical analysis in different ways, and

is not required to perform affirmative statistical analyses."). SoundExchange does not cite a case to the contrary.

In any event, the test that SoundExchange claims is required provides further evidence *in support of* Dr. Kendall's results. Dr. Blackburn, who claims to have performed this analysis, show that the differential promotional effect between interactive and non-interactive services is statistically significant at the 6 percent level, *see* Blackburn Decl. ¶ 6 & n.9, meaning that there is a 94 percent certainty that Dr. Kendall's results are distinguishable from normal variation in the data and therefore reliable, *see* Kendall Decl. ¶ 15. Although SoundExchange claims that 95 percent certainty is required, the economic literature is to the contrary. Indeed, the very source on which SoundExchange relies (at 3) in criticizing Dr. Kendall, the *Reference Manual on Scientific Evidence,* states that "[a]lthough the 5% criterion is typical ... less stringent 10% tests can also provide useful information."[8] Moreover, as Dr. Kendall demonstrates in his declaration, even if statistical certainty at the 95 percent level were required, it would not materially affect his results. Even under this approach, market royalty rate for non-interactive services should be reduced by between $0.0004 and $0.0007 per performance (all else equal), as compared to between $0.0004 and $0.0008 per performance under Dr. Kendall's approach. *See* Kendall Decl. ¶ 12.

CONCLUSION

For the foregoing reasons, the Judges should deny SoundExchange's motions in limine.

[8] Reference Manual on Scientific Evidence, at p. 320 (cited by SoundExchange Kendall Mot. at 4 n.5). Other noted industry sources reach a similar conclusion. *See* Kendall Decl. ¶ 17.

Dated: April 6, 2015

Respectfully submitted,

iHEARTMEDIA, INC.

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CERTIFICATE OF SERVICE

I, Evan T. Leo, hereby certify that a copy of the foregoing PUBLIC version of the (i) iHeartMedia's Opposition To SoundExchange's Motions in Limine to Strike the Testimony of Professors Fischel and Lichtman Regarding the iHeartMedia-Warner Agreement and To Exclude the Written Rebuttal Testimony of Todd Kendall; (ii) Exhibit A; (iii) Declaration of Todd Kendall (iv) Declaration of Evan T. Leo; (v) Redaction Log have been served on this 6th day of April 2015 on the following persons:

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EXHIBIT A

Exhibit A

Exhibit Redacted In Its Entirety

Declaration of Todd Kendall

PUBLIC

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE 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)	)	Docket No. 14-CRB-0001-WR (2016-2020)

DECLARATION OF TODD D. KENDALL IN SUPPORT OF iHEARTMEDIA'S OPPOSITION TO SOUNDEXCHANGE'S MOTION IN LIMINE TO EXCLUDE THE WRITTEN REBUTTAL TESTIMONY OF TODD KENDALL

I, Todd D. Kendall, declare as follows:

1. I previously filed written rebuttal testimony in this matter, which includes my qualifications.[1] In that testimony, I summarized the results of a study I conducted, examining actual consumer behavior for 10,000 internet users over six months, including their online music listening behavior and their music purchasing behavior.[2] I concluded that:

- "As a general matter, increased listening to an online music listening service is positively associated with increased music sales by the same individual, consistent with a conclusion that these services promote music purchases more than they substitute for them; and

- Increased listening to non-interactive music listening services is far more strongly associated with increased music sales than is listening to interactive services. I considered various ways to estimate this differential promotion effect, but in all cases, the additional music sales associated with non-interactive listening are more than 15 times larger than the additional music sales associated with interactive listening."[3]

1. "Rebuttal Testimony of Todd D. Kendall," February 22, 2015 ("Kendall WRT"). My qualifications are described in that document, at ¶¶1-2 & Appendix A.
2. *Id.*, at ¶4.
3. *Id.*, at ¶5.

2. I understand that SoundExchange filed a motion to exclude my testimony, and that a declaration by SoundExchange's expert, David Blackburn, was attached to that motion.[4] I was asked by counsel for iHeartMedia to review the motion and Dr. Blackburn's declaration, and to briefly provide any responses I thought were appropriate to SoundExchange's allegations of "methodological errors" in my testimony.[5]

I. SOUNDEXCHANGE'S SPECULATION REGARDING DIFFERENCES BETWEEN DESKTOP AND MOBILE USERS

3. My testimony summarized an analysis of a large sample of data from 10,000 computer users purchased from a data vendor that (as I described in my testimony) is widely recognized as reliable and widely used in business applications and academic studies published in top peer-reviewed journals.[6] Nevertheless, SoundExchange complains that these data are incomplete because they do not track mobile device usage. SoundExchange speculates that "consumers exhibit different listening and purchasing behavior on desktop versus mobile devices," and then alleges that, in their hypothetical, my study might be "not reliable and [my] conclusions are invalid."[7]

4. Neither SoundExchange nor Dr. Blackburn provides, as far as I can tell, any theory or evidence to support any claim that the promotion effects of online streaming services on music sales are different for mobile and desktop users. SoundExchange merely suggests that

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4. "SoundExchange's Motion in Limine to Exclude the Written Rebuttal Testimony of Todd Kendall," April 1, 2015 ("SoundExchange Motion"); "Declaration of David Blackburn, Ph.D. in Support of SoundExchange's Motion in Limine to Exclude the Written Rebuttal Testimony of Todd Kendall," March 31, 2015 ("Blackburn Declaration").
5. SoundExchange Motion, at p. 1.
6. I describe these data and their reliability in business and academic usage in Kendall WRT, at ¶7.
7. SoundExchange Motion, at p. 6.

it is possible.[8] Moreover, I am not aware of any reason to believe, nor any convincing evidence to indicate, that promotion effects for mobile and desktop users would differ in a material way.

5. In fact, SoundExchange's expert, Dr. Blackburn, also relied on a sample of data purchased from [[[redacted]]] in his previously-submitted rebuttal testimony.[9] His sample was different from mine, but as far as I can tell, Dr. Blackburn's sample did not include data on mobile users either. Nevertheless, Dr. Blackburn did not in his rebuttal testimony argue that the results of his study were methodologically flawed or not generalizable for this reason. To the contrary, he used these data to come to strong conclusions (which I disagree with) regarding the promotional effect of non-interactive services.[10] As far as I can tell, SoundExchange seems to have been perfectly happy to rely on [[[redacted]]] data until they saw the results of my study.

6. At a more general level, all or almost all empirical studies sample only a portion of the population, and it is always theoretically possible that the portion of the population included in the sample differs in some way from the rest of the population. However, absent theoretical or empirical reasons to believe the sample is unrepresentative in a way that materially biases the results, there is no economic basis to ignore the evidence provided by the sample. For instance, I understand that SoundExchange's expert, Dr. Rubinfeld, analyzed differences between interactive and non-interactive services by focusing exclusively on subscription

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8. SoundExchange claims that data on mobile users are available from the same data source as I relied upon [[redacted]]] because of a reference to [[[redacted]]] in a Pandora investor presentation. SoundExchange Motion, at p. 3. The investor presentation references [[[redacted]]] data for calculations of "Average Monthly Mobile App Minutes per Visitor." *Id.* However, these are not the data I used in my study and they would not have provided any additional value to my study if I had acquired them. For my study, I required individual user-level monthly data on both usage of music streaming sites and music purchasing, as well as other user-level variables. As I stated in my testimony, "I understand that no comparable data for mobile devices are available from [[redacted]]]." Kendall WRT, at ¶8. I made that statement because this is precisely what I understand that [[redacted]]] told us when asked about the availability of data on mobile devices similar to those I used regarding desktop devices.

9. "Written Rebuttal Testimony of David Blackburn, Ph.D.," February 23, 2015 ("Blackburn WRT"), at ¶¶39-50.

10. *Id.*, at 50 (stating, "this comparison makes clear that non-interactive services are no more promotional than interactive services are.")

services,[11] even while recognizing that subscription services constitute less than four percent of non-interactive listenership.[12]

7. Finally, even if, despite the lack of theory or evidence to support its claims, SoundExchange was correct that mobile users had a different promotion effect than desktop users, my conclusion comparing promotion effects for interactive and non-interactive services would be unchanged. As I explained in my testimony, even if there were some factor – such as mobile usage in this case – that could bias the estimated relationship between music listening and music purchasing in my analysis, there is no reason to believe the bias generated by this factor would differ between interactive and non-interactive music listening. Hence, the comparison between the two that I analyzed would still be properly measured.[13] In fact, Dr. Blackburn made the very same point in defending the results of his analysis of [[[redacted]]] data in his rebuttal testimony.[14] In other words, SoundExchange's complaint, even if true, is completely irrelevant to this conclusion.

II. SOUNDEXCHANGE'S CLAIMS REGARDING STATISTICAL SIGNIFICANCE

8. Despite the fact that I reported standard statistical significance tests in all of the regression analyses presented in my testimony,[15] SoundExchange nevertheless claims that I should have also reported a different test that they deem relevant, namely a test of whether two of the coefficients in the regressions I ran were the same.[16] Dr. Blackburn claims to have performed the tests SoundExchange believes I should have reported, and reports p-values of 0.06

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11. "Corrected Testimony of Daniel L. Rubinfeld," October 6, 2014, at ¶207.
12. *Id.*, at ¶¶70 & 72.
13. Kendall WRT, at ¶23.
14. Blackburn WRT, at ¶50 ("Importantly, however, these biases are likely similar for interactive and non-interactive services. As such, the comparison of the estimated promotional effect of interactive services with that of non-interactive services can be made.")
15. Kendall WRT, at ¶¶19, 22, 25, & Exhibits D & E.
16. SoundExchange Motion, at p. 1.

or higher.[17] SoundExchange claims that this finding proves that my conclusions are "not statistically significant at the standard 5% level," and insinuates that I chose not to report the results of this test because they were "not helpful for him [me] and counsels against his [my] conclusions."[18]

9. As discussed below, I do not agree with SoundExchange's and Dr. Blackburn's claims regarding statistical significance tests. Regardless, there is a good reason why I did not report the results of a test like the one SoundExchange claims I should have reported: it's essentially *irrelevant* to my conclusion, as I demonstrate below. For instance, in Exhibit D, I report the results of a regression of music purchasing (dollars spent) against music listening to interactive and non-interactive services. The coefficient on the non-interactive listening variable is 0.0070, indicating that a 10 percent increase in non-interactive listening is associated with a 0.070 percent increase in purchasing, as I stated in my testimony.[19] The coefficient on the interactive listening variable is 0.0027.

10. From an econometric standpoint, the best available estimate of a statistic is reflected in the "point estimate," *i.e.*, the coefficients described above.[20] One can also test the statistical significance of these point estimates relative to zero or relative to each other, and such a test is intended to describe the confidence a researcher can have that the calculated point estimates are not simply the result of sampling or other random variation.[21] Dr. Blackburn claims that a statistical test he performed "fails to reject the hypothesis that the effect of non-interactive services on sales is the same as the effect of interactive services on sales at the

17. Blackburn Declaration, at ¶6.
18. SoundExchange Motion, at p. 9.
19. Kendall WRT, at Exhibit D and result described in ¶22.
20. William H. Greene (2012) *Econometric Analysis*, 7th edition, Prentice Hall, at pp. 51-54
21. *Id.*, at p. 109.

standard 5-percent level," but instead only satisfies a 6 percent cut-off.[22] In other words, Dr. Blackburn can only say that my results are distinguishable from normal variation in the data with 94 percent certainty, not 95 percent certainty. Despite this 94 percent finding, Dr. Blackburn nevertheless claims that my study does not demonstrate any difference in promotion effects between interactive and non-interactive services.[23]

11. As discussed below, Dr. Blackburn has provided no basis to indicate that the test he ran is the appropriate one in this situation, nor has he demonstrated that a 6-percent result somehow makes the regression results uninformative or materially different from a 5-percent result. Nevertheless, to demonstrate that SoundExchange's claims are ultimately irrelevant regardless of this econometric dispute, I considered an assumption that, in fact, the two coefficients really are exactly equal, *i.e.*, both the interactive and non-interactive listening coefficients in this regression are 0.0070. This seems to be what SoundExchange and Dr. Blackburn are speculating might be true.

12. In the version of my testimony that was filed with the Judges, I reported calculations indicating that, due to promotion effects, the market royalty rate for non-interactive services would be reduced by between $0.0004 and $0.0008 per performance, relative to the royalty rate for interactive services (all else equal).[24] I re-ran these calculations, taking as given Dr. Blackburn and SoundExchange's claim that the two coefficients in the regression presented in Exhibit D were actually the same, 0.0070. This changed the results only slightly: now, due to promotion effects, the market royalty rate for non-interactive services would be reduced by between $0.0004 and *$0.0007* per performance (all else equal).

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22. Blackburn Declaration, at ¶6.
23. *Id.*
24. Kendall WRT, at ¶35.

13. The reason this result changes so little is that the difference in regression coefficients on which Dr. Blackburn and SoundExchange focus is only one among a number of differences between interactive and non-interactive services, which all combine to determine the overall royalty rate effect of promotion reported in my testimony. These various differences are described in detail in my testimony,[25] and Exhibits F, G, and H walk through each of them carefully. SoundExchange ignores these other differences and improperly focuses on the regression coefficients alone.

14. Even focusing narrowly on these two regression coefficients, neither SoundExchange nor Dr. Blackburn provides any basis to reject my conclusions as flawed. I understand that Dr. Blackburn has not provided any programs or other backup materials to support his claims about statistical significance in my regressions. Therefore, I can only guess regarding exactly how he parameterized his tests. For instance, I do not know whether Dr. Blackburn assumed the number of "degrees of freedom" in his test was based on the total number of observations in my sample (60,000) or instead the number of "clusters" (i.e., individual users), which is 10,000. Assumptions like these can make a difference in the calculation of a statistical test, and there are often subtleties that must be considered in parameterizing a test in one way versus another. Similarly, my guess is that Dr. Blackburn performed a "two-tailed" test (*i.e.*, a test of the null hypothesis that the coefficients on the interactive and non-interactive listening variables are equal), instead of a "one-tailed" test (*i.e.*, a test of the null hypothesis that the coefficient on the non-interactive listening variable is greater than the coefficient on the interactive listening variable).[26] I ran such a one-tailed test on the

25. *Id.*, at ¶¶26, 27, & 29 – 35.
26. Dr. Blackburn's declaration repeatedly references a textbook called *Introductory Econometrics* by an author named only "Woodbridge." Blackburn Declaration, at footnotes 3 & 6. I am not familiar with this textbook, and Google and Amazon.com searches turn up no econometrics textbook written by anyone

interactive and non-interactive regression coefficients in the dollar value regression presented in Exhibit D of my testimony, and found a p-value of 0.03, which would more than satisfy the 5-percent standard that SoundExchange and Dr. Blackburn claim is key to my conclusions.

15. As I demonstrated above, my conclusions do not depend materially on whether these coefficients are in fact the same or different, so the p-value is irrelevant, but even if one assumes that whatever test Dr. Blackburn ran was the appropriate one, the very document SoundExchange cites in criticizing my study indicates that my results provide useful information to the Judges. Specifically, the *Reference Manual on Scientific Evidence* states that, "[a]lthough the 5% criterion is typical … less stringent 10% tests can also provide useful information."[27] A statistical test with a p-value of 0.06, which is the result Dr. Blackburn claims he found, would easily satisfy a 10 percent test (because 0.06 is less than 0.10).

16. More broadly, it is not me but SoundExchange and Dr. Blackburn who have demonstrated a failure to meet standards of scientific practice. Standard scientific and statistical practice, reflected in textbooks and widely-cited econometric methodology articles, specifically warns against the types of errors SoundExchange and Dr. Blackburn have committed in their motion and declaration, including their narrow focus on the statistical significance of regression coefficients at the expense of economic or practical significance, and their claims of a substantial difference in interpretation between p-values of 0.06 and 0.05.

17. For instance, the American Bar Association Section of Antitrust Law's *Econometrics* guide states that statistical significance thresholds like five or ten percent "are to

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named Woodbridge. I suspect that Dr. Blackburn meant to reference the textbook by the well-known Michigan State University econometrician Jeffrey Wooldridge. If so, then one-tailed tests like the one I ran are described on p. 124 of that text. Jeffrey M. Wooldridge (2013) *Introductory Econometrics: A Modern Approach* (5th ed.), South-Western Cengage Learning, at p. 124.

27. Federal Judicial Center (2011) *Reference Manual on Scientific Evidence* (3rd Ed.), National Academies Press, at p. 320 (cited in SoundExchange Motion, at p. 4, footnote 5).

some degree arbitrary" and says that "[a]n evaluation of the results from an econometric model should include an assessment of the practical or economic significance of the results in addition to formal tests of statistical significance."[28] Similarly, McCloskey (1985), writing in the *American Economic Review*, noted correctly that tests of statistical significance "can only affirm a likelihood of excessive scepticism in the face of errors arising from too small a sample. The test does *not* tell the economist whether a fitted coefficient is large or small in an economically significant sense."[29] The distinction between statistical significance and practical significance, which SoundExchange and Dr. Blackburn attempt to elide, is one of the most fundamental concepts in empirical economics.

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 the foregoing is true and correct.

April 6, 2015

Todd D. Kendall

28. ABA Section of Antitrust Law, *Econometrics*, Second Edition (2014), at pp. 98-99.
29. Donald N. McCloskey (1985) "The Loss Function Has Been Mislaid: The Rhetoric of Significance Tests," *American Economic Review* 75(2):201-5, at 201.

Declaration of Evan Leo

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE 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)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

DECLARATION AND CERTIFICATION OF EVAN T. LEO ON BEHALF OF iHEARTMEDIA, INC.

1. I am one of the counsel for iHeartMedia, Inc. ("iHeartMedia") in this proceeding, and I submit this Declaration in support of the restricted version of iHeartMedia's Opposition to SoundExchange's Motions in Limine To Strike the Testimony of Professors Fischel and Lichtman Regarding the iHeartMedia-Warner Agreement and To Exclude the Written Rebuttal Testimony of Todd Kendall.

2. On October 10, 2014, the CRB adopted a Protective Order that limits the disclosure of materials and information marked "RESTRICTED" to outside counsel of record in this proceeding and certain other parties described in subsection IV.B of the Protective Order. *See* Protective Order (Oct. 10, 2014). The Protective Order defines "confidential" information that may be labeled as "RESTRICTED" as "information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future." *Id.* The Protective Order further requires that any party producing such confidential information must "deliver with all Restricted materials an affidavit

or declaration . . . listing a description of all materials marked with the 'Restricted' stamp and the basis for the designation." *Id.*

3. I submit this declaration describing the materials iHeartMedia has designated "RESTRICTED" and the basis for those designations, in compliance with Sections IV.A of the Protective Order. I have determined to the best of my knowledge, information and belief that the materials described below, which are being produced to outside counsel of record in this proceeding, contain confidential information.

4. The confidential information comprises or relates to (1) contracts, contractual terms, and contract strategy that are proprietary, not available to the public, competitively sensitive, and subject to express confidentiality provisions with third parties; (2) financial projections, financial data, and business strategy that are proprietary, not available to the public, and commercially sensitive; and (3) material subject to third-party licenses or other limitations that restrict public disclosure.

5. The contractual, commercial and financial information described above must be treated as restricted confidential information in order to prevent business and competitive harm that would result from the disclosure of such information.

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 the foregoing is true and correct.

April 6, 2105

Respectfully submitted,

/s/ Evan T. Leo

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE 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)	)	**Docket No. 14-CRB-0001-WR (2016-2020)**

REDACTION LOG FOR iHEARTMEDIA'S OPPOSITION TO SOUNDEXCHANGE'S MOTIONS IN LIMINE TO STRIKE THE TESTIMONY OF PROFESSORS FISCHEL AND LICHTMAN REGARDING THE iHEARTMEDIA-WARNER AGREEMENT AND TO EXCLUDE THE WRITTEN REBUTTAL TESTIMONY OF TODD KENDALL

iHeartMedia hereby submits the following list of redactions from iHeartMedia's Opposition to SoundExchange's Motions in Limine To Strike the Testimony of Professors Fischel and Lichtman Regarding the iHeartMedia-Warner Agreement and To Exclude the Written Rebuttal Testimony of Todd Kendall filed April 6, 2015 ("iHeartMedia's Opposition to SoundExchange's Motions in Limine"), and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration of Evan T. Leo submitted herewith, that the listed redacted materials are properly designated confidential and "RESTRICTED."

Document	Page/Paragraph/ Line	General Description
iHeartMedia's Opposition to SoundExchange's Motions in Limine	pp. 4-5, para. 3, lines 5-8	Contains proprietary business information that is competitively sensitive.
	p. 6, para. 1, lines 1-2, 7-8	Contains information designated restricted by other participants.
	pp. 6-7, para. 2, lines 1-2, 4-6, 9-12	Contains information designated restricted by other participants.

Document	Page/Paragraph/ Line	General Description
Exhibit iHeartMedia's Opposition to SoundExchange's Motions in Limine – Exhibit A	Redacted in its entirety	Contains information designated restricted by other participants.
iHeartMedia's Opposition to SoundExchange's Motions in Limine – Declaration of Todd Kendall	p. 3, para. 5, lines 2, 8	Contains material subject to third-party licenses or other limitations that restrict public disclosure.
	p. 3, n.8, lines 2, 3, 8, 9	Contains material subject to third-party licenses or other limitations that restrict public disclosure.
	p. 4, para. 7, line 9	Contains material subject to third-party licenses or other limitations that restrict public disclosure.

April 6, 2015

Respectfully submitted,

/s/ Evan T. Leo

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