Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
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

INITIAL MEMORANDUM OF LAW OF THE
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM),
THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM), AND SCREEN ACTORS GUILD –
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA

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The American Association of Independent Music (A2IM), the American Federation of Musicians of the United States and Canada ("AFM") and the Screen Actors Guild – American Federation of Television and Radio Artists ("SAG-AFTRA") (collectively, "Interested Independent Record Label and Artists' Union Parties"), as individual constituents of SoundExchange, jointly file this brief in response to the referral dated September 11, 2015 by the Copyright Office Judges' ("CRJs") to the Copyright Register of a "novel material question of law" concerning whether the CRJs can set more than one rate for different categories of licensors in the pending Webcasting IV proceeding to set rates for compulsory licenses pursuant to 17 U.S. Code Section 114(f)(2)(B) for so-called non-interactive services for the term 2016-2020 (the "Referral Order"). The answer is: No.

The Interests of the Parties

A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of over 350 independently owned U.S. music labels. A2IM's members are small and medium-sized music enterprises (SMEs). A2IM's membership includes music labels of varying sizes within the SME definition and varying staffing levels across the United States, from Hawaii to Indiana to Florida, representing musical genres as diverse as its membership. Independent doesn't mean just small artists. For example, A2IM member labels have issued music releases by artists including Taylor Swift, Mumford & Sons, the Lumineers, Vampire Weekend, Adele, Paul McCartney and many others during the past several years. Some of these artists' tracks are distributed by the major recording companies (Universal, Warner and Sony), but it is independent labels who are the owners of the sound recordings and who retain the exclusive right, as label, to license the recordings and collect revenues stemming from non-interactive digital performances in the United States.

SAG-AFTRA is a national labor union representing more than 165,000 recording artists and vocalists, as well as actors, announcers, broadcasters, and other media professionals. SAG-AFTRA exists to secure the strongest protection for media artists in sound recordings, motion pictures, television, and most other forms of media, including all forms of digital media.

AFM is the largest union in the world representing professional musicians, with over 70,000 members in the United States and Canada. Musicians represented by the AFM record music for sound recordings, movie sound tracks, commercials and television and radio programming, as both featured and session musicians. AFM works to protect the economic interests of musicians and to give them a voice in cultural and policy debates that affect them at home and abroad.

Together, SAG-AFTRA and AFM ("Artists' Unions") represent the sound recording performers – including featured artists, session vocalists and session musicians ("Artists") – whose creative work brings American music to life. Without their recorded performances, there would be no sound recording industry, no digital musical services and no radio industry as we know it. The talent, drive and output of American Artists are at the heart of creative works of the greatest cultural and economic value to our country. In recognition of that fact, and as a result of the advocacy of the Artists' Unions, Section 114 provides that the Artists shall receive 50% of the compulsory statutory license proceeds, with 45% of those proceeds paid to featured artists directly by SoundExchange, and 5% paid to non-featured musicians and vocalists through the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund, the independent administrator for the non-featured artist share.

The Importance Of A Level Playing Field In The Section 114(f)(2)(B) License <u>To The Interested Independent Record Label and Artists' Union Parties</u>

The Section 114(f)(2)(B) compulsory statutory license, is the appropriate mechanism to ensure fair treatment of creators/investors and their Artists, with rate setting by the CRJs after a fair hearing of all economic factors. As previously determined by the Copyright Register in 1998 (as discussed more fully in Part I.C below), the statutory license should compensate each copyright holder (and the associated Artist share) equally for each performance of a recording.

The identity of the creator of the sound performance or the economic power of the investor in the sound recording should be irrelevant to rate setting. The only differentiation in pay should be based upon consumer demand for the music, *i.e.*, according to the number of streams that occur for each recording, and not according to who owns or controls the applicable rights. That is the basis of the compulsory statutory license; each individual jazz recording, blues recording, pop recording or classical recording should all have the same basic single usage value.

Independent record labels and Artists, who are individuals and small and medium sized businesses, want a statutory license that places all sound recording owners and their Artists on a level playing field. However, statutory price-differentiation based on category of licensors could arbitrarily tip the scales in favor of some participants over others, and it would create a number of unintended and expensive issues for all market participants, especially when there is no market remedy available to any licensor who is arbitrarily not granted a hypothetical "top rate" by the CRJs. This would be a significant additional distortion to the marketplace, dramatically amplifying the effect of the artificial statutory license on the market itself. It would also multiply the number of parties in rate proceedings and create incentives for the interested parties to increase their spending within those proceedings, creating the very inefficiency that the statute intended to ameliorate. Moreover, it would also arbitrarily favor those participants who are able to spend the most to make their case before the CRJs. Furthermore, if any rights holders believe they can achieve a different rate if left to their own devices in a market without a statutory rate, as discussed below, that is accommodated already by the statutory scheme via Section 114(f)(3).

Thus, the legislature could not have intended that government (as opposed to the market itself) would decide who the "winners" and "losers" are based on just a selection of cherry-picked market evidence submitted to the CRJs. If differentiating rates based on licensor was actually intended, and putting aside for the moment the fact that the statutory licensing system brings with it significant efficiencies that benefit all licensors and services, then one could argue that there would be no need for a statutory license at all. If two rates are better than one, then surely three are better than two, four are better than three, and so on. Why stop at anything less than the actual free market itself?

Nevertheless, Congress has elected to regulate licenses and maintain a compulsory license scheme that, despite compelling copyright owners to license their works without their consent, provides a trade-off in the form of efficiencies for all parties, including lower transactional and administrative costs. Furthermore, the recent United States Copyright Office's report "Copyright and the Music Marketplace" (hereafter, "Copyright Office Music Industry Report") describes the current system of Section 112 and 114 licenses as "one of the few things that seems to be working reasonably well in our licensing system" and further states that the "licensing framework itself is generally well regarded." *See* Copyright Office Music Industry Report, http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf , at 6-7 and 114. If the sound recording industry is to be regulated in this way, the playing field for all owners must, at least, be level.

ARGUMENT

The CRJs cannot permissibly set a rate under 114(f)(2)(B) that differentiates among copyright owners for a variety of structural legal, practical and historical reasons, as set forth below. Moreover, setting differential rates in the current proceeding, which is now closed, would violate due process and the strictures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 501 *et seq.*

I. Section 114(f)(2)(B) Does Not Permit Setting Different Rates For Different Copyright Owners

A. The Structure of Section 114(f)(2)(B), (C) and (3) Dictate The Legal Conclusion That Congress Did Not Intend The CRJs To Set Differential Rates Based On The Identity Of The Licensor

As a threshold matter, the relevant statue needs to be considered. The first part of Section 114(f)(2)B) provides, in pertinent part, that:

> The schedule of reasonable rates and terms determined by the Copyright Royalty Judges ***shall***, subject to paragraph (3), ***be***

> ***binding on all copyright owners*** of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution1 Act of 2004, or such other period as the parties may agree. Such rates and terms ***shall distinguish among the different types of eligible nonsubscription transmission services*** then in operation and shall include a minimum fee for each such type of service, ***such differences to be based on criteria including***, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.

17 U.S.C. §114(f)(2)(B) (emphasis added).

This first part of the relevant statutory provision makes clear that the CRJs may set different rates based on the type of service being licensed, but makes no distinction as between copyright holders. As such, Congress clearly was focused on differences in music use by different types of services, not on differences in the identity of copyright owners when it passed, and later amended, Section 114(f)(2).

Additionally, that Congress dictated that the rates "shall. . . be binding on *all* copyright owners," indicates that "all" can only mean "all" equally, unless some further refinement is required based on the remainder of the statute. But the statute only provides for such further refinement with respect to licensees -- not with respect to licensors.

The next part of Section 114(f)(2)(B) also structurally supports just a single rate for all copyright owners:

> In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties, including--

> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) ***the relative roles of the copyright owner and the transmitting entity*** in the copyrighted work and the service made available to the public with respect to ***relative*** creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. § 114(f)(2)(B) (emphasis added).

It is evident from this text that the phraseology of the term "relative roles" and "relative" in (ii) refers only to relative roles comparing owners and users, not relative investments and risks among owners.

Following this, Section 114(f)(2) adds sub-section (C), which again makes clear that the only appropriate distinctions to be made are among users, not owners:

> (C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service ***indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational***, for the purpose of determining reasonable terms and rates of royalty payments ***with respect to such new type of service*** for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for eligible nonsubscription services and new subscription services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

17 U.S.C. § 114(f)(2)(C) (emphasis added).

Finally, Section 114(f)(3) makes clear that to the extent individual copyright owners have the ability to directly license, they may do so and thus not be bound by the statutory rate:

> License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more

> entities performing sound recordings shall be given effect in lieu of any decision of the Librarian of Congress or determination by the Copyright Royalty Judges.

17 U.S.C. § 114(f)(3).

Accordingly, Section 114(f)(3) provides for a structural "off ramp" for those copyright owners who do not wish to adhere to the statutory rate and have the ability to insist on different rates or terms. While the statutory rate will, in practice, often operate as a ceiling, other economic terms can be added and services altered such that owners can offer additional value to services that result in rates that differ from the statutory rate.

Well-worn maxims of statutory construction, including the maxims of *noscitur a sociis*, *ejusdem generis*, and *casus omissus*, support only a reading that the CRJs may not differentiate between copyright owners in setting statutory compulsory license rates under Section 114(f)(2)(B).

First, the doctrine of *noscitur a sociis,* provides that words must be construed in conjunction with the other words and phrases used in the text of a statute. Translated as "words must be construed by the company that they keep," it is evident that where Congress intended the CRJs to make distinctions between things in Section 114(f)(2)(B) proceedings, it was only with respect to differences in the services that use music, and there was no intent to make distinctions among owners.

Next, the maxim of *ejudem generis* also dictates the same conclusion. Where a statute describes things of a particular class or kind accompanied by words of a generic character, the generic words will usually be limited to things of a kindred nature with those particularly enumerated, unless there is something in the context of the statute to the contrary. Here, again, the list of considerations for the CRJs to consider all point to making distinctions between users, but no language points to distinctions among owners. Under this doctrine, then, the CRJs should not reach to make distinctions among owners.[1]

Finally, the canon of *casus omissus pro omisso habendus est*. also applies here. This maxim provides that a person, object, or thing omitted from an enumeration in a statute must be held to have been omitted intentionally. Here, the omission of any stated basis to distinguish rates among owners evidences Congress' intent that the CRJs not do so.

B. Practical Issues Also Compel The Conclusion That Congress Did Not Intend To Permit Differential Rates Based On Ownership

There are also a number of practical issues that dictate a single statutory rate. For example, a service that performs a recording is constant, whereas the entity or person who owns or controls rights of any particular recording can be quite fluid and historically quite hard to keep track of, as ownership and distribution rights change over time. [2] And, licensees cannot necessarily distinguish between ownership and distribution rights, so, as discussed above, where some labels or persons or entities, including the major-owned distribution companies, distribute copyrighted sound recordings owned or controlled by other labels or persons, the licensee (or the collection agency) usually does not have information readily available and sufficient to make

[1] In addition, the doctrine of *expression unius est exclusio alterius* may apply here. This maxim stands for the proposition that the express mention of one person, thing, or consequence implies the exclusion of all others. Where a statute is expressly limited to certain matters, it may not, by interpretation or construction, be extended to other matters. This rule proceeds from the premise that the legislature would not have made specified enumerations in a statute had the intention been not to restrict its meaning and to confine its terms to those expressly mentioned.

[2] There is simply no effective way that the Interested Independent Record Label and Artists' Union Parties are aware of for licensees or the collection agent to identify recordings by the "nature of the licensor." Users rarely even report ISRC numbers; and they need SoundExchange's assistance in administering the handful of direct licenses that have been done. The Section 114 system assumes that licensees don't need to worry about determining who owns what, and by and large they have no way to do so.

that distinction.

When the statute was authored, it thus made sense that there was an intention only to differentiate based on the type of service offered by the licensee and not based on some vague characterization of the licensor, which after all, might vary during the term of the five year license. Accordingly, setting differential rates within a licensing system that lacks the tools necessary to distinguish promptly which label, entity or person controls which rights, would add additional levels of complexity to the overall licensing system. This would create significantly higher administrative costs for all parties, contrary to the intention of Congress.

Moreover, differentiation by licensor will only further distort the market. As a regulatory matter, the statutory license compels property rights owners involuntarily to forego the injunction they would otherwise be entitled to if the user did not agree to market place rates and terms. The statutory license thus already introduces a significant distortion in the market. If the CRJs set different rates for different licensors, that will only create a new dynamic, in which certain labels and their artists are advantaged over others.

By way of one example how such a result could occur, there likely would be an unintended effect of creating an incentive for the services to favor content that is cheaper to them, not necessarily rewarding those who are granted a higher rate. So if there was a higher rate for some owners, those owners might not even want a higher statutory rate because the servicer might then play more streams of a repertoire of a competitor that was granted a lower rate. This could potentially reduce the revenue that a label could earn from its copyrights, even with a higher statutory rate. There is also the risk that differential rates might create a secondary market, which would incentivize some rights holders stuck with lower rates to enter into distribution agreements with other rights holders who were granted a higher rate by the CRJs. It clearly could not have been the intent of Congress, when establishing the statutory license, to allow for the licensing system to arbitrarily grant some companies a self-perpetuating advantage over other companies and invite gaming the system in this way.

C. Historical Rate Setting Precedent Compels The Conclusion That Congress Did Not Intend To Permit Differential Rates By Categories Of Licensors

Finally, there is a set of settled expectations in rate proceedings that rates not be distinguished based on the identity of the licensor. First, in each of the four Webcasting proceedings, including the present Webcasting IV proceeding, there have been multiple users who submitted proposals but, with limited exceptions not relevant here, just one principal representative of the copyright owners. In all cases, no party proposed rates differentiated by category of sound recording owner.[3]

Indeed, the Interested Independent Record Label and Artists' Union Parties also are not aware of *any* rate proceeding presided over by the CRJs or its predecessors appointed pursuant to Chapter 8 of the Copyright Act (*see* 17 U.S.C. § 801(b)(1)-(2)), under any of Sections 111, 112, 114, 115, 116, 118, 119, or 1004 where a distinction was made as between owners of the same copyright right.

This settled expectation has not been challenged in the current proceeding. No party has

[3] *See* Docket No. 2000–9 CARP DTRA 1&2, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings ("**Webcasting I**"), 67 Fed. Reg. 45240, at 45240-42 (describing parties and rate proposed) (July 8, 2002); Docket No. 2005–1 CRB DTRA, Digital Performance Right in Sound Recordings and Ephemeral Recordings ("**Webcasting II**"), 72 Fed. Reg. 24084, at 24084 and 24088-90 (describing parties and rate proposed) (May 1, 2007); Docket No. 2009–1 CRB Webcasting III, Digital Performance Right in Sound Recordings and Ephemeral Recordings ("**Webcasting III**"), 76 Fed. Reg. 13026, at 13026-27 (describing parties and rate proposed) (March 9, 2011); *id.*, 79 Fed. Reg. 23102, at 23106 ("**Webcasting III, Determination After Remand**") (Apr. 25, 2014) (CRJs expressly stating, in referencing an expert's testimony, that the expert "properly" identified the "willing sellers" as the "the several record companies."); Docket No. 14-CRB-0001-WR, Digital Performance Right in Sound Recordings and Ephemeral Recordings, Notice of Participants and Case Scheduling Order ("**Webcasting IV**") (Feb. 9, 2014).

ever suggested that different owners should receive different rates. In fact, the opposite is true. Rather, the economists for both the services and the owners, to the extent their work is not redacted, all appear to have taken into account differing marketplace rates in arriving at the blended rates reflected in their proposals.

Indeed, in the first proceeding under the Digital Performance Right in Sound Recordings Acr of 1995, under the predecessor to the current version of Section 114(f) for then extant digital services, the Copyright Register made a specific finding on this point:[4]

> 2. Value of an individual performance of a sound recording.
>
> The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the ‘‘blanket license’’ for the right to perform the sound recording, without once considering ***the value of the individual performance***—a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, ***the Register has made a determination that each performance of each sound recording is of equal value*** and has included a term that incorporates this determination.
>
> To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. ***Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings***. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, ***each performance of each sound recording***

[4] The rates at issue in this proceeding involved three services, and consistent with all of the Webcasting proceedings, there was a single representative of all sound recording owners, in this case, the RIAA.

must be afforded equal value.[5]

Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added); *see also id.*, at 25414, Section 260.2(d): "During any given payment period, the value of each performance of each digital sound recording shall be the same."). The recent Copyright Office Music Industry Report also repeats this point. *See* Copyright Office Music Industry Report, at 114 (citing A2IM's May 23, 2014 comments, at 3); *see also id.* at 144 ("In the Office's view, there is no policy justification to demand that music creators subsidize those who seek to profit from their works.").

Although Section 114(f)(2) has been amended since 1998, the structural considerations considered in 1998 have not been altered. There is no reason, based on the current record, to alter this conclusion now. Indeed, as discussed in the next section, to do so would be unfair and would violate due process, and even more so because the Webcasting IV proceeding is now closed.

II. Even Assuming, *Arguendo*, Different Rates Were Permitted, The Copyright Office Cannot Apply Them To This Webcasting IV Proceeding, Which Is Closed

It bears repeating that no party to the Webcasting IV proceeding has advocated for or even suggested it would be appropriate for the CRJs to distinguish rates based on the identity of

[5] For completeness, the Register added:

> This determination does not alter the statutory provision that specifies how the copyright owner of the right to publicly perform the sound recording must allocate the statutory fees among the recording artists. See 17 U.S.C. 114(f)(2).

It is clear from context that the Register meant to refer to the then extant version of 114(g) rather than 114(f)(2).

the owners. Accordingly, the independent labels and Artists were satisfied that SoundExchange, acting through a single law firm, could represent all copyright owners and interested Artists equally in the proceeding, and there were no conflicts among the constituents of SoundExchange.

The selection by the parties interested in the proceeds of the Section 114 license of a single representative makes sense because they relied upon the prior history, discussed above, whereby there has never been a rate proceeding that made a distinction among the sound recording owners or owners of the same right and the Register declared that the value of each performance of each digital sound recording shall be the same. It is too late to change that standard now since the Webcasting IV proceeding is closed.

A. The Due Process Standard Under The Constitution and The APA

Due process under the United States Constitution and the Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing "shall be timely informed of … (the) law asserted." 5 U.S.C. § 554(b)(3). Courts have uniformly held that for an agency to meet this obligation where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the interested party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard.

In addition, adoption of a new rule here would significantly alter the burden of proof in the Webcasting IV proceeding (by requiring evidence from additional parties and access to a heavily redacted record that A2IM members and Artists do not currently have), which would be a violation of 5 U.S.C. § 556.

Numerous due process decisions in other agency adjudication processes bear this out. For example, in other intellectual property agency adjudicatory proceedings such as those in the patent office, the APA's requirement that the substantive rules not be changed midstream have been held to apply.

Most recently, in *Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co.*, Civ. No. 2014-1466, 2015 U.S. App. LEXIS 14826, *7 (Fed. Cir. Aug. 24, 2015), the Federal Circuit held that 5 U.S.C. § 554(b)(3) requires that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted"; that § 554(c) requires that agencies give "all interested parties opportunity for . . . the submission and consideration of facts [and] arguments . . . [and] hearing and decision on notice"; and § 556(d) "entitle[s]" an interested party "to submit rebuttal evidence." Indeed, the *Progressive* court made very clear that § 554(b)(3) means that "***an agency may not change theories in midstream*** without giving respondents reasonable notice of the change" and "the opportunity to present argument under the new theory." *Id.*, at *7 (emphasis added) (citing *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968)). *See also In re Biedermann*, 733 F.3d 329, 337 (Fed. Cir. 2013) (where PTAB, an adjudicatory body adopted different reasons to support a new ground of rejection of certain patent claims, the APA required the PTO "to provide prior notice to the applicant of all 'matters of fact and law asserted' prior to an appeal hearing before the Board,"; finding that failure to follow these procedures required the Court to vacate the Patent Trial and Appeal Board's adjudicatory decision); s*ee also Rambus Inc. v. Rea*, 731 F.3d 1248 (Fed. Cir. 2013).

The same holds true in other adjudicatory proceedings. For example, in *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals held that due process was violated where the petitioners' application for authorization to hold interlocking directorships in certain corporations was rejected. The court held that this rejection was procedurally defective because it stemmed from FERC's adoption, after the close of the evidentiary hearing, a new legal standard of proof which he was given no opportunity to meet.

It is not just the APA that requires this rigorous "no midstream change" rule. Supreme Court cases have long held that a new standard cannot be applied retroactively as a constitutional imperative of due process. *See, e.g., West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 70-71 (1935); *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 n.10 (1974) (cases collected). Here, there was no notice of a new standard to apply different rates to different categories of copyright owners in the now closed Webcasting IV proceeding.

B. Even Where Midstream Changes Can Be Applied Retroactively, <u>The Standard Is Difficult To Meet And Has Not Been Met Here</u>

A2IM's members and the Artists' Unions had no knowledge that they should consider entering the proceeding with their own separate representation and rate proposals to present appropriate evidence and arguments on the novel hypothetical standard posed by the CRJs. An opportunity to submit evidence on this issue would have been imperative because it affects the rights of A2IM's and the Artists' Unions' members to protect the value of their property rights and royalties in a situation where the government imposes a compulsory license.

The D.C. Circuit has been adamant, for over 40 years, that even where a midstream change is permissible, a rigorous standard must be met before that standard can be applied retroactively. That standard has not been met here. In the seminal case, *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972) ("*First Union*"), the D.C. Circuit held that an agency cannot give retroactive effect to a new legal standard adopted in the course of agency adjudication without taking into account the following five factors:

> (1) whether the particular case is one of first impression,
>
> (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law,

> (3) the extent to which the party against whom the new rule is applied relied on the former rule,
>
> (4) the degree of the burden which a retroactive order imposes on a party, and
>
> (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. See also Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1553-1554 (D.C. Cir. 1993) (in determining whether a rule announced in an agency adjudication may be given retroactive effect, we have typically considered the five factors set forth initially in [*Retail Union*]).

Taking all of these considerations into account, the D.C. Circuit in *Retail Union* found that the inequity of applying the new rule at issue in that case to the facts far outweighed the interests that might be furthered if it were applied. The same reasoning and result pertains here.

Applying the *Retail Union* factors, it is clear that even if the Register believes that Section 114(f)(2)(B) does not preclude separate rates based on the identity of the copyright owner, it cannot apply such differences in the closed Webcasting IV proceeding.

(1) The case is one of first impression.

Applying the first *Retail Union* factor, the CRJs have already indicated that this is a novel issue of law and thus one of first impression. In such circumstances, it is not appropriate to apply a rule retroactively. *See also Consolidated Edison v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency must adhere to its precedents in adjudicating cases before it; can only change the established law and apply newly created rules in the course of an adjudication where the rule is not arbitrary and capricious). New standards of law can only be applied retroactively to the parties in an ongoing adjudication, if (a) the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard **and** (b) the affected parties have not detrimentally relied on the established legal regime. *Id.* (citing numerous cases including *Retail Union*).

In *Consolidated Edison*, the D.C. Circuit also distinguished between policy statements and changes in substantive law; policy statements can be relied upon during a pending case because they do not carry the force of law, whereas like here, unannounced changes in the substantive standard of adjudication cannot be changed midstream. Here, the rates determined are "binding on all copyright owners," 17 U.S.C. §114(f)(2)(B), and thus the proposed change is substantive in nature. Application here would be the very definition of an impermissible "arbitrary and capricious" change, since, as discussed above, there is no basis in the record to make distinctions among many different types of owners and owner-distributor relationships. Plus, the independent labels, representing over a third of the market, did not have sufficiently independent representation of counsel at the pending proceeding to review the redacted agreements in the record in order to even know what differential rates might be proffered.

(2) The novel proposed standard represents an abrupt departure from well-established practice.

Second, as described above, setting differential rates based on categorizing owners would be an abrupt departure from past rate setting decisions and the Register's 1998 finding. There is no basis in the record as far as A2IM and the Artists' Unions can tell, to simply make two or more categories of owners, and from the order of reference, it is not even clear if that is what the CRJs are suggesting. Would the lines be drawn by market share? By designation as an independent or major? Independent labels and individual sound recording owners come from many stripes. Would they differentiate between majors? Should there be geographic distinctions? Distinctions based on whether the independently owned records are distributed by the owner, or by a major, or through other means? Can there be distinctions made based on genre of work (*i.e.*, does a popular top 40 song deserve a higher rate than a jazz recording with a specialty audience)? And so on. The CRJs may not make such arbitrary determinations. *See* 5

U.S.C. § 706(2)(A) (requiring courts to set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").[6]

(3) The interested parties relied on the former standard.

Third, independent labels clearly relied upon the existing rule because they did not put in evidence on such distinctions. The only statutory criteria that arguably could even be applied would be the criteria in 114(f)(2)(B)(ii): "creative contribution, technological contribution, capital investment, cost, and risk." As explained above, these distinctions are not meant to apply vis a vis different types of owners but rather as a comparator between users and all owners.

Nevertheless, had there been notice of the potential for distinctions to be made among owners, independent labels may have demonstrated that they provide a greater degree of creative contribution to recordings they own than the major recording companies, make better technical contributions, make greater capital investments on a track-by-track basis (in absolute or relative terms), and collectively take greater risks at higher costs than majors who have economies of scale.

Moreover, while, at first blush, it might seem that there are blunt lines that can be roughly described in conversation, in practice such differentiation — whether it is between "newer" or "older" recordings, between "major" and "independent" recordings, between different genres of music, or any other distinction that might be drawn — rapidly falls apart, especially when the role of digital distribution is taken into account.

Consider the following type of common occurrence: an artist on a particular "Label A" receives her rights back and decides to self-release her recordings on her own "Label B." In this instance it would not be reasonable, equitable or an accurate reflection of the market if Label B's

[6] This provision of the APA applies to copyright office administrative adjudications. *See* Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25398 (May 8, 1998).

recordings are earning a lower rate the day after it goes from Label A to being self-released.

Accordingly, there is no basis to apply a different statutory rate to different labels, and independent labels and artists relied on the past practice in this regard when they decided not to proffer separate evidence on differential rates.

(4) Retroactive application would impose a huge burden on the parties.

Fourth, a new proposed standard to differentiate rates by categories of ownership would impose significant burdens on independent labels, many of which are extremely small businesses, and the Artists' Unions, to engage their own counsel. That will always be true, but is particularly true with respect to retroactive application of a novel standard to the pending proceeding because there was no expectation, in establishing legal budgets, that such representation would be necessary.

At a minimum, the heavy redactions of the record are hugely problematic since the members of A2IM and the Artists' Unions do not know the terms of the "marketplace" deals under consideration. As one example, comparing the Warner-IHEART deal to the Merlin-Pandora deal, different constituents of SoundExchange (artists, independent labels and the major recording companies, and even entities and individuals within those broader categories) might have differing views of the reasons for such differences and the value of things like steering and other consideration of value aside from the rates.

Also, due to the redactions in the public record, the members of A2IM and the Artists' Unions do not know the terms of the deals Apple did with the majors (*see* Testimony of Darius Van Arman, Oct. 6, 2014, in Webcasting IV, at 12-13), and if those were used as some basis to differentiate rates, the members of A2IM and the Artists' Unions cannot even have an opportunity to explain why any differential rates in the marketplace should or should not be taken into account.

Setting differential rates would also impose a burden on SoundExchange in administering payments under Section 114(g). If a particular track is owned by an independent or individual, but distributed by another entity, the paying agent would have to make additional distinctions based on whether a track falls under one rate or the other. At the moment, there is no administrative process, or dispute resolution process which can rapidly clarify for a licensee what label, entity or person controls the digital performance right for a recording, and it is doubtful one could be developed by January 1, 2016 when the new rates are scheduled to go into effect.

(5) There is no statutory interest in applying a novel proposed standard.

Finally, with respect to the fifth *Retail Union* factor, there is no statutory interest in applying a new standard here over the reliance of the parties on the old standard. As noted, no party to the proceeding advocated for such a differentiating rule, and the economists for both the services and the owners, to the extent their work is not redacted, all appear to have taken into account differing marketplace rates in arriving at blended unitary rates in their proposals.

Moreover, whether inside or outside of the Webcasting IV proceeding, to the awareness of A2IM and the Artists' Unions, no user of music and no Congressional, Judicial or Executive branch entity has expressed an interest in applying differential rates. And, as discussed above, doing so could create an unfortunate dynamic in this and future rate settings, by potentially pitting labels against each other or creating user and/or ownership-licensor gamesmanship.

The current record simply doesn't provide the CRJs with an effective way to draw lines between licensors. The interested parties have no idea what sort of rules the CRJs would apply in determining who would get which rate; in practice any differentiation that might be drawn rapidly falls apart, especially when the role of digital distribution is taken into account. Moreover, because it is impossible to predict how the CRJs would actually draw lines, the interested parties cannot even know what information to provide that might assist in ensuring that application is not erratic and unpredictable, and unintended consequences do not result. The Section 114 license — and SoundExchange as an organization — is founded on the idea that everyone on the creator side — majors, indies, artists, unions — are pulling in the same direction.

There is no statutory reason to alter this efficient resource, and there would thus be significant prejudice to more than one-third of the affected copyright owners to change course at this point in the proceedings.

III. In The Unlikely Event The Register Approves The Use Of A New Standard For The Present Proceeding, Then At A Minimum Due Process Requires That The Evidentiary Record Be Reopened

The cases discussed above mandate that the Webcasting IV proceeding not be reopened now, and that even if the Register finds that more than one rate differentiated by owner hypothetically could be set, that the CRJs could only do so prospectively in the forthcoming Webcasting V proceeding for rates commencing in 2021.

However, in the unlikely event that the Register believes differential rates could be applied retroactively to the Webcasting IV proceeding, at a minimum, the Constitutional and APA case law discussed above (not restated here) all stand for the proposition that the record must be reopened for the members of A2IM and the Artists' Unions to be provided with additional due process.

This should include, at a minimum: (a) notice precisely of the evidence that the CRJs believe justify a differential rate and what categories of owners such rate or rates would apply to and what criteria the CRJs would consider in determining such differential rates; (b) an opportunity not only to supplement with additional argument based on the existing record that such differentials are or are not justified, but to supplement the record with additional evidence and renewed cross-examination of any pertinent witnesses; and (iii) consider having their own independent counsel free of potential conflict present their position if it is determined that there are differences in views by the categories of owners that the CRJs identify.

Among other things, as noted above, the members of A2IM and the Artists' Unions would need sufficient time to consider what evidence to present concerning differing creative and technical contributions among owners and artists, as well as the different relative capital investment, cost and risk as between different categories of owners and artists, if those are the criteria to be used. This record cannot be built quickly.

While the better position is that the proceeding should not be reopened, due process and fundamental fairness dictates that if a novel standard is declared permissible and applied retroactively, sufficient process be afforded for the interested parties to address the change.

CONCLUSION

For the foregoing reasons, the CRJs may not set rates under 17 U.S.C. § 114(f)(2)(B) that differ based on the identity of the owners of sound recordings. In the event that the Register disagrees, such differential rates may not be ordered in the current Webcasting IV proceeding retroactively without violating due process under the U.S. Constitution and the APA. Finally, in the unlikely situation where a novel standard is applied retroactively, due process requires that the Webcasting IV proceeding be re-opened, upon notice of the categories the CRJs are considering, for the interested parties to submit ***both*** new evidence and new argument.

DATED: October 2, 2015

Respectfully submitted,

David Leichtman (NY Bar No. 2824480)
Paul V. LiCalsi (NY Bar No. 1806934)
Robins Kaplan LLP
601 Lexington Avenue
Suite 3400
New York, NY 10022
Tel: (212) 980-7400
Fax: (212) 9807499
Email: dleichtman@robinskaplan.com
plicalsi@robinskaplan.com

Counsel for The American Association Of Independent Music (A2IM)

Patricia Polach (D.C. Bar No. 412889)
Bredhoff & Kaiser, PLLC
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
Tel: (202) 842-2600
Fax: (202) 842-1888
Email: ppolach@bredhoff.com

Counsel for The American Federation of Musicians of the United States and Canada (AFM), and Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA)

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
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

CERTIFICATE OF SERVICE

I, David Leichtman, hereby certify that a copy of the foregoing **INITIAL MEMORANDUM OF LAW OF THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM), THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM), AND SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA** has been served electronically by agreement of the parties on this 2nd day of October, 2015, with hard copy sent by first class mail upon the following parties:

Thomas Cheney idobi Network LLC 1941 Vermont Avenue, NW Washington, DC 20001 tom@idobi.com Tel: 202-297-6977 *idobi Network LLC*	David Oxenford Wilkinson Barker Knauer, LLP 2300 N Street, NW, Suite 700 Washington, DC 20037 doxenford@wbklaw.com Tel: 202-383-3337 Fax: 202-783-5851 *Counsel for Educational Media Foundation*
Kurt Hanson AccuRadio, LLC 65 E. Wacker Place, Suite 930 Chicago, IL 60601 kurt@accuradio.com Tel: 312-284-2440 Fax: 312-284-2450 *AccuRadio, LLC*	Jeffrey J. Jarmuth Law Offices of Jeffrey J. Jarmuth 34 E. Elm Street Chicago, IL 60611-1016 jeff.jarmuth@jarmuthlawoffices.com Phone: 312-335-9933 Fax: 312-822-1010 *Counsel for AccuRadio, LLC*

<table>
<tr><td>Amazon.com, Inc.
410 Terry Avenue North
Seattle, WA 98109-5210
Contract-legal@amazon.com
Tel: 206-266-1000
Fax: 206-266-7010

Amazon.com, Inc.</td><td>Kenneth Steinthal
Joseph Wetzel
King & Spalding LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
ksteinthal@kslaw.com
jwetzel@kslaw.com
Tel: 415-318-1200
Fax:415-318-1300

Ethan Davis
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
edavis@kslaw.com
Tel: 202-626-5400
Fax: 202-626-3737

Counsel for Amazon.com, Inc., National Public Radio, Inc. (NPR), and Rhapsody International, Inc.</td></tr>
<tr><td>Rhapsody International, Inc.
1420 Fifth Avenue, Suite 1500
Seattle, WA 98101
mreagan@rhapsody.com
Tel: 415-934-2033
Fax: 415-536-2940

Rhapsody International, Inc.</td><td>Gregory A. Lewis
National Public Radio, Inc. (NPR)
1111 North Capital Street, NE
Washington, DC 20002
glewis@npr.org
Tel: 202-513-2050
Fax: 202-513-3021

National Public Radio, Inc.</td></tr>
<tr><td>Lisa Widup
Robert Windom
David Weiskopf
Apple Inc.
1 Infinite Loop
Cupertino, CA 95014
lwidup@apple.com
windom@apple.com
dweiskopf@apple.com
Tel: 408-974-4954
Fax: 408-974-9105

Apple Inc.</td><td>Dale Cendali
Claudia Ray
Bonnie Jarrett
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
dale.cendali@kirkland.com
claudia.ray@kirkland.com
bonnie.jarrett@kirkland.com
Tel: 212-446-4800
Fax: 212-446-4900

Counsel for Apple Inc., Beats Music, LLC</td></tr>
</table>

Beats Music, LLC 555 19th Street San Francisco, CA 94107 tlenane@beatsmusic.com Tel: 917-294-4448 Fax: 510-295-2687 *Beats Music, LLC*	
Mark C. Hansen, John Thome, Evan T. Leo Scott H. Angstreich, Kevin J. Miller Caitlin S. Hall, Igor Helman, Leslie V. Pope Matthew R. Huppert Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, NW, Suite 400 Washington, DC 20036 mhansen@khhte.com jthome@khhte.com eleo@khhte.com sangstreich@khhte.com kmiller@khhte.com chall@khhte.com ihelman@khhte.com lpope@khhte.com mhuppert@khhte.com Tel: 202-326-7900 Fax: 202-326-7999 *Counsel for iHeartMedia, Inc. (Previously "Clear Channel Communications, Inc." Notice of name change 9-23-14)*	Donna K. Schneider Associate General Counsel, Litigation & IP iHeartMedia, Inc. 200 E. Basse Rd. San Antonio, TX 78209 donnaschneider@iheartmedia.com Tel: 210-832-3468 Fax: 210-832-3127 *iHeartMedia, Inc.*
David Golden Constantine Cannon LLP 1001 Pennsylvania Avenue, NW Suite 1300 North Washington, DC 20004 dgolden@constantinecannon.com Tel: 202-204-3500 Fax: 202-204-3501 *Counsel for College Broadcasters Inc.*	Catherine Gellis College Broadcasters Inc. P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com Tel: 202-642-2849 *Counsel for College Broadcasters Inc.*

Lee Knife Digital Media Association (DiMA) 1050 17th Street, NW Washington, DC 20036 lknife@digmedia.org Tel: 202-639-9509 Fax: 202-639-9504 *Digital Media Association*	Ari Shohat Digitally Imported Inc. 3457 Ringsby Court, Suite 212 Denver, CO 80216 ari@di.fm Tel: 303-997-2202 Fax: 303-997-1058 *Digitally Imported Inc.*
Kevin Blair Brian Gantman Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com Tel: 916-251-1600 Fax: 916-251-1731 *Educational Media Foundation*	George Johnson GEO Music Group 23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com Tel: 615-242-9999 *GEO Music Group*
William Malone 9117 Vendome Drive West Bethesda, MD 20817 malone@ieee.org Tel: 301-365-1175 *Harvard Radio Broadcasting Co., Inc. (WHRB)*	William Malone 40 Cobbler's Green 205 Main Street New Canaan, CT 06840 malone@ieee.org Tel: 203-966-4770 *Counsel for Intercollegiate Broadcasting System, Inc. and +Harvard Radio Broadcasting Co., Inc.*

Frederick Kass Intercollegiate Broadcasting System, Inc. (IBS) 367 Windsor Highway New Windsor, NY 12553-7900 ibs@ibsradio.org ibshq@aol.com Tel: 845-565-0003 Fax: 845-565-7446 *Intercollegiate Broadcasting System, Inc. (IBS)*	Bruce G. Joseph Karyn K. Ablin Michael L. Sturm Jennifer Elgin Jillian Volkmar Wiley Rein LLP 1776 K Street, NW Washington, DC 20006 bjoseph@wileyrein.com kablin@wileyrein.com mstunn@wileyrein.com jelgin@wileyrein.com jvolkmar@wileyrein.com Tel: 202-719-7000 Fax:202-719-7049 *Counsel for the National Association of Broadcasters (NAB) and National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)*
Jane Mago, Esq. Suzanne Head National Association of Broadcasters (NAB) 1771 N Street, NW Washington, D.C. 20036 jmago@nab.org shead@nab.org Tel: 202-429-5459 Fax: 202-775-3526 *National Association of Broadcasters (NAB)*	Russ Hauth, Executive Director Harv Hendrickson, Chairman 3003 Snelling Avenue, North Saint Paul, MN 55113 rush@salem.cc hphendrickson@unwsp.edu Tel: 651-631-5000 Fax: 651-631-5086 *National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)*
Christopher Harrison Pandora Media, Inc. 2101 Webster Street, Suite 1650 Oakland, CA 94612 charrison@pandora.com Tel: 510-858-3049 Fax: 510-451-4286 *Pandora Media, Inc.*	R. Bruce Rich Todd Larson Sabrina A. Perelman Weil, Gotshal & Manges LLP 767 Fifth Avenue New York, NY 10153 r.bruce.rich@weil.com todd.larson@weil.com sabrina.perelman@weil.com Tel: 212-310-8170 Fax: 212-310-8007 *Counsel for Pandora Media Inc.*

Gary R. Greenstein Wilson Sonsini Goodrich & Rosati 1700 K Street NW; 5th Floor Washington, D.C. 20006 ggreenstein@wsgr.com Tel: 202-973-8849 Fax: 202-973-8899 *Counsel for Pandora Media, Inc.*	Jacob B. Ebin Akin Gump Strauss Hauer & Feld LLP One Bryant Park Bank of America Tower New York, NY 10036-6745 jebin@akingump.com Tel: 212-872-7843 Fax: 212-872-1002 *Counsel for Pandora Media, Inc.*
Patrick Donnelly Sirius XM Radio, Inc. 1221 Avenue of the Americas 36th Floor New York, NY 10020 patrick.donnelly@siriusxm.com Tel: 212-584-5100 Fax: 212-584-5200 *Sirius XM Radio, Inc.*	Cynthia Greer Sirius XM Radio, Inc. 1500 Eckington Place, NE Washington, DC 20002 cynthia.greer@siriusxm.com Tel: 202-380-1476 Fax: 202-380-4592 *Sirius XM Radio, Inc.*
Paul Fakler Martin Cunniff Jackson Toof Arent Fox LLP 1675 Broadway New York, NY 10019 Paul.Fakler@arentfox.com Martin.Cunniff@arentfox.com Jackson.Toof@arentfox.com Tel: 212-484-3900 Fax: 212-484-3990 *Counsel for Sirius XM Radio Inc.*	Rusty Hodge SomaFM.com, LLC 2180 Bryant Street, Suite 208 San Francisco, CA 94110 rusty@somafm.com Tel: 415-552-7662 *SomaFM.com, LLC*

C. Colin Rushing General Counsel Bradley E. Prendergast Senior Counsel SoundExchange, Inc. 733 10th Street, NW, 10th Floor Washington, DC 20001 crushing@soundexchange.com bprendergast@soundexchange.com Tel: 202-640-5858 Fax: 202-640-5883 *Counsel for SoundExchange, Inc.*	Glenn Pomerantz Kelly Klaus Anjan Choudhury Melinda LeMoine Rose Ehler Munger, Tolles & Olson LLP 355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 glenn.pomerantz@mto.com kelly.klaus@mto.com anjan.choudhury@mto.com Melinda.LeMoine@mto.com Rose.ehler@mto.com Tel: 213-683-9100 Fax: 213-687-3702 *Counsel for SoundExchange, Inc.*

DATED: October 2, 2015

David Leichtman (NY Bar No. 2824480)
Robins Kaplan LLP
601 Lexington Avenue
Suite 3400
New York, NY 10022
Tel: (212) 980-7400
Fax: (212) 9807499
Email: dleichtman@robinskaplan.com

Counsel for The American Association Of Independent Music (A2IM)

UNITED STATES COPYRIGHT OFFICE

Copyright and the Music Marketplace

A REPORT OF THE REGISTER OF COPYRIGHTS

FEBRUARY 2015

united states copyright office

Copyright and the Music Marketplace

a report of the register of copyrights

february 2015

Preface

Few would dispute that music is culturally essential and economically important to the world we live in, but the reality is that both music creators and the innovators that support them are increasingly doing business in legal quicksand. As this report makes clear, this state of affairs neither furthers the copyright law nor befits a nation as creative as the United States.

The Copyright Office has previously highlighted the outmoded rules for the licensing of musical works and sound recordings as an area in significant need of reform.[1] Moreover, the Office has underscored the need for a comprehensive approach to copyright review and revision generally.[2] This is especially true in the case of music licensing—the problems in the music marketplace need to be evaluated as a whole, rather than as isolated or individual concerns of particular stakeholders.

While this view is hardly a surprising one for the U.S. Copyright Office, it is no simple matter to get one's arms around our complex system of music licensing, or to formulate potential avenues for change. For this reason, in early 2014, the Office undertook this study—with all industry participants invited to participate—to broadly consider the existing music marketplace.[3]

This report is the result of that effort. In addition to identifying the shortcomings of the current methods of licensing music in the United States, it offers an in-depth analysis of the law and industry practices, as well as a series of balanced recommendations to improve the music marketplace.

Acknowledgments

This report was prepared by the Office of the General Counsel, U.S. Copyright Office, following an exhaustive analysis of industry practices and considerable dialogue with music creators and the businesses that represent and invest in their interests, as well as music services and distributors and other interested parties. I am indebted to the staff who worked so tirelessly and thoughtfully to see the report to fruition and am confident that it will be a major resource for both Congress and the public.

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[1] *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 334-35 (2013) ("To make a long story short, Congress could make a real difference regarding gridlock in the music marketplace.").

[2] *See The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary,* 113th Cong. 6 (2013) (statement of Maria A. Pallante, Register of Copyrights).

[3] *See* 17 U.S.C. § 701(b)(4) (noting that the Register of Copyrights shall conduct studies regarding copyright and other matters arising under Title 17 or the administration of the Copyright Office).

I doubt the report would have been possible without Jacqueline C. Charlesworth, General Counsel and Associate Register, who oversaw the complex research, public hearings, writing, and recommendations. It is difficult to say with certainty whether it is Jacqueline's outstanding skill set as a lawyer or her extensive background in the music industry that proved most valuable for this project, but either way she has produced a report that is fair, rational, and forward-thinking, a fitting framework for a field as culturally beloved and economically important as music is to the United States.

I am similarly indebted to Sarang (Sy) Damle, Deputy General Counsel, who provided additional leadership and numerous critical contributions, including deft drafting, dispassionate analysis, and deep regard for the intersection of music and technology.

I am very grateful as well for the contributions of Regan Smith, Assistant General Counsel, who oversaw the editing process and the final production of the report. Assistant General Counsel Steve Ruwe helped with the hearings and provided substantial research and analysis, especially in the area of statutory licensing. Likewise, Attorney-Advisors Rick Marshall and John Riley assisted with hearings, research and writing; John also prepared the helpful and impressive charts on the licensing and ratesetting processes that are included in the report. I also wish to recognize Michelle Choe, who is with the Copyright Office as a Barbara A. Ringer Honors Program Fellow, for her substantial research and writing efforts. Donald Stevens, also a Ringer Fellow, assisted with particular questions of international law, and Law Clerks Andrew Moore, Kyle Petersen, Maryna Koberidze, and Megan Hartnett provided valuable research support, for which I am thankful.

As always, the Copyright Office received significant and timely support from colleagues outside of Washington, D.C. I so appreciate Professor Rush Hicks and Luke Gilfeather of the Mike Curb College of Entertainment and Music Business at Belmont University for facilitating the roundtable held in historic Columbia Studio A on Music Row in Nashville. My thanks and appreciation, as well, to Professors David Nimmer and Neil Netanel of the UCLA School of Law for helping to facilitate the Los Angeles roundtable, and Professor Barton Beebe of NYU Law School for his assistance with the New York City roundtable. I would particularly like to acknowledge Representative Jerrold Nadler, who visited the New York roundtable to share his views about the importance of these issues.

Last but not least, I am indebted to the many organizations and individuals who provided written commentary and shared their frustrations, insights, and experiences in the roundtable discussions. I hope this report helps.

Maria A. Pallante
Register of Copyrights and Director
U.S. Copyright Office

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APPENDICES

Executive Summary

The United States has the most innovative and influential music culture in the world, but much of the legal framework for licensing of music dates back to the early part of the twentieth century, long before the digital revolution in music. Our licensing system is founded on a view that the music marketplace requires a unique level of government regulation, much of it reflected in statutory licensing provisions of the Copyright Act. The Copyright Office believes that the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change.

There is a widespread perception that our licensing system is broken. Songwriters and recording artists are concerned that they cannot make a living under the existing structure, which raises serious and systemic concerns for the future. Music publishers and performance rights organizations are frustrated that so much of their licensing activity is subject to government control, so they are constrained in the marketplace. Record labels and digital services complain that the licensing process is burdensome and inefficient, making it difficult to innovate.

While there is general consensus that the system needs attention, there is less agreement as to what should be done. In this report, after reviewing the existing framework and stakeholders' views, the Copyright Office offers a series of guiding principles and preliminary recommendations for change. The Office's proposals are meant to be contemplated together, rather than individually. With this approach, the Office seeks to present a series of balanced tradeoffs among the interested parties to create a fairer, more efficient, and more rational system for all.

A. Guiding Principles

The Copyright Office's study revealed broad consensus among study participants on four key principles:

- Music creators should be fairly compensated for their contributions.
- The licensing process should be more efficient.
- Market participants should have access to authoritative data to identify and license sound recordings and musical works.
- Usage and payment information should be transparent and accessible to rightsowners.

In addition to the above, based on the record in the proceeding, the Office has identified several additional principles that it believes should also guide any process of reform. These are:

- Government licensing processes should aspire to treat like uses of music alike.
- Government supervision should enable voluntary transactions while still supporting collective solutions.
- Ratesetting and enforcement of antitrust laws should be separately managed and addressed.
- A single, market-oriented ratesetting standard should apply to all music uses under statutory licenses.

The Office was guided by all of the above principles in developing its recommendations, which are summarized below.

B. Licensing Parity and Fair Compensation

Questions of licensing parity and fair compensation are closely tied to the relative treatment of music rights and rightsholders under the law. The Copyright Office believes that any overhaul of our music licensing system should strive to achieve greater consistency in the way it regulates (or does not regulate) analogous platforms and uses. With that goal in mind, the Office recommends the following:

- <u>Regulate musical works and sound recordings in a consistent manner</u>. The Office believes that, at least in the digital realm, sound recordings and the underlying musical works should stand on more equal footing. The Copyright Office's approach would offer a free market alternative to musical work owners, in the form of an opt-out right to withdraw specific categories of rights from government oversight in key areas where sound recording owners enjoy such benefits—namely, interactive streaming uses and downloads.
- <u>Extend the public performance right in sound recordings to terrestrial radio broadcasts</u>. As the Copyright Office has stated repeatedly for many years, the United States should adopt a terrestrial performance right for sound recordings. Apart from being inequitable to rightsholders—including by curtailing the reciprocal flow of royalties into the United States—the exemption of terrestrial radio from royalty obligations harms competing satellite and internet radio providers who must pay for the use of sound recordings. Assuming Congress adopts a terrestrial performance right, it would seem only logical that terrestrial uses should be included under the section 112 and 114 licenses that govern internet and satellite radio.

- Fully federalize pre-1972 sound recordings. As it concluded in its 2011 report on the topic, the Copyright Office believes that pre-1972 recordings—currently protected only under state law—should be brought within the scope of federal copyright law, with the same rights, exceptions, and limitations as more recently created sound recordings. The lack of federal protection for pre-1972 sound recordings impedes a fair marketplace. Record labels and artists are not paid for performances of these works by digital services, which (at least until recent court rulings under state law) were considered free from copyright liability on the sound recording side. At the same time, the owners of the musical works embodied in these sound recordings are paid for the same uses.

- Adopt a uniform market-based ratesetting standard for all government rates. While in some cases the law provides that the ratesetting authority should attempt to emulate a free market, in other cases it imposes a more policy-oriented approach that has led to below-market rates. There is no policy justification for a standard that requires music creators to subsidize those who seek to profit from their works. Accordingly, the Office calls for adoption of a single rate standard—whether denominated "willing buyer/willing seller" or "fair market value"—that is designed to achieve rates that would be negotiated in an unconstrained market.

C. Government's Role in Music Licensing

The government's involvement in the music marketplace is unusual and expansive relative to other kinds of works created and disseminated under the Copyright Act. In many cases, it compels copyright owners to license their works at government-set rates. Regulation of music publishers and songwriters is particularly pervasive: the two most significant areas of their market (mechanical and performance licensing) are subject to mandatory licensing and ratesetting. Antitrust concerns have been the traditional rationale for government intervention. To be sure, where particular actors engage in anticompetitive conduct in violation of antitrust laws, that conduct should be addressed. But compulsory licensing does more than that—it removes choice and control from all copyright owners that seek to protect and maximize the value of their assets.

Regardless of the historical justifications for government intervention, the Copyright Office believes that in today's world, certain aspects of the compulsory licensing processes can and should be relaxed. The below recommendations offer some ideas for how that might be accomplished in the various areas of the market where there is government involvement.

Performing Rights Organizations ("PROs") and the Consent Decrees

Many important issues have been raised in the Department of Justice's ("DOJ's") parallel consideration of the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") consent decrees. The Office endorses that review, and—in light of the significant impact of the decrees in today's performance-driven music market—hopes it will result in a productive reconsideration of the 75-year-old decrees. At the same time, the Copyright Office observes that it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees. In the area of performance rights, the Office offers the following recommendations:

- Migrate all ratesetting to the Copyright Royalty Board ("CRB"). The Copyright Office believes that allegations of anticompetitive conduct are worthy of evaluation (and, if appropriate, remedial action) separate and apart from the determination of fair rates for musical works. Each of these two critical policy objectives merits government attention in its own right. Accordingly, the Office proposes that the function of establishing rates for the public performance of musical works—currently the province of federal district courts under the consent decrees—be migrated to the CRB. Industry ratesetting is, of course, a primary function of the CRB, and the CRB has the benefit of experience assessing a broader spectrum of rate-related questions than the federal rate courts, as well as specific expertise in copyright law and economics.

- Repeal section 114(i). Regardless of whether PRO ratesetting is migrated to the CRB, as further discussed below, the Copyright Office endorses the proposal that the prohibition in section 114(i) that currently prevents ratesetting tribunals from considering sound recording performance royalties be eliminated. Originally designed as a protective measure to benefit songwriters and publishers, it appears to be having the opposite effect.

- Streamline interim ratesetting and require immediate payment of royalties. Under the consent decrees, anyone who applies for a license has the right to perform musical works in a PRO's repertoire—without paying the PRO any compensation—pending the completion of negotiations or rate court proceedings resulting in an interim or final fee. The problem is exacerbated by the substantial burden and expense of litigating even an interim rate in federal court. The Copyright Office believes that to the extent a licensing entity is required to grant a license upon request, there should be a streamlined mechanism to set an interim royalty rate, and that the licensee should have to start paying immediately.

- Permit opt-out from PROs for interactive streaming. The Office believes that music publishers should be able to withdraw specific categories of licensing rights from their authorizations to the PROs. At least for now, the Office believes that withdrawal of performance rights should be limited to digital rights equivalent to those that the record labels are free to negotiate outside of sections 112 and 114—essentially, interactive streaming rights for digital services. Publishers that chose to opt out would be required to provide a list of their withdrawn works and other pertinent information to a central source, such as the general music rights organization ("GMRO") discussed below. In addition, the Office believes that songwriters affiliated with that publisher should retain the option of receiving their writer's share of royalties directly through their chosen licensing collective.

- <u>Allow bundled licensing of mechanical and performance rights</u>. Industry participants support increased bundling of rights—*i.e.*, reproduction, distribution, and performance rights—in unified licenses to facilitate greater licensing efficiency. Although bundling of sound recording rights occurs as a matter of course, various legal restrictions have prevented that same development on the musical work side. The Office believes that the government should pursue appropriate changes to the legal framework to encourage bundled licensing, which could eliminate redundant resources on the part of both licensors and licensees. This could include allowing the PROs and other entities to become music rights organizations ("MROs"), which would be authorized to license both performance and mechanical rights.

Mechanical Licensing and Section 115

Study participants highlighted the serious shortcomings of the 106-year old compulsory license for "mechanical" reproductions of musical works (*e.g.*, CDs, vinyl records and downloads) in section 115. On the copyright owner side, parties complained that the mandatory nature of the license does not permit them to control their works or seek higher royalties. On the licensee side, parties criticized section 115's requirement of song-by-song licensing, a daunting task in a world where online providers seek licenses for millions of works. In light of these concerns, the Office offers the following recommendations:

- <u>Permit collective licensing of mechanical rights but with an opt-out right for interactive streaming and download uses</u>. The Office is sympathetic to music publishers' arguments for elimination of the compulsory license in section 115 in favor of free market negotiations. But in light of the diffuse ownership of musical works, it seems clear that some sort of collective system would be necessary even in section 115's absence. The Office thus believes that, rather than eliminating section 115 altogether, section 115 should instead become the basis of a more flexible collective licensing system that will presumptively cover all mechanical uses except to the extent individual music publishers choose to opt out. At least initially, the mechanical opt-out right would extend to interactive streaming rights and downloading activities—uses where sound recording owners operate in the free market (but not physical goods, which have somewhat distinct licensing practices). As envisioned by the Office, the collective system would include MROs (as noted, with the ability to represent both performance and mechanical rights), a GMRO (that would collect for works or shares not represented by an MRO or covered by a direct deal), and individual publishers that choose to opt out. Licensees could thus achieve end-to-end coverage through the combination of MROs, the GMRO, and direct licensors.

- Establish blanket licensing for digital uses under section 115. To further facilitate the rights clearance process and eliminate user concerns about liability to unknown rightsowners, the Office believes that mechanical licensing, like performance licensing, should be offered on a blanket basis by those that administer it. This would mean that a licensee would need only to file a single notice with an MRO to obtain a repertoire-wide performance and mechanical license from that licensing entity. The move to a blanket system would allow marketplace entrants to launch their services—and begin paying royalties—more quickly.

- CRB ratesetting on an "as-needed" basis. The Office believes that the CRB should continue to set rates under the section 115 license, though with an important modification: as is now the case with performance rights, rather than establish rates across the board every five years, the CRB would set rates for particular uses only on an as-needed basis when an MRO and licensee were unsuccessful in reaching agreement. Other interested parties (such as other MROs and other users) could choose to join the relevant proceeding, in which case those parties would be bound by the CRB-determined rate.

- Ensure copyright owners possess audit rights. Publishers have long complained about the lack of an audit right under section 115. In that regard, section 115 is an outlier—such audit rights have been recognized under other statutory licenses. The Office believes that the mechanical licensing system should be amended to provide for an express audit right, with the particular logistics to be implemented through regulation.

- Maintain audiovisual uses in the free market. Record companies proposed extending compulsory blanket licensing to certain consumer audiovisual products—such as music videos, album cover videos, and lyric videos—uses that have traditionally required a synchronization license negotiated in the free market. The Office is sympathetic to the labels' concerns, but cannot at this time recommend that consumer synch uses be incorporated into a government-supervised licensing regime. The Office does not perceive a market failure that justifies creation of a new compulsory license, and the market appears to be responding to licensing needs for consumer audiovisual products.

Section 112 and 114 Licenses

One of the few things that seems to be working reasonably well in our licensing system is the statutory license regime under sections 112 and 114, which permits qualifying digital services to engage in noninteractive streaming activities at a CRB-determined (or otherwise agreed) rate. Although the differing ratesetting standards for these licenses—as well as some of the rates established under those standards—have been a source of controversy, from the record in this study, the licensing framework itself is generally well regarded. Notwithstanding the comparatively positive reviews of the section 112 and 114 licenses, there are a few relatively minor improvements that the Office believes should be considered:

- Consider ratesetting distinction between custom and noncustom radio. In 2009, the Second Circuit ruled that personalized radio services are eligible for the section 112 and 114 licenses. Although the Office has some reservations about that interpretation, there appears to be no overwhelming call to remove custom radio from the statutory regime. Nonetheless, within that regime, it may be appropriate to distinguish between custom and noncustom radio, as the substitutional effect of personalized radio on potentially competing interactive streaming services may be greater than that of services offering a completely noncustomized experience. While the issue could be addressed legislatively, this does not appear to be necessary, as the CRB has the discretion to set different rate tiers today when the record supports such an outcome.

- Allow fine-tuning of technical aspects of the license through the exercise of regulatory authority. Internet services have criticized a number of the detailed limitations that section 114 imposes on compulsory licensees. These include the so-called "sound recording performance complement," a restriction that limits the frequency with which songs from the same album or by the same artist may be played by the service, as well as a prohibition against announcing upcoming selections. But for the fact that they appear in the statute itself, such details would seem to be more appropriately the province of regulation. As suggested more generally below, Congress may wish to commit nuances like these to administrative oversight by the Copyright Office.

- Consider permitting SoundExchange to process record producer payments. Record producers—who make valuable creative contributions to sound recordings—are not among the parties entitled by statute to direct payment by SoundExchange. In some cases, an artist may provide a letter of direction requesting SoundExchange to pay the producer's share of income from the artist royalties collected by SoundExchange, which SoundExchange will honor. It has been suggested that this informal practice be recognized through a statutory amendment. Though it would be beneficial to hear more from artists on this issue, the Office agrees that in many instances producers are integral creators and that the proposal therefore merits consideration.

- Allow SoundExchange to terminate noncompliant licensees. Unlike section 115, sections 112 and 114 do not include a right to terminate a licensee that fails to account for and pay royalties. The Office does not see a justification for continued licensing of a user that is not meeting its obligations, and agrees that the section 112 and 114 statutory licenses should be amended to include a termination provision akin to that in section 115.

Public Broadcaster Statutory License

- Create a unified statutory licensing scheme for public broadcasters. Public broadcasters must engage in a multitude of negotiations and ratesetting proceedings in different fora to clear rights for their over-the-air and online activities. Especially in light of the relatively low royalty rates paid by public broadcasters, Office suggests that the ratesetting processes applicable to public broadcasters be consolidated within a unified license structure under section 118 under the auspices of the CRB, where they would likely be much more efficiently resolved.

D. Licensing Efficiency and Transparency

The Office believes that accurate, comprehensive, and accessible data, and increased transparency, are essential to a better functioning music licensing system. Authoritative data would benefit all participants in the marketplace for sound recordings and musical works, and facilitate a more efficient system. In addition, it is essential to make reliable usage and payment information available to rightsholders. To achieve these twin goals, the Office offers the following recommendations:

- Establish incentives through the statutory licensing scheme for existing market players to create an authoritative public database. The Copyright Office believes that any solution to the music data problem should not be built by the government but should instead leverage existing industry resources. Accordingly, the Office recommends that the government establish incentives through the statutory licensing regime to encourage private actors to coordinate their efforts and contribute to a publicly accessible and authoritative database, including by encouraging the adoption and dissemination of universal data standards. To facilitate this process, the Copyright Office should provide regulatory oversight regarding standards and goals.

- Establish transparency in direct deals. Throughout the study, a paramount concern of songwriters and recording artists has been transparency in the reporting and payment of writer and artist shares of royalties, especially in the context of direct deals negotiated by publishers and labels outside of the PROs and SoundExchange, which may involve substantial advances or equity arrangements. These concerns should be addressed as part of any updated licensing framework, especially one that allows publishers to opt out of the statutory licensing system and pursue direct negotiations. In the case of direct deals for rights covered by an MRO or SoundExchange, the Office recommends allowing songwriters and artists to elect to receive their shares of royalties from the licensee through their chosen licensing entity.

E. An Updated Music Licensing System

To implement the principles and recommendations laid out above, the Copyright Office is proposing an updated framework for the licensing of musical works. The basic components of this proposal are as follows:

- <u>MROs</u>. Under the Office's proposal, except to the extent they chose to opt out of the blanket statutory system, publishers and songwriters would license their public performance and mechanical rights through MROs.
  - An MRO could be any entity representing the musical works of publishers and songwriters with a market share in the mechanical and/or performance market above a certain minimum threshold, for example, 5%. Existing rights organizations, such as ASCAP, BMI, HFA and others, could thus qualify as MROs.
  - Each MRO would enjoy an antitrust exemption to negotiate performance and mechanical licenses collectively on behalf of its members—as would licensee groups negotiating with the MROs—with the CRB available to establish a rate in case of a dispute. But MROs could not coordinate with one another and would be subject to at least routine antitrust oversight.
  - Each MRO would be required to supply a complete list of the publishers, works, percentage shares and rights it represented, as well as the MRO's licensing contact information, to the GMRO, and would be obligated to keep that information current. MROs would not have to share all of their data for purposes of the public database. For example, there would be no need for an MRO to provide contact information for its members (other than those that opted out) since the MRO would be responsible for distributing royalties under the licenses it issued.
  - MROs would also be responsible for notifying the GMRO of any members that had exercised opt-out rights by providing the relevant opt-out information, including where a direct license might be sought, so potential licensees would know where to go for license authority.
- <u>GMRO</u>. Even though most licensing activity would be carried out by the MROs and directly licensing publishers, the hub of the new licensing structure would be the "general" MRO or GMRO. The GMRO would have certain important responsibilities:
  - First, the GMRO would be responsible for maintaining a publicly accessible database of musical works represented by each MRO, which

would incorporate data supplied by the MROs and other authoritative sources. The GMRO would actively gather missing data, reconcile conflicting data, and correct flawed data, and would also provide a process to handle competing ownership claims. In addition to musical work data, the GMRO would also incorporate sound recording data—presumably from SoundExchange—into the public database, and be responsible for developing additional data that matched sound recordings with musical works to facilitate more efficient licensing.

- Second, the GMRO would also serve as the default licensing and collection agent for musical works (or shares of works) that licensees were unable to associate with an MRO or opt-out publisher. Services with usage-based payment obligations would transmit records of use for unmatched works, along with associated payments and an administrative fee, to the GMRO. The GMRO would then attempt to identify the MRO or individual copyright owners and, if successful, pay the royalties out. If unsuccessful, the GMRO would add the usage record to a public unclaimed royalties list and hold the funds for some period of time—*e.g.*, three years—to see if a claimant came forward. As is the case with SoundExchange, after that period, the GMRO could use any remaining unclaimed funds to help offset the costs of its operations.

- <u>GMRO funding and resources</u>. The Copyright Office believes that both copyright owners and users should provide support for the GMRO, as both groups will benefit from its activities. Under the Office's proposal, every MRO, as well as SoundExchange, would be required to contribute key elements of data to create and maintain a centralized music database. MROs would be responsible for allocating and distributing the vast majority of royalties. In exchange for these contributions on the part of copyright owners, the Office believes that most direct financial support for the GMRO should come from fees charged to users of the section 112, 114 and 115 licenses. Thus, although licensees would be paying royalties to MROs and individual publishers directly—and SoundExchange as well—they would have a separate obligation to pay a licensing surcharge to the GMRO. The surcharge to be paid by statutory licensees could be determined by the CRB based on the GMRO's costs (and without consideration of royalty rates) through a separate administrative process. The surcharge would be offset by administrative fees and other sources of income for the GMRO, including any "black box" funds unclaimed by copyright owners.

- <u>Copyright Royalty Board improvements</u>. Under the Copyright Office's proposal, ratesetting by the CRB would shift from a five-year cycle to a system under which the CRB would step in only as necessary when an MRO or SoundExchange and a licensee could not agree on a rate. The new model would create opportunities for combined ratesetting proceedings for noninteractive services (*e.g.*, internet, terrestrial, and satellite radio) encompassing both sound recordings and musical works. The Office recommends other procedural adjustments to the CRB as well—including adjustments to the statutorily prescribed litigation process and its settlement procedures. It would also be worthwhile to remove unnecessary procedural details in the statute that are better left to regulation by the CRB.

- <u>Regulatory implementation</u>. The Copyright Office recommends that if Congress acts to restructure the music licensing system, it would be most productive for the legislation to set out the essential elements of the updated system but leave the details to be implemented through regulation by the Copyright Office and, in ratesetting matters, the CRB. Such a construct would likely be more realistic to enact than a highly detailed statutory prescription—especially in the case of music licensing, where the particulars can be overwhelming.

- <u>Further evaluation</u>. Should Congress choose to embark upon a series of changes to the licensing system as described above, the Office recommends that the new system be evaluated by the Copyright Office after it has been in operation for a period of several years. Assuming the new licensing framework includes an opt-out mechanism, the efficacy of that process would be of particular interest. Congress could choose to narrow or expand opt-out rights as appropriate.

I. Introduction

The United States has the most innovative and influential music culture in the world, but our system for enabling the paid use of music—and ensuring compensation for its creators—lags far behind. The structures that evolved in the previous century to facilitate the lawful exploitation of musical works and sound recordings, while perhaps adequate for the era of discs and tapes, are under significant stress. From a copyright perspective, we are trying to deliver bits and bytes through a Victrola.

It is a testament to the irresistible power of music that industry and market participants have done their best to adapt the old methods, including pre-digital government policies, to embrace current technologies and consumer expectations. But the costs of failing to update our outmoded licensing methods are escalating. Even when distributors are perfectly willing to pay licensing fees, they may find it difficult to identify the owners of the music they use. Those seeking to launch new delivery platforms are constrained—and sometimes even defeated—by the complexities and expense of convoluted clearance processes. Perhaps most concerning is that many deeply talented songwriters and developing artists now question whether a career in music is realistic under the current regime.

As might be expected, many of the issues raised by the participants in this study of the music marketplace revolved around government mandates, in particular the role of the antitrust consent decrees governing the licensing of performance rights in musical works by performing rights organizations ("PROs"), the section 115 "mechanical" license for the reproduction and distribution of musical works, and the section 112 and 114 licenses for the digital performance of sound recordings.

There is a profound conviction on the part of music publishers and songwriters that government regulation of the rates for the reproduction, distribution, and public performance of musical works has significantly depressed the rates that would otherwise be paid for those uses in an unrestricted marketplace. The standards employed for the section 115 and PRO ratesetting proceedings—section 801(b)(1)'s four-factor test for mechanical uses and the "reasonable fee" standard of the consent decrees (which cannot take into account sound recording performance rates)—are perceived as producing below-market rates, especially when compared to rates paid for analogous uses of sound recordings. On the other side of the fence, licensees urge that government oversight is essential to forestall alleged monopolistic practices on the part of the PROs and large music publishers.

The PROs are viewed as both as a blessing and a threat. Licensees laud the efficiencies of the blanket licenses they offer while at the same time bemoaning the societies' perceived bargaining position as a result of that very breadth. Songwriters, for their part, are deeply concerned about the potential loss of transparency in reporting and payment, should major publishers opt to withdraw from the PROs and license performance rights directly—as some publishers have suggested they may do in a quest for higher rates than those set by the rate courts under the consent decrees.

With respect to the section 112 and 114 licenses for the performance of sound recordings, the debate has centered on the disparate rate standards for differing classes of digital users—the more malleable 801(b)(1) standard that is applied to satellite radio versus the willing buyer/willing seller standard for competing online radio services—as well as the overall burden and expense of the CRB ratesetting process. Internet radio providers complain that the CRB process has yielded rates that have required them to seek congressional intervention.

There are differing opinions as to how to handle pre-1972 sound recordings, which are currently outside of the ambit of federal copyright law but protected in varying degrees under differing state regimes. Some concur with the Copyright Office's 2011 recommendation that pre-1972 recordings should be brought fully within the scope of federal copyright protection, but others argue for a more limited fix or no fix at all. Meanwhile, since the inception of the study, three courts have held that the public performance of pre-1972 recordings is subject to protection under applicable state law, further complicating the licensing landscape.

And last but not least is the longstanding issue of whether terrestrial radio broadcasters should continue to be exempted under the Copyright Act from paying royalties for the performances of sound recordings that drive their multibillion dollar industry—a debate that has been sharpened as online radio services seek to compete with their terrestrial counterparts.

At the same time, stakeholders widely acknowledge that there is a need for universal data standards to facilitate the identification of musical works and sound recordings, and the licensing process generally. In particular, there is broad recognition of the necessity for reliable data to match sound recordings to the musical works they embody. But there is discord as to how to address these problems. Some market participants are willing to share the data they accumulate with the world, while others are reluctant to do so.

Despite the wide range of viewpoints expressed in the course of this study, the Office's review of the issues has confirmed one overarching point: that our music licensing system is in need of repair. The question, then, is how to fix it, in light of the often conflicting objectives of longtime industry participants with vested interests in traditional business models and infrastructure; digital distributors that do not produce or own music and for which music represents merely a cost of doing business; consumers whose appetite for music through varied platforms and devices only continues to grow; and individual creators whose very livelihoods are at stake. This report seeks to chart a path forward.

Given their complexity and significance, many of the issues addressed below would themselves be worthy of a separate report. But instead of focusing on each particular licensing process as an isolated problem, the goal of this study is to illuminate the system as a whole—including interrelated issues and concerns—to see if there may be a balanced set of changes that could provide benefits to all. Rather than present a detailed legislative proposal, then, with all of the intricacy that would entail, the report instead suggests some key principles and modifications that the Copyright Office believes would be useful in framing a better system.

The ideas described below are thus intended to serve as a useful framework for continuing discussion of how we might reinvent our music licensing system, rather than a fully developed answer. As Congress considers a range of potential amendments to our copyright laws, the Office hopes that interested parties will take advantage of this unique opportunity to improve our music licensing process for the digital age.

A. Study History

In April 2013, Congress, led by the House Judiciary Committee, began a comprehensive review of the nation's copyright laws to evaluate "whether the laws are still working in the digital age."[1] The myriad issues affecting the music industry have been a significant focus of that review.[2]

The Office initiated this study to illuminate critical concerns of the music marketplace and to identify potential avenues for change. On March 17, 2014, the Office published an initial Notice of Inquiry in the Federal Register (the "First Notice") requesting public comment on twenty-four subjects affecting the existing music licensing environment.[3]

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[1] Press Release, H. Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Laws (Apr. 24, 2013), http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw.

[2] Of the seventeen hearings that have been held so far as part of the congressional review, two were specifically dedicated to music licensing. *Music Licensing Under Title 17 (Part I & II): Hearing Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) ("*Music Licensing Hearings*"). Music industry representatives also participated in a number of other hearings. *See, e.g., Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014).

[3] Music Licensing Study: Notice and Request for Public Comment, 78 Fed. Reg. 14,739 (Mar. 17, 2014). This Notice of Inquiry, along with the Office's second Notice of Inquiry and Notice of Public Roundtables, are attached as Appendix A. A list of the parties who responded to the

The Office received 84 written comments in response to its notice, spanning a broad spectrum of interested parties, including music industry associations, service providers and technology companies, legal scholars, public interest groups, and individual artists and creators.[4]

In June 2014, the Office conducted three two-day public roundtables in Nashville, Los Angeles, and New York City.[5] The roundtables provided participants with the opportunity to share their views on the topics identified in the First Notice and other issues pertaining to our music licensing system and how it might be improved.

In addition, on July 23, 2014, the Office published a second Notice of Inquiry ("Second Notice") requesting further comments on a number of significant issues raised in earlier comments and discussed at the roundtables.[6] The Office received 51 substantive written comments in response to the Second Notice, again representing a wide variety of viewpoints, on these subjects.[7]

B. Licensing and Ratesetting Charts

The Office has prepared a series of charts to illustrate our current systems for licensing of musical works and sound recordings and the ratesetting procedures under the several statutory licenses, as well as how those processes would be altered as a result of the modifications proposed by the Office. These appear at the back of the study in Appendix D. The Office hopes that these charts will prove helpful to readers as they make their way through this report.

Office's Notices of Inquiry, along with a list of participants in the Office's public roundtables, is attached as Appendix B.

[4] The comments received in response to the First Notice are available on the Copyright Office website at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/index.html. References to these comments in this document are by party name (abbreviated where appropriate) followed by "First Notice Comments" (*e.g.*, "DiMA First Notice Comments").

[5] *See* Music Licensing Study, 79 Fed. Reg. 25,626 (May 5, 2014). Transcripts of the proceedings at each of the three roundtables are available on the Copyright Office website at http://copyright.gov/docs/musiclicensingstudy/transcripts/.

[6] Music Licensing Study: Second Request for Comments, 79 Fed. Reg. 42,833 (July 23, 2014).

[7] The comments received in response to the Second Notice are available on the Copyright Office website at http://copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/extension_comments/. References to these comments in this document are by party name (abbreviated where appropriate) followed by "Second Notice Comments" (*e.g.*, "RIAA Second Notice Comments").

II. Music Licensing Landscape

Our rules for music licensing are complex and daunting even for those familiar with the terrain. To begin with, our licensing structures must address two different species of copyright—the sound recording and the musical work—residing in a single product. Each of these separate copyrights, in turn, itself represents several different exclusive rights that may be separately licensed, including the rights of reproduction, distribution, public performance, as well as the right to synchronize works with visual content.

The situation is further complicated by the fact that many licensing transactions are regulated by the government. But the government rules have not been implemented in a unified or systematic fashion. Instead, they represent a series of statutory and judicial mandates that came into effect at various points during the last century to address particular concerns of the day. And still more challenging is that not all licensing is conducted according to these government-mandated protocols. Some licensing is permitted to transpire in the private marketplace without government oversight. In addition, there are voluntary workarounds to the government processes—more efficient alternatives that have grown up like trees around the government rules and are now deeply rooted.

This section provides an introduction to our music licensing system and those who participate in it.[8] Before turning to the challenges we face and how they might be addressed, it is important to understand where we are and how we got here.

A. *Copyright Overview*

1. Brief History of Copyright Protection for Music

Congress passed the first federal copyright act in 1790.[9] That act did not provide express protection for musical compositions (or "musical works" in the parlance of the current Copyright Act), though such works could be registered as "books."[10] Then, in 1831, Congress amended the law to provide expressly that musical works were subject to federal copyright protection.[11]

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[8] As noted above, the Office has included charts in Appendix D of this report that provide a bird's-eye view of the licensing and ratesetting systems for music. The charts are intended as high-level references and do not capture every nuance or quirk of the system. A list of abbreviations used in the report is included as Appendix C.

[9] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[10] *See Clayton v. Stone*, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2872); I. Trotter Hardy, *Copyright and New Use Technologies*, 23 NOVA L. REV. 659, 664 (1999).

[11] Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

The 1831 amendment, however, provided owners of musical works with only the exclusive right to reproduce and distribute their compositions, *i.e.*, to print and sell sheet music, because, "[a]t the time, performances were considered the vehicle by which to spur the sale of sheet music."[12] In 1897, Congress expanded the rights of music owners to include the exclusive right to publicly perform their works.[13] With the 1909 Copyright Act, federal copyright protection for musical works was further extended by adding an exclusive right to make "mechanical" reproductions of songs in "phonorecords"—in those days, piano rolls, but in the modern era, vinyl records and CDs. At the same time, Congress limited the new phonorecord right by enacting a compulsory license for this use, a topic that is addressed in greater depth below.[14] And in 1995, Congress confirmed that an owner's exclusive right to reproduce and distribute phonorecords of musical works extends to digital phonorecord deliveries ("DPDs")—that is, the transmission of digital files embodying musical works.[15]

Over time, new technologies changed the way people consumed music, from buying and playing sheet music, to enjoying player pianos, to listening to sound recordings on a phonograph or stereo system.[16] But it was not until 1971, several decades after the widespread introduction of phonorecords, that Congress recognized artists' sound recordings as a distinct class of copyrighted works that were themselves deserving of federal copyright protection.[17] This federal protection, however, was limited to sound recordings fixed on or after February 15, 1972, and, until more recently, protected only the exclusive rights of reproduction, distribution, and preparation of derivative works. No exclusive right of public performance was granted.[18] Then, in 1995, Congress granted sound recording owners a limited public performance right for digital audio

[12] *See* Maria A. Pallante, *ASCAP at 100*, 61 J. COPYRIGHT SOC'Y 545, 545-46 (2014).

[13] Act of Mar. 3, 1897, ch. 392, 29 Stat. 694; *see also* Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157, 1158-59 (2007).

[14] This report uses both the term "compulsory" and the term "statutory" when describing the section 112, 114, and 115 licenses.

[15] Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), Pub. L. No. 104-39, § 4, 109 Stat. 336, 344-48; *see also* 17 U.S.C. § 115(c)(3)(A).

[16] *See* U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 7, 11 (2011) ("PRE-1972 SOUND RECORDINGS REPORT"); Michael Erlinger, Jr., *An Analog Solution in a Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA ENT. L. REV. 45, 57-58 (2009).

[17] Pub. L. No. 92-140, 85 Stat. 391 (1971) ("Sound Recording Act of 1971"); *see generally* PRE-1972 SOUND RECORDINGS REPORT at 7-12.

[18] *See* PRE-1972 SOUND RECORDINGS REPORT at 12-14.

transmissions—though, as discussed below, that right was made subject to compulsory licensing under sections 112 and 114 of the Copyright Act.[19]

2. Musical Works Versus Sound Recordings

As the above history indicates, a musical recording encompasses two distinct works of authorship: the musical work, which is the underlying composition created by the songwriter or composer along with any accompanying lyrics, and the sound recording, which is the particular performance of the musical work that has been fixed in a recording medium such as CD or digital file. Because of this overlap, musical works and sound recordings are frequently confused. It is important to keep in mind, however, that these are separately copyrightable works.

A musical work can be in the form of sheet music, *i.e.*, notes and lyrics written on a page, or embodied in a phonorecord, *i.e.*, in a recording of the song.[20] A sound recording comprises the fixed sounds that make up the recording. The musical work and sound recording are separately protected, and can be separately owned, under copyright law.

3. Key Players in the Music Marketplace

Musical works and sound recordings can be—and often are—created, owned, and managed by different entities.

a. Songwriters

The authors of a musical work are composers, lyricists and/or songwriters.[21] A songwriter may contribute music, lyrics, or both.

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[19] DPRSRA §§ 2, 3. The digital performance right is also subject to a number of exceptions, including for transmissions to or within a business for use in the ordinary course of its business, for nonsubscription broadcast transmissions, and for certain geographically limited retransmissions of nonsubscription broadcast transmissions. 17 U.S.C. § 114(d)(1)(A), (B), (C)(ii), (C)(iv).

[20] The Copyright Act sometimes draws a distinction between "dramatic" musical works—that is, musical works that are part of a dramatic show such as an opera, ballet, or musical—and "nondramatic" musical works. For example, the compulsory license under section 115 for the making and distributing of phonorecords applies only to nondramatic works. *See* 17 U.S.C. § 115. In practice, however, the distinction drawn in section 115 does not appear especially consequential except when a licensee is seeking to use the work in the context of the dramatic production; for instance, a show tune that is recorded for release as an individual song is understood to be licensable under section 115.

[21] For ease of reference, this report will collectively refer to these creators of musical works as "songwriters."

The Songwriters Guild of America ("SGA") and Nashville Songwriters Association International ("NSAI") are well-known trade organizations that represent the general interests of songwriters. Another group, the Society of Composers and Lyricists ("SCL"), represents the interests of songwriters working specifically in the motion picture and television industries.

b. Music Publishers

Songwriters often enter into publishing agreements with music publishers. Under such an arrangement, the publisher may pay an advance to the songwriter against future royalty collections to help finance the songwriter's writing efforts. In addition, the publisher promotes and licenses the songwriter's works and collects royalties on the songwriter's behalf. In exchange, the songwriter assigns a portion of the copyright in the compositions he or she writes during the deal term to the publisher—traditionally 50%, but sometimes less—and the publisher is compensated by receiving a royalty share.[22] In some cases, a musical work has a single songwriter and a single publisher, and dividing royalties is relatively straightforward. But many songs have multiple songwriters, each with his or her own publisher and publishing deal. In such cases, it may be challenging to determine royalty shares—or "splits"—among the various parties.[23]

The three "major" music publishers—Sony/ATV Music Publishing ("Sony/ATV"), Warner/Chappell Music, and Universal Music Publishing Group ("UMPG")—together control over 60% of the music publishing market.[24] There are also a handful of mid-sized music publishers, such as Kobalt Music Group and BMG Chrysalis, and thousands of smaller music publishers, among them self-published songwriters. The National Music Publishers Association ("NMPA") and the Association of Independent Music Publishers ("AIMP") are two major trade organizations representing the interests of music publishers.[25] Another group, Interested Parties Advancing Copyright ("IPAC"), was established in Nashville in 2014 and includes independent publishers, administrators, business managers, and entertainment attorneys.[26]

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[22] DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 220 (8th ed. 2013) ("PASSMAN").

[23] *See generally* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 329-44 (4th ed. 2010) ("KOHN").

[24] *See* Ed Christman, *First-Quarter Music Publishing Rankings: SONGS Surges Again*, BILLBOARD (May 12, 2014), http://www.billboard.com/biz/articles/news/publishing/6084783/first-quarter-music-publishing-rankings-songs-surges-again.

[25] NMPA & HFA First Notice Comments at 1.

[26] Nate Rau, *New Nashville Group to Push for Copyright Reform*, THE TENNESSEAN (May 25, 2014), http://www.tennessean.com/story/money/industries/music/2014/05/25/nashville-copyright-group-emerges/9513731.

c. Performing Rights Organizations ("PROs")

Songwriters and publishers almost always associate themselves with a PRO, which is responsible for licensing their public performance rights. The two largest PROs—the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI")—together represent around over 90% of the songs available for licensing in the United States.[27] ASCAP and BMI operate on a not-for-profit basis and, as discussed below, are subject to antitrust consent decrees that impose constraints on their membership and licensing practices. In ASCAP's case, this includes an express prohibition on licensing any rights other than public performance rights.

In addition to these larger PROs, there are two considerably smaller, for-profit PROs that license performance rights outside of direct government oversight. Nashville-based SESAC, Inc. was founded in the 1930s.[28] SESAC's market share of the performance rights market is unclear, but appears to be at least 5% and possibly higher.[29] Global Music Rights ("GMR"), a newcomer to the scene established in 2013, handles performance rights licensing for a select group of songwriters.[30] While ASCAP and BMI's consent decrees prohibit them from excluding potential members who are able to meet fairly minimal criteria,[31] SESAC and GMR have no such restriction and add new members by invitation only.[32]

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[27] *See* Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, N.Y. TIMES (Feb. 13, 2014), http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html.

[28] *About Us*, SESAC, http://www.sesac.com/about/about.aspx (last visited Jan. 26, 2014).

[29] *See* Chris Versace, *The Future of Streaming Music Rests With Congress*, FOX BUSINESS (June 23, 2014), http://www.foxbusiness.com/technology/2014/06/23/future-streaming-music-rests-with-congress (SESAC "controls approximately 5% of the market"); *In re Pandora Media, Inc.* ("*Pandora Ratesetting*"), 6 F. Supp. 3d 317, 351 & n.55 (S.D.N.Y. 2014) (noting that during license negotiations SESAC had used a 10% figure to describe its market share, but that the actual figure "is impossible to know with certainty").

[30] *See* GMR, http://www.globalmusicrights.com (last visited Jan. 30, 2015); *see also* Ed Christman, Gail Mitchell, and Andrew Hampp, *Pharrell to Leave ASCAP for Irving and Grimmet's Global Music Rights*, BILLBOARD (July 25, 2014), www.billboard.com/articles/business/6188942/pharrell-to-leave-ascap-for-irving-and-grimmets-global-music-rights; Ben Sisario, *New Venture Seeks Higher Royalties for Songwriters,* N.Y. TIMES (Oct. 29, 2014), http://www.nytimes.com/2014/10/30/business/media/new-venture-seeks-higher-royalties-for-songwriters.html.

[31] ASCAP must admit anyone who has published a single musical work or is actively engaged in the music publishing business; BMI similarly accepts anyone who has written at least one musical work that is likely to be "performed soon." *See United States v. ASCAP*, No. 41-1395, 2001 WL 1589999, 2001-02 Trade Cas. (CCH) ¶ 73,474, § XI (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree"); *United States v. BMI*, No. 64-civ-3787, 1966 U.S. Dist. LEXIS 10449, 1966 Trade Cas. (CCH) ¶ 71,941, § V (S.D.N.Y. 1966), *as amended by*, 1994 U.S. Dist. LEXIS 21476, 1996-1 Trade Cas.

d. Mechanical Rights Administrators

As examined in more depth below, the right to make and distribute phonorecords of musical works—*i.e.*, the mechanical right—is subject to compulsory licensing under section 115 of the Act. But in practice, because of the administrative burdens imposed by the license—including service of a notice on the copyright owner and monthly reporting of royalties on a song-by-song basis—mechanical licensing is often handled via third-party administrators.[33] The oldest and largest such organization is the Harry Fox Agency, Inc. ("HFA"), which was established by the NMPA in 1927 and today represents over 48,000 publishers in licensing and collection activities.[34] Mechanical licenses issued by HFA incorporate the terms of section 115, but with certain variations from the statutory provisions.[35] Another entity that assists with mechanical licensing is Music Reports, Inc. ("MRI"), which prepares and serves statutory notices on behalf of its clients and administers monthly royalty payments in keeping with the requirements of section 115.[36] Mechanical licenses are also issued and administered directly by music publishers in many instances.

e. Recording Artists and Producers

The creators of sound recordings typically include recording artists—that is, the singer or members of the band who are featured in the recording. The recording process is often managed by a producer, who supervises and contributes overall artistic vision to the project. Other "nonfeatured" musicians and vocalists may add their talents to the recording as well. Except with respect to digital performance rights falling under the section 114 statutory license,[37] featured artists are typically paid under their record company contracts, while nonfeatured performers are usually compensated at an hourly

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(CCH) ¶ 71,378 (S.D.N.Y. 1994). The most readable version of the current BMI consent decree is the version provided on the Department of Justice's ("DOJ's") website, and is the version cited throughout this report. *See United States v. BMI*, No. 64-civ-3787 (S.D.N.Y. Nov. 18, 1994) (final judgment) ("BMI Consent Decree"), *available at* http://www.justice.gov/atr/cases/f307400/307413.pdf.

[32] *Radio Music License Comm., Inc. v. SESAC*, 29 F. Supp. 3d 487, 498 (E.D. Pa. 2014); *Pandora Ratesetting*, 6 F. Supp. 3d at 351; GMR, http://www.globalmusicrights.com (last visited Jan. 30, 2015).

[33] KOHN at 771-72, 808-10.

[34] HARRY FOX AGENCY, http://www.harryfox.com (last visited Jan. 9, 2015).

[35] KOHN at 803-806. For example, HFA licenses allow licensees to account for royalties on a quarterly basis, as opposed to the monthly reporting required under section 115. *Become an HFA Licensee*, HARRY FOX AGENCY, http://www.harryfox.com/license_music/become_hfa_licensee.html (last visited Jan. 25, 2015).

[36] *See* MRI First Notice Comments at 1-3.

[37] *See* 17 U.S.C. § 114(g) (dividing statutory royalty proceeds among these groups).

rate based on their work on specific projects.[38] Producers may be paid a flat fee for their efforts and/or may be paid a royalty share by the featured artist out of the artist's earnings.[39]

The organization SoundExchange collects and pays royalties to featured and nonfeatured artists (as well as to record companies) for noninteractive streaming uses under the section 112 and 114 statutory licenses, and advocates for their interests in relation to those uses.[40] The Recording Academy, also known as the National Academy of Recording Arts and Sciences ("NARAS")—the organization responsible for the GRAMMY awards—represents musicians, producers, recording engineers, and other recording professionals on a wide range of industry matters.[41] The Future of Music Coalition ("FMC") advocates on behalf of individual music creators.[42] The American Federation of Musicians of the United States and Canada ("AFM") and Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") are labor unions that represent the interests of nonfeatured musicians and vocalists.[43]

f. Record Companies

Most commercially successful sound recordings are the product of contractual relationships between recording artists and record labels.[44] Though levels of responsibility vary according to the specifics of individual recording contracts, a record label's usual role is to finance the production of sound recordings, promote the recordings (and sometimes the recording artists themselves), and arrange to distribute the recordings via physical and digital distribution channels.[45] Except in the case of noninteractive streaming uses that qualify for the section 112 and 114 licenses, record labels typically handle the licensing for the sound recordings they own.

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[38] *See Sound Recordings at a Glance*, SAG-AFTRA, http://www.sagaftra.org/files/sag/documents/soundrecordings_ataglance_2014.pdf (last visited Jan. 25, 2014).

[39] *See* Dan Daley, *Points of Survival: Producers Adapt to a New Economic Landscape in the Music Industry*, GRAMMY.COM (Sept. 1, 2010), http://www.grammy.com/news/points-of-survival; NARAS First Notice Comments at 5-6.

[40] Unlike royalties paid under section 114, royalties under the 112 license are not distributed directly to featured and nonfeatured artists, but instead are paid to the sound recording owner. *See* 17 U.S.C. § 114(g)(2); *see also* 17 U.S.C. § 112(e).

[41] NARAS First Notice Comments at 1.

[42] *About Us*, FUTURE OF MUSIC COALITION, https://www.futureofmusic.org/about (last visited Jan. 25, 2015).

[43] SAG-AFTRA & AFM First Notice Comments at 1-2.

[44] KOHN at 1454.

[45] PASSMAN at 63. Labels may also secure mechanical rights to musical works embodied in sound recordings.

In modern industry parlance, there are two classes of record labels: "major" labels and "independent" labels.[46] There are currently three major record labels: Universal Music Group ("UMG"), Sony Music Entertainment, Inc. ("SME"), and Warner Music Group ("WMG").[47] Independent labels are entities that are not wholly owned by one of the three major record labels. In the United States, there are currently hundreds of independent labels, which account for roughly 35% of domestic recording industry revenues.[48]

One notable feature of the modern music marketplace is the extent of common corporate ownership of major record labels and major music publishers: UMPG is owned by UMG (which in turn is owned by French media conglomerate Vivendi); the Sony Corporation owns SME and half of Sony/ATV; and Warner/Chappell Music is a division of WMG.[49]

The Recording Industry Association of America ("RIAA") and the American Association of Independent Music ("A2IM") are the two primary trade organizations representing the interests of record labels. The International Federation of the Phonographic Industry ("IFPI") represents record labels globally.[50] As noted above, SoundExchange—originally a division of the RIAA and later spun off as an independent entity[51]—represents the interests of the record labels in relation to the section 112 and 114 licenses.

g. Music Providers

There are a number of organizations that represent the interests of the thousands of music broadcasters and distributors—including radio and television stations, digital music companies, and physical and online record stores.

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[46] A2IM, the U.S. trade association that represents the interests of independent record labels, objects to the term "major label." According to A2IM, independent labels, collectively, represent 34.6% of the U.S. music market, making them "the largest music label industry segment." A2IM First Notice Comments at 1, 3.

[47] The three major labels all own and operate smaller labels. For example Atlantic Records and Rhino Entertainment Company are both owned by WMG.

[48] A2IM First Notice Comments at 1, 3.

[49] Sebastian Torrelio, *Jody Gerson Appointed Chairman and CEO of Universal Music Publishing Group*, VARIETY (Aug. 1, 2014), http://variety.com/2014/biz/news/jody-gerson-appointed-chairman-and-ceo-of-universal-music-publishing-group-1201273829; *Profile: Sony Corp*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?symbol=SNE.N; *About Us*, WARNER/CHAPPELL MUSIC, http://www.warnerchappell.com/about (last visited Jan. 25, 2015).

[50] IFPI, http://www.ifpi.org (last visited Jan. 15, 2015).

[51] Glenn Peoples, *SoundExchange Distributes Record $153 Million in Q3, Celebrates 10-Year Anniversary*, BILLBOARD (Oct. 4, 2014), http://www.billboard.com/biz/articles/news/5748060/soundexchange-distributes-record-153-million-in-q3-celebrates-10-year.

The National Association of Broadcasters ("NAB") is the main trade organization representing terrestrial (AM/FM) radio and television broadcasters.[52] Broadcasters have also established a number of "music license committees" that collectively negotiate licensing arrangements with the PROs. These include the Radio Music License Committee ("RMLC"),[53] the Television Music License Committee ("TMLC"),[54] the National Religious Broadcasters Music License Committee ("NRBMLC") and the National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC").[55] National Public Radio ("NPR") operates and advocates on behalf of public radio stations.

The Digital Media Association ("DiMA") is a national trade organization that advocates for digital music and media companies, such as Pandora, Rhapsody, Apple, and YouTube.[56]

CTIA–The Wireless Association ("CTIA")[57] represents the wireless communications industry, and the Computer and Communications Industry Association ("CCIA") represents a broad range of technology companies.[58]

Music Business Association ("Music Biz"), formerly the National Association of Recording Merchandisers, includes many physical and digital distributors of music in its membership.[59]

h. Consumers

Last but not least, there are music fans. As digital technologies continue to evolve, individual users interact with music more and more in ways that implicate copyright—they copy it, share it, and remix it with other content.

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[52] NAB First Notice Comments at 1.

[53] RMLC First Notice Comments at 1.

[54] TMLC First Notice Comments at 1.

[55] NRBMLC First Notice Comments at 2-3; NRBNMLC First Notice Comments at 1-2. The National Cable & Telecommunications Association ("NCTA"), which represents cable operators, has its own music license committee to negotiate PRO licenses for public performances of music in cable operators' local programming. *See* NCTA, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 1 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307982.pdf.

[56] DiMA First Notice Comments at 1.

[57] CTIA First Notice Comments at 2-4.

[58] CCIA Second Notice Comments at 1.

[59] *About*, MUSIC BUSINESS ASSOCIATION, http://musicbiz.org/about (last visited Jan. 25, 2015).

A number of groups represent the interests of music consumers in policy matters, including Public Knowledge and the Consumer Federation of America ("CFA").[60]

B. Licensing Musical Works

1. Exclusive Rights in Musical Works

The owner of a musical work possesses exclusive rights under the Copyright Act, including the right to authorize others to exploit the following exclusive rights: the right to make and distribute copies (*e.g.*, sheet music) or phonorecords (*e.g.*, CDs and digital audio files) of the work (the so-called "mechanical" right);[61] the right to create derivative works (*e.g.*, a new work based on an existing composition);[62] the right to display the work publicly (*e.g.*, by posting lyrics on a website);[63] and the right to perform the work publicly (*e.g.*, in a live venue or broadcast).[64] Although it is not specified in section 106 of the Act, as a matter of business practice, the music industry also recognizes the right to synchronize musical works to visual content (*e.g.*, in a music video). The synchronization (or "synch" right) is a species of the reproduction right and may also implicate the derivative work right.[65]

The music industry relies on different entities to license and administer rights in musical works, principally because of a variety of legal restrictions and industry practices that have grown up over time. This balkanized licensing scheme was not overly problematic during the analog age, when determining the boundaries between rights was relatively straightforward. In pre-digital days, radio and record distributors represented distinct commercial channels with different licensing needs. Today, however, digital providers often merge these roles. As a result, the demarcations between traditional licensing categories are no longer as clear—especially with respect to the relation between reproduction and distribution rights, on the one hand, and public performance, on the other. The current complexity of the music licensing marketplace is attributable at least in part to the blurring of the traditional lines of exploitation.

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[60] CFA & Public Knowledge First Notice Comments at 1; *About Us*, PUBLIC KNOWLEDGE, https://www.publicknowledge.org/about-us (last visited Jan. 25, 2015).

[61] 17 U.S.C. § 106(1), (3).

[62] 17 U.S.C. § 106(2).

[63] 17 U.S.C. § 106(5).

[64] 17 U.S.C. § 106(4).

[65] *See Buffalo Broad. Co., Inc., v. ASCAP*, 744 F.2d 917, 920 (2d Cir. 1984) ("The 'synch' right is a form of the reproduction right also created by statute as one of the exclusive rights enjoyed by the copyright owner." (citing 17 U.S.C. § 106(1))); *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 321 (2d Cir. 1995) (observing that a defendant "might have infringed [plaintiff's] exclusive right to prepare derivative works" by synchronizing music to an audiovisual work, but the court "need not resolve that question" as copying (and a defense to this right) were already proven).

2. Reproduction and Distribution Rights

a. Historical Background

Until the early twentieth century, owners of musical works were compensated primarily through the reproduction and distribution of sheet music. Sales of sheet music were a significant source of revenue for music publishers for a long time.[66] And prices for sheet music were, as they are today, set in the free market.[67]

By the early 1900s, however, technological advances made music available for the first time via "mechanical" renderings of songs captured in player piano rolls and phonograph records.[68] Although music publishers insisted that physical embodiments of their works were copies, the Supreme Court held otherwise in the 1908 case *White-Smith Music Publishing v. Apollo*, reasoning that such reproductions were not in a form that human beings could "see and read."[69]

With the enactment of the 1909 Copyright Act, however, Congress overrode the Court's decision and recognized copyright owners' exclusive right to make and distribute, and authorize the making and distribution, of phonorecords—*i.e.*, mechanical reproductions—of musical works.[70] At the same time, Congress was concerned about a lack of competition in the marketplace—in particular, it was alleged that the Aeolian Company, a manufacturer of player pianos, was seeking to buy up exclusive rights from publishers to create a monopoly for piano rolls.[71] To address that concern, Congress simultaneously created a compulsory license for mechanical reproductions of musical works—the first compulsory license in U.S. copyright law—establishing a statutory rate of 2 cents per copy.[72]

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[66] *See* KOHN at 674. By 1919, a single department store chain—Woolworth's—was selling over 200 million copies of sheet music. *Id.* at 6.

[67] Sheet music was generally sold for 10 cents per copy. *Id.* at 6.

[68] *Id.* at 6-7.

[69] *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 8-9, 17-18 (1908).

[70] H.R. REP. NO. 60-2222, at 6-8 (1909); s*ee also Miller v. Goody*, 139 F. Supp. 176, 182 (S.D.N.Y. 1956).

[71] H.R. REP. NO. 59-7083, pt. 2, at 5 (1907); RUSSELL SANJEK UPDATED BY DAVID SANJEK, PENNIES FROM HEAVEN 22-23 (1996).

[72] H.R. REP. NO. 60-2222, at 7-8; Copyright Act of 1909, Pub. L. No. 60-349, §1(e), 35 Stat. 1075, 1075-76. Adjusted for inflation, the 2 cent rate would be more than 50 cents today. *Music Licensing Hearings* (statement of David M. Israelite, President and Chief Executive Officer, NMPA).

Though it has been amended several times, the 1909 compulsory license, originally set forth in section 1(e) of the Act,[73] continues in force today. In the Copyright Act of 1976, Congress recodified the compulsory license in section 115, and raised the statutory rate to 2.75 cents.[74] At that time, Congress also created the Copyright Royalty Tribunal ("CRT")—with five commissioners appointed by the President—to adjust the royalty rate thereafter.[75] The CRT was replaced in 1993 by the Copyright Arbitration Royalty Panel ("CARP") system; rather than permanent appointees, the CARP arbitrators were convened for specific rate proceedings.[76] The CARP system, in turn, was replaced in 2004 by the current system, the Copyright Royalty Board ("CRB"), which is composed of three administrative judges appointed by the Librarian of Congress.[77]

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), which, in addition to granting a digital performance right for sound recordings, amended section 115 to expressly cover the reproduction and distribution of musical works by digital transmission, or DPDs.[78] The 1995 legislation recognized what

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[73] Copyright Act of 1909 § 1(e).

[74] H.R. REP. NO. 94-1476, at 111 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5726. Notably, the Register of Copyrights had proposed elimination of the compulsory license in the process leading up to the adoption of the 1976 Copyright Act, but music publishers and composers ultimately chose to oppose such a change, opting instead for the three-quarter cent rate increase. *See* U.S. COPYRIGHT OFFICE, 88TH CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 33, 36 (Comm. Print 1961) ("GENERAL REVISION OF COPYRIGHT REPORT"); S. REP. NO. 94-473, at 91-92 (1975); *see also Music Licensing Reform: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 109th Cong. (2005) ("*Music Licensing Reform Hearing*") (statement of Marybeth Peters, Register of Copyrights), *available at* http://copyright.gov/docs/regstat071205.html (stating that publishers and songwriters were concerned that elimination of the statutory license would cause "unnecessary disruptions in the music industry").

[75] Copyright Act of 1976, Pub. L. No. 94-553, §§ 801-802, 90 Stat. 2541, 2594-96.

[76] Copyright Royalty Tribunal Reform Act of 1993, Pub. No. 103-198, § 802, 107 Stat. 2304, 2305 (1993).

[77] 17 U.S.C. §§ 801-805; Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341. The statute calls the ratesetting body the "Copyright Royalty Judges." *See* 17 U.S.C. § 801. But it is more commonly referred to as the "Copyright Royalty Board," including in the regulations, and this report uses that convention. *See* 37 C.F.R. § 301.1 ("The Copyright Royalty Board is the institutional entity in the Library of Congress that will house the Copyright Royalty Judges . . . .").

[78] *See* S. REP. NO. 104-128, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356, 357 ("The purpose of [this Act] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used. . . . In addition, the bill clarifies the application of the existing reproduction and distribution rights of musical work and

is often referred to as "pass-through" licensing for DPDs, in that it allows a section 115 licensee, such as a record label, to authorize a third-party service to distribute DPDs of the works covered under its license.[79]

Significantly, the express recognition of digital transmissions of musical works as a right covered by section 115 led to a lengthy rulemaking proceeding commenced by the Copyright Office in 2001 to determine the scope and application of the section 115 compulsory license with respect to various uses, which included the question whether interactive streaming services were required to procure mechanical licenses under section 115 in addition to performance licenses.[80] In 2008, recognizing that streaming services make and rely upon server copies and other reproductions of musical works in order to operate, the Office concluded that streaming services could utilize the section 115 compulsory licensing process to cover the reproductions made to facilitate streaming.[81] In 2009, the CRB adopted the first statutory rates and terms for interactive streaming services.[82] As a result of these developments, on-demand streaming services seek both mechanical and PRO licenses for the musical works they use.

b. Mechanical Rights Licensing

Statutory Licensing

Under section 115, those who seek to make and distribute reproductions of a musical work may obtain a license to do so by serving a notice of intent ("NOI") on the copyright owner, no later than thirty days after making, and before distributing, any phonorecords.[83] Once a person has served the NOI, the person must provide statements of account and pay the statutorily prescribed royalties on a monthly basis.[84] If the name and address of the owner of the work cannot be identified from the public records of the

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sound recording copyright owners in the context of certain digital transmissions."); *see also* 17 U.S.C. § 115(c)(3)(A).

[79] 17 U.S.C. § 115(c)(3)(A).

[80] Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 40,802, 40,804-05 (July 18, 2008).

[81] Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173, 66,174 (Nov. 7, 2008) ("The interim regulation clarifies that (1) whenever there is a transmission that results in a DPD, all reproductions made for the purpose of making the DPD are also included as part of the DPD, and (2) limited downloads qualify as DPDs.").

[82] Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510, 4514-15 (Jan. 26, 2009); 37 C.F.R. §§ 385.1-385.5, 385.10-385.17.

[83] 17 U.S.C. § 115(b)(1).

[84] 17 U.S.C. § 115(c)(5).

Copyright Office, the user may file the NOI with the Office.[85] In that case, the user must pay a filing fee to the Office but does not need to deposit royalties.[86]

The compulsory license under section 115 is available only after a recording has been made and distributed to the public under the authority of the copyright owner.[87] Consequently, the initial recording of a musical work, or "first use," does not fall under the compulsory license, and the copyright owner has the authority to determine whether and how the work is first reproduced and distributed. Once a work is eligible for statutory licensing, section 115 limits the way the work can be exploited. A section 115 license includes the right to make a musical arrangement of the song but does not permit the user to change the basic melody or fundamental character of the work.[88]

As noted above, the CRB is the administrative body responsible for establishing statutory rates and terms under the section 115 license, a process that by statute takes place every five years.[89] While copyright owners and users are free to negotiate voluntary licenses that depart from the statutory rates and terms, in practical effect the CRB-set rate acts as a ceiling for what the owner may charge. Rates for the license are established under a standard set forth in section 801(b)(1) of the Copyright Act, which requires the CRB to weigh several policy-oriented objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[90]

The rates currently applicable under section 115 were the result of an industry-wide negotiated agreement that was submitted to the CRB as a settlement of the most recent

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85 17 U.S.C. § 115(b)(1).

86 *See* 17 U.S.C. § 115(c)(1); 37 C.F.R. § 201.18(f)(3).

87 KOHN at 792-93; *see* 17 U.S.C. § 115(a)(1).

88 17 U.S.C. § 115(a)(2).

89 KOHN at 742; 17 U.S.C. § 804(b)(4).

90 17 U.S.C. § 801(b)(1).

ratesetting proceeding.[91] The current rate to make and distribute permanent downloads or physical phonorecords of a musical work is 9.1 cents per copy.[92] For ringtones, the rate is 24 cents per use.[93] The royalty rate to make reproductions of musical works in connection with interactive streaming, limited download services, and certain other services is a percentage of the service's revenue ranging from 10.5% to 12%, subject to certain minimum royalty floors, and after deducting royalties paid by the service for the public performance of those works.[94] It may seem counterintuitive that ringtones—which typically use only short excerpts of musical works—have a significantly higher royalty rate than full-length reproductions. Because ringtones abbreviate the full-length work, it was not immediately clear whether ringtones were eligible for the section 115 license. As a result, many ringtone sellers entered into privately negotiated licensing arrangements with publishers at rates well above the statutory rate for the full use of the song.[95] In 2006, the Copyright Office resolved the section 115 issue, opining that ringtones were subject to compulsory licensing.[96] But in the ensuing ratesetting proceeding before the CRB, music publishers were able to introduce the previously negotiated agreements as marketplace benchmarks, and as a result secured a much higher rate for ringtones than the rate for full songs.[97]

Voluntary Licenses

Section 115 provides that a license that is voluntarily negotiated between a copyright owner and user will be given effect in lieu of the rates and terms set by the CRB.[98] Although the use of the section 115 statutory license has increased in recent years with the advent of digital providers seeking to clear large quantities of licenses, mechanical licensing is still largely accomplished through voluntary licenses that are issued through

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[91] Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67,938, 67,939 (Nov. 12, 2013).

[92] For songs over five minutes, the rate is higher—1.75 cents per minute or fraction thereof. 37 C.F.R. § 385.3(a).

[93] 37 C.F.R. § 385.3(b).

[94] 37 C.F.R. §§ 385.12-385.14, 385.23.

[95] Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64,303, 64,308-09 (Nov. 1, 2006) (discussing "voluntary license agreements granting the labels the right to create ringtones at specified mutually-negotiated royalty rates").

[96] *Id.* at 64,303.

[97] Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4517-18; *id.* at 4522 (explaining that those licenses constitute "valuable rate evidence from the marketplace for" ringtones but not for "other products at issue in this proceeding (*i.e.*, CDs and permanent downloads)").

[98] 17 U.S.C. § 115(c)(3)(E)(i).

a mechanical licensing agency such as HFA or by the publisher directly.[99] While HFA and other licensors typically incorporate the key elements of section 115 into their direct licenses, they may also vary those terms to some degree, such as by permitting quarterly accountings rather than the monthly statements required under the statute.[100] That said, as observed above, the terms of the statutory license act as a ghost in the attic, effectively establishing the maximum amount a copyright owner can seek under a negotiated mechanical license.[101]

Recent Reform Efforts

The last significant legislative effort to modernize mechanical licensing took place nearly a decade ago. In 2006, Representatives Lamar Smith and Howard Berman introduced the Section 115 Reform Act ("SIRA").[102] SIRA would have created a blanket mechanical license for digital services, while leaving the remainder of section 115 intact for physical reproductions (and also not affecting performance rights).

SIRA included several notable features.[103] It would have established a "general designated agent" with the possibility of additional designated agents provided they represented at least 15% of the music publishing market. Copyright owners would elect to be represented by a designated agent, with the general designated agent representing any copyright owners that failed to make such an election. Each designated agent would have been required to maintain a searchable electronic database of musical works represented by that agent. The cost of establishing such databases would have been shared by designated agents and licensees, with cost-sharing amounts determined by the CRB. The CRB would also have established rates and terms for the license itself, and there would have been an interim ratesetting mechanism for new types of services. There were also provisions addressing distribution of unclaimed funds and audit rights. SIRA enjoyed support from key industry participants, including NMPA, DiMA, SGA, and the PROs.[104] Although the bill was forwarded to the full Judiciary Committee, due to opposition from other parties, it was not reported out.[105]

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99 W. Jonathan Cardi, *Über-Middleman: Reshaping the Broken Landscape of Music Copyright*, 92 IOWA L. REV. 835, 841-42 (2007).

100 KOHN at 771.

101 *Id.* at 771-72.

102 SIRA, H.R. 5553, 109th Cong. (2006). SIRA was later incorporated into the Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. (2006).

103 *See generally* Copyright Modernization Act of 2006, H.R. 6052; Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1271 (2007).

104 Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing* at 1277. Groups such as Public Knowledge and the Electronic Frontier Foundation opposed SIRA because

SIRA followed—and was perhaps an industry response to—an earlier 2005 proposal from the Copyright Office. Then-Register of Copyrights Marybeth Peters testified before Congress to propose a "21st Century Music Reform Act."[106] Among other things, that proposal would have effectively repealed the section 115 statutory license, and would have authorized the establishment of "music rights organizations" ("MROs") that could license both performance and mechanical rights on a blanket basis. The proposal also conditioned an MRO's recovery of statutory damages on the MRO having made publicly available the list of works it was authorized to license. While industry participants agreed in principle with the basic goals of the Copyright Office's proposal, they expressed concerns about many of its specifics, including the lack of a limit on the number of MROs, antitrust issues, and administrative burdens.[107]

3. Public Performance Rights

a. The PROs

As mentioned above, although musical compositions were expressly made subject to copyright protection starting in 1831, Congress did not grant music creators the exclusive right to publicly perform their compositions until 1897.[108] Though this right represented a new way for copyright owners to derive profit from their musical works, the sheer number and fleeting nature of public performances made it impossible for copyright owners to individually negotiate with each user for every use, or detect every case of infringement.[109] ASCAP was established in 1914, followed by other PROs, to

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of its provisions regarding temporary copies and recognition that interactive streaming involves the making of DPDs. *Id.* at 1277-81.

[105] *See Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) ("*Reforming Section 115 Hearing*") (statement of Rep. Howard Coble).

[106] *See generally Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 21-36 (2005) ("*Copyright Office Views on Music Licensing Reform Hearing*") (statement of Marybeth Peters, Register of Copyrights).

[107] *Id.* at 56-57 (letter from Jonathan Potter, Executive Director, DiMA); *id.* at 59-60 (letter from Steven M. Marks, RIAA); *id.* at 99 (comments of ASCAP); *id.* at 62-64 (comments of NMPA).

[108] *See* Steve Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 COLUM. J.L. & ARTS 139, 176 (2008); Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 737 (1998).

[109] *BMI v. CBS*, 441 U.S. 1, 4-5 (1979); *see also Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888, 891 (S.D.N.Y. 1948).

address the logistical issue of how to license and collect payment for the public performance of musical works in a wide range of settings.[110]

Today, the PROs provide various different types of licenses depending upon the nature of the use. Anyone who publicly performs a musical work may obtain a license from a PRO, including terrestrial, satellite and internet radio stations, broadcast and cable television stations, online services, bars, restaurants, live performance venues, and commercial establishments that play background music.

Most commonly, licensees obtain a blanket license, which allows the licensee to publicly perform any of the musical works in a PRO's repertoire for a flat fee or a percentage of total revenues.[111] Some users opt for a blanket license due to its broad coverage of musical works and relative simplicity as compared to other types of licenses. Large commercial establishments such as bars, restaurants, concert venues, stores, and hotels often enter into blanket licenses to cover their uses, paying either a percentage of gross revenues or an annual flat fee, depending on the establishment and the type and amount of use.[112] Terrestrial radio stations obtain blanket licenses from PROs as well, usually by means of the RMLC.[113] Many television stations, through the TMLC, also obtain blanket licenses.[114]

Less commonly used licenses include the per-program or per-segment license, which allows the licensee to publicly perform any of the musical works in the PRO's repertoire for specified programs or parts of their programming, in exchange for a flat fee or a percentage of that program's advertising revenue.[115] Unlike a blanket license, the per-program or per-segment license requires more detailed reporting information, including program titles, the specific music selections used, and usage dates, making the license more burdensome for the licensee to administer.[116]

Users can also license music directly from music publishers through a direct license or a source license. A direct license is simply a license agreement directly negotiated

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[110] *BMI v. CBS*, 441 U.S. at 4-5*; see also Alden-Rochelle*, 80 F. Supp. at 891.

[111] *Meredith Corp.*, 1 F. Supp. 3d at 190; *BMI v. CBS*, 441 U.S. at 5.

[112] *See* KOHN at 1263, 1275-80. The Copyright Act exempts many small commercial establishments from the need to obtain a public performance license. *See* 17 U.S.C. § 110(5).

[113] David Oxenford, *What is the RMLC, And Why Should a Radio Station Pay Their Bill?*, BROAD. L. BLOG (Aug. 24, 2012), http://www.broadcastlawblog.com/2012/08/articles/what-is-the-rmlc-and-why-should-a-radio-station-pay-their-bill.

[114] *Meredith Corp.*, 1 F. Supp. 3d at 189-90.

[115] *See generally* Lauren M. Bilasz, *Note: Copyrights, Campaigns, and the Collective Administration of Performance Rights: A Call to End Blanket Licensing of Political Events*, 32 CARDOZO L.REV. 305, 323 & nn.111-112 (2010) (descriptions of each license).

[116] *See, e.g.*, KOHN at 1266 (discussing per-program licenses).

between the copyright owner and the user who intends to publicly perform the musical work. Source licenses are commonly used in the motion picture industry, because the PROs are prohibited from licensing public performance rights directly to movie theater owners.[117] Instead, film producers license public performance rights for the music used in films at the same time as the synchronization rights, and pass the performance rights along to the theaters that will be showing their films.[118] In the context of motion pictures, source licenses do not typically encompass non-theatrical performances, such as on television. Thus, television stations, cable companies, and online services such as Netflix and Hulu must obtain public performance licenses from the PROs to cover the public performance of musical works in the shows and movies they transmit to end users.[119]

b. Antitrust Oversight

Basic Antitrust Principles

Unlike the mechanical right, the public performance of musical works is not subject to compulsory licensing under the Copyright Act. But, as described below, ASCAP and BMI are subject to government antitrust regulation through longstanding consent decrees. And while neither SESAC nor GMR is subject to such direct antitrust regulation, each, of course, must abide by generally applicable antitrust law, which is enforceable by the government or through private causes of action. SESAC, for example, has recently been the subject of private antitrust suits, as discussed below. A detailed explanation of the antitrust rationale that underlies the PRO consent decrees is beyond the scope of this study. But a brief discussion of some basic antitrust principles may be helpful in understanding the motivation behind the decrees.

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates."[120] As the Supreme Court has opined, however, "Congress could not have intended a literal interpretation of the word 'every,'" and as a result, courts

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[117] This prohibition was a result of antitrust litigation brought by movie theater owners in the 1940s. *Alden-Rochelle*, 80 F. Supp. 888; *see also* Christian Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* 6, 20 (Sept. 1, 2005) (unpublished LL.M. thesis, Golden Gate University School of Law), *available at* http://digitalcommons.law.ggu.edu/theses/13 at 19.

[118] *See id.* at 19.

[119] *Id.*; *see also* Netflix First Notice Comments at 1-2; *ASCAP Reports Increased Revenues in 2011*, ASCAP (Mar. 8, 2012), http://www.ascap.com/press/2012/0308_ascap-reports.aspx (reflecting blanket licenses with Netflix and Hulu). Licensing of performance rights from SESAC and GMR occurs without direct antitrust oversight, and those smaller PROs may refuse to license their repertoires to potential licensees.

[120] 15 U.S.C. § 1.

"analyze[] most restraints under the so-called 'rule of reason.'"[121] The rule of reason test requires a court to not only find a restraint of trade, but also determine whether that restraint is unreasonable.[122] The Supreme Court has also recognized, however, that "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."[123] Thus, certain arrangements—including price-fixing agreements—are deemed per se violations of section 1.[124]

A "tying" arrangement is another kind of business practice that raises antitrust concerns. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product."[125] Such arrangements are unlawful "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market."[126] But as the Federal Trade Commission ("FTC") observes, "[t]he law on tying is changing."[127] While the Supreme Court "has treated some tie-ins as per se illegal in the past, lower courts have started to apply the more flexible 'rule of reason' to assess the competitive effects of tied sales."[128]

Department of Justice Consent Decrees

Since 1941, ASCAP and BMI's licensing practices have been subject to antitrust consent decrees overseen by the Antitrust Division of the DOJ and enforced by federal district courts in New York City.[129] Those consent decrees were implemented in reaction to alleged anticompetitive practices of ASCAP and BMI. Specifically, when originally formed, both PROs acquired the exclusive right to negotiate members' public performance rights, and forbade their members from entering into direct licensing

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[121] *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 342-43 (1982).

[122] *Associated Press v. United States*, 326 U.S. 1, 27 (1945).

[123] *Arizona*, 457 U.S. at 343-44.

[124] *Id.* at 344-45.

[125] *N. Pac Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[126] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 4662 (1992).

[127] *Tying the Sale of Two Products*, FTC, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products (last visited Jan. 26, 2015).

[128] *Id.*

[129] *See generally United States v. BMI*, 275 F.3d 168, 171-72 (2d Cir. 2001) (describing the history); *see also Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 26, 2015).

arrangements. Additionally, both offered only blanket licenses covering all of the music in their respective repertoires.[130]

In the 1930s, the DOJ's Antitrust Division investigated ASCAP for anticompetitive conduct—specifically that ASCAP's licensing arrangements constituted price-fixing and/or unlawful tying.[131] The government subsequently filed federal court actions in 1934 and 1941, arguing that the exclusive blanket license—as the only license offered at the time—was an unlawful restraint of trade and that ASCAP was charging arbitrary prices as a result of an illegal copyright pool.[132] While the first case was never fully litigated after the government was granted a mid-trial continuance, the latter action was settled with the imposition of a consent decree in 1941.[133] That consent decree has been modified twice, first in 1950 and most recently in 2001.[134] The United States also pursued antitrust claims against BMI, resulting in a similar consent decree in 1941.[135] The 1941 BMI consent decree was superseded by a new decree in 1966, which was last amended in 1994.[136]

Although the ASCAP and BMI consent decrees are not identical, they share many of the same features. As most relevant here, the PROs may only acquire nonexclusive rights to license members' public performance rights; must grant a license to any user that applies, on terms that do not discriminate against similarly situated licensees; and must accept any songwriter or music publisher that applies to be a member, as long as the writer or publisher meets certain minimum standards.[137]

ASCAP and BMI are also required to offer alternative licenses to the blanket license. One option is the adjustable fee blanket license, a blanket license with a carve-out that reduces the flat fee to account for music directly licensed from PRO members. Under the consent decrees, ASCAP and BMI must also provide, when requested, "through-to-the-audience" licenses to broadcast networks that cover performances not only by the networks themselves, but also by affiliated stations that further transmit those

[130] Christian Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 6, 20; *see also* Wilf at 177.

[131] Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 20-21.

[132] *BMI v. CBS*, 441 U.S. at 10.

[133] Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 20-21.

[134] *BMI v. CBS*, 441 U.S. at 11.

[135] *BMI v. CBS*, 441 U.S. at 12 n.20.

[136] Seyfert, *Copyright and Anti-Trust Law: Public Performance Rights Licensing of Musical Works into Audiovisual Media* at 22; *see also* BMI Consent Decree.

[137] ASCAP Consent Decree §§ IV.B-C, VI, VIII, XI; BMI Consent Decree §§ IV.A, V, VIII.

performances downstream.[138] ASCAP and BMI are also required to provide per-program and per-segment licenses, as are described above.[139]

ASCAP is expressly barred from licensing any rights other than its members' public performance rights (*i.e.*, ASCAP may not license mechanical or synchronization rights).[140] Although BMI's consent decree lacks a similar prohibition, in practice BMI does not license any rights other than public performance rights.[141]

Finally, and perhaps most significantly, prospective licensees that are unable to agree to a royalty rate with ASCAP or BMI may seek a determination of a reasonable license fee from one of two federal district court judges in the Southern District of New York.[142] The rate court procedures are discussed in greater detail below.

In response to requests by ASCAP and BMI to modify certain provisions of their decrees, the DOJ's Antitrust Division announced in June 2014 that it would be evaluating the consent decrees, and has solicited and received extensive public comments on whether and how the decrees might be amended.[143] Specifically, both ASCAP and BMI seek to modify the consent decrees to permit partial grants of rights, to replace the current ratesetting process with expedited arbitration, and to allow ASCAP and BMI to provide bundled licenses that include multiple rights in musical works.[144] The DOJ has expressed its intent to "examine the operation and effectiveness of the Consent Decrees," particularly in light of the changes in the way music has been delivered and consumed since the most recent amendments to those decrees.[145] At the same time, the DOJ is

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[138] ASCAP Consent Decree § V; BMI Consent Decree § IX.

[139] ASCAP Consent Decree §§ II.J-K, VII; BMI Consent Decree § VIII.B. Note that under the ASCAP consent decree, the per-segment license has a number of conditions that must be met before it can be used. ASCAP Consent Decree § VII.

[140] ASCAP Consent Decree § IV.A.

[141] *See* BMI, Comments on Department of Commerce Green Paper at 4-5 (Nov. 13, 2013), *available at* http://www.ntia.doc.gov/files/ntia/bmi_comments.pdf.

[142] ASCAP Consent Decree § IX; BMI Consent Decree § XIV.

[143] *Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 26, 2015).

[144] ASCAP, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 18, 22, 31 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307803.pdf ("ASCAP Antitrust Consent Decree Review Comments"); BMI, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 2 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307859.pdf ("BMI Antitrust Consent Decree Review Comments").

[145] *Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 26, 2015).

conducting a related investigation to determine whether there has been a coordinated effort among music publishers and PROs to raise royalty rates.[146]

Key Antitrust Cases

In addition to the DOJ actions that led to the adoption of the consent decrees, PRO practices have been the subject of private antitrust actions, including a number related to the consent decrees. The decisions in these cases serve to highlight courts' approach to the collective licensing of public performance rights and administration of the consent decrees.

In the 1979 Supreme Court case of *BMI v. CBS*, CBS had sued ASCAP and BMI, alleging that the blanket license violated antitrust laws by constituting "illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights."[147] Rather than declaring the blanket licenses per se unlawful, the Court held that they should be evaluated under a "rule of reason" test, observing that a blanket license could be useful to address the problem of negotiating thousands of individual licenses. The Court also noted as relevant the fact that there were no "legal, practical, or conspiratorial impediment[s]" to obtaining direct licenses, indicating licensees have a real choice in the direct license as an alternative to the blanket license.[148] On remand, the court of appeals upheld the blanket license under the rule of reason, explaining that it did not unreasonably restrain competition because CBS could feasibly obtain direct licenses from copyright owners.[149]

After the *BMI v. CBS* litigation, a number of other courts examined the blanket license, and sustained it against antitrust challenges under rule-of-reason analysis. In *Buffalo Broadcasting v. ASCAP*, the Second Circuit concluded that, in the context of local television stations, the blanket license did not violate the Sherman Act because per-program licenses, direct licenses, and source licenses were realistic alternatives to the blanket license.[150] A federal district court in the District of Columbia reached a similar conclusion with respect to cable stations.[151]

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[146] Ed Christman, *Dept. of Justice Sends Doc Requests, Investigating UMPG, Sony/ATV, BMI and ASCAP Over Possible "Coordination,"* BILLBOARD (July 13, 2014), http://www.billboard.com/biz/articles/news/publishing/6157513/dept-of-justice-sends-doc-requests-investigating-umpg-sonyatv. Members of the DOJ Antitrust Division attended and observed the Office's roundtables for this study in Nashville and New York.

[147] *BMI v. CBS*, 441 U.S. at 6.

[148] *Id.* at 24.

[149] *CBS v. ASCAP*, 620 F.2d 930, 938-39 (2d Cir. 1980).

[150] *Buffalo Broad. v. ASCAP*, 744 F.2d at 926-32; *see also id.* at 934 (Winter, J., concurring) ("[S]o long as composers or [publishers] have no horizontal agreement among themselves to refrain from

More recent litigation has involved royalty rate disputes. In 2012, the Second Circuit addressed rate disputes involving ASCAP and BMI, on the one hand, and DMX, a background music service, on the other, regarding the rate to be paid for an adjustable-fee blanket license.[152] In arguing for a lower rate, DMX pointed to direct licenses it had entered into with a number of copyright owners, most of them smaller publishers, on relatively favorable terms for DMX.[153] DMX, however, also relied on a direct license from Sony/ATV, a major music publisher. That deal gave Sony/ATV a pro rata share of the same annual rate as other smaller publishers, but also provided Sony a $2.4 million advance and a $300,000 administrative fee.[154] The court found this and the other direct deals entered into by DMX to be persuasive benchmarks and that the rate courts reasonably considered DMX's direct licenses in their rate determinations. Although the PROs argued that the substantial advance paid to Sony/ATV rendered that license an inadequate basis to set rates for the remainder of publishers covered by PRO licenses, the court of appeals affirmed the rates adopted by the rate courts.[155]

There has also been recent litigation between the PROs and Pandora, the internet radio service. In 2011 and 2013, respectively, in response to demands by their major publisher members, ASCAP and BMI both amended their rules to allow music publishers to withdraw from PRO representation the right to license their public performance rights for "new media" uses—*i.e.*, digital streaming services—while still allowing the PROs to license to other outlets on their behalf.[156] As a result, Pandora—faced with a potential loss of PRO licensing authority for the major publishers' catalogs—proceeded to negotiate licenses directly with EMI Music Publishing Ltd. ("EMI"),[157] Sony/ATV and UMPG at varying rates that brought the publishers higher fees than those they were receiving under the PRO system. Pandora, however, challenged the publisher's partial withdrawal of rights before both the ASCAP and BMI rate courts. In each case—though applying slightly differing logic—the court ruled that under the terms of the consent

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source or direct licensing and there is no other artificial barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition.").

151 *Nat'l Cable Television Ass'n, Inc. v. BMI*, 772 F. Supp. 614, 628 (D.D.C. 1991).

152 *BMI v. DMX*, 683 F.3d at 35, 43.

153 *Id.* at 38.

154 *Id.*

155 *Id.* at 47-49.

156 *In re Pandora Media, Inc*., Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927, at *2 (S.D.N.Y. Sept. 17, 2013); *BMI v. Pandora Media, Inc.*, Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788, at *2-3 (S.D.N.Y. Dec. 19, 2013).

157 Not long afterward, EMI's music catalog was bought by Sony/ATV. *In re Pandora*, 2013 WL 5211927, at *3.

decrees, music publishers could not withdraw selected rights; rather, a publisher's song catalog must be either "all in" or "all out" of the PRO.[158]

Following these rulings, the district court held a bench trial and issued a decision on the merits of the rate dispute between ASCAP and Pandora.[159] Relying on Pandora's negotiated agreements with the major publishers as benchmarks, ASCAP sought a rate of 1.85% of revenues for 2011-2012, 2.50% for 2013, and 3.00% for 2014-2015.[160] The court determined that a rate of 1.85% of revenues with no increase was appropriate for the entire period. In so concluding, the court rejected ASCAP's reliance on the higher-priced licensing agreements with the major publishers, concluding that Sony/ATV and UMPG had engaged in improper negotiation tactics, such as declining to provide lists of the works the publishers represented so that Pandora could remove those works from its service in the event of a failure to reach agreement.[161] The *Pandora* decision is addressed in greater depth in Part IV.

SESAC has also recently been the target of antitrust suits by local television stations and the RMLC, both of which have accused SESAC of engaging in anticompetitive conduct by taking steps to make its blanket license the only viable option for these users, such as by unreasonably and steeply raising the cost of the per-program license and imposing penalties on publishers that engage in direct licensing.[162] In October 2014, the local television stations and SESAC agreed to a settlement in which SESAC agreed to pay $58.5 million to the television stations and to provide a per-program license in addition to a blanket license beginning January 1, 2016.[163] The RMLC suit against SESAC remains pending.

c. Consent Decree Procedures

As noted, ASCAP and BMI are required by their consent decrees to grant a nonexclusive license to publicly perform all of the works in their repertoires to any potential licensee who makes a written application.[164] An entity that seeks a public performance license begins the process by submitting such a request to the PRO. In the absence of an established rate for the applicant's use, the PRO and the applicant may then engage in

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[158] *In re Pandora*, 2013 WL 5211927, at *5-7; *BMI*, *v. Pandora*, 2013 WL 6697788, at *3-4.

[159] *Pandora Ratesetting*, 6 F. Supp. 3d at 321-22.

[160] *Id.* at 354.

[161] *Id.* at 357-61.

[162] *Meredith Corp.*, 1 F. Supp. 3d at 192-93; *RMLC v. SESAC*, 29 F. Supp. 3d at 492-94.

[163] Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement at 1-2, 5, *Meredith Corp.*, 1 F. Supp. 3d 180 (No. 09-cv-9177). TMLC, which was not a party to the litigation, was also a signatory to the settlement. *Id.* at 1 n.2.

[164] ASCAP Consent Decree § VI; BMI Consent Decree § IV.A.

negotiations regarding the appropriate rate.[165] Significantly, however, under both consent decrees, the mere submission of the application gives the applicant the right immediately to being using the musical works in the PROs' repertoires without payment of any fee or compensation during the pendency of negotiations or a ratesetting proceeding.[166]

If the PRO and licensee are unable to agree on a fee, either party may apply for a determination of a reasonable fee by the applicable rate court.[167] The term "rate court" is a bit of a misnomer, however; as noted above, rate disputes are handled by the federal district judge in the Southern District of New York who has been assigned ongoing responsibility for administration of the relevant consent decree.[168] Currently, the ASCAP decree and ratesetting cases are overseen by Judge Denise Cote, and Judge Louis L. Stanton oversees these matters with respect to BMI.

In a rate court proceeding, the PRO has the burden of proving that the royalty rate it seeks is "reasonable," and if the court determines that the proposed rate is not reasonable, it will determine a reasonable rate itself.[169] In determining a reasonable fee, the rate court is tasked with assessing the fair market value of the license, *i.e.*, "what a license applicant would pay in an arm's length transaction."[170] But antitrust concerns also play a direct role: according to the Second Circuit, the rate courts are also obligated to "tak[e] into account the fact that the PRO, as a monopolist, exercises disproportionate power over the market for music rights."[171]

Since negotiations between PROs and potential licensees—as well as rate court proceedings—can be lengthy, an applicant or a PRO may apply to the rate court to fix an interim rate, pending final determination of the applicable rate. Under the two decrees, such interim fees are supposed to be set by the court within three to four months.[172] Once the rate court fixes the interim rate, the licensee must pay the interim fee

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[165] ASCAP Consent Decree § IX.F; BMI Consent Decree § XIV.A.

[166] ASCAP Consent Decree § IX.E; BMI Consent Decree § XIV.A.

[167] ASCAP Consent Decree § IX.A; BMI Consent Decree § XIV.A.

[168] Paul Fakler, *Music Copyright Royalty Rate-Setting Litigation: Practice Before the Copyright Royalty Board and How It Differs from ASCAP and BMI Rate Court Litigation*, 33 THE LICENSING J. 1, 5 (2013), *available* at http://www.arentfox.com/sites/default/files/FaklerLicensingJournalArticle.pdf.

[169] ASCAP Consent Decree § IX.B-D; BMI Consent Decree § XIV.A.

[170] *Pandora Ratesetting*, 6 F. Supp. 3d at 353 (citation omitted).

[171] *BMI v. DMX*, 683 F.3d at 45 (internal quotation marks, citations, and alterations omitted).

[172] The interim fee proceedings are to be completed within 90 days in ASCAP's case and 120 days in BMI's case. *See* ASCAP Consent Decree § IX(F); BMI Consent Decree § XIV.B.

retroactively to the date of its license application.[173] Final royalty rates are also applied retroactively.[174]

Significantly, section 114(i) of the Copyright Act prohibits the rate court from considering the licensing fees paid for digital performances of sound recordings in its ratesetting proceedings for the public performance of musical works.[175] This provision was included when Congress created a public performance right for sound recordings with the 1995 enactment of the DPRSRA.[176] In theory, it was intended to protect royalties for the public performance of musical works from being diminished as a result of the grant of a public performance right for sound recordings in digital contexts.[177]

4. Statutory License for Public and Noncommercial Broadcasting

The activities of public and noncommercial educational broadcasters are subject to a hodgepodge of music licensing protocols. Section 118 provides a statutory license that covers such entities' public performances of musical works and reproductions and distributions that enable such performances.[178] The section 118 license, however, applies only to over-the-air broadcasts.[179] Noncommercial broadcasters must clear digital performance rights for musical works (*e.g.*, for internet radio) with the PROs under the provisions of the consent decrees as applicable.[180]

In addition, the section 118 license does not extend to the use of sound recordings by noncommercial broadcasters. For certain reproduction, distribution, and derivative rights for sound recordings, noncommercial broadcasters rely on the exemption in section 114(b), which applies to music "included in educational television and radio programs . . . distributed or transmitted through public broadcasting entities."[181] The

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[173] *See* ASCAP Consent Decree § IX(F); BMI Consent Decree § XIV.B.

[174] *See* ASCAP Consent Decree § IX(F); BMI Consent Decree § XIV.B.

[175] 17 U.S.C. § 114(i).

[176] DPRSRA § 3.

[177] BMI First Notice Comments at 11.

[178] 17 U.S.C. § 118(c).

[179] 17 U.S.C. § 118(c)(1), (f) (limiting performance license to "noncommercial educational broadcast station[s]" as defined in 47 U.S.C. § 397); 47 U.S.C. § 397 (defining "noncommercial educational broadcast station" as a "television or radio broadcast station"); s*ee also* NRBMLC First Notice Comments at 14 (describing section 118 license as being "confined to over-the-air transmissions").

[180] *See id.* at 14-15 (explaining that for "digital transmission of musical works . . . noncommercial broadcasters are required to negotiate with ASCAP, BMI, and SESAC").

[181] 17 U.S.C. § 114(b).

114(b) exemption does not apply to digital performances and related reproductions, however.[182] For those uses, noncommercial broadcasters must obtain section 112 and 114 statutory licenses (discussed below).[183]

C. Licensing Sound Recordings

1. Exclusive Rights in Sound Recordings

The owner of a sound recording fixed after February 15, 1972 possesses a number of exclusive rights under the Copyright Act, including the right to make and distribute copies or phonorecords (*e.g.*, CDs and DPDs) of the work;[184] the right to create derivative works (*e.g.*, a new work based on an existing recording);[185] and the right to perform the work publicly by means of a digital audio transmission (*e.g.*, via internet or satellite radio).[186] The Act exempts public performances of sound recordings by terrestrial radio stations.[187]

2. Reproduction and Distribution Rights

Except in the limited case of noninteractive streaming services that qualify for compulsory licensing under sections 112 and 114, licenses to reproduce and distribute sound recordings—such as those necessary to make and distribute CDs, transmit DPDs and ringtones, or operate an interactive music service—are obtained through direct negotiation between a licensee and the sound recording owner (usually a record label) in the open market.[188]

3. Public Performance Rights

a. Lack of Terrestrial Performance Right

In the 1995 DPRSRA, Congress gave sound recording owners an exclusive public performance right, but one limited to digital audio transmissions, and created the

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182 NPR First Notice Comments at 4-5. Section 114(b) extends to "educational television and radio programs." 17 U.S.C. § 114(b). (Note that section 114(b) defines "educational television and radio programs" by referencing 47 U.S.C. § 397, but Congress deleted that definition from section 397 in 1978 without changing section 114(b). *See* 47 U.S.C. § 397 note. At the time of § 114(b)'s enactment in 1976, the term was defined in section 397 as "programs which are primarily designed for educational or cultural purposes.").

183 NRBMLC First Notice Comments at 2-3; NPR First Notice Comments at 3-4.

184 17 U.S.C. § 106(1), (3).

185 17 U.S.C. § 106(2).

186 17 U.S.C. § 106(6).

187 17 U.S.C. § 114(d)(1).

188 *See* DiMA First Notice Comments at 8.

section 112 and 114 statutory licenses to cover satellite radio and noninteractive subscription providers engaged in digital performances.[189] In 1998, Congress extended the compulsory license provisions to include subscription internet radio services.[190] It also expanded the exemption for ephemeral copies for over-the-air broadcasts and created the section 112(e) statutory license.[191] Traditional over-the-air broadcasts, however, are expressly exempted from the sound recording performance right.[192]

Congress drew this legal distinction based on perceived differences between digital and traditional services, believing at the time that traditional broadcasters posed "no threat" to the recording industry, in contrast to digital transmission services.[193] A longstanding justification for the lack of a sound recording performance right has been the promotional effect that traditional airplay is said to have on the sale of sound recordings.[194] In the traditional view of the market, broadcasters and labels representing copyright owners enjoy a mutually beneficial relationship whereby terrestrial radio stations exploit sound recordings to attract the listener pools that generate advertising dollars, and, in return, sound recording owners receive exposure that promotes record and other sales.[195]

As discussed in Section III, apart from the fact that sound recordings help generate billions of dollars annually for terrestrial radio stations, there are significant questions as to whether the traditional view of the market—even if persuasive in earlier times—remains credible today. Notably, in 2014, with 298 million active listeners, terrestrial radio had "more than double the total of Pandora (79 million), Sirius XM (27 million) and Spotify (14 million) combined."[196]

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[189] *See generally* DPRSRA.

[190] Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, § 405(a), 112 Stat. 2860, 2890-2899 (1998).

[191] *Id.* §§ 402, 405(b).

[192] *See* 17 U.S.C. § 114(d)(1).

[193] *See* S. REP. NO. 104-128, at 14-15 ("It is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.").

[194] *Id.*

[195] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-862, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS 13-21 (2010), *available at* http://www.gao.gov/assets/310/308569.pdf ("GAO REPORT").

[196] Zach O'Malley, *Truth in Numbers: Six Music Industry Takeaways From Year-End Data*, FORBES (Jan. 22, 2015), *available at* http://www.forbes.com/sites/zackomalleygreenburg/2015/01/22/truth-

Internationally, the United States is an outlier. Virtually all industrialized nations recognize a more complete public performance right for sound recordings than does the United States.[197] The failure of U.S. law to do the same causes U.S. record companies and artists to forgo an estimated $70-100 million in royalties for foreign exploitations of their works due to the lack of reciprocity.[198]

Significantly, however, in recent years, the nation's largest broadcast company, iHeartMedia (formerly Clear Channel), has entered into licensing agreements with WMG and a number of independent record labels (including Big Machine Records, the record label of Taylor Swift, Rascal Flats, and Tim McGraw) covering both terrestrial and internet radio.[199] While the current CRB rate for streamed radio is a per-play rate, these arrangements apparently feature a percentage-based or other alternative rate structure for both digital and terrestrial uses.[200] Although the terms of these deals remain private, reports indicate that iHeartMedia agreed to pay the smaller labels based on an industry rate of 1% of advertising revenues for terrestrial uses, and perhaps a larger sum to WMG.[201]

In recent years there have also been various legislative efforts to provide for a more complete public performance right,[202] as well as numerous congressional hearings focused on expanding the right to cover traditional broadcast transmissions.[203] The

in-numbers-six-music-industry-takeaways-from-year-end-data/ (noting live music comprises 26% and satellite radio subscription 10%).

[197] Only a handful of countries countries—including Iran and North Korea—lack such a right, in addition to the United States. *See, e.g,* A2IM First Notice Comments at 8; SoundExchange First Notice Comments at 17.

[198] GAO REPORT at 30 (estimates based on language of the Performance Rights Act, S. 379, 111th Cong. (2009)). The NAB disputes these figures. NAB First Notice comments at 29-30 & n.15.

[199] *See* Ed Christman, *Here's Why Warner Music's Deal with Clear Channel Could be Groundbreaking for the Future of the U.S. Music Biz (Analysis),* BILLBOARD (Sept. 12, 2013), http://www.billboard.com/biz/articles/news/5694973/heres-why-warner-musics-deal-with-clear-channel-could-be-groundbreaking.

[200] *Id.*

[201] *Id.*; *see also* Ben Sisario, *Clear Channel-Warner Music Deal Rewrites the Rules on Royalties*, N.Y. TIMES (Sept. 12, 2013), http://www.nytimes.com/2013/09/13/business/media/clear-channel-warner-music-deal-rewrites-the-rules-on-royalties.html.

[202] *See, e.g.*, Performance Rights Act, H.R. 848, S. 379, 111th Cong. (2009); Performance Rights Act, H.R. 4789, S. 2500, 110th Cong. (2010); Free Market Royalty Act, H.R. 3219, 113th Cong. (2013).

[203] *See, e.g.*, *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) ("*Internet Streaming of Radio Hearing*"); *Music Licensing Hearings*.

Copyright Office has long supported, and continues to support, the creation of a more complete sound recording performance right.[204]

b. Section 112 and 114 Licenses

The section 114 statutory license allows different types of noninteractive digital music services—free and paid internet radio services,[205] "preexisting" satellite radio services,[206] and "preexisting" music subscription services[207]—to perform sound recordings upon compliance with the statutory license requirements, including the payment of royalties as determined by the CRB.[208] In addition, recognizing that such digital services must make server reproductions of sound recordings—sometimes called "ephemeral" copies—to facilitate their digital transmissions, Congress established a related statutory license under section 112 to authorize the creation of these copies.[209] Rates and terms for the section 112 license are also established by the CRB.

The section 112 and 114 licenses for sound recordings are subject to a number of technical limitations. For instance, services relying on the section 114 statutory license are prohibited from publishing an advance program schedule or otherwise announcing

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[204] *See, e.g.*, *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 117-18 (2009) ("*Performance Rights Act Hearing*") (statement of Marybeth Peters, Register of Copyrights); *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 111th Cong. 13-30 (2007) ("*Ensuring Artists Fair Compensation Hearing*") (statement of Marybeth Peters, Register of Copyrights); *Internet Streaming of Radio Hearing* at 8-22 (statement of David O. Carson, General Counsel, U.S. Copyright Office); U.S. COPYRIGHT OFFICE, PERFORMANCE RIGHTS IN SOUND RECORDINGS (Comm. Print 1978), *available at* http://copyright.gov/reports/performance-rights-sound-recordings.pdf ("PERFORMANCE RIGHTS REPORT").

[205] Free noninteractive internet radio services not exempt under 17 U.S.C. § 114(d)(1) qualify as "eligible nonsubscription services" and paid noninteractive internet radio services qualify as "new subscription services" in the parlance of section 112 and 114. *See* 17 U.S.C. § 114(j)(6), (8).

[206] A preexisting satellite digital audio radio service is a subscription satellite audio radio service provided pursuant to a satellite digital audio radio service license issued by the FCC on or before July 31, 1998. 17 U.S.C. § 114(j)(10). Currently, there is only one satellite service, Sirius XM. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23,054, 23,055 (Apr. 17, 2013) ("PSS/Satellite II").

[207] A preexisting subscription service is a noninteractive audio-only service that was in existence on or before July 31, 1998. U.S.C. § 114(j)(11). Music Choice—which transmits music via cable and satellite television and the internet—is an example of a pre-existing subscription service. PSS/Satellite II, 78 Fed. Reg. at 23,055 n.5.

[208] 17 U.S.C. § 114(d)(2).

[209] DMCA § 402; 17 U.S.C. § 112(e)(1); H.R. REP. NO. 105-796, at 89 (1998) (Conf. Rep.).

or identifying in advance when a specific song, album or artist will be played.[210] Another example is the "sound recording performance complement," which limits the number tracks from a single album or by a particular artist that may be played during a 3-hour period.[211]

Payment and reporting of royalties under the section 112 and 114 licenses are made to a single non-profit agent: SoundExchange.[212] SoundExchange was established by the RIAA in 2000 and in 2003 was spun off as an independent entity.[213] The Copyright Act specifies how royalties collected under section 114 are to be distributed: 50% goes to the copyright owner of the sound recording, typically a record label; 45% goes to the featured recording artist or artists; 2½% goes to an agent representing nonfeatured musicians who perform on sound recordings; and 2½% to an agent representing nonfeatured vocalists who perform on sound recordings.[214] Section 112 fees are paid by SoundExchange directly to the sound recording owner.[215] Prior to distributing royalty payments, SoundExchange deducts the reasonable costs incurred in carrying out its responsibilities.[216]

Notably, the Act does not include record producers in the statutorily defined royalty split. As a result, record producers must rely on contracts with one of the parties specified in the statute, often the featured recording artist, in order to receive royalties from digital performances.[217] To help facilitate these contracts, SoundExchange has

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[210] *See* 17 U.S.C. § 114(d)(2)(B)-(C).

[211] 17 U.S.C. § 114(d)(2)(B)(i), (d)(2)(C)(i), (j)(13).

[212] 37 C.F.R. § 380.11 ("*Collective* is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 license period, the Collective is SoundExchange, Inc."); *see also Intercollegiate Broad. Sys., Inc.* v. *Copyright Royalty Bd.*, 571 F.3d 69, 91 (D.C. Cir. 2009).

[213] *Technology Briefing: Internet; Online Royalty Pool Created*, N.Y. TIMES, Nov. 29, 2000, at C4; *Global Business Briefs*, WALL ST. J., Oct. 2, 2003, at B5.

[214] 17 U.S.C. § 114(g)(2); *see About Digital Royalties*, SOUNDEXCHANGE, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/ (last visited Jan. 26, 2015). Royalties collected pursuant to section 112 are not distributed according to this split, and instead are paid entirely to the record labels. Review of Copyright Royalty Judges Determination, 73 Fed. Reg. 9143, 9146 (Feb. 19, 2008).

[215] 17 U.S.C. § 112(e); *see also* Review of Copyright Royalty Judges Determination, 73 Fed. Reg. 9143, 9146 (Feb. 19, 2008) (explaining that "[r]oyalties collected under section 114 are paid to the performers and the copyright owners of the sound recordings . . . whereas, the royalties collected pursuant to the section 112 license are not paid to performers").

[216] 17 U.S.C. § 114(g)(3).

[217] *See* 17 U.S.C. 114(g)(2); *About Digital Royalties*, SOUNDEXCHANGE, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/ (last visited Jan. 26, 2015); *see also*

begun processing direct payments to producers based upon written direction from the featured artist.[218]

Since SoundExchange became an independent entity in 2003, it has distributed over $2 billion to artists and labels.[219] The collective engages in outreach to identify and locate artists and labels who may be due royalties from the funds that is has collected.[220] Nonetheless, significant amounts of unclaimed funds have accumulated over time.[221] Press accounts indicate that SoundExchange had unclaimed royalties of approximately $96 million as of the end of 2013.[222] Under the applicable regulations, SoundExchange retains all undistributed royalties for not less than three years, and thereafter may release them to offset its administrative costs and/or to engage in ratesetting and enforcement activities.[223]

Interactive/Noninteractive Distinction

The statutory licensing framework applies only to noninteractive (*i.e.*, radio-style) services; interactive or on-demand services are not covered.[224] The distinction between interactive and noninteractive services has been the matter of some debate. The statute provides that an interactive service is one that enables a member of the public to receive either "a transmission of a program specially created for the recipient," or "on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient."[225]

The statutory definition leads to the question whether so-called "personalized" or "custom" music streaming services—services that tailor the music they play to individual user preferences—transmit programs that are "specially created for the

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Music Licensing Hearings at 14 (statement of Neil Portnow, President/CEO of The Recording Academy).

[218] NARAS First Notice Comments at 5.

[219] *Our Work*, SOUNDEXCHANGE, http://www.soundexchange.com/about/our-work/ (last visited Jan. 26, 2015).

[220] *SoundExchange Outreach Efforts*, SOUNDEXCHANGE, http://www.soundexchange.com/wp-content/uploads/2014/11/Outreach-Fact-Sheet_11.5.14.pdf (last visited Jan. 26, 2015).

[221] *See* Glenn Peoples, *SoundExchange Financials Show Fewer Unclaimed Royalties, Persistent Data Problems*, BILLBOARD (Dec. 24, 2014), http://www.billboard.com/articles/business/6415147/ soundexchange-fewer-unclaimed-royalties-data-problems.

[222] *Id.*

[223] *See, e.g.*, 37 C.F.R. §§ 380.8, 380.17, 380.27.

[224] *See* 17 U.S.C. §§ 112(e), 114(d)(2)-(3), (f). The distinction between interactive and noninteractive services has been the matter of some debate, and is addressed *infra*.

[225] 17 U.S.C. § 114(j)(7).

recipient." In *Arista Records LLC v. Launch Media, Inc.* ("*Launch Media*"), the Second Circuit held that one such service that played songs for users based on users' individual ratings was not interactive because the service did not displace music sales.[226] Following the *Launch Media* decision, personalized music streaming services such as Pandora and Rdio obtain statutory licenses as noninteractive services for their public performance of sound recordings. The CRB-established rates do not currently distinguish between such customized services and other services that simply transmit undifferentiated, radio-style programming over the internet.

Ratesetting Standards

Notably, under section 114, the rate standard applicable to "preexisting" satellite radio and music subscription services (*i.e.*, those services that existed as of July 31, 1998) differs from that for other services such as internet radio and newer subscription services.[227] This distinction is a legislative artifact. The section 114 statutory license was first created with the enactment of the DPRSRA in 1995, and at the time it applied only to satellite radio and subscription music services. Royalty rates and terms under the more limited 1995 license were governed by the four-factor policy-oriented standard in section 801(b)(1) of the Act—that is, the same standard that had long applied to the section 115 license for musical works.[228] With the enactment of the DMCA in 1998, Congress expanded the section 114 license to include internet radio, created a new statutory license for associated ephemeral recordings in section 112, and created a new ratesetting standard—the "willing buyer/willing seller"—standard. Congress, however, grandfathered preexisting services (*i.e.,* those that existed before the DMCA's enactment) under the old royalty ratesetting standard.

Accordingly, because of the staggered enactment of the section 112 and 114 licenses, royalty rates for a limited set of older services—Sirius XM, as the only preexisting satellite service, and Music Choice and Muzak, as the only preexisting subscription services—are governed by the four-factor standard in section 801(b) of the Act.[229] Meanwhile, for all internet radio and other newer digital music services, and for all ephemeral recordings regardless of the service, the CRB is to establish rates and terms "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[230] As explained in Section III, the continuing propriety of that disparity is a matter of dispute among stakeholders.

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[226] *Launch Media*, 578 F.3d 148, 161, 163-64 (2d Cir. 2009).

[227] 17 U.S.C. § 114(j)(10), (11); *see* PSS/Satellite II, 78 Fed. Reg. at 23,055.

[228] *See* 17 U.S.C. §§ 114(f)(1), 115(c)(3), 801(b)(1).

[229] *See* 17 U.S.C. §§ 114(f)(1), 801(b)(1); PSS/Satellite II, 78 Fed. Reg. at 23,055 & n.5.

[230] 17 U.S.C. § 114(f)(2)(B). The provision further requires the CRB to consider "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may

CRB Ratesetting Proceedings

The statutory rates that apply under the section 112, 114 and 115 licenses are established by the CRB.[231] CRB ratesetting proceedings for the section 112, 114, and 115 licenses take place at five-year intervals, and the timing of these proceedings is set by statute.[232]

The CRB is composed of three judges, and Congress imposed strict qualifications for these positions. Each CRB judge is required to have at least seven years of legal experience.[233] The chief copyright royalty judge must have a minimum of five years of experience in adjudications, arbitrations, or court trials. As for the other two judges, one must have significant knowledge of copyright law and the other must have significant knowledge of economics.[234] The Register of Copyrights also plays a role in ratesetting, in that she is responsible for reviewing the CRB's determinations to ensure they are free from material legal error, and may also be called upon to address material questions of substantive law that impact the proceedings.[235] Final ratesetting determinations are appealable to the United States Court of Appeals for the District of Columbia Circuit.[236]

Congress intended the ratesetting process to permit voluntary industry agreements when possible.[237] For example, Congress provided antitrust exemptions to statutory licensees and copyright owners of sound recordings, so that they could designate common agents to collectively negotiate and agree upon royalty rates.[238] The statute also allows for settlement of ratesetting disputes, and mandates a three-month "voluntary negotiation period" at the start of each proceeding before the parties submit their cases.[239] If a settlement is reached among some or all of the participating parties, the Act

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interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings," and "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk." *Id.*

231 17 U.S.C. § 801(b)(1).

232 17 U.S.C. § 804(b).

233 17 U.S.C. § 802(a).

234 17 U.S.C. § 802(a).

235 H.R. REP. NO. 108-408, at 26 (2004) *reprinted in* 2004 U.S.C.C.A.N. 2,332, 2,341; 17 U.S.C. § 802(f)(1).

236 17 U.S.C. § 803(d)(1).

237 H.R. REP. NO. 108-408, at 24.

238 17 U.S.C. §§ 112(e)(2), 114(e)(1), 115(c)(3)(B) (These antitrust exemptions are limited to negotiations addressing rights within the scope of the statutory licenses in sections 112, 114, and 115).

239 *See* 17 U.S.C. § 803(b)(1)-(3).

empowers the CRB to adopt that settlement "as a basis for statutory terms and rates" that will apply to all parties under the statutory license.[240] Notably, however, the Act does not require the CRB to immediately act on such settlements. In the past, the CRB has deferred the adoption of partial settlements until the end of the full ratesetting proceeding.[241]

Absent a settlement, the CRB must proceed to determine the rates and terms of the statutory license. Although the CRB has some flexibility in organizing its procedures, many aspects of its proceedings are dictated by the statute.[242] In many instances, these procedures depart from practices used in ordinary civil litigation. For instance, participating parties must file their written direct cases in support of their requested rates—including witness testimony and supporting exhibits—before any discovery has been taken.[243] Additionally, the statute requires separate direct and rebuttal phases of ratesetting hearings, effectively resulting in two trials.[244] These procedures cannot be altered by the CRB even upon stipulation of the parties.

Royalty Rates

In general, the CRB (like the CARP before it) has adopted "per-performance" rates for internet radio, rather than the percentage-of-revenue rates that are typical in PRO licenses.[245] That per-stream approach has proven controversial. After the CRB's "Webcasting II" decision in 2007, a number of internet radio services and broadcasters complained that the per-performance rates were unsustainable. These concerns led Congress to pass legislation giving SoundExchange the authority to negotiate and agree to alternative royalty schemes that could be binding on all copyright owners and others

[240] 17 U.S.C. § 801(b)(7).

[241] *See* SoundExchange First Notice Comments at 8-9; *see also* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,027 (Mar. 9, 2011) (adopting partial settlement entered into in June 2009 as basis for final rates and terms for commercial webcasters).

[242] *See* 17 U.S.C. § 803(b)(6).

[243] 17 U.S.C. § 803(b)(6).

[244] 17 U.S.C. § 803(b)(6)(C).

[245] *See, e.g.,* 37 C.F.R. § 380.3(a)(1); *see also* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240, 45,272 (July 8, 2002). Section 112 rates have been a relatively insignificant part of the CRB's ratesetting proceedings, and have been established as a modest percentage of the 114 rate. *See e.g.,* 37 C.F.R. § 385.3(c) (establishing ephemeral recording rate to be 5% of the total royalties paid under the section 112 and 114 licenses).

entitled to royalty payments in lieu of the CRB-set rates.[246] Similar complaints after the CARP's 1998 webcasting decision led Congress to enact analogous legislation in 2002.[247]

In the wake of Congress' actions, SoundExchange reached agreement with a number of internet radio services, in general adopting royalty rates that were more closely aligned with the services' revenues. For example, in 2009, SoundExchange negotiated rates with large commercial "pureplay" internet radio services (*i.e.*, services like Pandora that only transmit over the internet).[248] Under that agreement, those services agreed to pay the greater of 25% of gross revenues or specified per performance rates.[249]

c. Privately Negotiated Licenses

A streaming service that does not fall under the section 112 and 114 licenses—*i.e.*, an interactive service—must negotiate a license with a record company in order to use the label's sound recordings.[250] Since direct licenses are agreed upon at the discretion of the copyright owner and the potential licensee, the license terms can be vastly different from those that apply under the statutory regime. It is common for a music service seeking a sound recording license from a label to pay a substantial advance against future royalties, and sometimes an administrative fee.[251] Other types of consideration may also be involved. For example, the major labels acquired a reported combined 18% equity stake in the on-demand streaming service Spotify allegedly based, at least in part, on their willingness to grant Spotify rights to use their sound recordings on its service.[252]

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[246] *See* Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974. Congress later extended the timeframe for negotiations. *See* Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926; *see also* Terry Hart, *A Brief History of Webcaster Royalties*, COPYHYPE (Nov. 29, 2012), http://www.copyhype.com/2012/11/a-brief-history-of-webcaster-royalties.

[247] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780.

[248] Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 34,796, 34,797 (July 17, 2009); Brian T. Yeh, *Statutory Royalty Rates for Digital Performance of Sound Recordings: Decision of the Copyright Royalty Board*, *in* MUSIC LICENSING RIGHTS AND ROYALTY ISSUES 35, 49 (Thomas O. Tremblay ed., 2011).

[249] Notification of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. at 34,799-800; KOHN at 1498.

[250] 17 U.S.C. § 114(d)(3)(C).

[251] A2IM Second Notice Comments at 5-6; Resnick Second Notice Comments at 2-3; *see also* Hannah Karp, *Artists Press for Their Share*, WALL ST. J. (July 21, 2014), http://online.wsj.com /news/articles/SB20001424052702303833804580023700490515416 (reporting that Warner Music Group received an advance from Google of over $400 million).

[252] *See* Helienne Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, GUARDIAN (Aug. 17, 2009), http://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify.

4. Pre-1972 Sound Recordings

When Congress acted in 1971 to grant federal copyright protection to sound recordings, it extended federal protection prospectively, to recordings created on or after February 15, 1972.[253] Sound recordings fixed before February 15, 1972 are protected by a patchwork of differing state laws.[254]

The disparate treatment of pre-1972 sound recordings under federal versus state law has given rise to a number of significant policy concerns, including issues about the preservation and use of older recordings without the benefit of federally recognized limitations on copyright owners' exclusive rights.[255] These issues were extensively addressed in a 2011 Copyright Office report on potential federalization of copyright for pre-1972 recordings.[256]

In its report, the Office surveyed state laws and determined that "the protections that state law provides for pre-1972 sound recordings are inconsistent and sometimes vague and difficult to discern."[257] In addition, the Office's report concluded that state law did not provide adequate protection for uses that would be considered fair uses under federal law.[258] The Office therefore recommended that pre-1972 recordings be brought within the federal copyright system, which would offer uniform protection to their owners as well as appropriate exceptions and limitations for the benefit of users.

Since the Office's report was released, there have been some notable developments in this area. A significant question has arisen concerning whether state law protection extends to the public performance of pre-1972 recordings.[259] In the context of their negotiated deals with record labels, some major services, including YouTube and Spotify, obtain licenses that cover the use—including the performance—of pre-1972

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[253] Sound Recording Act of 1971, 85 Stat. at 392.

[254] The Copyright Act expressly permits states to continue state law protection for pre-1972 sound recordings until February 15, 2067, at which time all state protection will be preempted by federal law and pre-1972 sound recordings will enter the public domain. 17 U.S.C. § 301(c). There is, however, a significant class of pre-1972 sound recordings that do enjoy federal copyright protection—sound recordings of foreign origin for which copyright protection was "restored" as part of the Uruguay Round Agreements Act in 1994. *See* PRE-1972 SOUND RECORDINGS REPORT at 17-20.

[255] *See* PRE-1972 SOUND RECORDINGS REPORT at 64-70.

[256] *See generally id.*

[257] *Id.* at 48.

[258] *Id.* at 86-87.

[259] In a 1977 report on public performance rights in sound recordings, the Copyright Office recognized that Congress had left the decision whether or not to recognize a performance right for pre-1972 sound recordings to the states. PERFORMANCE RIGHTS REPORT at 18.

sound recordings.[260] Some services that use the section 112 and 114 statutory licenses, such as Music Choice,[261] make payments to SoundExchange for use of pre-1972 works pursuant to the same statutory rates and terms applicable under sections 112 and 114.[262] Others, including Sirius XM and Spotify, do not pay royalties either to copyright owners directly or to SoundExchange for performances of pre-1972 sound recordings.[263]

Recently, three courts—two in California and one in New York—have held that the unauthorized public performance of pre-1972 sound recordings violates applicable state law. In the initial case, a California federal district court ruled that Sirius XM infringed rights guaranteed to plaintiffs by state statute.[264] A state court in California subsequently adopted the federal court's reading of the California statute in a second action against Sirius XM.[265] Following these decisions, in a third case against Sirius XM, a federal district court in New York has indicated that the public performance of pre-1972 sound recordings constitutes common law copyright infringement and unfair competition under New York law.[266] Notably, the reasoning employed in these decisions is not expressly limited to digital performances (*i.e.*, internet streaming and satellite radio); they thus could have potentially broad implications for terrestrial radio (currently exempt under federal law for the public performance of sound recordings) as well. In the meantime, similar lawsuits have been filed against other digital providers,

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260 Tr. at 161:18-21 (June 5, 2014) (Scott Sellwood, Google/YouTube); Tr. at 152:04-09 (June 5, 2014) (Steven Marks, RIAA).

261 Music Choice First Notice Comments at 15; Tr. at 190:08-18 (June 24, 2014) (Paul Fakler, Music Choice).

262 PRE-1972 SOUND RECORDINGS REPORT at 45 n.196; *but see* PSS/Satellite II, 78 Fed. Reg. at 23,073 (indicating pre-1972 sound recordings are not covered by section 112 and 114 licenses).

263 *See* Hannah Karp, *Turtles and Sirius XM: Not Happy Together*, WALL ST. J. (Aug. 3, 2013), http://blogs.wsj.com/speakeasy/2013/08/03/turtles-and-sirius-xm-not-happy-together. Previously, Sirius XM did include pre-1972 recordings in its royalty accounting logs to SoundExchange, which were non-itemized, but stopped in 2011 after SoundExchange asked Sirius XM to start reporting exactly what it was paying for. *See* Hannah Karp, *Sirius Is Sued Over Music Royalties for Pre-1972 Recordings*, WALL ST. J. (Aug. 26, 2013), http://www.wsj.com/articles/SB10001424127887324591204579037260890310376.

264 *See Flo & Eddie Inc. v. Sirius XM* ("*Flo & Eddie v. Sirius XM CA*"), No. 13-cv-5693, 2014 U.S. Dist. LEXIS 139053, at *22-23 (C.D. Cal. Sept. 22, 2014).

265 *Capitol Records, LLC v. Sirius XM*, No. BC520981 (Cal. Super. Ct. Oct. 14, 2014) (order regarding jury instructions), *available at* http://www.project-72.org/documents/Sirius-XM-Order-Granting-Jury-Mot.pdf.

266 *See Flo & Eddie Inc. v. Sirius XM* ("*Flo & Eddie v. Sirius XM NY*"), No. 13-cv-5784, 2014 U.S. Dist. LEXIS 166492, at *40-44, *50-52 (S.D.N.Y. Nov. 14, 2014) (denying Sirius XM's motion for summary judgment, and asking Sirius XM to show cause why judgment should not be entered on behalf of plaintiffs), *reconsideration denied*, 2014 U.S. Dist. LEXIS 174907 (Dec. 12, 2014).

including Pandora, Google, Apple's Beats service, and Rdio, alleging the unauthorized use of pre-1972 recordings.[267]

Another issue that has been the subject of recent litigation is whether the DMCA safe-harbor provisions extend to pre-1972 sound recordings.[268] Under section 512(c), an internet service provider is not liable for "infringement of copyright by reason of the storage at the direction of a user of" infringing material, provided that the service meets certain statutory conditions, including take-down requirements.[269] Meanwhile, a separate provision of the Act, section 301(c), preserves state law protection for pre-1972 sound recordings, stating that "any rights or remedies under the common law or statute of any state shall not be annulled or limited by this title until February 15, 2067."[270] In its 2011 report, the Office examined the interplay between these two provisions, and concluded that the DMCA safe harbors did not apply to pre-1972 sound recordings.[271] Although one decision predating the Office's report found that the DMCA safe harbors do apply to pre-1972 sound recordings,[272] more recent decisions have agreed with the Copyright Office that the safe harbors are a creature of federal law and do not limit state law protections.[273]

D. Synchronization Rights

To incorporate music into an audiovisual work—such as a film, video television program, or video game—the creator of that work must obtain synchronization licenses from both the owner of the musical work and the owner of the sound recording. Synchronization (often shortened to "synch") refers to the use of music in "timed-relation" to visual content.[274] Although the Copyright Act does not refer explicitly to a

[267] *See Flo & Eddie, Inc. v. Pandora Media, Inc.*, No. 14-cv-07648 (C.D. Cal. Oct. 2, 2014); Complaint, *Capitol Records, LLC v. Pandora Media, Inc.*, No. 651195/2014 (N.Y. Sup. Ct. Apr. 17, 2014); *see also* Eriq Gardner, *Sony, Google, Apple Hit With Lawsuits Over Pre-1972 Music,* HOLLYWOOD REPORTER (Jan. 23, 2015), http://www.hollywoodreporter.com/thr-esq/sony-google-apple-hit-lawsuits-766187.

[268] *See* 17 U.S.C. § 512(a)-(d).

[269] 17 U.S.C. § 512(c).

[270] 17 U.S.C. § 301(c).

[271] PRE-1972 SOUND RECORDINGS REPORT AT 130-32.

[272] *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 640–42 (S.D.N.Y. 2011). *But see Capitol Records, Inc. v. MP3tunes, LLC*, No. 07-cv-9931, 2012 WL 242827, at *1–*2 (S.D.N.Y. Jan. 9, 2012) (citing Copyright Office report and acknowledging that its earlier decision "may involve a 'substantial ground for difference of opinion'").

[273] *Capitol Records, LLC v. Vimeo, LLC,* 972 F. Supp. 2d 500, 536-37 (S.D.N.Y. 2013); *see also Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 552 (S.D.N.Y. 2013) (denying motion for reconsideration); *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005).

[274] *See Steele v. Turner Broad. Sys., Inc*. 646 F. Supp. 2d 185, 193 (D. Mass. 2009).

synchronization right, it is generally understood to be an aspect of music owners' reproduction and/or derivative work rights.[275]

The licensing of music for audiovisual works, unlike that for other uses, occurs in the free market for both musical works and sound recordings. The synch market thus stands as a useful counterpoint to the regulated licensing markets discussed above. A notable feature of the synch market is the relatively even balance between royalties paid for the musical works rights and those paid for the sound recording rights. Musical work and sound recording owners are generally paid equally—50/50—under individually negotiated synch licenses.[276]

The synchronization market for uses in commercial works such as film, television programs, and video games appears reasonably efficient and flexible. In addition to in-house resources, a number of intermediaries help handle licensing for those who wish to use music in a new creative work. Music supervisors working for production companies facilitate selection, negotiation, and delivery of music for use in audiovisual productions.[277] Companies such as Greenlight, Dashbox, Cue Songs, and Rumblefish provide online services that offer different songs for synchronization purposes.[278]

An evolving aspect in the music licensing marketplace is the exploitation of music videos that record labels produce to accompany new releases. Traditionally, any royalties for these videos were nominal, as they were created largely to promote sales of

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[275] *See, e.g.*, *Buffalo Broad. v. ASCAP*, 744 F.2d at 920; *Agee*, 59 F.3d at 321.

[276] *See* NMPA & HFA First Notice Comments at 16; Tr. at 60:20-22 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP) ("synchronization licenses are generally divided in terms of income 50/50 between sound recording and the musical composition."). While parity may be commonplace for individually negotiated deals, the same does not seem to hold true for broader licenses with consumer-facing video services such as YouTube. Under an HFA-administered YouTube license, publishers are paid 15% of YouTube's net revenue from videos uploaded by non-record label users that incorporate HFA-controlled publishing rights and embody a commercially released or distributed sound recording (*i.e.*, a lip sync video), and 50% of revenue from videos that incorporate HFA-controlled publishing rights but a user-created recording (*i.e.*, a cover recording). NMPA/HFA/YOUTUBE LICENSING OFFER, *Licensing Offer Overview*, http://www.youtubelicenseoffer.com/docs/notice.pdf (last visited Jan. 29, 2015). By comparison, YouTube's standard contract for independent record labels reportedly allocates 45% of YouTube subscription music video revenue to labels, as compared to 10% to publishers. Ed Christman, *Inside YouTube's Controversial Contract with Indies*, BILLBOARD June 20, 2014, http:// www. billboard.com/biz/articles/news/digital-and-mobile/6128540/analysis-youtube-indie-labels-contract-subscription-service?mobile_redirection=false.

[277] NMPA & HFA Second Notice Comments at 10-13.

[278] *Id.* at 14-15.

records through music video channels such as MTV.[279] But more recently, as videos have become among the most common ways in which consumers wish to enjoy music,[280] there is strong interest in developing this market. Record labels seek to license these professionally created videos—which incorporate musical works—to online providers such as YouTube and Vevo.[281]

In the early 2000s major record labels and publishers entered into "New Digital Media Agreements" ("NDMAs") to allow labels efficiently to obtain licenses from their major publisher counterparts so they can pursue new digital products and exploit music videos in online markets.[282] These licensing arrangements, in turn, became a model for a more recent 2012 agreement between UMG and NMPA that allowed UMG to seek similar rights from smaller independent publishers on an "opt-in" basis. The licensing arrangement includes rights for the use of musical works in "MTV-style" videos, live concert footage, and similar exploitations.[283]

Like the major record labels, larger music publishers have entered into direct licensing relationships with the on-demand video provider YouTube that allow them some amount of control over the use of user-uploaded videos incorporating their music and provide for payment of royalties.[284] Following the settlement of infringement litigation

[279] *See* PASSMAN at 177-78 (reflecting the decline of the traditional market for music video on platforms such as the MTV television network); KOHN at 1119 (noting that promotional music videos have synchronization fees that are "quite nominal, set at an amount intended merely to cover the administrative costs of preparing the paperwork for the license grant. This is because the copyright owner stands to substantially benefit from . . . performance royalties resulting from the exhibition of the music video.").

[280] RIAA Second Notice Comments at 14.

[281] Vevo is a joint venture between UMG, SME, the Abu-Dhabi Media Company, and YouTube. *See* Alex Pham, *YouTube Confirms Vevo Deal*, BILLBOARD (July 2, 2013), http://www.billboard.com /biz/articles/news/digital-and-mobile/1568816/youtube-confirms-vevo-deal; *see also* PASSMAN at 259 (for record company-produced videos streamed, "the record labels get about 70% of ad revenues and/or subscription monies," and generally pay publishers "in the range of 10% of the ad revenues (a little under 15% of the 70% that the company gets")).

[282] *See* RIAA First Notice Comments at 14 n.28; NMPA Second Notice Comments at 33.

[283] *See id.* at 33; Susan Butler, *UMG/NMPA Broker Model License Agreement*, MUSIC CONFIDENTIAL, June 21, 2012; Ed Christman, *NMPA Inks Deal With Universal Music Group Over VEVO, YouTube Videos*, BILLBOARD (June 19, 2012), http://www.billboard.com/biz/articles/news/publishing/ 1093134/nmpa-inks-deal-with-universal-music-group-over-vevo-youtube. The licensing arrangement excludes rights for synch uses in motion pictures, television, advertising, video games and other products that are typically individually negotiated by publishers. *Id.*

[284] *See YouTube Licensing Offer Overview*, YOUTUBE LICENSING OFFER, http://www.youtubelicense offer.com/notice (last visited Jan. 26, 2015).

by a class of independent music publishers against YouTube in 2011,[285] NMPA and its licensing subsidiary HFA announced an agreement with YouTube in which smaller publishers could choose to license their musical works to YouTube by opting in to prescribed licensing terms. Those who choose to participate in the arrangement grant YouTube the right to "reproduce, distribute and to prepare derivative works (including synchronization rights)" for videos posted by YouTube's users.[286] The license does not, however, cover the public performance right. Music publishers who opt into the YouTube deal receive royalties from YouTube and have some ability to manage the use of their music through HFA, which administers the relationship and can access YouTube's content identification tools on behalf of individual publishers.[287] Over 3,000 music publishers have entered into this licensing arrangement with YouTube.[288]

Another developing area is the market for so-called "micro-licenses" for music that is used in videos of modest economic value, such as wedding videos and corporate presentations. In the past, income received by rightsholders from licensing such uses might not overcome administrative or other costs. But the market is moving to take advantage of technological developments—especially online applications—that make micro-licensing more viable. This includes the aforementioned services like Rumblefish, but also efforts by NMPA, HFA, and RIAA to license more synchronization rights through programs that allow individual copyright owners to effectuate small licensing transactions.[289]

E. Licensing Efficiency and Transparency

New digital services face a formidable challenge when attempting to license music. One study showed that acquiring the necessary rights to offer a marketable digital music offering[290] requires roughly 18 months of effort, with some entities never able to

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[285] *See The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp. 2d 159 (S.D.N.Y. 2009).

[286] *YouTube License Agreement,* YOUTUBE LICENSING OFFER, http://www.youtubelicenseoffer.com /docs/license.pdf (last visited Jan. 26, 2015); *see also* Susan Butler, *Anatomy of a Trade Group License*, MUSIC CONFIDENTIAL, Sept. 9, 2011.

[287] *See YouTube Licensing Offer Overview*, YOUTUBE LICENSING OFFER, http://www.youtubelicense offer.com/notice (last visited Jan. 26, 2015).

[288] Susan Butler, *U.S. Music Licensing: The Rights Holders (Part Two, Conclusion)*, MUSIC CONFIDENTIAL, June 5, 2014.

[289] Ed Christman, *RIAA & NMPA Eyeing Simplified Music Licensing System, Could Unlock 'Millions' in New Revenue*, BILLBOARD (June 13, 2013), http://www.billboard.com/biz/articles/news/record-labels/1566550/riaa-nmpa-eyeing-simplified-music-licensing-system-could.

[290] *See* RIAA First Notice Comments at 8 ("To be competitive, today's streaming, cloud and subscription music services require licenses to the full catalog of songs (and shares thereof) owned by virtually every music publisher."); DiMA Second Notice Comments at 16 ("Digital service providers and record companies do, in fact, need to obtain licenses for millions of songs

successfully negotiate the licenses needed to launch their services.[291] One of the key reasons for this complexity is the lack of an "authoritative list of rights holders and the recordings/works they represent."[292]

As discussed in detail in Section III, it is widely acknowledged that reliable, up-to-date information about copyrighted works is a critical prerequisite for efficient licensing in the modern music marketplace. Both copyright owners and music services must be able to uniquely identify particular sound recordings and underlying musical works, along with the dynamic and often fractured ownership status of these distinct works. In addition, they need to be able to pair sound recordings with the musical works they embody. While the industry has made some progress on this front, much remains to be done.

1. Data Standards

One of the initial considerations regarding management of reliable and up-to-date copyright information for musical works and sound recording copyrights is the use of standard identifiers. Fortunately, the music industry already employs a variety of standard identifiers recognized by the International Organization for Standardization ("ISO"), the international standard-setting body. The ISO has established two key standards for the identification of works themselves—the International Standard Music Work Code ("ISWC") for musical works, and the International Standard Recording Code ("ISRC") for sound recordings.[293]

The ISWC represents a unique, permanent, and internationally recognized reference number for the identification of musical works. The standard was developed by the International Confederation of Societies of Authors and Composers ("CISAC"). In the U.S. and Canada, ASCAP is the appointed agency that assigns ISWCs, and works with

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in order to meet consumer expectations and be commercially viable."). Notably, the recently launched streaming service "The Overflow" offers a limited catalog of "Christian music" and related genres. Glenn Peoples, *David Beside Goliath: New Christian Music Streaming Service The Overflow Points to a New Strategy*, BILLBOARD (Jan. 05, 2015) http://www.billboard.com/articles/business/6429451/overflow-christian-subscription-streaming-music-service; THE OVERFLOW, http://theoverflow.com (last visited Jan. 20, 2015) (reporting on recently launched streaming service The Overflow, which offers a limited catalog of Christian music and related genres).

[291] DAVID TOUVE, MUSIC BUSINESS ASSOCIATION, THE INNOVATION PARADOX: HOW LICENSING AND COPYRIGHT IMPACTS DIGITAL MUSIC STARTUPS 6-7 (2012) ("TOUVE"); *see also* John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?*, NEW YORKER (Nov. 24, 2014), *available at* http://www.newyorker.com/magazine/2014/11/24/revenue-streams (reporting that Spotify's U.S. licensing efforts took two years).

[292] TOUVE at 5.

[293] *See* Jessop First Notice Comments at 4.

other representatives of songwriters and publishers to assign ISWCs. As relevant here, to obtain an ISWC, a publisher must provide the following minimum: at least one original title for the work; all songwriters of the work identified by their Interested Parties Information ("IPI") code (discussed below); and whether the work is derived from an existing work.[294] One significant issue with ISWCs, then, is that they cannot be assigned until all the songwriters on a musical work are identified. This has the benefit of assuring that data are complete before an identifier is attached. But it also leads to a substantial lag time before the ISWC for a particular musical work can be assigned—unfortunately, this can occur well after a record is released, so that digital files embodying the individual tracks often will not include ISWCs identifying the underlying musical works.[295] ASCAP and BMI—which also use proprietary numbering systems to track works internally—add ISWCs to their databases as those codes are assigned.[296]

The ISRC was created as a unique, permanent, and internationally recognized reference number for the identification of sound and music video recordings. ISRCs are assigned at the track—rather than album—level. The ISO has appointed IFPI as the international ISRC agency. IFPI in turn, designates national or regional agencies to manage the issuance of ISRCs within a specific country or region. The U.S. ISRC agency is RIAA. RIAA authorizes individual record labels to assign ISRCs to their own recordings.[297] ISRCs are required to be included on digital files provided for the iTunes store and by many other digital platforms.

There are some shortcomings with the ISRC system. First, there is no single definitive U.S. database for ISRCs. Instead, each sound recording owner must maintain its own ISRC records and metadata.[298] Notably, however, SoundExchange, is currently compiling a database of sound recordings performed under the section 112 and 114

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[294] *What is an ISWC*, ISWC INTERNATIONAL AGENCY, http://www.iswc.org/en/iswc.html (last visited Jan. 9, 2015).

[295] Tr. at 334:13-337:20 (June 23, 2014) (Andrea Finkelstein, SME; Jacqueline Charlesworth & Sarang Damle, U.S. Copyright Office); Tr. at 343:2-344:16, 346:17-21 (June 23, 2014) (Lynn Lummel, ASCAP).

[296] ASCAP Second Notice Comments at 11 ("It should be underscored that each work will have two identifiers—the ISWC as well as the PRO's own internal Work ID number.").

[297] *Obtaining Code*, USISRC, http://www.usisrc.org/about/obtaining_code.html (last visited Jan. 25, 2015). RIAA also authorizes "ISRC managers" to assign ISRCs to sound recordings produced by artists and labels that do not wish to manage their own ISRC assignments. *Id.; see also Registration Fees*, USISRC, http://www.usisrc.org/faqs/registration_fees.html (last visited Jan. 25, 2015).

[298] Pipeline Project 2014, Belmont University's Mike Curb College of Music Business and Entertainment ("Pipeline Project") Second Notice Comments at 7; *see also Types*, USISRC, https://www.usisrc.org/applications/types.html (last visited Jan. 25, 2015).

licenses, and expects to have good identification and ownership information, including ISRCs, for approximately 14 million recordings in the relatively near term.[299]

In addition, in the case of multiple owners, ISRCs do not require a complete list of owners before assignment of ISRCs. Instead, the ISRC website recommends that multiple owners simply designate one of the owners to assign the ISRC.[300]

The ISO has adopted two other codes to identify the individuals or entities associated with particular works. The IPI code allows a musical work to be associated with the various parties that are involved in its creation, marketing, and administration. IPI codes apply to composers, authors, composer/authors, arrangers, publishers, administrators, and sub-publishers. The codes are assigned by CISAC and are necessary to obtain an ISWC.[301]

The International Standard Name Identifier ("ISNI") is akin to the IPI, but while the IPI scheme is limited to musical works, ISNI is designed to be a global identification system for creators of *all* types of copyrighted works, including authors, songwriters, recording artists, and publishers. The ISNI International Agency was founded in 2010 to develop the standard, with the goal of eventually replacing existing, disparate identification standards, including the IPI.[302] ISNIs are assigned by an international network of registration agencies which rely upon a centralized database to assign and track ISNI identifiers.[303] Over 8 million identities have been registered so far across multiple classes of creators and works.[304] At the moment, however, it appears that most ISNIs are being assigned to literary authors in Europe. It also seems that the number of registration agencies globally remains limited, with only one agency so far in the United States.[305]

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[299] SoundExchange Second Notice Comments at 4-5.

[300] Pipeline Project Second Notice Comments at 7.

[301] *The IPI System*, IPISYSTEM.ORG, http://www.ipisystem.org/SUISASITES/IPI/ipipublic.nsf/pages/index1 (last visited Jan. 9, 2015).

[302] *See* Jennifer Gatenby & Andrew MacEwan, *ISNI: A New System For Name Identification*, INFORMATION STANDARDS QUARTERLY, Summer 2011, at 4-5, *available at* http://www.niso.org/publications/isq/2011/v23no3/gatenby; Jennifer Gatenby & Joep Kil, *ISNI From Development to Operations*, ISNI, www.isni.org/filedepot_download/58/95.

[303] *See* Gatenby & MacEwan, *ISNI: A New System For Name Identification* at 4-5.

[304] ISNI, http://www.isni.org (last visited Jan. 9, 2015).

[305] Pipeline Project Second Notice Comments at 5. Bowker, an affiliate of ProQuest, assigns ISNIs and tracks the assignment and usage of them. *See Bowker Becomes First ISNI Registration Agency in the U.S.*, BOWKER (June 21, 2012), http://www.bowker.com/en-US/aboutus/press_room/2012/pr_06212012a.shtml; Bowker, *Use of ISNI Is Growing Fast Among Authors, Says New Bowker Analysis*, YAHOO FINANCE (May 7, 2014), http://finance.yahoo.com/news/isni-growing-fast-among-authors-144800650.html.

The music industry also employs identifiers not associated with ISO, including Universal Product Codes ("UPC"). In the music context, a UPC is a set of numbers, along with a corresponding barcode, that identify a finished music product. A different UPC is usually necessary for each product or version of a product to distinguish among, for example, albums, digital singles, or remixed versions of sound recordings. UPCs are generally required by most major physical retailers, and are now required by the iTunes store and other digital platforms. Record labels generally acquire UPCs from GS1 US, a nonprofit group that sets standards for international commerce. UPCs can also be obtained for free or at a nominal cost from a music distributor such as CD Baby or TuneCore.[306]

In addition to standards that have been or are being developed by international standard-setting entities, there are also private initiatives for identifying music and its owners, for example, through the use of digital acoustic fingerprinting and similar technologies. Examples include Gracenote, Shazam, and The Echo Nest—and perhaps most notably, YouTube. An acoustic fingerprint is a digital rendering of the acoustical properties of a particular sound recording, typically one embodied in a digital file such as an mp3 file. That fingerprint can be stored and searched for matches to other digital music files.[307] An acoustic fingerprint does not, on its own, provide ownership or authorship information, but it can be associated with metadata—such as the standardized identifiers discussed above—that does. One advantage of using digital fingerprints is that while it is relatively trivial to strip metadata such as ISRCs and ISWCs from individual music files, it is arguably more difficult to alter a file's acoustic fingerprint without changing the quality of the audio.[308]

2. Public Data

The U.S. Copyright Office operates a public registration system, which maintains information that can help to identify musical works, sound recordings, and their owners. The registration database, however, is not a comprehensive resource for this purpose. Copyright registration is not mandatory, and so registration records are far

[306] *How to Get UPC Barcodes for Your Products*, WALL ST. J., http://guides.wsj.com/small-business/starting-a-business/how-to-get-upc-codes-for-your-products-2 (last visited Jan. 9, 2014); Kristin Thomson, *Metadata for Musicians*, FUTURE OF MUSIC COALITION (Nov. 4, 2014), https://futureofmusic.org/article/article/metadata-musicians.

[307] Michael Brown, *White Paper: Audio Fingerprinting*, MAXIMUM PC (Apr. 3, 2009), http://www.maximumpc.com/article/features/white_paper_audio_fingerprinting.

[308] *See* Ciumac Sergiu, *Duplicate Songs Detector Via Audio Fingerprinting,* CODE PROJECT (June 20, 2013), http://www.codeproject.com/Articles/206507/Duplicates-detector-via-audio-fingerprinting.

from complete. In addition, even when a work has been registered, the registration record is static and thus will not reflect a change in ownership.[309]

The database that houses the Office's registration records is not currently designed to identify or locate works through the use of standard identifiers, such as those described above, and such identifiers are not required in the registration process.[310] As a result, a relatively small number of registration records for musical works and sound recordings reflect these standard identifiers.[311]

Apart from the original registration, some, but not all, copyright owners choose to record assignments and transfers of ownership through the Copyright Office's recordation process. Again, however, such records are far from complete.[312] Nor, due to the historical separation of the registration and recordation systems, is information about recorded documents reliably linked to registration records.[313]

3. Non-Government Databases

Several entities actively develop and maintain their own discrete databases, many of which include standard identifiers and other metadata used by the music industry to track sound recordings and musical works.

As noted above, the RIAA does not keep a central database of sound recordings associated with ISRCs, and so the most comprehensive U.S. sound recording database is likely that of SoundExchange. SoundExchange maintains a database of sound recordings whose uses have been reported to it under the section 112 and 114 licenses, together with information regarding the associated recording artists and labels. This

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[309] ROBERT BRAUNEIS, ABRAHAM L. KAMINSTEIN SCHOLAR IN RESIDENCE, U.S. COPYRIGHT OFFICE, TRANSFORMING RECORDATION AND REENGINEERING AT THE UNITED STATES COPYRIGHT OFFICE 127-129 (2015) ("BRAUNEIS"), *available at* http://www.copyright.gov/docs/recordation/.

[310] Technological Upgrades to Registration and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013); BRAUNEIS at 120-121.

[311] As of March 2013, for example, ISRCs were associated with only 5,510 (0.03%) of registration records in the Copyright Office Catalog. *Id.* at 121.

[312] *Id.* at 110-111.

[313] *Id.* The Office has recently embarked upon public processes to consider possible upgrades to its systems that could improve the searchability and usability of its records. Such changes might include, for example, a more robust registration database and a shift to a more user-friendly and accessible electronic recordation system. *See* Strategic Plan for Recordation of Documents, 79 Fed. Reg. 2696 (Jan. 15, 2014); Technological Upgrades to Registration and Recordation Functions, 78 Fed. Reg. 17,722 (Mar. 22, 2013).

database is not currently publicly accessible or available to be used for licensing purposes.[314]

In the realm of musical works, HFA maintains an extensive database of ownership information and provides an online tool enabling the public to search for songwriter and publisher data for all songs that have been registered by its member publishers.[315] ASCAP, BMI, and SESAC each also have databases covering the compositions in their repertoires that are available to the public through their respective websites.[316] In addition, ASCAP and BMI—along with the Society of Composers, Authors and Music Publishers of Canada ("SOCAN")—are currently collaborating to create a common, authoritative resource for the musical works represented by the several organizations. The joint initiative, called MusicMark, will enable publishers to submit a single file for registration of a song and revise ownership data across the PROs simultaneously, even if the work was co-written by members of different societies. Each PRO will then integrate the registration data into its own repertoire database. By enabling PRO members to more efficiently register musical works through a single interface—including works co-written by songwriters who are members of different PROs—MusicMark should provide a more accurate and synchronized view of copyright information for works in the repertoires of the participating PROs.[317]

While each of these databases represents an important and valuable component of the U.S. music marketplace, because they are separate and separately controlled, they do not offer a comprehensive licensing resource. The HFA and PRO databases are currently searchable by the public only manually, on an individual song basis.[318] In addition, these organizations do not warrant the accuracy or completeness of the information they provide (perhaps because they are relying upon representations by third parties concerning authorship and ownership).[319] Finally, it is unclear what effect publisher

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[314] SoundExchange Second Notice Comments at 5.

[315] SONGFILE, http://www.songfile.com (last visited Jan. 25, 2015).

[316] ASCAP's database is called ACE, and BMI's database is called the BMI Repertoire. *See Ace Title Search*, ASCAP, https://www.ascap.com/Home/ace-title-search/index.aspx (last visited Jan. 29, 2015); *BMI Repertoire*, BMI, http://repertoire.bmi.com/startpage.asp (last visited Jan. 29, 2015). SESAC also has a database called SESAC Repertory. *SESAC Repertory*, SESAC, http://www.sesac.com/Repertory/RepertorySearch.aspx?x=39&y=19 (last visited Jan. 29, 2015).

[317] MUSICMARK, http://www.musicmark.com (last visited Jan. 9, 2015).

[318] *See* SONGFILE, http://www.songfile.com (last visited Jan. 25, 2015); *Ace Title Search*, ASCAP, https://www.ascap.com/Home/ace-title-search/index.aspx (last visited Jan. 29, 2015); *BMI Repertoire*, BMI, http://repertoire.bmi.com/startpage.asp (last visited Jan. 29, 2015); *SESAC Repertory*, SESAC, http://www.sesac.com/Repertory/RepertorySearch.aspx?x=39&y=19 (last visited Jan. 29, 2015).

[319] *Terms of Use Agreement*, ASCAP, http://www.ascap.com/about/legal-terms/terms-of-use.aspx (last visited Jan. 16, 2015); *Terms and Conditions of Use*, BMI, http://www.bmi.com/legal/entry/

withdrawal from the PROs in favor of direct administration of the relevant rights—should it come to pass—might have on the efficacy of the PRO databases.[320]

4. International Efforts

One example of international efforts to address data information deficiencies is (or was) the planned Global Repertoire Database ("GRD") for musical works, to be developed by a working group spearheaded and funded by music publishers and collective management organizations in the EU with the support of the World Intellectual Property Organization ("WIPO"). The GRD was intended to provide a comprehensive and authoritative source of data about the ownership and administration of musical works throughout the world. Its supporters anticipated enabling registrations directly from publishers, composers and collective management organizations, and maintaining a database of those registrations, with procedures to resolve ownership disputes. Unfortunately, despite the acknowledged need for solutions in data sharing, support for the project has waned and the GRD effort has been put on hold (at least for the time being).[321]

A similar effort remains underway with respect to sound recordings. Phonographic Performance Ltd ("PPL"), the U.K. collective rights organization, is building a Global Recordings Database and has so far compiled ownership data on over 5.6 million recordings released in the United Kingdom. PPL intends to expand its efforts by

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terms_and_conditions_of_use (last visited Jan. 25, 2015); *SESAC Repertory Terms and Conditions*, SESAC, http://www.sesac.com/Repertory/Terms.aspx (last visited Jan. 25, 2015); *Songfile Terms of Use*, SONGFILE, http://www.songfile.com/termsofuse.html (last visited Jan. 25, 2015).

[320] Notably, in the wake of the *Pandora* decision—which criticized UMPG's and Sony/ATV's failure to provide catalog data to Pandora—these publishers have recently posted their U.S. catalogs online. *See* Press Release, UMPG, Universal Music Publishing Group To Offer Expanded Access To Song Catalog Data Through Company's Website (June 27, 2014), *available at* http://www.umusicpub.com/#contentRequest=newsdetail&contentLocation=sub&contentOptions=%26articleID%3D6437%26from%3Dpressreleases; *Sony/ATV Makes Entire Catalogue Available Online*, MUSIC BUSINESS WORLDWIDE (JULY 16, 2014), http://www.musicbusinessworldwide.com/sonyatv-makes-entire-catalogue-available-online/.

[321] *PRS 'disappointed' at Global Repertoire Database collapse*, MUSIC ALLY (June 11, 2014), http://musically.com/2014/07/11/prs-disappointed-at-global-repertoire-database-collapse; Paul Resnikoff, *Repertoire Database Declared a Global Failure. . .* , DIGITAL MUSIC NEWS (July 10, 2014), http://www.digitalmusicnews.com/permalink/2014/07/10/global-repertoire-database-declared-global-failure.

working with major record companies and a range of overseas music licensing companies to include worldwide data.[322]

Another initiative is the U.K.'s Copyright Hub, a web portal connected to a network of rightsholders that aims to make it easier for people to track down and license copyrighted works.[323] At present, the Copyright Hub's functionality is fairly basic, offering helpful information about copyright law and website links to licensing organizations. The plan is to change from a signposting tool into an inquiry router that sends queries to rights managers' databases, and returns results to Hub users.[324] In addition, further development may enable creators to register rights information with third-party registries linked to the Hub.[325]

5. Data Sharing Initiatives

As explained above, data regarding the creation, ownership, and administration of sound recordings and musical works are currently maintained in discrete and independently administered databases. A number of initiatives have attempted to overcome this situation by developing standards related to the communication of information about works among disparate sources. In particular, these initiatives are aimed at allowing relevant information and metadata to be efficiently communicated in a common format so that each party requiring access to the data can understand and automatically process that data without excessive administrative costs.

One such initiative is Digital Data Exchange ("DDEX"), an industry consortium consisting of media companies, music licensing entities, digital service providers and others.[326] DDEX has developed standardized formats in which rights and licensing information is represented and communicated.[327] For example, DDEX offers digital sales reports standards that are being used in the U.K. to provide standard reporting formats

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322 RICHARD HOOPER & ROS LYNCH, COPYRIGHT WORKS: STREAMLINING COPYRIGHT LICENSING FOR THE DIGITAL AGE 3 (2012), *available at* http://www.copyrighthub.co.uk/Documents/dce-report-phase2.aspx.

323 THE COPYRIGHT HUB, http://www.copyrighthub.co.uk (last visited Jan. 25, 2015).

324 *Id.*

325 *Id.*; Tom Cox, *Copyright Hub Pilot Introduced in the UK*, INTELLECTUAL PROPERTY BLAWG (Aug. 8, 2013), http://www.intellectualpropertyblawg.com/copyright-law/copyright-hub-pilot-introduced-in-the-uk; *Welcome to the Copyright Hub*, WORLD INTELLECTUAL PROPERTY REVIEW (Jan. 9, 2013), http://www.worldipreview.com/article/welcome-to-the-copyright-hub.

326 *See* DDEX First Notice Comments at 1.

327 *See, e.g.*, MUSIC BUSINESS ASSOCIATION, MUSIC METADATA STYLE GUIDE V2, at 35-38, *available at* http://musicbiz.org/wp-content/uploads/2014/08/MusicMetadataStyleGuide-MusicBiz-FINAL.pdf (last modified Aug. 14, 2014).

between digital music services and the U.K. PRO, PRS for Music.[328] By employing DDEX messaging standards, entities wishing to transact with multiple companies can avoid handling multiple formats and delivery methods.[329]

A similar initiative is WIPO's proposed International Music Registry ("IMR"), which seeks to provide a single access point to the different rights management systems used around the world. WIPO is currently conducting a series of stakeholder discussions on the IMR's scope and structure.[330]

[328] Press Release, RightsFlow, PRS For Music And Rightsflow Partner On DDEX Standardized Reporting Initiative (Dec. 13, 2010), http://mi2n.com/print.php3?id=136849.

[329] *See* DDEX First Notice Comments at 1-2.

[330] *What Copyright Infrastructure is needed to facilitate the Licensing of Copyrighted Works in the Digital Age: the International Music Registry?*, WIPO, http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_aut_ge_11/wipo_ip_aut_ge_11_t12.doc; *The International Music Registry*, WIPO, http://www.wipo.int/imr/en (last visited Jan. 27, 2015).

III. Challenges of the Current System

Perhaps not surprisingly in light of its bewildering array of rights and practices, those who participated in the study identified many significant obstacles in the current music licensing marketplace. As detailed below, stakeholders have a wide range of opinions concerning how best to address them.

Despite the areas of controversy, however, on a somewhat brighter note, study participants were able to articulate some broad areas of consensus as to the overarching principles that should guide any revision of our licensing system, as follows: First, music creators need to be fairly compensated for their efforts.[331] Second, the licensing process needs to be more efficient, including through bundling of necessary rights.[332] Third, market participants need access to authoritative data to identify and license the music they use.[333] And fourth, usage and payment information should be transparent

[331] *See, e.g.*, Copyright Alliance First Notice Comments at 6 ("We believe all authors and creators are entitled to fair compensation for their creative work."); DiMA First Notice Comments at 1 ("DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works."); NMPA & HFA First Notice Comments at 31 (noting that "[f]or music publishers and songwriters, music licensing is only effective if it provides a fair market royalty for the use of their songs"); SGA First Notice Comments at 3 (identifying "fair market value compensation for the use of musical works" as an "indispensable need").

[332] *See, e.g.,* Public Knowledge & CFA First Notice Comments at 5 ("Copyright law's music licensing provisions can help alleviate . . . bottlenecks and make music licensing more efficient and fair for all."); NMPA & HFA First Notice Comments ("Music publishers and songwriters seek an efficient digital music marketplace. . . ."); RIAA Second Notice Comments at 13 ("Commenters desire a more efficient licensing process, and focused on blanket licensing as one way to achieve such efficiency."); NARAS First Notice Comments at 2 ("The Recording Academy supports a structure that is fair, simple and efficient for both the licensor and licensee."); GIPC Second Notice Comments at 7 (urging the Office to "keep in mind issues of efficiency in the marketplace so as to facilitate new, licensed services").

[333] *See, e.g.,* Modern Works Music Publishing First Notice Comments at 10 ("Congress should encourage cooperation among licensors to create technologies that enable licensees to easily search rights databases."); Pilot Music Business Services Second Notice Comments at 3 ("[O]ne centralized database is needed"); Pipeline Project Second Notice Comments at 18 ("It seems to us that the statutory license was the twenty-century's solution to efficiency; however, as we progress further into the digital age, and as data becomes more useful, we no longer see a great need for a compulsory license."); Tr. 381:04-11 (June 23, 2014) (Waleed Diab, Google/YouTube) ("[T]he ability to match the information on the sound recording side and the composition side is absolutely necessary. . . . I think what you are hearing is, there is absolutely a need for a centralized, standardized, data base, somewhere that services can go and pull that information.").

and accessible to rights owners.[334] Many of the stakeholders' comments reflect these important goals.

A. Compensation and Licensing Disparities

1. Effect of Market Trends on Creator Income

According to the Supreme Court, copyright is intended to increase the "harvest of knowledge" by assuring creators "a fair return for their labors."[335] And, as noted above, industry participants are in general agreement that a well-functioning music licensing system should adequately compensate those who create and record songs.[336] There is, however, substantial debate as to whether the current music licensing system is achieving this goal and, if it is not, the reasons why it is failing creators.

In recent years, many music creators have decried what they see as a precipitous decline in their income.[337] Understanding the reasons for this apparent decrease requires a basic understanding of creators' various income streams. Songwriters have three primary sources of income, which they generally share with music publishers: mechanical royalties, synchronization royalties, and performance royalties. Recording artists receive a share of revenues from their record labels for the sale of physical and digital albums and singles, sound recording synchronization royalties, and digital performance

[334] *See, e.g.*, NSAI Second Notice Comments at 2-3 (expressing concern about advances and bonuses that "are never paid to the songwriter or composer" and proposing requiring that "such payments be disclosed by record labels and music publishers"); SGA First Notice Comments at 3 (calling for "complete transparency throughout the licensing, use and payment process"); Kohn First Notice Comments at 11 (proposing that service providers "be required to provide transparent access to transaction data in real-time to an independent validation service"); RIAA Second Notice Comments at 19 ("The major record companies . . . support the idea that where there is direct licensing, publishers/writers should have a direct audit right with respect to third parties that use their works.").

[335] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545-46 (1985).

[336] *See* RIAA Second Notice Comments at 8 ("[N]obody seems to question the basic premise that royalty rates *should* reflect fair market value.").

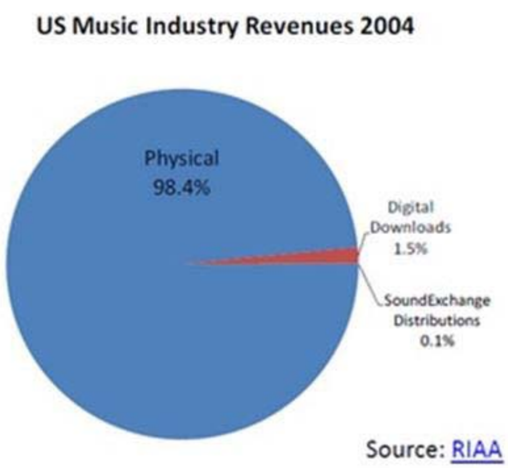
[337] *See, e.g.*, SGA First Notice Comments at 10 ("[T]he income of the music and recording industries (and especially of individual music creators and recording artists) have been diminished, according to reliable estimates, by as much as two-thirds."); A2IM First Notice Comments at 10 (noting that "the decline in sound recording revenues" has "had a dramatic effect on the income of both music labels . . . and their recording artists"); *see also* Nate Rau, *Nashville's musical middle class collapses*, THE TENNESSEAN (Jan. 13, 2015), http://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245 (observing that industry trends have led to "the collapse of Nashville's music middle class").

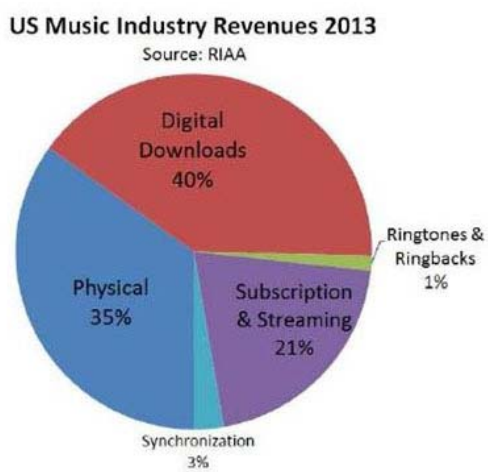
royalties. In addition, recording artists may derive income from live performances, the sale of merchandise, and other sources.[338]

a. From Physical Formats to Downloads to Streaming

In recent years there has been a profound shift in the way music is consumed—from purchases of physical albums, to downloads of digital singles, to on-demand access through digital streaming services. These shifts in music consumption patterns have led to corresponding changes in the relative mix of income streams to copyright owners—in particular, an increased reliance on performance royalties as compared to reproduction and distribution royalties.[339]

For example, the below charts from the RIAA illustrate the shift from U.S. physical sales to digital downloads and other sources of revenue from 2004 to 2013. They reflect remarkable change in less than a decade:[340]





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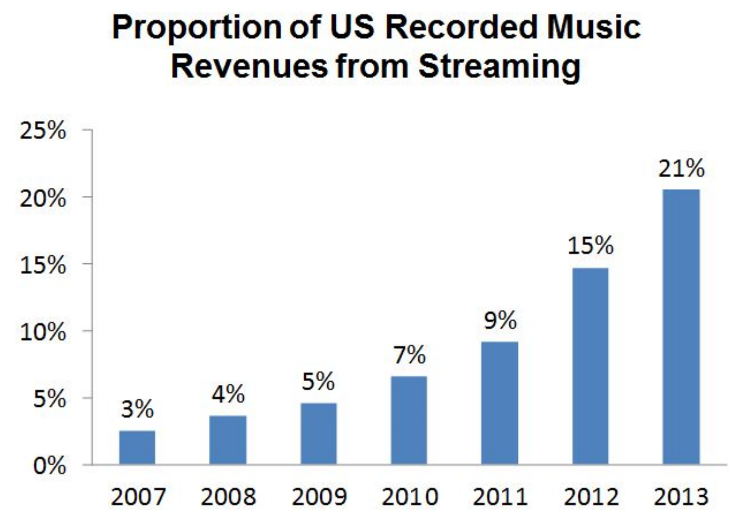
[338] Under so-called "360" record deals, artists may be required to share a portion of these additional revenues with their label. *See* Doug Bouton, Note, *The Music Industry in Flux: Are 360 Record Deals the Saving Grace or the Coup de Grace?*, 9 VA. SPORTS & ENT. L.J. 312, 318 (2010).

[339] *See, e.g.*, IPAC First Notice Comments at 13 (observing that "the decline in revenue from physical album sales, to downloads, and ultimately streaming, has drastically reduced the income opportunities for songwriters and composers"); RIAA Second Notice Comments at 38 ("Songwriters and recording artists have become more dependent on performance revenue, but that revenue is not sufficient on its own to sustain a livelihood.").

[340] *See* RIAA, *A Fruitful Anniversary for iTunes,* MUSIC NOTES BLOG (Apr. 25, 2013), http://www.riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=A-Fruitful-Anniversary-&blog_type=&news_month_filter=4&news_year_filter=2013 (providing 2004 chart); RIAA First Notice Comments at 51 (providing 2013 chart). Charts reproduced with the permission of RIAA.

Other data from the RIAA show how streaming, in particular, has boomed in recent years:[341]



Source: RIAA

NMPA submitted data showing a similar shift.[342] In 2012, NMPA reported that 30% of U.S. music publisher revenues came from performance royalties, 36% from mechanical royalties, 28% from synch royalties, and 6% from other sources.[343] Two years later, NMPA reported that 52% of music publisher revenues came from public performance royalties, while only 23% came from mechanical royalties, 20% from synch licenses, and 5% from other sources.[344] Other recent sales data show that streaming is continuing its surge—according to Nielsen, the number of on-demand streams in the United States grew 54% from 2013 to 2014, with "over 164 billion songs streamed on-demand through audio and video platforms."[345]

The meteoric rise of streaming has corresponded with a sharp decline in physical and digital download sales. In 2014, according to Nielsen data, total U.S. album sales (in both physical and digital formats) fell by 11.2%, and digital download sales decreased

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[341] RIAA First Notice Comments at 50. Chart reproduced with the permission of RIAA.

[342] NMPA Second Notice Comments at 8 (citing sources).

[343] Ed Christman, *NMPA's David Israelite to Congress: A More Efficient Mechanical Licensing System*, Billboard (June 13, 2012), http://www.billboard.com/biz/articles/news/publishing/1093490/nmpasdavid-israelite-to-congress-a-more-efficient-mechanical.

[344] Press Release, NMPA, U.S. Music Publishing Industry Valued at $2.2 Billion (June 11, 2014), *available at* https://www.nmpa.org/media/showrelease.asp?id=233.

[345] NIELSEN, 2014 NIELSEN MUSIC U.S. REPORT, http://www.nielsen.com/content/dam/corporate/us/en/public%20factsheets/Soundscan/2014-year-end-music-report.pdf.

12.5%, from the year before.[346] Of course, this has been accompanied by a commensurate drop in mechanical revenues for music publishers and songwriters. According to NSAI, "[m]any songwriters report a reduction of 60 to 70% or more" in mechanical royalties, and those royalties "continue to decrease by an alarming rate."[347] Many believe that in the not-too-distant future, interactive streaming will eclipse digital downloads to become the dominant means by which consumers access music.[348]

Meanwhile, since the late 1990s, there has been a marked decline in industry revenues overall.[349] RIAA observes that, since 1999, total U.S. recorded music retail revenues have dropped about 53%.[350] As relative newcomer Spotify summed up the situation, "the majority of revenue in the industry has evaporated."[351]

What is a matter of some debate among stakeholders, however, is the actual cause of this striking decline. Some commenters view the reduction in overall revenue and creator income as the result of ordinary market forces. For example, NAB suggested that general market factors—including an extended recession, a decline in consumer discretionary spending, and increased competition for consumers' shrinking entertainment budgets—have all contributed to reduced creator income.[352] Other

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[346] *Id.*; *see also* BMI Second Notice Comments at 16 ("[T]he instant availability to the public of the widest possible choice of recorded music by means of streaming technology has come at the expense of an accelerating drop-off in the sale of recordings (hard copies and downloads).").

[347] NSAI Second Notice Comments at 6.

[348] *See* IFPI, DIGITAL MUSIC REPORT 2014, at 5, http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf ("It is now clear that music streaming and subscription is a mainstream model for our business."); ASCAP First Notice Comments at 5-6 (stating that "digital music streaming services account for an increasingly large portion of music revenues in the U.S."); SoundExchange First Notice Comments at 22 ("The music marketplace changed rapidly from one long dominated by the sale of physical products, to one in which digital downloads are the primary means of acquiring ownership of copies. Now, it is changing again, and obtaining access to music through streaming services is ascendant.").

[349] *See* Michael DeGusta, *The REAL Death of the Music Industry*, BUSINESS INSIDER (Feb. 18, 2011), http://www.businessinsider.com/these-charts-explain-the-real-death-of-the-music-industry-2011-2.

[350] RIAA Second Notice Comments at 38.

[351] *How is Spotify contributing to the music business?*, SPOTIFY, http://www.spotifyartists.com/spotify-explained/#how-is-spotify-contributing-to-the-music-business (last visited Jan. 30, 2015) (citing global data).

[352] NAB First Notice Comments at 9-10.

stakeholders identified industry-specific market trends as a reason for the decline, such as increased competition driving down the value of synch licenses.[353]

Others attribute at least a good portion of the decrease to the shift from album sales to individual song purchases.[354] IPAC explained this dynamic in the context of mechanical royalties:

> Dramatically lower album sales is the primary market development that has led to songwriters reporting significant income declines in recent years. During the heyday of the CD, album cuts made almost as much money in mechanical royalties as the most popular single on the CD. Today's music industry is seeing significantly fewer full album purchases and significantly more individual song purchases. As a result, mechanical royalty income generated from the songs on an album has declined dramatically, leading to the decline in songwriter income.[355]

But IPAC also observed that this trend has been exacerbated by the shift to streaming, which it claims generates lower royalties for copyright owners,[356] a topic that is addressed next.

b. Impact of Music Streaming Models

A major area of debate is whether digital music streaming services fairly compensate rightsholders, particularly music publishers and songwriters. Digital streaming providers assert that they provide copyright owners with entirely new revenue streams by paying performance royalties to both sound recording and musical work owners for

[353] LaPolt Second Notice Comments at 3 ("[W]hile synchronization licenses are more plentiful than ever, these licenses are paying lower and lower rates per individual agreement for the average songwriter."); NMPA & HFA Second Notice Comments at 8 (noting that "increased competition has driven down synch fees"); NSAI Second Notice Comments at 6 ("With hundreds of television networks and online content providers compared to just a few years ago, more synch licenses are issued, but for a much lower amount per use.").

[354] *See* CFA & Public Knowledge First Notice Comments at 60-62 ("The leading edge of the shift was driven by unbundling of albums and the sale of singles. Consumers were no longer forced to buy songs they did not want in order to get the ones they desired."); Tr. at 274:01-12 (June 23, 2014) (Paul Fakler, NAB/Music Choice) ("Consumers no longer are forced to buy a bundled album containing recordings that they don't want to buy. So there are a lot of factors that have gone into declines of record sales.").

[355] IPAC Second Notice Comments at 8; *see also* NSAI Second Notice Comments at 6 ("One major reason is dramatically less income from album cuts not released as singles. A few years ago a non-single cut on an album with high sales volume produced greater income for many songwriters. Today album cuts, with a few rare exceptions, produce very little income.").

[356] IPAC Second Notice Comments at 8-9.

interactive and noninteractive services.[357] With respect to sound recording royalties specifically, DiMA noted that "[d]igital radio alone paid out $590.4 million in royalties to artists and rightsholders last year."[358]

Copyright owners, as well as the RIAA, acknowledge the increase in performance royalties.[359] ASCAP and BMI in recent years have both announced record-high collections and royalty distributions.[360] But notwithstanding the overall increase in performance royalties, many copyright owners believe that "the downward spiral of record sales and therefore artist and mechanical royalties has not yet been compensated by the increase in streaming revenue."[361] In other words, increases in performance revenues have not made up for the dramatic decrease in sales.

Significantly, the leading interactive streaming audio service, Spotify, believes that the "rapid decline [in industry revenue] is not due to a fall in music consumption but to a shift in music listening behavior towards formats that do not generate significant income for artists."[362] ASCAP observed that "technological developments have significantly increased the use of musical works, yet significantly decreased the income earned by songwriters."[363] Songwriters increasingly worry about their income (or lack thereof)

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357 DiMA First Notice Comments at 45 ("The substantial royalties paid by digital music services constitute new revenue streams that were unimagined just a few decades ago.").

358 *Id.*

359 RIAA First Notice Comments Ex. A at 1 ("In 2013, strong growth in streaming revenues contributed to a US music industry that was stable overall at $7 billion for the fourth consecutive year."); *see also* IFPI, DIGITAL MUSIC REPORT 2014 at 5 ("The US music market continued to stabilize, growing slightly in trade revenue terms, helped by rising consumer demand for music streaming services.").

360 Ben Sisario, *Collectors of Royalties for Music Publishers May See Better Results*, N.Y. TIMES (Sept. 23, 2013), http://www.nytimes.com/2013/09/23/business/media/collectors-of-royalties-for-music-publishers-may-see-better-results.html; Press Release, *ASCAP Reports Strong Revenues in 2013,* ASCAP (Feb. 12, 2014), http://www.ascap.com/press/2014/0213-2013-financials.aspx.

361 ABKCO First Notice Comments at 5; *see also, e.g.,* NMPA Second Notice Comments at 7 (noting that "performance royalties are increasing in importance while mechanical income has diminished. Almost all musical work owners are in agreement that this is the most challenging aspect of the new digital marketplace"); RIAA Second Notice Comments at 38; ASCAP Second Notice Comments at 23 (finding that "overall songwriter income has declined because mechanical right income has dropped by a large margin.").

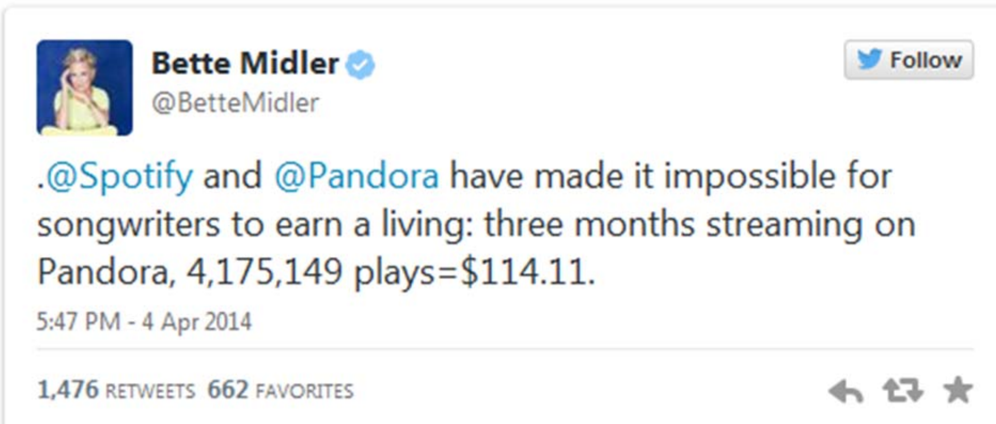
362 *How is Spotify contributing to the music business?*, SPOTIFY, http://www.spotifyartists.com/spotify-explained/#how-is-spotify-contributing-to-the-music-business (last visited Jan. 30, 2015). Spotify states, however, that its subscription service "aims to regenerate this lost value by converting music fans from these poorly monetized formats to our paid streaming format, which produces far more value per listener." *Id.*

363 ASCAP First Notice Comments at 39.

from digital streaming services, especially those that they regard as poorly "monetized"—*i.e.*, ad-supported services that do not require a subscription fee or generate a large amount of advertising revenue.

A growing number of high-profile songwriter/artists—including Taylor Swift and Thom Yorke—are leveraging their sound recording rights to remove their music from Spotify, principally out of concern that Spotify's free ad-supported tier of service does not fairly compensate them for their songs.[364] As Swift put it succinctly: "I think that people should feel that there is a value to what musicians have created, and that's that."[365]

Songwriter concerns are vividly illustrated by the following tweet by Bette Midler:



Other songwriters have made similarly bleak claims.[366] For instance, the songwriter Aloe Blacc recently reported:

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[364] Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?*; Stuart Dredge, *Thom Yorke Explains Why He Hates Spotify*, BUSINESS INSIDER (Oct. 7, 2013), http://www.businessinsider.com/thom-yorke-explains-why-he-hates-spotify-2013-10; Sasha Bogursky, *Taylor Swift, Garth Brooks and other artists lead the fight against Spotify*, FOX NEWS (Nov. 19, 2014), http://www.foxnews.com/entertainment/2014/11/19/taylor-swift-garth-brooks-artists-lead-fight-against-spotify/.

[365] Jack Dickey, *Taylor Swift on* 1989, *Spotify, Her Next Tour and Female Role Models*, TIME (Nov. 13, 2014), http://time.com/3578249/taylor-swift-interview. In a similar move, GMR recently demanded that YouTube remove videos from its service containing approximately 20,000 songs that GMR represents, including the Eagles and Pharrell Williams. Eriq Gardner, *Pharrell Williams' Lawyer to YouTube: Remove Our Songs or Face $1 Billion Lawsuit*, HOLLYWOOD REPORTER (Dec. 22, 2014), http://www.hollywoodreporter.com/thr-esq/pharrell-williams-lawyer-youtube-remove-759877.

[366] *See, e.g.*, Maya Kosoff, *Pharell Made Only $2,700 In Songwriter Royalties From 43 Million Plays of 'Happy' On Pandora*, BUSINESS INSIDER (Dec. 23, 2014), http://www.businessinsider.com/pharrell-made-only-2700-in-songwriter-royalties-from-43-million-plays-of-happy-on-pandora-2014-12; David Lowery, *My Song Got Played On Pandora 1 Million Times and All I Got Was $16.89, Less Than*

> Avicii's release "Wake Me Up!" that I co-wrote and sing, for example, was the most streamed song in Spotify history and the 13th most played song on Pandora since its release in 2013, with more than 168 million streams in the US. And yet, that yielded only $12,359 in Pandora domestic royalties—which were then split among three songwriters and our publishers. In return for co-writing a major hit song, I've earned less than $4,000 domestically from the largest digital music service.[367]

Notably, songwriters who are not also recording artists with some measure of control over their recordings typically do not have the option to withdraw their works from low-paying services, because—due to the combination of the section 115 compulsory license and the ASCAP and BMI consent decrees—they have no choice other than to permit the exploitation of their musical works by such providers. And even recording artists cannot remove their music from noninteractive digital services like Pandora that qualify for the section 112 and 114 compulsory licenses.

For their part, the digital music services deny that they are the cause of the decline in songwriter income. These services note that they pay royalties for the public performance of sound recordings, while terrestrial radio does not, and so the total royalties they pay to both sound recording and musical work owners must be considered.[368] Accordingly, Pandora challenged the numbers cited by Midler and Blacc by publicizing the total amounts paid for all rights to perform the songs, including sound recording rights—stating that they paid $6,400 in royalties in Midler's case and over $250,000 for the plays of "Wake Me Up!".[369]

Digital music services emphasize that they "pay the lion's share of their revenues over to rights owners,"[370] and suggest that the songwriter concerns are more accurately traced to

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What I Make From a Single T-Shirt Sale!, THE TRICHORDIST (June 24, 2013), http://thetrichordist.com/2013/06/24; Doug Gross, *Songwriters: Spotify doesn't pay off . . . unless you're a Taylor Swift*, CNN (Nov. 13, 2014), http://www.cnn.com/2014/11/12/tech/web/spotify-pay-musicians (noting that the songwriters of the Bon Jovi hit "Livin' on a Prayer" split $110 in royalties from Pandora for 6.5 million plays of that song).

[367] Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014), http://www.wired.com/2014/11/aloe-blacc-pay-songwriters.

[368] DiMA First Notice Comments at 46.

[369] Andy Gensler, *Bette Midler Disparages Pandora, Spotify Over Artist Compensation*, BILLBOARD (Apr. 6, 2014), http://www.billboard.com/biz/articles/news/digital-and-mobile/6039697/bette-midler-disparages-pandora-spotify-over-artist; Alison Kosik, *The puzzling and 'antiquated' world of music royalties*, CNN MONEY (Nov. 17, 2014), http://money.cnn.com/2014/11/17/media/aloe-blacc-music-royalties.

[370] DiMA First Notice Comments at 46; *see also* Glenn Peoples, *Pandora Revenue Up 40 Percent, Listening Growth Softens*, BILLBOARD (Oct. 23, 2014), http://www.billboard.com/biz/articles/news/

the division of total royalties between sound recording owners and musical work owners.[371] From the services' perspective, total content costs are the relevant consideration. They assert that they are "agnostic" as to how that total is divided among various rightsholders.[372]

Digital music services and broadcasters also contend that, to the extent individual creators believe they are not receiving adequate income, the blame might lie with intermediaries. DiMA stated that "there is little transparency about what happens to the significant royalties generated from digital music services after they are paid to record labels, music publishers, and PROs, and processed under the financial terms of recording artists' and songwriters' own private arrangements with rightsowners."[373] DiMA thus alleged that, rather than being paid out to individual creators, "a significant portion of the royalties received are retained by [intermediaries] for their own account, or applied toward the recoupment of advances paid to recording artists and songwriters."[374] SAG-AFTRA and AFM, which represent individual artists, expressed a similar worry that direct licensing deals "can create uncertainty regarding which benefits of the deal are subject to being shared with Artists at all." They noted in particular that "[d]irect license deals increasingly have been reported to include 'breakage'—advance payments or guaranteed payments in excess of the per-performance royalty earned under the license—equity shares, promotion or other non-usage based elements" and that even if such amounts are shared with artists, they "may

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digital-and-mobile/6296383/pandora-revenue-up-40-percent-listening-growth-softens (noting Pandora pays 46.5% of its revenues in royalties to copyright owners).

371 *See* DiMA First Notice Comments at 11 ("[M]uch of the current debate over rates stems from disagreement among the labels, publishers and PROs about how to allocate the *content owners' fixed share of the pie*, rather than from a notion that service providers are not paying enough, in the aggregate, for content.").

372 *See* Tr. at 193:13-18 (June 4, 2014) (Scott Sellwood, Google/YouTube) ("[I]f there could be some agreement between publishers and labels as to total content cost, we don't—we're very agnostic, we don't care whether it's a performance or a reproduction, tell us how much it costs."); *accord* Tr. at 112:02-113:08 (June 17, 2014) (Vickie Nauman, CrossBorderWorks) ("[Third-party technology developers'] incentives are not to solve the problems between the publishers and the labels and the PROs . . . [T]hey want to know that they can come to a simple source and pay for the rights.").

373 DiMA First Notice Comments at 47.

374 *Id.*; *see also* NAB First Notice Comments at 10-12 ("To the extent recording artists have not been adequately sharing in the new revenue streams from on-demand streaming services . . . it is likely due to these same creative accounting schemes that the record companies have employed for decades to underpay artists.").

be subject to recoupment and less transparent than payments under the compulsory license."[375]

c. Non-Performing Songwriters

While all creators have been affected by the shift from full-album sales to digital streaming models, songwriters who are not also performing artists appear to have been especially hard hit. Unlike songwriter-artists, "pure" songwriters who write works for others to perform do not have the potential to make up for lost income through touring or merchandise sales.

According to NSAI, since 2000, the number of full-time songwriters in Nashville has fallen by 80%.[376] NSAI further observes that two decades ago, there were some 3,000 to 4,000 publishing deals available for songwriters in Nashville; that number has since dropped to 300 to 400.[377] A publishing deal is crucial, as it "essentially pays a songwriter an annual salary to write songs."[378] Without such a deal, it may be impossible for a songwriter to finance his or her creative efforts. A recent article in *The Tennessean* concludes that the result of the shift away from album sales to streaming "has been the collapse of Nashville's musical middle class."[379]

d. Additional Considerations

Piracy

In addition, a broad range of stakeholders—with the exception of the CFA and Public Knowledge[380]—pointed to piracy as a continuing challenge that depresses revenues for both legal music providers and rightsholders. But piracy was not a significant focus of discussion. Unlike in the Napster era, stakeholders now seem resigned to this marketplace condition and the perhaps irreversible impact it has had on the industry. RIAA—which abandoned its lawsuits against individual file-sharers several years ago[381]—observed that piracy "certainly is in the background when you talk about whether digital music services are earning enough money or paying enough money,

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375 SAG-AFTRA & AFM Second Notice Comments at 2.

376 Rau, *Nashville's musical middle class collapses*.

377 NSAI Second Notice Comments at 6.

378 Rau, *Nashville's musical middle class collapses*.

379 *Id.*

380 CFA & Public Knowledge First Notice Comments at 70 ("In today's music market, the claim that piracy is still a problem is contradicted by a great deal of evidence on actual consumer behavior.").

381 David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010), http://www.wired.com/2010/05/riaa-bump/.

competing against free remains a problem."[382] DiMA agreed that "the truth is that any legitimate digital service right now competes with free."[383] This sentiment was echoed by Spotify as well: "We are competing with piracy. It's a reality that we all face on every level of the ecosystem. We are all competing with free."[384]

Impact of DMCA Safe Harbors

While piracy may now be considered as an accepted background fact, the same cannot be said of the DMCA safe harbors, codified in section 512 of the Copyright Act, which remain highly controversial. Section 512 curtails liability for online providers for infringing user-posted content provided that they remove such content expeditiously in response to a copyright owner's takedown notice.[385] Although the operation of the DMCA safe harbors is beyond the scope of this study, the Office briefly notes these DMCA concerns since they were so frequently expressed.[386]

Many copyright owners blame the DMCA's safe harbor regime for allowing digital providers the opportunity to profit from the unauthorized use of copyrighted music without paying licensing fees.[387] One composer, Hélène Muddiman, likened the situation to a company giving away someone else's CDs at a fairground and making money by advertising to the people in line.[388] Music publisher Jason Rys contended that

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[382] Tr. at 98:02-04 (June 24, 2014) (Susan Chertkoff, RIAA); *see also* RIAA Second Notice Comments at 6 ("It remains a problem that the legitimate market for licensed musical works must operate in an environment in which there is also a huge amount of infringing use.").

[383] Tr. at 111:09-11 (June 24, 2014) (Lee Knife, DiMA).

[384] Tr. at 122:01-04 (June 24, 2014) (James Duffett-Smith, Spotify).

[385] 17 U.S.C. § 512(c); DMCA § 202(a).

[386] In a separate public process, the Department of Commerce's Internet Policy Task Force—led by the U.S. Patent and Trademark Office ("USPTO") and the National Telecommunications and Information Administration ("NTIA")—has, in keeping with its July 2013 Green Paper, established a "multi-stakeholder" dialogue on "improving the operation of the notice and takedown system for removing infringing content from the Internet under the DMCA." *See* Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, 78 Fed. Reg. 61,337, 61,338 (Oct. 3, 2013); *see also* DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 54 (2013) ("GREEN PAPER"), *available at* http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf. The Office will be interested to see the results of that process.

[387] *See* Lincoff First Notice Comments at 9.

[388] Tr. at 136:10-139:05 (June 17, 2014) (Hélène Muddiman, Hollywood Elite Composers); *see also* Zoë Keating, *What should I do about Youtube?*, ZOEKEATING.TUMBLER.COM (Jan. 22, 2015) http://zoekeating.tumblr.com/post/108898194009/what-should-i-do-about-youtube (describing YouTube's negotiating tactics for licenses covering its new subscription service, which include

"due to the DMCA there's nothing you can realistically do to stop your songs from appearing on YouTube."[389]

In addition to complaining that the notice and takedown regime created under the DMCA results in an impossible game of "whack-a-mole"—since removed content is frequently reposted, requiring the owner to serve another takedown notice[390]—some stakeholders also point out that the digital companies' ability to exploit infringing content unless and until a notice is sent affords these providers significant added leverage in licensing negotiations, since content owners must either agree to a license or devote significant resources to an unending takedown process. This dynamic, in turn, is thought to have a "depressive effect" on royalty rates.[391]

For their part, digital services stress the considerable effort that is required to respond to copyright owners' slew of takedown notices. The number of takedown requests submitted to Google, for example, continues to climb and suggests a staggering amount of online infringement. In 2010, Google received approximately 3 million DMCA takedown requests; in 2014, that number was 345 million—over 940,000 takedown requests every day.[392]

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excluding artists from YouTube's revenue-sharing program if the artist declines to license their works for the subscription service).

[389] Tr at 228:08-10 (June 16, 2014)(Jason Rys, Wixen Music Publishing); *see* Tr at 119:10-21 (June 24, 2014) (Dick Huey, Toolshed Inc.) (the DMCA is "a defense that's used by the largest tech companies in some cases to avoid direct licensing").

[390] Audiosocket First Notice Comments at 1; Buckley Second Notice Comments at 4; DotMusic First Notice Comments at 8.

[391] BMI First Notice Comments at 28-29 ("Another explanation [for reduced songwriter, composer and recording artist income] is the depressive effect of the [DMCA] safe harbors, which shield Internet service providers . . . from liability for certain user activities."). To cite a recent example, Irving Azoff of GMR recently threatened litigation against YouTube for the unauthorized performances of his clients' music notwithstanding the safe harbors, explaining that "they are the ones that have been least cooperative and the company our clients feel are the worst offenders." Gardner, *Pharrell Williams' Lawyer to YouTube: Remove Our Songs or Face $1 Billion Lawsuit*. GMR's apparent position is that if YouTube is able to identify music for the purpose of monetizing it through its Content ID system, it should also be able to take it down without the service of individual takedown notices. *Id.*

[392] Joe Mullin, *Google Handled 345 Million Copyright Takedowns in 2014*, ARSTECHNICA (Jan. 6, 2015), http://arstechnica.com/tech-policy/2015/01/google-handled-345-million-copyright-takedowns-in-2014; *Section 512 of Title 17: Hearing Before the Subcomm. On Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 47 (2014) (Statement of Katherine Oyama, Sr. Policy Counsel, Google Inc.).

2. Disparate Treatment of Analogous Rights and Uses

Closely tied to the issue of fair compensation is the disparate legal treatment of sound recordings and musical works, both vis-à-vis each other and across different delivery platforms. Many participants regard these disparities as unwarranted, and blame them for the unfairness and inefficiency in the music licensing system.

a. Inconsistent Ratesetting Standards

As explained above, ratesetting standards under the statutory licenses and consent decrees differ based on the right and use at issue. The CRB establishes rates for mechanical reproductions of musical works under section 115 under the four-factor, public policy-oriented standard in section 801(b)(1) of the Copyright Act.[393] Under the ASCAP and BMI consent decrees, the rate courts establish rates for the public performance of musical works under a "fair market value" analysis which attempts to determine the price that a willing buyer and willing seller would agree to in an arm's length transaction, but gives substantial weight to antitrust concerns.[394]

As also described above, rates for the digital performance of sound recordings under section 114 are set under different standards, depending on the type of use. Royalty rates for a limited set of older services—Sirius XM, as the only preexisting satellite service, and Music Choice and Muzak, as the only preexisting subscription services—are governed by the same four-factor standard in section 801(b)(1) as mechanical reproductions of musical works subject to compulsory licensing under section 115.[395] Meanwhile, royalty rates for all internet radio and newer noninteractive subscription services, and for all ephemeral recordings under section 112 regardless of the type of service, are established under the so-called "willing buyer/willing seller" standard, which many believe yields more market-oriented rates than those established under section 801(b)(1).[396]

Most stakeholders seem to acknowledge that it is problematic for the law to impose differing ratesetting standards, especially for businesses that provide similar services.[397]

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[393] 17 U.S.C. § 801(b)(1).

[394] ASCAP First Notice Comments at 25 (quoting *United States v. BMI* (*Music Choice II*), 316 F.3d 189, 194 (2d Cir. 2003)); *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) (stating that "the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music").

[395] *See* 17 U.S.C. §§ 114(f)(1), 801(b)(1).

[396] *See* 17 U.S.C. §§ 112(e)(4), 114(f)(2)(B).

[397] *See, e.g.*, SoundExchange First Notice Comments at 6-8, 14-16; DiMA First Notice Comments at 40; RIAA First Notice Comments at 30-32; Public Knowledge & CFA First Notice Comments at 23-26; Sirius XM First Notice Comments at 3; NARAS First Notice Comments at 8-9.

As DiMA noted, "[t]he 'playing field' regarding ratesetting standards is not level, and the result is fundamental inequity."[398] Depending upon whether they wish to see higher or lower royalty rates, however, these same stakeholders disagree as to which ratesetting standard should apply.

Music services and public interest groups support adoption of the 801(b)(1) standard for all statutory licenses, as the standard more likely to produce lower rates. Public Knowledge and CFA, for example, opined that the 801(b)(1) standard's balancing of policy considerations and focus on "creating economic incentives with the ultimate purpose of encouraging artists and platforms to create new works and bring those works to market" better aligns with the constitutional purpose of copyright law.[399] Similarly, Sirius XM pointed out that the 801(b)(1) standard provided more "latitude to consider the enumerated policy factors, including recognizing the 'relative contributions' of technological pioneers, and ensuring that both copyright owners and users are treated fairly."[400] It also noted that rates set under the standard have proven less susceptible to legal challenge or congressional modification.[401]

Taking a somewhat different tack, DiMA criticized the willing buyer/willing seller standard for "requir[ing] judges to set a rate based solely on *marketplace benchmarks*," where "there is very little record evidence of market rates for directly licensed internet radio services that are not tied to a separate rights grant for additional service types and functionalities (such as direct licenses for interactive services)."[402] In a related vein, Spotify noted that under the willing buyer/willing seller standard, benchmark rates proffered by licensees "are often premised on the agreements entered into by only the largest of licensors . . . [who] demand 'Most Favored Nations' provisions to ensure that only the highest rates are utilized in the market as opposed to rates that would arise from true free market negotiations."[403]

In contrast, copyright owners and their representatives support the adoption of the willing buyer/willing seller standard for all rates across the board. They posit that the willing buyer/willing seller standard is fairer to music owners and creators, who cannot opt out of compulsory licenses.[404] BMI stated that it is "simple and self-evident" that

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398 DiMA First Notice Comments at 40.

399 Public Knowledge & CFA First Notice Comments at 24-25.

400 Sirius XM First Notice Comments at 13.

401 *Id.* at 14-15.

402 DiMA First Notice Comments at 36 (emphasis in original).

403 Spotify First Notice Comments at 7.

404 See, *e.g.*, NMPA & HFA First Notice Comments at 8, 15-16; Wixen First Notice Comments at 2; BMI First Notice Comments at 3; IPAC First Notice Comments at 6; NARAS First Notice Comments at 1; Tr. at 292:17-20 (June 24, 2014) (Peter Brodsky, Sony/ATV).

creators should be paid at a fair market value rate.[405] Sony/ATV argued that the 801(b)(1) standard "creates artificially deflated rights," whereas a willing buyer/willing seller standard "will create fair market value" for copyright owners.[406] In sum, copyright owners strongly object to a ratesetting standard that does not aspire to free-market rates.

In this regard, a number of copyright owners, including NMPA, ASCAP, BMI, SESAC, and NARAS, expressed support for the Songwriter Equity Act ("SEA"), proposed legislation that would change the ratesetting criteria applicable to section 115 from the 801(b)(1) formula to the willing buyer/willing seller standard.[407]

b. Different Ratesetting Bodies

Another disparity in the ratesetting process involves the bodies that oversee the ratesetting proceedings. As discussed above, antitrust consent decrees entered into with the DOJ by ASCAP and BMI dictate that rates set for the public performance of musical works administered by those PROs are overseen by two judges of the U.S. District Court for the Southern District of New York that sit as rate courts for the respective consent decrees. Antitrust concerns play a predominant role in the setting of these rates.[408] In contrast, the CRB, which sets rates for the statutory licenses in sections 112, 114, and 115, does not set rates with antitrust concerns specifically in mind.[409] Instead, the CRB is designed to be an expert ratesetting body, and to bring to bear "a significant mastery of economics and marketplace factors as well as considerable knowledge of copyright law."[410]

A number of stakeholders criticized this divided ratesetting regime. Licensees pointed out that similar services must petition different bodies to obtain the rights necessary to engage in a single activity—for example, interactive streaming—leading to increased costs. When rates are set by different bodies at different times, there is a question as to

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405 BMI First Notice Comments at 3.

406 Tr. at 291:04-07 (June 24, 2014) (Peter Brodsky, Sony/ATV).

407 SEA, H.R. 4079, 113th Cong. (2014); *see also Songwriter Equity Act Gains Support in Congress*, BMI, http://www.bmi.com/news/entry/songwriter_equity_act_gains_support_in_congress (last visited Jan. 30, 2015). The SEA would also eliminate the current prohibition in section 114(i) that prohibits the PRO rate courts from considering sound recording performance rates in establishing the performance royalties due for musical works.

408 *BMI v. DMX*, 683 F.3d at 49.

409 Indeed, as noted, Congress provided copyright owners and users with an antitrust exemption to allow those groups to engage in collective negotiation of rates under the statutory licenses. *See* 17 U.S.C. §§ 112(e)(2); 114(e)(1), 115(c)(3)(B).

410 H.R. REP. NO. 108-408, at 25; *see generally* 17 U.S.C. § 802(a).

how to adjust and harmonize the different rates.[411] Others raised fundamental structural and procedural concerns, such as the propriety of a single district court being tasked with an ongoing economic responsibility it is not specifically designed to handle, in comparison to a dedicated tribunal such as the CRB. Bob Kohn, author of a well-known treatise on music licensing, noted that "rate court proceedings have morphed from the nature of a fairness hearing for proposed rates to an actual rate setting process—something which the courts are not equipped to do, especially without jurisdiction over rate setting for mechanical reproductions of musical works and transmissions of sound recordings."[412]

Music services fear that fragmented consideration of royalty rates across different ratesetting bodies can lead to unsustainable results.[413] On this point, a representative from Spotify stated:

> One thing that is absolutely essential, though, is that any rate setting standard is not looked at in a vacuum. . . . If we have an increase in publishing rates, for example, that go up beyond, much higher than they are at the moment, then we could be in a situation where we pay out more than one hundred percent of our revenue, which is unsustainable.[414]

Adding to general concerns about disparate ratesetting processes is the fact that section 114(i) of the Copyright Act prevents the PRO rate courts from considering fees set by the CRB for digital performance of sound recordings, thus further encouraging balkanization.[415]

Recognizing the shortcomings inherent in the current divided approach, some participants proposed unifying ratesetting proceedings for music licensing in a single body, observing that this could also lead to cost savings through the elimination of duplicative proceedings.[416]

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[411] Tr. at 237:08-21 (June 16, 2014) (Gary R. Greenstein, Wilson Sonsini Goodrich & Rosati).

[412] Kohn First Notice Comments at 12.

[413] Tr. at 194:05-18 (June 4, 2014) (Scott Sellwood, Google/YouTube) ("[T]he main concern for us that comes from fragmentation is an incremental creep in total content cost from which we can't really sustain the business."). RIAA, however, likened this concern to "saying if Dunkin' Donuts finds out that the price of coffee is going up that now they are going to tell their flour supplier that they are going to pay less." Tr. at 98:12-19 (June 24, 2014) (Susan Chertkoff, RIAA).

[414] Tr. at 258:01-14 (June 23, 2014) (James Duffett-Smith, Spotify).

[415] *See* NMPA & HFA First Notice Comments at 21-22; BMI First Notice Comments at 12; SESAC First Notice Comments at 3-5; NARAS First Notice Comments at 4; CTIA First Notice Comments at 11-12; Tr. at 268:11-269:14 (June 16, 2014) (Timothy A. Cohan, PeerMusic).

[416] *See* FMC First Notice Comments at 4 (suggesting that "it may be more useful to have arbitration and dispute resolution mechanisms take place under the same court, perhaps the

c. Pre-1972 Sound Recordings

As explained above, legal uncertainties surround state law protection for pre-1972 sound recordings. This has led digital music providers to take different approaches as to the payment of royalties for the streaming of pre-1972 sound recordings—some pay, and some do not. In recent months, questions of whether and how to pay for such uses have become more immediate due to judicial decisions in California and New York upholding the right of pre-1972 sound recording owners to collect for performances of their works—and additional lawsuits are pending.[417]

As a general matter, some stakeholders support the full federalization of sound recordings—*i.e.*, the total inclusion of pre-1972 sound recordings within the federal Copyright Act, subject to existing exceptions and limitations—while others have favored a more limited solution that would, for example, provide a payment mechanism under the section 112 and 114 licenses for noninteractive digital services with a safe harbor from state liability. In addition, it seems that some parties, particularly digital music services, might be content to operate without a federal statutory obligation to compensate pre-1972 sound recording owners. But these stakeholders at least acknowledge that a federal licensing scheme would be preferable to obtaining direct licenses under scattered state laws for each sound recording performed, which is no longer merely a hypothetical scenario.[418]

Full Federalization Considerations

Full federalization means that all rights and limitations in the Copyright Act applicable to post-1972 sound recordings would also apply to pre-1972 sound recordings.[419] The Copyright Office's 2011 report on the treatment of pre-1972 recordings recommends full federalization. Specifically, the Office concluded that this approach would "improve the certainty and consistency of copyright law, will likely encourage more preservation and access activities, and should not result in any appreciable harm to the economic interests of right holders."[420]

Copyright Royalty Board"); Lincoff First Notice Comments at 4-11 (proposing a unified "digital transmission right" encompassing rights of musical works and sound recording owners with rates set by the CRB).

[417] The decisions came down shortly after the close of the record in this study, so it is possible that stakeholders' positions as to how our licensing system should handle pre-1972 recordings have evolved somewhat from their earlier expressed views.

[418] *See, e.g.*, DiMA First Notice Comments at 39; Music Choice First Notice Comments at 13-16.

[419] *See* PRE-1972 SOUND RECORDINGS REPORT at ix.

[420] *Id.*

A range of study participants agree with the Office's view.[421] The prospect of receiving federally required compensation for pre-1972 exploitations is a driver for some; NARAS, which largely agreed with the Office's findings, observed that "older artists, who contributed greatly to our nation's cultural legacy, often rely on their recordings as their sole source of income."[422] Others consider access to the full spectrum of the Copyright Act's rights and limitations to be an important element of any solution. Some creators of pre-1972 sound recordings, for instance, believe they should have access to federal termination rights.[423] The Library of Congress (which submitted comments as an interested party) worried that preserving "millions of historic music and sound recordings" will be impossible under the current regime, where "pre-1972 recordings are subject to a variety of disparate state laws and state common law that . . . lack statutory language to exempt archival copying for preservation purposes."[424] Others, including digital music services, feel strongly that the fair use doctrine and DMCA safe harbor provisions should apply to pre-1972 recordings.[425]

Partial Federalization Alternative

Supporters of partial federalization, while open to consideration of a broader solution, believe that a measure requiring compensation for use of pre-1972 sound recordings

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421 *See, e.g.*, Kernochan Center Second Notice Comments at *passim*; Brigham Young University Copyright Licensing Office ("BYU") First Notice Comments at 3; FMC First Notice Comments at 8-10; Kohn First Notice Comments at 14-15; Library of Congress First Notice Comments at 2-4; Public Knowledge Second Notice Comments at 3-5; Tr. at 164:22-165:02 (June 17, 2014) (Eric Harbeson, Music Library Association).

422 NARAS First Notice Comments at 6.

423 *See, e.g.*, *id.* at 7-8; Tr. at 154:11-154:21 (June 5, 2014) (Robert Meitus, Meitus Gelbert Rose LLP). *But see* PRE-1972 SOUND RECORDINGS REPORT at 148-49 (recommending against federal termination rights to existing grants, but supporting such rights for grants made after effective date of federalization legislation). With respect to older recordings that fall within the scope of federal protection, one participant suggested providing authors of sound recordings with the opportunity to recapture their creations if the record labels stop exploiting the works commercially. Rinkerman Second Notice Comments at 2. According to the proposal, these rights would incentivize the continued availability of works and prevent works from languishing in limbo based on perceptions of marketability. *Id.* RIAA responded that, since digital music platforms make it easier to re-issue obscure recordings without the costs associated with physical distribution, owners do not need additional incentive to exploit commercially viable works under their control. Tr. at 211:16-212:09 (June 24, 2014) (Susan Chertkof, RIAA).

424 Library of Congress First Notice Comments at 2-3.

425 DiMA First Notice Comments at 39; BYU First Notice Comments at 3. Though DiMA "takes no view" on the federalization issue, it claims that, to the extent Congress considers incorporating pre-1972 sound recordings into federal copyright law, such a change should be "absolute and full." Tr. at 157:05-18 (June 5, 2014) (Lee Knife, DiMA).

should be enacted in the near term.[426] SoundExchange explained that full federalization "would raise a number of complicated issues," but resolving those issues should not delay providing legacy artists with fair compensation for the use of their works.[427] SoundExchange noted in particular that "the artists who created pre-1972 recordings are especially dependent on digital revenue streams, because they are often less likely than more current artists to be able to generate significant income from touring, product sales and other sources."[428] For those who support such an approach, obtaining royalties from digital performance services is of primary importance and partial federalization should be implemented as a short-term solution while issues of full federalization continue to be debated.[429]

Accordingly, some stakeholders advocated for Congress to simply expand the section 112 and 114 statutory licensing scheme to encompass pre-1972 sound recordings. According to these parties, bringing pre-1972 sound recordings within the scope of federal copyright protection in this manner would supply digital music services with an easy means to offer lawful public performances of those recordings while generating new sources of revenue for copyright owners.[430] Proponents of partial federalization have supported Congress' adoption of the Respecting Senior Performers as Essential Cultural Treasures Act (otherwise known as the "RESPECT Act"), legislation introduced in 2014 that would extend the section 112 and 114 licenses to cover pre-1972 recordings but at the same time provide protection from state law liability for such uses.[431]

d. Terrestrial Radio Exemption

As explained above, current law does not require traditional terrestrial—or "over-the-air"—radio broadcasters to compensate sound recording owners for the public performance of their recordings.[432] Digital music services, by contrast, must pay both sound recording owners and musical work owners for performances. The Copyright Office has long supported a full public performance right for sound recordings.

Recording artists and record labels argue that they are entitled to compensation from terrestrial radio stations in the same way that songwriters and publishers receive

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[426] *See, e.g.*, A2IM First Notice Comments at 7-8; ABKCO First Notice Comments at 3; RIAA First Notice Comments at 32-33; *see also* NARAS First Notice Comments at 6-8 (supporting partial federalization as a "stop gap").

[427] SoundExchange First Notice Comments at 11-13.

[428] *Id.* at 11-12.

[429] Tr. at 180:11-14 (June 24, 2014) (Casey Rae, FMC).

[430] *See* LaPolt First Notice Comments at 10 ("Recording artists with pre-1972 recordings were denied an estimated $60 million in royalties in 2013 alone.").

[431] RESPECT Act, H.R. 4772, 113th Cong. (2014).

[432] 17 U.S.C. §§ 106(4), 106(6), 114(a).

compensation when their songs are played on the radio.[433] They characterize the terrestrial broadcast exemption as an antiquated "loophole" that causes "glaring inequity."[434] They believe that the terrestrial radio industry does not adequately compensate sound recording owners for helping to generate billions of dollars in annual advertising revenues for radio services.[435] In this regard, they assert that the promotional effect of radio airplay on record sales claimed by broadcasters is overstated, and that sound recording owners should not be forced to forgo compensation in exchange for the suggestion of promotional value.[436]

In addition, copyright owners and digital streaming services together urge that current law gives terrestrial radio unwarranted competitive advantage over new, innovative entrants.[437] They note that wireless communications technologies have improved to the point where digital services are competing directly with traditional terrestrial radio, and consumers are using the same devices to receive digital and analog transmissions of the same recordings.[438] As one participant put it, "[t]o me it seems obvious that having an individual song play or performance on terrestrial radio in your car is fundamentally the same as a satellite radio Sirius XM play in your car as is a Pandora stream via a wireless cellphone tower through your car radio."[439]

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[433] *See* SoundExchange First Notice Comments at 16 ("The rationale for requiring terrestrial radio services to pay royalties to artists and copyright owners is the same as for all other platforms."); *see also, e.g.,* A2IM First Notice Comments at 8; RIAA First Notice Comments at 30-31; SAG-AFTRA & AFM First Notice Comments at 6.

[434] *See, e.g.*, SAG-AFTRA & AFM First Notice Comments at 6; SoundExchange First Notice Comments at 16.

[435] *See* A2IM First Notice Comments at 8 ("AM/FM broadcasters make billions selling ads to folks who tune in for our music while our sound recording creators get nothing."); NARAS First Notice Comments at 9 ("Broadcast radio is the only industry in America that bases its business on using the intellectual property of another without permission or compensation."); SAG-AFTRA & AFM First Notice Comments at 6 ("Radio has built a $15 billion industry based primarily on the exploitation of the creative work of Artists, and should finally be required to fairly compensate those Artists.").

[436] SoundExchange First Notice Comments at 16; LaPolt First Notice Comments at 6.

[437] DiMA First Notice Comments at 40-41; FMC First Notice Comments at 15; RIAA First Notice Comments at 30-31; Sirius XM First Notice Comments at 2-4; *see also* Copyright Alliance First Notice Comments at 2.

[438] Sirius XM First Notice Comments at 3-4; *see also* DiMA First Notice Comments at 40-41 (noting that "platform distinctions do not make sense in the digital environment where the very same consumer electronics devices—such as automobile in-dash receivers—are capable of receiving digital and/or analog transmissions of the same sound recording").

[439] Geo Music Group & George Johnson Music Publ'g at 13.

Predictably, terrestrial broadcasters opposed a new requirement to pay performance royalties for sound recordings, likening such payments to a "tariff" aimed at subsidizing the recording industry.[440] They state that the terrestrial broadcast exemption represents a "reciprocal dynamic" by which "record labels and performing artists profit from the free exposure and promotion provided by radio airplay, while local radio stations receive revenues from advertisers that purchase airtime to sell their products and services."[441] As evidence of the high promotional value of broadcast radio, they point out that record companies spend millions of dollars annually trying to persuade radio stations to play or promote their recordings.[442]

Foreign performance royalties are an important consideration in this debate. Virtually all industrialized nations recognize a more robust sound recording performance right than the United States; according to proponents of the right, the United States stands out on the list of countries (among them Iran and North Korea) that do not.[443] Proponents further point out that the terrestrial radio exemption prevents U.S. sound recording owners and performers from collecting royalties for foreign radio broadcasts, as most countries do not require payment of performance royalties to American sound recording owners due to the lack of reciprocity.[444] According to one estimate, in addition to forgone domestic royalties, U.S. sound recording owners are deprived of between $70 and $100 million in foreign royalties each year.[445]

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[440] *See* NAB First Notice Comments at 29.

[441] *Id.* at 28 (citing research indicating the promotional benefit provided to the recording industry from free radio airplay ranges from $1.5 to $2.4 billion annually).

[442] *Id.*; *see also* GAO REPORT at 50 (explaining that it is common for record companies to employ independent promoters to encourage the broadcast industry to perform their songs).

[443] *See* Tr. at 287:11-17 (June 23, 2014) (Blake Morgan, ECR Music Group and #IRespectMusic); *The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary,* 113th Cong. 3 (2013) ("*The Register's Call for Updates Hearing*") (statement of Rep. Melvin L. Watt) ("I think it is time, and the time is long overdue, for Congress to recognize a performance right in sound recordings . . . . To not do so just prolongs this longstanding inequity and keeps us out of pace with the international community."); SoundExchange First Notice Comments at 16-17 ("The free ride given to terrestrial radio also makes the U.S. an outlier internationally. At least 75 nations recognize some form of performance right for terrestrial radio, and the U.S. is the only western industrialized nation that does not.").

[444] *See, e.g.,* RIAA First Notice Comments at 30-31; FMC First Notice Comments at 14-15; SoundExchange First Notice Comments at 17.

[445] *See* GAO REPORT at 30; *see also* Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 Harv. J. of Sports & Ent. L 221, 226 (2011).

For their part, broadcast industry representatives dispute the amount of royalties sound recording owners are unable to recover as a result of the limited performance right.[446] They posit that U.S. expansion of the performance right will be insufficient to compel reciprocity, claiming many foreign nations will continue to balk at paying royalties unless the U.S. makes other conforming changes to its law as well.[447] They also maintain that many U.S. sound recording owners are already paid when their works are performed abroad, as foreign collection societies are sometimes willing (or even compelled) to pay for these uses.[448]

B. Government's Role in Music Licensing

1. PRO Consent Decrees

PROs, publishers, songwriters, and others criticized the ASCAP and BMI consent decrees on many fronts, arguing that the 75-year-old regime is outdated,[449] that PROs "can no longer meet the evolving needs of writers, publishers, music licensees and

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[446] NAB claims that proponents of reconciling international performance right laws have "failed to substantiate the actual amount of revenue at issue." NAB Second Notice Comments at 3. It further asserts that, even if substantiated, "[t]he estimated . . . $70 million dollars in foreign performance tariffs essentially constitute a rounding error to the major record companies." NAB First Notice Comments at 29 n.15.

[447] NAB Second Notice Comments at 3 ("[Proponents] also ignore the fact that many of these foreign regimes are distinctly less generous to sound recordings in other respects. If the U.S. is to adopt their regimes in one respect, presumably it should do so in others such as a much shorter term of protection, no protections against anti-circumvention devices, and cultural and other playlist quotas.").

[448] NAB alleges that "the U.K. adheres to 'simultaneous publication rules,' which grant U.S. sound recordings the same rights as U.K. sound recordings when they are released in both countries simultaneously," though no evidence documenting that point was submitted during the course of this study. NAB Second Notice Comments at 3-4; *see also* LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings* at 225 (explaining that "[i]n practice, many foreign collecting societies . . . have been willing to reciprocate even before being legally required to do so," but noting that laws and collecting society practices are not identical and reciprocal arrangements are generally negotiated on a case-by-case basis).

[449] SGA First Notice Comments at 4; *see also* BMI First Notice Comments at 3 (noting that "the decrees must be reviewed with an eye towards modernization"); LaPolt Second Notice Comments at 15 (explaining that the consent decrees are "restrictive and outdated"); NSAI Second Notice Comments at 6 ("Non-performing songwriters are threatened with extinction under . . . the outdated ASCAP and BMI Consent Decree models."); Wixen First Notice Comments at 3 (ASCAP and BMI "cannot sufficiently represent songwriters' interests while operating under the outdated consent decrees.").

ultimately the consumers,"[450] and that while the "consent decrees were imposed to protect against anticompetitive behavior, they are now used to distort and manipulate the market for the benefit of a handful of powerful digital distribution companies that are the gatekeepers between music's creators and those who want to enjoy that music."[451] Licensees and others, however, believe that the consent decrees are vital to preventing anticompetitive conduct by the PROs and major publishers.[452] Some believe that direct antitrust regulation should be extended even further, to encompass all licensing of public performances of musical works.[453]

As noted above, the DOJ is undertaking a review of the consent decrees to examine their continued operation and effectiveness, and has solicited public comments, which reflect many of the same concerns that the Office heard during this study.[454] While the DOJ is focused on whether the consent decrees can or should be modified as a matter of antitrust policy, this study examines the impact of the decrees on the music licensing marketplace in general.

a. Royalty Rates

Under the consent decrees, any party may obtain permission from ASCAP or BMI to perform musical works upon the submission of an application. If, after the application

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[450] ASCAP First Notice Comments at 3.

[451] NMPA, Comments Submitted in Response to the DOJ's Antitrust Consent Decree Review at 5 (Aug. 6, 2014), *available at* http://www.justice.gov/atr/cases/ascapbmi/comments/307900.pdf.

[452] *See, e.g.*, CFA & Public Knowledge First Notice Comments at 6 ("[T]he court's ruling in [*In re Petition of Pandora Media*] should put an end to the claims that these antitrust decrees are 'obsolete' or 'outdated.'"); CTIA First Notice Comments at 6 ("[T]he decrees remain essential to foster competitive market pricing for music performance rights."); DiMA Second Notice Comments at 16 ("[The PRO] collectives require government oversight . . . . [T]he natural behavior for collectives and monopolies is to instinctively leverage their position and attempt to extract supra-competitive rates and terms."); FMC First Notice Comments at 6 (Even if the consent decrees are examined regarding changes in the marketplace, "there would be no compelling reason to completely eliminate the consent decrees and the important limitations they place on PROs and publishers from engaging in anticompetitive behavior."); RMLC First Notice Comments at 5 ("[T]he pattern of price corrections and other decree enforcement measures implemented by the federal judiciary following vigorously contested trials and appeals is testimony to the continuing need for judicial supervision of ASCAP and BMI."); TMLC First Notice Comments at 5 ("[The] status quo requires, at the very least, maintaining constraints protecting music users such as those provided for in the ASCAP and BMI consent decrees.").

[453] *See, e.g.*, CTIA First Notice Comments at 6 ("Due to the nature of the markets, SESAC and the major publishers also exercise substantial supra-competitive market power. That market power should also be controlled.").

[454] *Antitrust Consent Decree Review*, U.S. DOJ, http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html (last visited Jan. 30, 2015).

is received, the PRO and user cannot agree to the licensing fee, either may apply to the applicable rate court for a determination of the rate.

In general, licensees expressed more confidence in the rate court process than did the PROs and copyright owners. For instance, DiMA opined that the "time-tested" rates have "consistently established royalty rates that appropriately approximate the 'fair market value' of particular licenses in different contexts."[455] CTIA observed that the rate courts are "essential to foster competitive market pricing for music performance rights."[456]

In contrast, PROs and copyright owners stated that the rate courts deflate public performance royalties below their true market value.[457] Songwriters and publishers believe that the rate court rates are inequitable to copyright owners, asserting that the rates they set are "below-market,"[458] "unfair and unrealistic[],"[459] and "artificially low."[460] In support of these claims, several stakeholders pointed to the 12 to 1 (some say 14 to 1) discrepancy between the rates set by the CRB for the public performance of sound recordings and rates set by rate courts for the public performance of musical works.[461]

Copyright owners complained that the "fair market value" standard employed by the rate courts is inadequate, with a "lack of clarity regarding what factors the rate court

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455 DiMA First Notice Comments at 30.

456 CTIA First Notice Comments at 6.

457 ASCAP First Notice Comments at 26 (Royalty rates are "set at rates below what the evidence indicates are market levels."); LaPolt First Notice Comments at 11 ("The compulsory rates set by the rate courts for licenses are severely lower than their true market value."); NARAS Second Notice Comments at 2 (explaining that "recent rate court decisions made pursuant to the Consent Decrees have resulted in royalty rates for digital music services that are below fair market value").

458 BMI First Notice Comments at 9.

459 Council of Music Creators First Notice Comments at 5.

460 SCL First Notice Comments at 12.

461 ASCAP First Notice Comments at 29 n.45, 44 ("This almost 12-to-1 disparity in SoundExchange and PRO payments is unprecedented in the global music marketplace." ASCAP elsewhere notes the ratio may be higher, citing a rate of "12 to 14 times greater.") (citation omitted); BMI First Notice Comments at 2 (finding that "recording artists are paid as much as . . . twelve times [what songwriters and publishers are paid] for the public performance right."); Music Managers' Forum ("MMF") & Featured Artists' Coalition ("FAC") Second Notice Comments at 10 (noting "the price for musical compositions is disadvantaged by a factor of 10 or 12 to 1"); SESAC First Notice Comments at 4 (referencing a ratio of 13:1); Tr. at 58:19-21 (June 17, 2014) (Gary R. Greenstein, Wilson Sonsini Goodrich & Rosati) (referencing "14-to-1 fees to the sound recording copyright owner versus the musical work copyright owner").

should consider . . . and the weight given to those factors."[462] A number of copyright owners highlighted section 114(i), which precludes consideration of rates set for sound recording performances by the rate courts, as one reason for below-value PRO performance rates.[463] In addition, ASCAP objected that "neither ASCAP nor BMI are free to refuse to license their repertories," leading to a lack of "competitive market transactions involving non-compelled sellers" to use as benchmarks for the government-regulated rate.[464]

b. Rate Court Proceedings

A common complaint about the rate court process is that it is expensive and time-consuming.[465] Netflix observed that "both the substantial costs of litigation and the business uncertainties inherent in court-determined approximations of what is a competitive rate impose unnecessary risks and costs on all parties."[466] Music Choice complained that "costs are disproportionately burdensome on individual licensees," whereas a PRO can spread its costs across copyright owners.[467] But ASCAP observed, "ASCAP and applicants have collectively expended well in excess of one hundred million dollars on litigation expenses related to rate court proceedings, much of that incurred since only 2009."[468] And attorney Christian Castle objected that "songwriters did not ask for [the process], cannot escape it, and are forced to participate."[469]

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[462] ASCAP First Notice Comments at 24; *see also* SESAC First Notice Comments at 6 ("The consent decrees . . . offer no definition or guidelines as to what constitutes 'reasonable.'").

[463] *See* BMI First Notice Comments at 10 ("We believe that the prohibition against the PRO rate courts considering the rates set for sound recordings provides in part an explanation for this unintended disparity."); *see also* ABKCO First Notice Comments at 2; ASCAP First Notice Comments at 29-30.

[464] ASCAP First Notice Comments at 25.

[465] *Id.* at 3 ("Rate court proceedings have become extremely time and labor-intensive, costing the parties millions in litigation expenses."); BMI First Notice Comments at 8-9 ("Federal rate court litigation is an exceptionally slow process to set prices to keep up with the rapidly-evolving digital marketplace, and it is exceedingly expensive for all participants . . . ."); SESAC First Notice Comments at 7 ("[T]he consent decrees . . . hold[] songwriters and music publisher royalties' hostage to systematically protracted rate negotiations and expensive, time-consuming rate court proceedings.").

[466] Netflix First Notice Comments at 6.

[467] Music Choice First Notice Comments at 5.

[468] ASCAP First Notice Comments at 23.

[469] Castle First Notice Comments at 8.

Federal copyright litigation is not only expensive but often lengthy,[470] and the rate courts are no exception. According to BMI, "a typical rate court case can take many years to be resolved, which includes the inevitable, potentially multi-year, appeal of the trial court's decision."[471] ASCAP noted that although the consent decree "mandates that proceedings must be trial-ready within one year of the filing of the initial petition, that deadline is rarely met."[472] As music attorney Dina LaPolt commented, the drawn-out proceedings create the perception that rate courts "cannot keep up with the pace set by the new digital marketplace."[473]

c. Interim Fees

Other concerns revolve around the fact that the rate for a particular license may not be established until long after the licensee begins using musical works. The ASCAP and BMI consent decrees allow music users to perform the PRO's repertoire upon the mere filing of an application for a license, without payment of any license fee.[474] As a general matter, songwriters, publishers, and PROs found it unfair that "the current rate court system . . . does not provide for an inexpensive, effective way to set interim fees to compensate creators while the long rate-setting process plays out."[475]

This feature potentially exposes the PROs to gamesmanship by applicants, as "the burden is on the PRO to make a motion for the imposition of an interim fee—a motion that is, like the rate court proceeding itself, expensive and time-consuming."[476] As ASCAP elaborated: "Even when an interim fee is paid, it is often at less than full value," leading many licensees to make "strategic choices to stay on interim terms until ASCAP determines it must commence an expensive rate court proceeding."[477] BMI observed that "it is not unheard of for an applicant to go out of business before a fee is ever set; as a result, the PROs (and, of course, in turn, our writers, composers and publishers) are never compensated for the use of their valuable repertoires."[478]

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[470] *See* U. S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 24-26 (2013) *available at* http://copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf.

[471] BMI First Notice Comments at 9.

[472] ASCAP First Notice Comments at 22.

[473] LaPolt Second Notice Comments at app. 4.

[474] ASCAP First Notice Comment at 15; BMI First Notice Comment at 16.

[475] BMI First Notice Comments at 3; *see also* LaPolt Second Notice Comments at app. 4 (noting that "some licensees employ the rate court as a dilatory tactic to use performance licenses for a time without having to compensate the PROs.").

[476] BMI First Notice Comments at 16.

[477] ASCAP First Notice Comments at 16 & n.22.

[478] BMI First Notice Comments at 17; *see also* ASCAP First Notice Comments at 15-16.

d. Inconsistent Regulation of PROs

Yet another concern is the disparate treatment of entities that license performance rights. The largest PROs, ASCAP and BMI, are subject to direct government oversight and regulated pricing under the consent decrees. Other entities that represent significant catalogs of works, however, such as SESAC and GMR—and major publishers, who may withdraw from the PROs to license public performance rights directly—are not. Some contend that the application of different rules to these different players creates an unwarranted competitive imbalance and opportunities for regulatory arbitrage.[479]

Licensees argued that SESAC, for example, has taken advantage of this discrepancy by engaging in anticompetitive behavior that is prohibited under the consent decrees.[480] As noted above, in 2014, RMLC and local television stations each separately sued SESAC seeking antitrust relief.[481] RMLC argued that SESAC's practices created "significant overcharges to radio stations for their uses of SESAC music,"[482] while the local television stations criticized SESAC for offering only a blanket license and refusing to provide licensees with repertoire information.[483] These suits were both allowed to proceed after

[479] SCL First Notice Comments at 12 ("Commercial entities like SESAC, startups like Azoff MSG Entertainment [GMR] and a variety of foreign PROs are all competing for the opportunity to the collect revenues of the music creators but unlike ASCAP and BMI, are not constrained by antiquated regulations in their efforts to do so."); Sarah Skates, *Global Music Rights Has Growing Roster, Negotiating Power*, MUSIC ROW (Oct. 30, 2014), http://www.musicrow.com/2014/10/global-music-rights-has-growing-roster-negotiating-power/ (opining that GMR "would likely have more power than other PROs ASCAP and BMI when negotiating licenses on behalf of its members, due to the fact that it would not be subject to the same regulatory agreements that govern the more established organizations").

[480] Music Choice First Notice Comments at 10 ("Given the current state of SESAC's repertory, the same facts supporting the continued need for rate court regulation of ASCAP and BMI apply equally to SESAC, and SESAC should be subject to the same regulation and rate court supervision as the other PROs.").

[481] *See RMLC v. SESAC*, 29 F. Supp. 3d 487; *Meredith Corp.*, 1 F. Supp. 3d 180.

[482] RMLC First Notice Comments at 2.

[483] TMLC First Notice Comments at 14; s*ee also* Sirius XM First Notice Comments at 6 ("[SESAC's] combination of concentrated ownership and either an unwillingness or inability to be transparent as to what works are actually in the repertory creates a completely untenable situation.").

the respective courts denied SESAC's motions to dismiss.[484] (The parties to the New York case brought by Meredith Corporation have since agreed to a settlement.[485])

SESAC disagreed that it has a competitive advantage, instead contending that because "the industry . . . arose in a culture that assumes that the rates set by the rate courts are accurate . . . SESAC must also accept those rates."[486] And copyright owners suggested that the rates obtained by SESAC and GMR outside of the consent decrees might be useful as market benchmarks in rate court proceedings.[487]

Even within the consent decree framework, there are regulatory discrepancies. The ASCAP and BMI decrees are administered by different district court judges, and in the past, there have been periods of time during which the ASCAP and BMI decrees included significantly different terms.[488] The decrees are still not entirely aligned. For example, the ASCAP consent decree expressly prohibits ASCAP from licensing any rights other than public performance rights, while the BMI consent decree contains no such provision. BMI has expressed the view that it may license other rights under its consent decree—but has yet to do so.[489] In short, "[n]othing obligates the rate courts to reach similar results on rate-setting or other issues."[490]

e. Parties' Proposals

Stakeholders suggested a broad range of solutions to the perceived shortcomings of the consent decrees governing ASCAP and BMI. The most salient proposals are discussed below.

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[484] *RMLC v. SESAC*, 29 F. Supp. 3d at 500-03 (dismissing price fixing allegation, but allowing monopoly claim to proceed); *Meredith Corp. v. SESAC LLC*, No. 09-cv-9177, 2011 WL 856266, at *1 (S.D.N.Y. Mar. 9, 2011) (denying motion to dismiss).

[485] Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement at 1-2, 5, *Meredith Corp.*, 1 F. Supp. 3d 180 (No. 09-cv-9177). TMLC, which was not a party to the litigation, was also a signatory to the settlement. *Id.* at 1 n.2.

[486] Tr. at 61:04-11 (June 5, 2014) (Reid Alan Waltz, SESAC); *see also* Tr. at 58:20-59:03 (June 23, 2014) (Bill Lee, SESAC) ("Although SESAC is not under a rate court, many rate court decisions do have a negative impact on SESAC's ability to modify license agreements. And ultimately it is the creator, the songwriter, who suffers because of that lack of modernization.").

[487] Production Music Association Second Notice Comments at 5.

[488] *See generally* RICHARD A. EPSTEIN, ANTITRUST CONSENT DECREES: IN THEORY AND PRACTICE 30-39 (2007) ("EPSTEIN") (describing differences between the decrees and concluding that the consent decrees "did not keep ASCAP and BMI in parity at all times, so that differential regulations governed key portions of their business").

[489] *See* BMI, Comments on Department of Commerce Green Paper at 4-5.

[490] LaPolt First Notice Comments at 12.

Complete or Partial Withdrawal of Rights

As discussed above, the ASCAP and BMI rate courts recently concluded that, under the consent decrees, music publishers could not withdraw only "new media" (*i.e.*, digital streaming) rights from the PROs to be licensed directly. As a result, the major publishers have petitioned the DOJ seeking modification of the consent decrees to allow for such partial withdrawals. As an alternative plan, major publishers are also evaluating whether to withdraw their works entirely from the PROs and directly negotiate public performance rates outside of the consent decree framework.[491]

A broad range of stakeholders expressed serious apprehension about complete publisher withdrawal, predicting "havoc" for the music industry.[492] BMI noted that complete withdrawal "is potentially catastrophic for smaller publishers and songwriters who depend on BMI for their livelihood, and for BMI's hundreds of thousands of customers who depend on BMI to fulfill their copyright obligations."[493] Significantly, Martin Bandier, chairman and CEO of Sony/ATV—one of the major publishers considering full withdrawal—similarly predicted that if Sony/ATV found it necessary to withdraw, such an outcome could be "catastrophic" for ASCAP and BMI.[494]

Part of the concern is that many administrative costs of running a PRO, such as negotiating licenses or monitoring radio stations, do not scale downward with a reduction in revenues; a royalty check costs the same amount to process whether it is large or small. ASCAP and BMI offset their administrative costs by charging a commission (roughly 13% of royalties paid in both cases[495]). If major publishers are to wholly withdraw, the commissions collected by the PROs from the substantial royalties generated by those catalogs would no longer be available to defray fixed overhead expenses. As a result, the remaining smaller members of these organizations would have to shoulder the full administrative costs, likely through significantly higher commissions.[496] Some commenters questioned whether the PROs would be able to

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[491] BMI First Notice Comments at 9 ("[M]any knowledgeable publishers . . . have lost confidence in the efficacy of the rate court process to yield fair market-value. That loss of confidence is driving publishers to move away from the PROs to avoid this perceived inadequacy.").

[492] *See, e.g.*, Tr. at 23:17-20 (June 17, 2014) (Timothy Cohan, PeerMusic) ("[T]here seems to be consensus that there would be universal havoc—I think that's an apt term—if total withdrawals were to happen."); Tr. at 30:05-06 (June 17, 2014) (Ashley Irwin, SCL) (stating that publisher withdrawals would result in "total havoc").

[493] BMI Second Notice Comments at 12.

[494] Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*.

[495] A2IM First Notice Comments at 6.

[496] *See, e.g.,* ASCAP Second Notice Comments at 3-4 (predicting that "withdrawing publishers will result in a loss of revenue but without an attendant drop in expenses, which will have to be

continue in operation in such a circumstance.[497] A related concern is that smaller publishers might face unsustainable increases in licensing and transaction costs as independent entities, which could lead to greater consolidation in the music publishing market.[498]

Nonetheless, based on their public statements and comments during this study, at least two major publishers—UMPG and Sony/ATV—appear poised to withdraw.[499] In contrast to Sony/ATV, a representative from UMPG suggested that such an action would not be the end of the PROs:

> We could withdraw tomorrow, and it would be seamless. The landscape would not change that much. You're talking about introducing maybe a few additional players to the licensing process, Universal being one of them. The societies don't go away. The societies continue to exist for those writers and publishers who don't have the resources that we're fortunate enough to have to create infrastructures to deal with licensing and data management, but there are several solutions, they are all workable, and they don't impact the industry or the writer community negatively.[500]

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unfairly borne by the remaining ASCAP members"); *see also* LaPolt First Notice Comments at 12-13; NARAS Second Notice Comments at 2.

[497] Tr. at 9:09-15 (June 5, 2014) (Sam Mosenkis, ASCAP) ("[I]f the revenues . . . decrease[] by 60 percent, clearly operating ratios are going to increase, possibly to a point where we can't operate efficiently enough and the whole concept of efficient licensing really drops down the drain."); *see also* NSAI Second Notice Comments at 3 ("If major music publishers directly license and collect the digital performance royalties easiest to accomplish, it is unlikely that ASCAP and BMI could continue to exist on what is left, at least with the same efficiency and cost.").

[498] *See, e.g.*, RIAA First Notice Comments at 39 ("[O]utright withdrawal is a possibility that imperils the whole musical work performance licensing system, and creates a risk that there will be no practical way to access works, and shares of works, owned by smaller publishers.").

[499] *See* ASCAP First Notice Comments at 36; Tr. at 37:02-39:08 (June 17, 2014) (David Kokakis, UMPG); *see also* Ed Christman, *Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI*, BILLBOARD (July 11, 2014), http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi (reporting the details of a letter sent by Sony/ATV chairman and CEO, Martin Bandier, to Sony/ATV songwriters explaining that Sony/ATV "may have no alternative but to take all of our rights out of ASCAP and BMI"). Warner/Chappell did not participate in the study, but previously announced "their intentions to withdraw their New Media licensing rights from ASCAP" along with other large publishers, following completion of the June 2012 deal between Pandora and Sony/EMI. *In re Pandora*, 2013 WL 5211927, at *3.

[500] Tr. at 34:18-35:09 (June 17, 2014) (David Kokakis, UMPG).

As an alternative to full withdrawal, partial withdrawal of only new media rights remains a possibility if the rate courts' "all in or all out" interpretations of the consent decrees are reversed on appeal, or the DOJ concludes that it should support a modification of the decrees to permit it. The PROs and major publishers have advanced several arguments in favor of partial withdrawal, including their view that it would allow for fairer, market-based rates for new media uses, that it would allow for greater flexibility in licensing terms, and that directly negotiated licenses with digital services would provide a competitive benchmark in ratesetting proceedings governing non-withdrawing publishers.[501]

Licensees, however, stated that even partial withdrawal would undermine the protection of the consent decrees, and allow the withdrawing publishers to raise rates through the exercise of unfettered market power.[502] Music Choice claimed that for the brief period before the ASCAP rate court banned publishers' partial withdrawal, "negotiations with Sony and UMPG were oppressive, and resulted in substantially higher royalty rates."[503] Others echoed the concern that publishers would engage in anticompetitive behavior.[504]

Songwriters also have significant concerns about publisher withdrawals, specifically as to how the writer's share of performance royalties would be administered and paid. Songwriter contracts typically provide that the writer's share will be collected and paid through a PRO,[505] but many of these contracts likely do not contemplate publisher withdrawal from the PRO.[506] Songwriters fear that, if they instead receive payment through the publisher, they will be vulnerable to the publisher's less transparent

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[501] *See, e.g.,* ASCAP First Notice Comments at 34-35.

[502] DiMA First Notice Comments at 32 ("[I]f the antitrust consent decrees were to be modified by the Department of Justice to accommodate 'limited' withdrawals . . . the marketplace for musical work public performance rights would be significantly compromised.").

[503] Music Choice First Notice Comments at 6.

[504] Public Knowledge & CFA First Notice Comments at 5 ("When ASCAP allowed the largest music publishers to remove their digital rights from the existing contracts, [the publishers] immediately returned to the abusive practices that had made the consent decree necessary in the first place."); Tr. at 52:07-20 (June 24, 2014) (Paul Fakler, Music Choice) ("[After publishers did partially withdraw] there was evidence from the record, of collusion, strong arm tactics to inflate the rates, sharing confidential information about negotiations.").

[505] Tr. at 12:07-09 (June 17, 2014) (Garry Schyman, SCL) ("We only receive the writer's share, and that's contractual."); Tr. at 24:13-16 (June 17, 2014) (Timothy Cohan, PeerMusic) ("Contracts have mentioned the writer's share for a long, long time. They are not consistent. It is often negotiated from contract to contract.").

[506] Tr. at 12:10-14 (June 17, 2014) (Garry Schyman, SCL) ("[V]ery often the contracts do not specify what would happen if the music is withdrawn from a PRO. It merely says if money is collected through your society, that you are entitled to receive your share.").

accounting.[507] FMC suggested that "[a]ny further amendments to the consent decrees must be done with complete transparency and with a thoughtful consideration of the impact on songwriters' leverage and compensation."[508]

The SCL voiced concerns that withdrawal of publishers from U.S. PROs would cause problems for foreign songwriters, who enter into exclusive arrangements with their local performing rights society, which in turn authorize U.S. PROs to collect royalties on their behalf through reciprocal relationships. According to SCL, a U.S. publisher representing a foreign author's works under a sub-publishing agreement lacks the authority to withdraw that writers' rights from the U.S. PRO.[509] Questioned about this, David Kokakis of UMPG responded that his company has "considered the international implications" of withdrawal and does not "currently intend to disrupt that [reciprocity] model."[510] Kokakis maintained that "exploitation of foreign works in the United States . . . would continue to run through the [U.S.] societies."[511]

A number of study participants proposed continued reliance upon the PROs to collect and administer royalties from licensees even under directly negotiated deals.[512] According to ASCAP, when the major publishers sought to withdraw their new media rights, ASCAP entered into administration arrangements with the withdrawing publishers "that enabled the publishers to negotiate directly their digital rights in the free market, but leave the administration of such deals—receiving fees, processing music use information data, matching works to interested parties and paying all interested parties—to ASCAP" for a fee.[513] Such an arrangement might also address the concern that the withdrawing publishers would "lack the infrastructure to license and collect performance royalties from bars, restaurants or live performance venues."[514]

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507 NARAS Second Notice Comments at 2 (noting that "the rest of the music ecosystem would lose the efficiency, transparency and stability provided by the PROs."); Public Knowledge & CFA First Notice Comments at 18; Tr. at 33:22-34:06 (June 24, 2014) (Rick Carnes, SGA).

508 FMC First Notice Comments at 6-7.

509 Tr. at 31:16-32:04 (June 17, 2014) (Ashley Irwin, SCL) ("[M]y deal with [a foreign PRO] does not allow a sub-publisher to pull out of an American society. It contravenes my agreement with my local society. So I don't know if anybody has considered what the foreign societies will do if the publishers pull out here that are representing, once again, a reciprocity thing.").

510 Tr. at 34:11-13, 43:09-10 (June 17, 2014) (David Kokakis, UPMG).

511 *Id*. at 43:17-19.

512 *Id*. at 38:06-08; BMI Second Notice Comments at 14; s*ee also* Tr. at 45:05-10 (June 16, 2014) (Ashley Irwin, SCL) (proposing bifurcation of public performance right between publishers and songwriters, so that songwriters could continue to utilize the PROs).

513 ASCAP Second Notice Comment at 6.

514 NSAI Second Notice Comments at 3; *see also* NMPA & HFA First Notice Comments at 20 ("[Withdrawal] presents a Hobson's choice for music publishers—either pull out of ASCAP

Elimination Versus Expansion of Consent Decrees

During the course of this study, PROs, publishers, and songwriters have advocated for the sunset of the consent decrees that govern ASCAP and BMI.[515] ASCAP noted the anomaly that the decrees "continue[] into perpetuity regardless of the increased competition in the marketplace for licensing the public performance of musical works."[516] ASCAP thus views the decrees as "particularly punitive in nature when viewed in light of current DOJ policy," which mandates the inclusion of sunset provisions in standard consent decrees, and under which the DOJ "does not currently enter into consent decrees with terms longer than ten years."[517] ASCAP observed that the marketplace has undergone massive changes since its decree was first adopted in 1941, in that "ASCAP now faces vibrant competition, not only from BMI, but also from unregulated competitors such as SESAC, foreign PROs, and new market entrants, as well as from ASCAP's own publisher and writer members."[518] BMI similarly points out that "outmoded views of the purported monopoly power of regulated collectives such as BMI and ASCAP need to be discarded" as "digital technology has made it easier for creators and distributors, including unregulated competitors to PROs, to identify performances and their owners."[519]

In contrast, licensees fear that sunset of the consent decrees would lead not just to higher but "supracompetitive" rates that are all the more problematic when licensees have to pay performance royalties for both sound recordings and mechanical rights.[520] A wide range of licensees accordingly support the continuation of the consent decrees in essentially unchanged form.[521]

Some participants went further by suggesting that the restrictions imposed by the consent decrees should be extended to the smaller PROs not currently subject to direct

completely (and take on the difficult burdens of general licensing, *e.g.*, licensing to small music users such as bars and clubs), or forfeit the right to negotiate agreements at market rates with digital service providers.").

515 BMI First Notice Comments at 20; ASCAP First Notice Comments at 4.

516 *Id.* at 37-38.

517 *Id.* at 38; *see also* BMI First Notice Comments at 13 ("In 1979, the [DOJ] determined that entering into perpetual consent decrees was not in the public interest.").

518 ASCAP First Notice Comments at 38.

519 BMI First Notice Comments at 25.

520 *See, e.g.*, Music Choice First Notice Comments at 8.

521 *See, e.g.*, DiMA First Notice Comments at 15 ("The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights . . . .").

supervision. For example, Netflix suggested that all PROs should be subject to the same ratesetting authority and that PROs could divide the shares of the royalty pools among themselves.[522] Participants also suggested that withdrawing major publishers should be subject to oversight and possibly a consent decree to protect against a concentration of market power.[523]

Rate Court Changes

The costs and length of rate court proceeding are frustrating for many. Some—including ASCAP and BMI—have suggested replacing the rate courts with an alternative dispute resolution process such as arbitration.[524] IPAC advocated for private negotiation followed by expedited mediation within prescribed time limits.[525]

Licensees, however, were skeptical. NAB stated that "[t]here is no reason to believe that, without drastic elimination of appropriate and essential discovery and appellate review, private arbitration will be any more efficient, speedy, or cost-effective than the rate courts."[526] FMC voiced a concern that sealed arbitration proceedings would threaten transparency.[527] Even while acknowledging the rate courts' flaws, a number of licensees supported the continuation of that regime, in part due to its procedural safeguards, including use of the Federal Rules of Civil Procedure and Evidence.[528] As one licensee opined, "the *process* of rate-setting under the ASCAP and BMI consent decrees—and the

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[522] Netflix First Notice Comments at 7.

[523] *See, e.g.*, Tr. at 44:22-45:05 (June 5, 2014) (Lee Knife, DiMA) ("I think whenever you have that type of concentration of market power, that kind of demands some type of oversight, again, whether or not that's in the form of a compulsory license, a statutory license, a consent decree, or something like that."); Tr. at 52:07-20 (June 24, 2014) (Paul Fakler, Music Choice).

[524] ASCAP First Notice Comments at 23-24 (explaining that arbitration would offer a more definite timeline and would discourage applicants from relying on the license application or interim licenses); *Music Licensing Hearings* at 52 (statement of Michael O'Neill, CEO, BMI) ("We believe that replacing the current rate court with arbitration in New York under the American Arbitration Association rules would be a faster, less expensive, and a more market-responsive mechanism for all parties to obtain fair, market-value rate decisions."); Content Creators Coalition Second Notice Comments at 2-3.

[525] IPAC First Notice Comments at 9.

[526] NAB Second Notice Comments at 2; s*ee also* Music Choice Second Notice Comments at 8; Tr. at 55:14-16 (June 24, 2014) (Willard Hoyt, TMLC) ("It has been our experience that arbitration is not, necessarily, less expensive than the rate court.").

[527] Tr. at 88:21-89:05 (June 23, 2014) (Casey Rae, FMC).

[528] Music Choice First Notice Comments at 29.

hypothetical competitive market standard for rate-setting applied in Rate Court cases—has worked reasonably well."[529]

PROs and publishers also seek to encourage interim payment of royalties pending the determination of a final rate. MMF and FAC suggested that "[a]t the very least US licensees should be required to make an interim payment pending the issuing of a final license with an agreed tariff."[530] BMI suggested that rather than invoking the burdensome rate court process to set an interim rate, the fee could be set at the rate the licensee paid under its last license or, for new users, the "going industry rate."[531]

Bundled Licensing

There appears to be broad agreement among stakeholders that PROs and other licensing entities should be able to bundle performance rights with reproduction and distribution rights, and potentially other rights, to meet the needs of modern music services.[532] NSAI, for example, opined that "[t]he most efficient path to digital service providers obtaining necessary licenses would be to allow the PRO's to license and collect mechanical royalties."[533]

Stakeholders offered conflicting methods by which bundled rights could be made available. For instance, NMPA suggested that bundled rights could be sought directly from the music publishers that own and administer the song in question.[534] But the PROs suggested that their existing structures could be leveraged to facilitate bundled

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529 Netflix First Notice Comments at 7-8 (emphasis in original); *see also* Sirius XM First Notice Comments at 4 ("In our experience, the ASCAP and BMI consent decrees and the licensing process that they mandate work relatively well."); Spotify First Notice Comments at 10 (explaining that "the current system where the PROs are subject to regulation via the consent decrees is working well").

530 MMF & FAC Second Notice Comments at 10.

531 BMI First Notice Comments at 17.

532 *See* ASCAP First Notice Comments at 30; DiMA First Notice Comments at 25 ("A mechanism should be put in place that enables the collective administration of an 'all-in,' combined mechanical and performance royalty."); IPAC First Notice Comments at 8 ("A unified licensing scheme for uses that require both public performance and mechanical licenses could benefit both licensees and copyright owners."); RIAA First Notice Comments at 6 ("[T]he marketplace needs bundles of rights."); Public Knowledge & CFA First Notice Comments at 28; SCL First Notice Comments at 12.

533 NSAI Second Notice Comments at 8.

534 NMPA & HFA First Notice Comments at 18; Tr. at 239:15-18 (June 24, 2014) (Jay Rosenthal, NMPA).

licensing on a blanket basis, if only the consent decrees were amended.[535] Several parties also observed that allowing bundling of rights would align U.S. music licensing with collective practices in Europe.[536]

Elimination of Section 114(i)

Songwriters and publishers expressed support for the SEA, which, in addition to addressing the ratesetting standard under section 115, would amend section 114(i) to remove language prohibiting the rate courts and other bodies from considering the license fees payable for the public performance of sound recordings when determining rates to be paid for musical works.[537] Proponents of the SEA stated that rate courts should be able to consider all relevant evidence[538] and predicted that the courts, after considering the CRB-established sound recording rates, would increase performance rates for musical works so that they were more commensurate with rates paid for sound recordings.[539]

Music services opposed amending section 114(i) on the ground that eliminating the evidentiary exclusion of the CRB-set rate for sound recordings would increase rates for musical works without a proportional decrease of rates for sound recordings, leading to an overall escalation of total content costs to potentially unsustainable levels.[540] Some noted that those who now support the elimination of that provision are the same parties who sought it in the first place, as the provision was enacted out of copyright owners'

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[535] ASCAP First Notice Comments at 30-34; BMI First Notice Comments at 15-16; Tr. at 273:13-15 (June 24, 2014) (Richard Reimer, ASCAP); Tr. at 38:03-04 (June 24, 2014) (Stuart Rosen, BMI).

[536] BMI First Notice Comments at 6; Tr. at 32:20-33:01 (June 4, 2014) (Dan Coleman, Modern Music Works Publishing); Tr. at 273:07-12 (June 24, 2014) (Richard Reimer, ASCAP).

[537] SEA, H.R. 4079 § 2.

[538] *See, e.g.,* NMPA & HFA First Notice Comments at 21-22; BMI First Notice Comments at 18-19; SESAC First Notice Comments at 3-4; NARAS First Notice Comments at 4; Geo Music Group & George Johnson Music Publ'g First Notice Comments at 16; Tr. at 198:09-17 (June 5, 2014) (Daniel Gervais, Vanderbilt University Law School) (noting "when you read in the Copyright Royalty Board determination that the value of a sound recording is unrelated to the value of the song . . . [t]o me, that complete disconnect is not warranted").

[539] *See, e.g.,* BMI First Notice Comments at 18; ASCAP First Notice Comments at 27-30; SESAC First Notice Comments at 5; NMPA & HFA First Notice Comments at 26-28; NARAS First Notice Comments at 4; LaPolt First Notice Comments at 12.

[540] *See e.g.*, CTIA First Notice Comments at 12 (noting that "publishers want it both ways—they want the higher sound recording fees to be relevant in setting their fees, but they want to protect their affiliate record companies and ensure that sound recording fees are not dragged down by much lower musical works fees"); Music Choice First Notice Comments at 34 ("The simple fact is that the disparity in rates between the Section 114 license and the PRO licenses does not prove that the PRO rates are too low; it proves that the Section 114 rates are too high.").

concern that consideration of sound recording license fees might depress musical work rates.[541] Opponents further observed that music publishers themselves previously testified before the CRB that it was economically logical and necessary to maintain a distinction between musical work and sound recording rates, and are now simply questioning their prior judgment in light of the higher sound recording rates set by the CRB.[542]

2. Mechanical Rights Licensing

Many parties have called for either the complete elimination or modernization of section 115, citing issues such as the administrative challenges of the license, the inaccuracy and slowness of the ratesetting process, and frustration with government-mandated rates.

a. Royalty Rates and Standard

A broad range of parties expressed dissatisfaction with royalty rates established by the CRB. Music publishers and songwriters argue that the rates determined under the section 801(b)(1) standard applicable to section 115 are depressed as a result of the government ratesetting process and do not reflect the fair market value of musical works. While advocating for the elimination of the compulsory license, these parties also assert that at the very least mechanical rates should be established under the more market-oriented willing buyer/willing seller standard that applies under the section 112 and 114 licenses.[543]

Musical work owners explain that section 115 acts as a ceiling that does not allow them to seek higher royalties through voluntary negotiations.[544] Many point to the fact that the current 9.1 cent rate for phonorecords has not kept pace with inflation, since the

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[541] CTIA First Notice Comments at 11-12.; Tr. at 254:06-19 (June 16, 2014) (Russell Hauth, NRBMLC) ("Now that the sound recording industry has got a great rate, the musical works want the same, and they want to not be separated any longer. You know, I've got to say that's fairly hypocritical.").

[542] *See, e.g.,* NRBMLC First Notice Comments at 11-12; Tr. at 254:06-19 (June 16, 2014) (Russell Hauth, NRBMLC); Tr. at 76:22-79:07 (June 24, 2014) (Bruce Rich, RMLC); Tr. at 85:13-86:07 (June 24, 2014) (Paul Fakler, NAB).

[543] *See* ABKCO First Notice Comments at 1; BMI First Notice Comments at 5; Gear Publ'g Co. & Lisa Thomas Music Servs., LLC First Notice Comments at 4; IPAC First Notice Comments at 7; *see also* Tr. at 119:01-09 (June 17, 2014) (John Rudolph, Music Analytics); Tr. at 33:20-34:02 (June 23, 2014) (Jay Rosenthal, NMPA).

[544] *See* Carapetyan Second Notice Comments at 1 ("The reality is it is rarely used in standard industry practice, serving only as a framework for negotiating terms of direct licenses, but acting as a *de facto* ceiling for royalty rates nonetheless."); Geo Music Group & George Johnson Music Publ'g First Notice Comments at 10 (opining that "the *statutory rate is still a cap* and *as non-effective as it gets*.") (emphasis in original); NSAI Second Notice Comments at 7.

original 2 cent rate set by statute in 1909 would be 51 cents today if adjusted for inflation.[545] In addition, a number of participants noted a 9 to 1 inequity of rates between sound recordings and musical works for downloads and CDs: when a song is downloaded from iTunes for $1.29, approximately 80 cents is allocated for the sound recording, but only 9.1 cents goes to the musical work.[546] By way of contrast, rates for privately negotiated synchronization licenses—which are not subject to government oversight—generally reflect a 1 to 1 ratio between musical works and sound recordings.[547]

Digital music services, however, disagree, contending that the statutory rates set under the section 801(b)(1) standard reflect fair market value, or higher.[548] According to them, the statutory rates provide a "useful benchmark for direct deals" by providing a framework by which to negotiate such deals.[549] They contend that the willing buyer/willing seller standard is faulty at best since "the 'market' the standard seeks to construct or emulate does not exist and often has never existed,"[550] whereas the section 801(b)(1) standard is "flexible" and more predictable and accounts for fairness in compensating copyright owners.[551]

Though record labels are in agreement with digital music services that the section 801(b)(1) standard does not result in rates lower than fair market value, they have also advocated changing the rate standard to the willing buyer/willing seller standard.[552] Record labels point to the importance of emphasizing fair market value as "the goal of any rate-setting process" and argue that harmonizing the statutory rate standards by

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[545] *See* LaPolt Second Notice Comments at 9; MMF & FAC Second Notice Comments at 6; Modern Works Music Publishing First Notice Comments at 4-5; *see also* Tr. at 250:15-21 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP).

[546] NMPA & HFA First Notice Comments at 16; Tr. at 266:14-267:05 (June 16, 2014) (Ilene Goldberg); *see also* Kohn First Notice Comments at 19-20.

[547] LaPolt First Notice Comments at 14; NMPA & HFA First Notice Comments at 16; *see also* Tr. at 60:20-22 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP).

[548] *See* DiMA First Notice Comments at 23 ("The Section 801(b) standard has been time-tested to provide fair rates (*i.e.*, 'reasonable fees') that have been accepted for more than half a century in many different contexts, including ratesetting proceedings under Sections 114(f)(1)(B), 115, and 116."); DiMA Second Notice Comments at 21; Sirius XM First Notice Comments at 13-14; *see also* Tr. at 310:01-09 (June 23, 2014) (Lee Knife, DiMA).

[549] DiMA First Notice Comments at 19.

[550] DiMA Second Notice Comments at 20; *see also* Music Choice First Notice Comments at 37.

[551] DiMA Second Notice Comments at 20-21; *see also* Tr. at 278:21-279:02 (June 23, 2014) (Paul Fakler, NAB/Music Choice); Tr. at 294:02-10 (June 23, 2014) (Cynthia Greer, Sirius XM).

[552] RIAA First Notice Comments at 25.

bringing section 115 within the willing buyer/willing seller standard would achieve that goal.[553]

b. Administrative Burdens

Stakeholders expressed near universal concern about the inefficiencies of the mechanical licensing process. The section 115 statutory license creates a per-work licensing model; the same model is employed when seeking licenses through intermediaries such as HFA.[554] Licensees seeking to release individual records typically obtain a mechanical license for the specific product through HFA or directly from the publisher.[555] But digital services seeking large volumes—sometimes millions—of licenses are more likely to rely on the section 115 statutory license for at least some of their licensing needs. Consequently, digital providers expressed considerable frustration with the song-by-song licensing process.[556]

Although the statutory licensing process is more commonly relied upon now than it has been in the past, RIAA regarded this development as merely "an indication that musical work licensing is so broken that mass use of the compulsory license process is the best of a lot of bad options."[557] In addition to the burden of seeking licenses for individual works, licensees complain about the lack of readily available data concerning musical work ownership, as described further below.[558] Digital services asserted that the inaccessibility of ownership information leads to costly and burdensome efforts to identify the rightsholders and potentially incomplete or incorrect licenses, exposing them to the risk of statutory infringement damages despite diligent efforts.[559]

A number of licensees also objected to the detailed accounting and payment requirements imposed by section 115.[560] DiMA noted that for "direct license agreements

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[553] *Id.*

[554] *See, e.g.*, BMI First Notice Comments at 5; DiMA First Notice Comments at 20; Spotify First Notice Comments at 3-5; RIAA First Notice Comments at 10-11.

[555] *See id.* at 40 (describing the previously high volume of mechanical licenses issued through HFA and the increasing practice of direct licensing for new songs and new albums).

[556] *See* DiMA First Notice Comments at 20 (noting that "the costs [in filing NOIs with the Copyright Office] can be overwhelming given the volume of works at issue"); Tr. at 172:06-13 (June 16, 2014) (Lawrence J. Blake, Concord Music).

[557] RIAA First Notice Comments at 23 n.36.

[558] DiMA First Notice Comments at 20.

[559] *Id.* at 20-21.

[560] CTIA First Notice Comments at 13 (explaining that "virtually all participants in the market have recognized that the licensing regime for the reproduction and distribution rights, which requires specific monthly reporting and payment, is complex and burdensome"); LaPolt Second

for rights otherwise covered by the section 115 statutory licenses, it is customary for digital music services to pay rightsowners on a *quarterly basis*."[561] The statute, however, requires accounting and payment on a monthly basis, which increases administrative burdens and out-of-pocket costs.

c. Perceived Unfairness

Many stakeholders are of the view that the section 115 license is unfair to copyright owners. As one submission summed it up: "The notifications, statements of account, license terms, lack of compliance, lack of audit provisions, lack of accountability, lack of transparency, 'one size fits all' royalty rates and inability to effectively enforce the terms of the license demonstrate a complete breakdown in the statutory licensing system from start to finish."[562]

Lack of Audit Rights

Though there may be significant practical limitations on copyright owners' ability to exercise audit rights due to the burden and expense of examining licensees,[563] the right to audit is nonetheless highly valued. Accordingly, there is a particular industry concern that section 115 does not provide music publishers with the right to verify the statements of account they receive from licensees.

Section 115 differs from other statutory licenses in the Copyright Act in providing for an "honor system" of self-reporting without a verification procedure.[564] Owners of musical works, therefore, have no choice other than to rely upon user-certified royalty

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Notice Comments at 10; Tr. at 234:21-235:01 (June 23, 2014) (Cheryl Potts, Crystal Clear Music & CleerKut).

[561] DiMA First Notice Comments at 22 (emphasis in original). *See* 17 U.S.C. § 115(c)(5).

[562] Gear Publ'g Co. & Lisa Thomas Music Servs., LLC First Notice Comments at 5-6; Geo Music Group & George Johnson Music Publ'g First Notice Comments at 9.

[563] Music Choice First Notice Comments at 21 ("Although many cases are filed by songwriters and recording artists for underpayment of royalties, far more cases go unlitigated. This is because, among other reasons, (1) the audit provisions in the authors' contracts are often very restrictive; (2) it is very expensive for an author to hire forensic accountants to conduct an audit; (3) once an audit begins, the record company or publisher uses various tactics, including accounting records that seem designed to obfuscate royalty revenues received and royalties due, to impede the audit; and (4) even after underpayments are established, authors often must accept pennies on the dollar for their claims because the cost of litigation against the record companies and publishers is so high.").

[564] NMPA & HFA First Notice Comments at 14.

statements that they may find difficult to trust.[565] Further complicating the situation is that a compulsory licensee may pay all royalties to one co-owner without any notification to the others.[566]

As one stakeholder put it, "[a]n audit right is particularly necessary in the music industry which has an admittedly long and storied history of dubious accounting practices and exploiting songwriters. Every songwriter deserves and should be entitled to a straight count; self-certification . . . is not sufficient."[567] Another stated, "it's trust but you can't verify . . . . [W]e've got to rely on the kindness of strangers that they're going to report accurately."[568]

For many musical work owners, the issue is not just trust, but fairness. As musician David Lowery explained, "I have seen instances where a supposed compulsory licensee has failed to comply with its payment obligations for years, ignored termination notices, and yet is still able to continue to receive the benefits of new statutory licenses for songwriters who await the same fate."[569] Or, as another songwriter advocate concluded: "Having been compelled by the government to license their songs to strangers, it seems only fair that the songwriter at least be able to confirm to their reasonable satisfaction that they are getting a straight count."[570]

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565 Castle First Notice Comments at 2. As discussed above, in lieu of requiring certifications, the mechanical licensing agent HFA instead conducts audits of licensees—a substantial benefit for its publisher members. *See* Michael Simon, *The Basics of Mechanical Licensing from Harry Fox*, ARTISTS HOUSE MUSIC (July 12, 2007), http://www.artistshousemusic.org/articles/the+basics+of+mechanical+licensing+from+harry+fox (noting HFA's audits of licensees). But the section 115 license does not require this.

566 IPAC First Notice Comments at 3-4 ("If the digital music service pays all royalties for the use of a musical work to only one co-owner, then that co-owner is obligated to pay the other co-owners of the musical work their respective share of the monies received. This practice effectively shifts to the copyright owner the accounting and payment obligations of the user. This example also puts co-owners of the musical work who have not received the Notice at a disadvantage—these co-owners will likely be unaware that their musical works are being used, be unaware that royalties are due, and be in a difficult position in terms of that co-owner's rights to audit the digital music service.").

567 Rys First Notice Comments at 2.

568 Tr. at 209:17-20 (June 16, 2014) (Keith Bernstein, Crunch Digital).

569 Lowery First Notice Comments at 1; *see also* IPAC First Notice Comments at 3-4.

570 Castle First Notice Comments at 3.

While record companies seemed to offer some support for the ability of publishers and songwriters to audit mechanical uses,[571] digital services objected to any sort of verification process. In opposing an audit right, DiMA argued that the required statements of account already provide for a method of "self-auditing," and that auditing requirements would be burdensome and frustrate the value of the license itself.[572] In addition, due to the challenges of accounting for digital uses under different licensing schemes, DiMA believed auditing would cause even good-faith actors to appear noncompliant.[573]

A few parties offered specific proposals for an audit right under section 115. NMPA and HFA suggested amending section 115 to include a duty to exchange and update usage data on a continuous basis.[574] David Lowery suggested a system whereby the Copyright Office could investigate licensees that were not compliant with their duties under section 115.[575]

Administrative Issues

Publishers, songwriters, and licensing administrators emphasized the problem of noncompliant statutory licensees.[576] The required notices to obtain a statutory license are frequently deficient,[577] and licensees regularly fail to timely and accurately pay and report usage.[578] Due to the involuntary nature of the license, publishers and songwriters cannot easily avoid these risks, as "[n]othing in the Section 115 license scheme requires

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[571] RIAA Second Notice Comments at 19 (noting that major record companies "support the idea that where there is direct licensing, publishers/writers should have a direct audit right with respect to third parties that use their works").

[572] *See* DiMA First Notice Comments at 19-20.

[573] *Id.* at 21 ("For digital music services that rely on licenses under Section 115 as well as separate licenses for the public performance of musical works, it is often impossible to determine the appropriate deduction for musical work public performance royalties at the time that accountings under the Section 115 licenses are due. This is because the calculation of 'mechanical' royalty rates under Section 115 requires that public performance royalties be deducted; and public performance rates are often not determined—whether by 'interim agreement,' 'final agreement' or ratesetting proceeding—until long after the close of the month during which Section 115 royalties are due.").

[574] NMPA & HFA First Notice Comments at 9-10; *see also* Kohn First Notice Comments at 11.

[575] Lowery First Notice Comments at 3-4.

[576] *See, e.g.*, *id.* 1-4.

[577] Carapetyan Second Notice Comments at 1 (noting that there is "a bevy of legally deficient 'Notices of Intention' that force publishers into the involuntary role of teaching the fundamentals of copyright to the masses—which is neither practical nor fair—and often in the end the cost in effort and man-hours far exceeds the minuscule royalties for the use").

[578] Lowery First Notice Comments at 2.

any consideration of the creditworthiness or trustworthiness of the compulsory licensee."[579] Many found the recourse provided by statute—termination of the license and costly infringement lawsuits—ineffective.[580]

Publishers also complained about regulatory provisions that permit payment of royalties and service of NOIs on a single co-owner of a work, with that co-owner then under an obligation to account to the other co-owners. As one commenter explained, "[t]his practice effectively shifts to the copyright owner the accounting and payment obligations of the user."[581]

At the same time, a number of parties asserted that the complex nature of the statutory licensing scheme was unfair to licensees. Some pointed to the complexity of the section 115 royalty regulations for digital services—and the fine distinctions they draw among different types of services—as a source of confusion as to what royalties need to be paid.[582] Digital services also highlighted the one-sided risk of costly statutory damages should they fail to ascertain that a first use of a work has occurred (rendering the work eligible for statutory licensing) and timely serve an NOI on the copyright owner, even where such determination is difficult due to lack of sufficient data.[583]

d. Parties' Proposals

Elimination of Statutory License

Songwriters and publishers appear almost universally to favor the elimination of the section 115 statutory license, albeit with an appropriate phase-out period.[584] They assert that the statutory regime creates an artificial *status quo* that precludes a private market from developing.[585] Musical work owners predict that the elimination of a license would allow "a functioning licensing market . . . [to] flourish."[586]

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[579] *Id.* at 2-3; *see also* NMPA & HFA First Notice Comments at 15.

[580] *See, e.g.*, Castle Second Notice Comments at 3 ("[A] defaulter under the statutory license can lawfully continue sending NOIs for future licenses even if they have never paid a dime on past licenses—the only recourse a songwriter has in this case is termination and if that too is ignored, extraordinarily expensive federal copyright litigation.").

[581] IPAC First Notice Comment at 3; *see also* Rys First Notice Comments at 2.

[582] *See* DiMA First Notice Comments at 22 (observing differences between the royalty rate structures for some current rate categories).

[583] *Id.* at 21.

[584] *See, e.g.*, NMPA & HFA First Notice Comments at 8; NSAI Second Notice Comments at 7; IPAC First Notice Comments at 4.

[585] *See* ABKCO First Notice Comments at 1 ("The free market is stifled under Section 115 licensing requirements with government controlling rates which thereby limits and inhibits sector growth

Digital music services, however, assert that the section 115 license is both important and fair, as it "provides an *essential counter-balance to the unique market power of copyright rights owners* . . . by providing a mechanism for immediate license coverage, thereby negating the rights owner's prerogative to withhold the grant of a license."[587] Thus, some licensees view section 115 as a protection against monopoly power that allows the public to enjoy musical works while still compensating copyright owners.[588] Spotify argued that the free market is not stifled by the statutory license, but that section 115 instead acts as "an indispensable component to facilitating a vibrant marketplace for making millions of sound recordings available to the public on commercially reasonable terms."[589]

Blanket Licensing

In light of the widely perceived inefficiencies of song-by-song licensing of mechanical rights—particularly as compared to the collective approach of the PROs—a wide range of stakeholders suggested that a blanket system would be a superior means of licensing mechanical rights.[590] As RIAA noted, blanket licensing avoids the administrative costs associated with negotiating and managing large numbers of licenses of varying terms and provides a way for legitimate services to avoid infringement risk.[591] Similarly, the publisher ABKCO opined that blanket license agreements would facilitate the use of music and would help licensees fulfill notification and reporting obligations.[592] IPAC

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and innovation."); MMF & FAC Second Notice Comments at 14-15; RIAA Second Notice Comments at 4-5; Pipeline Project Second Notice Comments at 16.

586 NMPA & HFA First Notice Comments at 7; *see also* IPAC First Notice Comments at 6.

587 DiMA First Notice Comments at 19 (emphasis in original).

588 Modern Works Music Publishing Second Notice Comments at 3 (explaining that section 115 is "an *antitrust provision* that accelerates the entry of musical works into the public sphere, while ensuring that copyright holders are paid.") (emphasis in original).

589 Spotify First Notice Comments at 3.

590 *See, e.g.*, NARAS First Notice Comments at 3-4; DiMA First Notice Comments at 16-17; IPAC First Notice Comments at 6-7; BMI First Notice Comments at 5; ASCAP First Notice Comments at 30-31. In 2006, the House Subcommittee on Courts, the Internet, and Intellectual Property considered SIRA, legislation that would have created a blanket license for digital uses under section 115. While SIRA enjoyed support from some key stakeholders and was approved by the subcommittee, it was not passed out of the full committee. *See Reforming Section 115 Hearing* at 4 (statement of Rep. Howard Coble) (detailing legislative history); Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing* at 1277 (describing support for SIRA).

591 RIAA Second Notice Comments at 13.

592 ABKCO First Notice Comments at 1-2.

suggested that blanket licensing could be implemented through the creation of one or more licensing agencies.[593]

To highlight the complexity of licensing in the modern music marketplace, RIAA described the experience of one of its members, which had released "a very successful album," and "had to obtain for that album 1481 licenses for the release of three physical products, the 92 digital products, the 27 songs across the 51 songwriters" with a total of "89 shares."[594] One of those shares "represented [a] 1.5 percent interest in a song, and there were two publishers for that."[595] According to the RIAA, apart from multiple songwriter interests, one of the reasons for this explosion in licensing complexity is the increased complexity of the releases themselves—whereas in the past a record label release consisted of "a disk and some liner notes," today it comprises multiple digital formats, different kinds of audiovisual presentations, and different kinds of music services.[596]

In light of its belief that these problems "cannot be solved by piecemeal efforts," RIAA proposed fundamentally restructuring performance and mechanical licensing for musical works.[597] Under the RIAA proposal, record labels would receive a compulsory blanket license covering all rights (performance, mechanical, and synch) necessary for what RIAA calls "modern music products," including audiovisual products like music videos, videos with album art or liner notes, and lyric videos.[598] The rate court and CRB would be eliminated. Instead, the record labels and publishers would agree upon splits of revenues received by the record labels from their sale and licensing of recorded music. The record companies would have sole responsibility to sell and license those products; those deals would be negotiated by the labels in the marketplace (except for uses falling under the section 112 and 114 licenses).[599] RIAA believed that its proposal would achieve fair market rates for publishers and songwriters while retaining the benefits of a collective licensing system, such as simplified licensing and lower administrative costs.[600]

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[593] IPAC First Notice Comments at 6-7.

[594] Tr. 25:11-16 (June 4, 2014) (Steven Marks, RIAA).

[595] *Id. at* 25:16-18.

[596] *Id. at* 24:04-26:18.

[597] RIAA First Notice Comments at 15-17.

[598] *Id.* at 16. RIAA made clear that its proposed blanket license would not cover other uses of musical works, like synch rights for movie, television, and advertising, performances within live venue, stand-alone lyrics, and sheet music. *Id.* at 17.

[599] *Id.* at 15-18.

[600] *Id.* at 18-22.

But publishers and songwriters vigorously resisted RIAA's proposal, arguing that it would merely shift control over musical works from songwriters and music publishers to record labels—since the labels would then be in charge of licensing decisions and royalty rates.[601] They also expressed concern about bringing audiovisual works or other rights currently outside of the compulsory system under a statutory blanket license.[602] NMPA characterized the RIAA's proposal as "seeking to expand the scope of the Sec. 115 compulsory license to authorize almost all forms of exploitation of a sound recording, including, among other things, record label created videos, and 'first use' rights."[603]

3. Sections 112 and 114

As compared to issues relating to the licensing of musical works, concerns regarding the section 112 and 114 statutory licenses were relatively modest.

a. Royalty Rates

Sound recording owners appear generally satisfied with the section 112 and 114 rates set under the willing buyer/willing seller standard.[604] A2IM, in particular, appreciates that the CRB's process treats all sound recordings the same for ratesetting purposes.[605]

CFA and Public Knowledge, however, assert that section 112 and 114 royalties are "much too high," pointing to the fact that Pandora had "yet to demonstrate sustained profitability."[606] DiMA similarly contended that the willing buyer/willing seller

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601 NMPA Second Notice Comments at 32-33; *see also* Tr. at 245:12-20 (June 24, 2014) (Peter Brodsky, Sony/ATV).

602 LaPolt Second Notice Comments at 14; NMPA Second Notice Comments at 32-35; NSAI Second Notice Comments at 8; *see also* Tr. at 214:14-20 (June 16, 2014) (John Barker, IPAC); Tr. at 246:21-247:09 (June 24, 2014) (Peter Brodsky, Sony/ATV).

603 NMPA Second Notice Comments at 32.

604 RIAA First Notice Comments at 32 ("All services operating under the statutory licenses should pay fair market royalties set under the willing buyer/willing seller standard."). In contrast, RIAA criticized the "below-market royalty rates" set under the section 801(b)(1) standard for grandfathered services. *Id.* at 31.

605 A2IM First Notice Comments at 3.

606 CFA & Public Knowledge First Notice Comments at 8. Pandora did report a modest profit in Q3, 2013, but its current strategy is focused on expansion. Romain Dillet, *Pandora Beats, Q3 2013 Revenue Up 60% to $120M, Net Income of $2.1M; Q4 Forecast Much Lower Than Expected*, TECHCRUNCH (Dec. 4, 2012), http://techcrunch.com/2012/12/04/pandoras-q3-2013/; PANDORA MEDIA, INC., QUARTERLY REPORT (FORM 10-Q) 21 (Oct. 28, 2014), http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-sec (click on Oct. 28, 2014 filing) ("[W]e expect to incur annual net losses on a U.S. GAAP basis in the near term because our current strategy is to leverage any improvements in gross profit by investing in broadening distribution channels, developing

standard yields rates that are "high and unsustainable" and that numerous services, including those operated by AOL, Yahoo!, East Village Radio, Turntable.fm, Loudcity, RadioParadise, and 3 Wk, have exited the business as a result.[607]

DiMA also criticized the CRB's imposition of per-performance rates for internet radio, suggesting that such a rate structure should not be applied "in circumstances where the higher usage does not equate to higher revenues for the digital music service provider."[608] DiMA and others additionally observed that Congress felt compelled to offer relief to internet radio services complaining of high rates under the willing buyer/willing seller standard by passing the Small Webcaster Settlement Act of 2002 and the Webcaster Settlement Acts of 2008 and 2009 to allow for negotiated alternatives to the CRB-set rates.[609]

b. Interactive/Noninteractive Divide

Stakeholders expressed a number of concerns regarding eligibility for the section 112 and 114 licenses.

As discussed above, interactive services are not eligible for the statutory licenses under sections 112 and 114, though in the Second Circuit's 2009 *Launch Media* decision, the court concluded that a custom radio service—one that relies on user feedback to play a personalized selection of music—is not an "interactive" service.[610] As a result, custom radio services such as Pandora are treated as noninteractive and operate under section 112 and 114 licenses.

Copyright owners expressed concern that "customized Internet radio has approached interactivity in every sense of the word except under the outdated requirements of the statutory definition."[611] RIAA similarly opined that *Launch Media* "all but extinguished voluntary licensing of personalized streaming services at a premium [above] the statutory rate."[612] Notably, however, sound recording owners did not necessarily favor

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innovative and scalable advertising products, increasing utilization of advertising inventory and building our sales force.").

[607] DiMA First Notice Comments at 33 n.76.

[608] *Id.* at 36.

[609] *Id.* at 37; Educational Media Foundation ("EMF") First Notice Comments at 7-8; Sirius XM First Notice Comments at 14; Spotify First Notice Comments at 12.

[610] *See* 17 U.S.C. § 114(d)(2)(A)(i); *Launch Media,* 578 F.3d 148.

[611] ASCAP First Notice Comments at 44*; see also* BMI First Notice Comments at 22.

[612] RIAA First Notice Comments at 34.

moving personalized services out of the statutory license.[613] Instead, they advocated for a "middle tier" of royalty rates for personalized radio services under the statutory license.[614]

Other participants argued for expansion of the statutory licensing framework to cover additional services.[615] For instance, A2IM favored "narrowing the definition of 'interactive service' to cover only those services that truly offer a full on-demand interactive experience."[616] SAG-AFTRA and AFM also supported such an expansion, as "[a]rtists will continue to benefit most fairly from [customized services] through receiving an equal share of the proceeds, paid to them directly and transparently by SoundExchange."[617]

In addition to the interactive/noninteractive distinction of section 114, concerns were raised about the sound recording performance complement—which limits the number of plays of a single featured artist or from a particular album in a three-hour period—as well as section 114's ban on the pre-announcement of songs.[618] Broadcasters said that these requirements frustrate simulcasting activities of terrestrial radio stations that do not adhere to these restrictions in their over-the-air broadcasts.[619] NAB contended that the sound recording performance complement "merely serve[s] as a bargaining chip for leverage in the negotiations with broadcasters, due solely to the undue burden such restrictions place on radio stations that seek to stream their broadcasts,"[620] and pointed out that record labels regularly grant broadcasters waivers of the restriction as evidence that the record labels do not need these provisions to protect their interests.[621] NPR noted the upstream effect of the limitation, explaining that because public radio has limited resources, it is forced to "create separate programming depending on the method by which it will be distributed."[622]

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[613] *See id.* ("[A]t this juncture, we do not necessarily advocate excluding from the statutory license services that have been generally accepted as operating within the statutory license based on the *Launch* decision.").

[614] ABKCO First Notice Comments at 3; *see also* RIAA First Notice Comments at 34.

[615] Sirius XM First Notice Comments at 20-21.

[616] A2IM First Notice Comments at 5.

[617] SAG-AFTRA & AFM First Notice Comments at 6 (note however, that SAG-AFTRA & AFM also support increased rates if a service has increased functionality).

[618] 17 U.S.C. § 114(d)(1)(C)(iv), (d)(2)(B)-(C), (j)(13).

[619] NAB First Notice Comments at 4-5; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

[620] NAB First Notice Comments at 4.

[621] *Id.* at 5.

[622] NPR First Notice Comments at 5.

c. Technical Limitations of Section 112

A number of digital services criticized technical limitations on the availability of the section 112 license that applies to the ephemeral (*i.e.*, server) copies needed to facilitate their transmissions.[623] For example, some licensees criticized the requirement that the licensee destroy such copies within six months' time as "unreasonable" and "archaic" and one that has no benefit for rightsholders.[624] NAB noted that this requirement is particularly illogical as server copies "are not meant to be temporary."[625] DiMA suggested that section 112 should be substantially updated to reflect modern realities of digital music services.[626] Others suggested that any ephemeral copies made in furtherance of a public performance should be exempted entirely.[627]

RIAA opposed a blanket exemption for ephemeral recordings, explaining that those recordings "have value" by providing services with "improved quality of service, operational efficiencies or other competitive advantages."[628] RIAA also observed that "[t]he current statutory scheme replicates marketplace agreements for sound recordings, in which licensees commonly acquire performance and related reproduction rights in a single transaction and pay a bundled royalty that covers both rights."[629]

d. Lack of Termination Provision

SoundExchange opined that while the section 112 and 114 licensing framework "generally works well," noncompliance with the statutory requirements—by irregular or inaccurate payments or missing or incomplete reporting—is "commonplace."[630] SoundExchange described its efforts to bring services into compliance, but also expressed its belief that the section 112 and 114 system needs "a clear mechanism for termination of statutory licenses for services that repeatedly fail to act in compliance with applicable requirements," such as the one that exists under section 115.[631]

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623 "Ephemeral recordings are copies that are made and used by a transmitting organization to facilitate its transmitting activities." U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 144 (2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf.

624 CTIA First Notice Comments at 16-18; DiMA First Notice Comments at 35; DiMA Second Notice Comments at 18.

625 NAB First Notice Comments at 7; Music Choice First Notice Comments at 13.

626 DiMA Second Notice Comments at 18.

627 *See, e.g.*, NAB First Notice Comments at 2; Sirius XM First Notice Comments at 9-10.

628 RIAA Second Notice Comments at 31-32.

629 *Id.* at 32.

630 SoundExchange First Notice Comments at 2, 5.

631 *Id.* at 5; *see also* 17 U.S.C. § 115(c)(6) (termination provision under section 115).

e. Royalty Distribution Process

Unlike section 114—which provides a statutory formula for the direct distribution of royalties by SoundExchange to artists, record labels and musicians—the related section 112 license contains no such requirement. Some submissions suggested that the royalties collected by SoundExchange as the designated agent under the section 112 license should be distributed to artists directly, as under section 114, rather than through record labels.[632] Music Choice commented that, "[d]ue to the terms of their agreements with the record companies and various record company accounting practices . . . the vast majority of recording artists never see a penny of the portion of the performance royalty allocated to the Section 112 license."[633]

In addition, section 114 currently does not allocate a share of royalties to record producers, so there is no statutory mandate for direct payment to producers. Instead, individual contracts between recording artists and producers provide for producer compensation, which may include a share of royalties.[634] SoundExchange has begun processing direct payment of the producer's share of performance royalties on a voluntary basis when it receives written authorization from the featured artist.[635] NARAS has proposed to make this process a "consistent and permanent" feature of section 114.[636]

4. Public and Noncommercial Broadcasting

As discussed above, the activities of public and noncommercial educational broadcasters are subject to two different statutory licenses as well as PRO licensing and ratesetting. Noncommercial broadcasters complain about the divergent licensing mechanisms for the various music rights they must acquire. Noncommercial religious broadcasters observed that, to clear musical works rights, they could be required to participate in a CRB proceeding under section 118 for over-the-air transmissions, two rate court proceedings under the consent decrees for digital transmissions of ASCAP and BMI works, and private negotiation for digital transmissions of SESAC works.[637] In addition,

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[632] *See* Music Choice First Notice Comments at 13; Resnick Second Notice Comments at 1.

[633] Music Choice First Notice Comments at 13*; see also* Resnick Second Notice Comments at 1.

[634] *See* NARAS First Notice Comments at 5.

[635] *2013 Letter of Direction*, SOUNDEXCHANGE (Apr. 14, 2013), https://www.soundexchange.com/wp-content/uploads/2013/05/Letter-of-Direction-04-14-13.pdf ("*2013 SoundExchange Letter of Direction*").

[636] *See* NARAS First Notice Comments at 5-6.

[637] NRBNMLC First Notice Comments at 14-15.

ascertaining the rate for digital performances of sound recordings requires participation in yet another CRB ratesetting proceeding under section 114.[638]

Noncommercial broadcasters thus seek to expand the section 118 license to encompass "all music elements."[639] Noncommercial religious broadcasters proposed, in particular, "[f]olding digital transmissions of musical works into the existing section 118 license applicable to broadcast transmissions."[640] NPR advocated for a further step: broadening the section 118 license to encompass "all known and yet to be created distribution methods and technologies," including physical products and permanent digital downloads.[641]

Finally, noncommercial broadcasters seek to ensure that the policy-oriented 801(b)(1) ratesetting standard will apply to any expanded version of the section 118 license.[642]

5. Concerns Regarding CRB Procedures

As with the rate courts, many stakeholders expressed concern about the CRB ratesetting process—many of which are governed by detailed statutory provisions[643]—including specific concerns regarding discovery procedures, the settlement process, and bifurcated proceedings.

a. Inefficiencies and Expense

Copyright owners and licensees together complained about the inefficiency and high cost of proceedings before the CRB.[644] RIAA and SoundExchange suggested that one way to reduce costs would be to simplify the rate standards and move to a

[638] EMF First Notice Comments at 8-9 (noting reasons noncommercial broadcasters are unlikely to settle in section 114 proceedings).

[639] NPR First Notice Comments at 7.

[640] NRBNMLC First Notice Comments at 15.

[641] NPR First Notice Comments at 7; *see also* Public Television Coalition ("PTC") First Notice Comments at 11.

[642] *See* NRBNMLC First Notice Comments at 16. While the 801(b)(1) "reasonable terms and rates" standard currently applies under section 118, sound recording uses under section 114(d) are subject to the willing buyer/willing seller standard. 17 U.S.C. §§ 114(d), 801(b)(1); Noncommercial Educational Broadcasting Compulsory License, 63 Fed. Reg. 49,823, 49,824 (Sept. 18, 1998) (noting the rate standard for section 118 is "reasonable terms and rates" with no further statutory criteria, but the legislative history of section 118 indicated that "the rate should reflect the fair value of the copyrighted material").

[643] *See* 17 U.S.C. § 801 *et seq.*

[644] *See, e.g.*, ASCAP First Notice Comments at 24 n.31; Music Choice First Notice Comments at 29-31; RIAA First Notice Comments at 36; Sirius XM First Notice Comments at 17.

straightforward willing buyer/willing seller rate standard across the board.[645] SoundExchange noted that "[r]elative to a streamlined fair market value standard, every specific factor included in a rate standard increases cost and decreases predictability."[646]

Stakeholders also pointed to the bifurcated ratesetting procedures contemplated by statute—which references separate direct and rebuttal phases of ratesetting hearings[647]—as a significant and costly inefficiency,[648] creating a "'two ships passing in the night' quality to the proceedings."[649] There was broad support for eliminating the bifurcated nature of trials before the CRB because "[b]ifurcation offers no advantages or efficiencies in discovery, comprehension of complex issues, savings in judicial resources, or elimination of duplicative presentations of evidence."[650]

Another shortfall of the system is that the rate adjustment process occurs only once every five years. Parties representing both copyright owners and music users found the process slow and insufficiently responsive to new and developing technologies and services.[651] Because ratesetting occurs only on a periodic basis, copyright owners and users must attempt to predict and accommodate each type of service that might arise in the upcoming five-year period.[652] For instance, as RIAA recounted, "[t]he Section 115 rate-setting process . . . resulted in a rate schedule with 17 different rate categories, and in which publishers and songwriters can receive varying percentages of the relevant content royalty pool" based on those categories, causing the administration of payments to be "exceedingly complex."[653]

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[645] *See, e.g.,* RIAA First Notice Comments at 36; SoundExchange First Notice Comments at 6-8.

[646] SoundExchange Second Notice Comments at 10; *see also* RIAA Second Notice Comments at 43 (noting a single-factor rate standard as a possible streamlining measure).

[647] 17 U.S.C. § 803(b)(6)(C).

[648] NAB First Notice Comments at 19 & n.11; Sirius XM First Notice Comments at 17.

[649] Music Choice First Notice Comments at 30; *see* Sirius XM First Notice Comments at 17 (same).

[650] NAB First Notice Comments at 20.

[651] *See* BMI First Notice Comments at 27; DiMA First Notice Comments at 23; RIAA First Notice Comments at 45; Tr. at 256:02-06 (June 16, 2014) (Jason Rys, Wixen Music Publishing).

[652] Kohn First Notice Comments at 14 (referencing the "unnecessarily complex set of individual rate regimes for the various uses contemplated by Section 114 by various kinds of defined transmitters").

[653] RIAA First Notice Comments at 24*; see also id.* at 11-12 (further noting frustrations with mechanical royalty ratesetting).

b. Settlement Obstacles

In theory, Congress designed the CRB procedures to facilitate and encourage settlement rather than administrative ratesetting by the CRB. Several stakeholders, however, noted practical and procedural hurdles they have encountered in finalizing settlements.

The most common stakeholder plea was to modify the CRB process so the Judges would act quickly on any settlement.[654] Stakeholders complained that even where a settlement is reached, the CRB has delayed ruling on the settlement,[655] sometimes adopting the settlement only after the proceedings were concluded.[656] RIAA also observed that delay of settlement has frustrated the business plans of services.[657] Music Choice concurred that delays during the voluntary negotiation period leave inadequate time for parties to conduct rate proceedings.[658]

To address these issues, SoundExchange proposed bypassing CRB approval of settlements by granting the section 112 and 114 designated agent (*i.e.*, SoundExchange) the authority to enter into opt-in settlement agreements for a statutory license.[659] It further suggested that the CRB could be required to adopt a negotiated settlement even if it would not fully resolve a case.[660] SoundExchange also surmised that parties may be reluctant to settle because the negotiated rate may be used as a benchmark or otherwise in rate determinations, and suggested that parties be permitted to designate settlements as non-precedential.[661]

c. Discovery Process

Music services criticized the discovery process that applies to ratesetting proceedings before the CRB on two grounds. First, they observed that because the statute specifies that discovery occurs only *after* the submission of the parties' direct cases—contrary to the ordinary practice in civil litigation—"parties are required to assume what they will

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[654] *See, e.g.*, Tr. at 141:16-21 (June 16, 2014) (Tegan Kossowicz, UMG) ("With respect to an earlier mention of the implementation of CRB settlements, they should be expedited when possible, and that doesn't just pertain to both these sections, but as well as other proceedings that we may have in the future on licensing.").

[655] Tr. at 99:16-100:03 (June 16, 2014) (Brad Prendergast, SoundExchange); Tr. at 129:17-130:03 (June 23, 2014) (Steven Marks, RIAA).

[656] SoundExchange First Notice Comments at 9 n.12; Tr. at 122:15-22 (June 23, 2014) (Colin Rushing, SoundExchange).

[657] RIAA First Notice Comments at 24-25.

[658] Music Choice First Notice Comments at 30.

[659] SoundExchange First Notice Comments at 9-10.

[660] *Id.* at 9.

[661] *Id.* at 10.

develop during discovery and hope that relevant information will be voluntarily revealed by their opponent in the opponent's written case."[662] Licensees believe that this process puts them at a disadvantage, because much of the information regarding benchmark rates is held by copyright owners.[663] In addition, the statutory procedures limit discovery to documents directly related to the direct statements.[664] Licensees suggested that this rule allows copyright owners to behave strategically in their own direct statement and thus limit discovery.[665]

Music providers also complained about the statutory limits on discovery.[666] While recognizing the hypothetical benefits of a streamlined discovery process, some observed that there are no actual cost savings and the restrictions are not fair.[667] According to licensees, the 60-day discovery window is too short,[668] and the statutory limit of 25 interrogatories and 10 depositions for all parties on each side is insufficient.[669] Other discovery-related suggestions included adoption of a standardized blanket protective order that would be implemented for "non-public, commercially-sensitive information produced in discovery and submitted as evidence."[670] NAB also supported use of the Federal Rules of Civil Procedure and Federal Rules of Evidence, with slight modifications, for CRB proceedings.[671]

In response to these concerns about discovery, copyright owners argued that the commenting parties "did not identify any instance in which the Judges believed the

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[662] DiMA First Notice Comments at 38.

[663] *See id.* at 38-39; Music Choice First Notice Comments at 29-30; Sirius XM First Notice Comments at 15-16; Tr. at 104:10-105:12 (June 16, 2014) (Gary R. Greenstein, Wilson Sonsini Goodrich & Rosati).

[664] 17 U.S.C. § 803(b)(6)(C)(v).

[665] Music Choice First Notice Comments at 29; Sirius XM First Notice Comments at 16.

[666] *See* 17 U.S.C. § 803(b)(6).

[667] Music Choice First Notice Comments at 29; Tr. at 208:19-209:07 (June 4, 2014) (Lee Knife, DiMA).

[668] DiMA First Notice Comments at 38; *see also* NAB First Notice Comments at 20 (supporting longer discovery periods); Sirius XM First Notice Comments at 16-17 (same).

[669] DiMA First Notice Comments at 38-39; *see also* Music Choice First Notice Comments at 30 ("[G]iven the number of witnesses and the number of participants in most proceedings, the Copyright Act's limitation on depositions to ten per side (spread between direct and rebuttal discovery) is clearly insufficient.").

[670] NAB First Notice Comments at 3; Music Choice First Notice Comments at 31 ("The cost of participation in rate proceedings should not include the risk that confidential business information may be publicly disclosed. A standardized blanket protective order, similar to that employed by the Trademark Trial and Appeals Board, would be helpful.").

[671] NAB First Notice Comments at 21.

current procedures prevented a full record from being developed,"[672] and added that "open-ended discovery" would add to the complication, expense, or inefficiency of proceedings.[673] At the same time, copyright owners agreed that conducting discovery "up front" could be "helpful," along with eliminating the bifurcated nature of CRB proceedings.[674]

C. *Licensing Efficiency and Transparency*

1. Music Data

a. Lack of Reliable Public Data

Based on the record in this proceeding, there can be little doubt that the current music licensing landscape is severely hampered by the lack of publicly accessible, authoritative identification and ownership data.[675] There are several facets to this problem.

To begin with, there is a lack of comprehensive and reliable ownership data, particularly for musical works. As RIAA noted, "it is difficult to identify and keep track of musical work ownership due to changes when musical works and catalogs change hands."[676] Further complicating the situation is that the rights to musical works are often split among multiple songwriters, with differing publishers and PROs, making musical work data harder to track and maintain.[677]

In addition, digital music files often do not include the standard identifiers for the copyrighted works the files embody—*i.e.*, the ISRC for the sound recording and the ISWC for the underlying musical work.[678] Even when the file includes the ISRC, as is

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[672] SoundExchange Second Notice Comments at 10.

[673] Tr. at 115:20-116:07 (June 4, 2014) (Steven Marks, RIAA); *see* SoundExchange Second Notice Comments at 10.

[674] Tr. at 107:19-108:22 (June 4, 2014) (Steven Marks, RIAA); *see* RIAA Second Notice Comments at 43 (favoring "earlier disclosure of a focused set of critical information").

[675] *See, e.g.*, RIAA First Notice Comments at 17, 20, 22; NMPA & HFA First Notice Comments at 10-12; Peter Menell First Notice Comments at 2; Public Knowledge & CFA First Notice Comments at 28; RMLC First Notice Comments at 7-9; TMLC First Notice Comments at 16; Spotify First Notice Comments at 11; IPAC Second Notice Comments at 2; *Music Licensing Hearings* at 71-72 (statement of Jim Griffin, OneHouse LLC).

[676] RIAA First Notice Comments at 46.

[677] *See* Spotify First Notice Comments at 4.

[678] DiMA Second Notice Comments at 6 ("Neither ISRC Codes nor ISWC Codes are applied to all works, nor are they applied uniformly or correctly, even when they are attached to work."); *but compare* Tr. at 382:20-22 (June 23, 2014) (Andrea Finkelstein, SME) ("I would say for the majors, everything that is in digital release has an ISRC associated."), *with* MMF & FAC Second Notice

now commonplace for new releases, the ISWC for the underlying musical work is often not yet assigned at the time of initial release.[679] And even after an ISWC has been obtained by the musical work owner, there is no comprehensive, publicly accessible database that can be used to match the ISRC to the ISWC.[680] Google noted that requiring licensors to supply data helps to "identify exactly what it is they are licensing . . . both from a deal implementation standpoint as well as a deal valuation standpoint," adding that "those sort of data requirements . . . work their way back up the chain, to the creators."[681]

Beyond the ISRC and ISWC, there is also a lack of universal and uniform data to identify songwriters and recording artists associated with individual works. While a global identifier for creators—the ISNI—has been certified by ISO to replace older systems employed by the PROs and others, it is not yet widely used.[682]

These shortcomings cause serious inefficiencies. Licensees expend significant effort attempting to identify particular sound recordings and the musical works they embody, as well as tracking down their copyright owners. Because there is no centralized data resource, stakeholders devote "significant resources to maintaining redundant and often inconsistent databases of musical work ownership and split information."[683] Digital services noted that the lack of an authoritative source of data exposes even well-intentioned actors to potential statutory damages for "inadvertently distributing works without requisite authorization."[684] According to DiMA, this risk is inequitable because copyright owners inadequately identify themselves and their works.[685]

Comments at 29 ("Contrary to oral testimony to the New York Roundtable in June, the [ISRC] has not, in our experience, achieved the penetration that is seen with ISWC.").

679 *See* Tr. at 336:17-19 (June 23, 2014) (Andrea Finkelstein, SME) ("No, we don't have ISWCs, and we certainly don't have them at that point [when a sound recording is sent to a digital service provider].").

680 CCIA Second Notice Comments at 2 ("[A]lthough Industry Standard Recording Codes (ISRCs) have existed for more than two decades, there is still not a recorded database of them."); Tr. at 345:05-06 (June 23, 2014) (Andrea Finkelstein, SME) ("There is [an ISRC database] cooking at SoundExchange.").

681 Tr. at 53:09-17 (June 23, 2014) (Waleed Diab, Google/YouTube).

682 *See* Pipeline Project Second Notice Comments at 5; Tr. at 516:02-09 (June 23, 2014) (Bob Kohn, Kohn on Music Licensing); Tr. at 558:11-14 (June 23, 2014) (Lynn Lummel, ASCAP); *see also* ISNI, http://www.isni.org (last visited Jan. 30, 2015).

683 RIAA Second Notice Comments at 32; *see also* NMPA & HFA First Notice Comments at 10-11.

684 Menell First Notice Comments at 2.

685 DiMA First Notice Comments at 17, 29.

Commenters also referenced the recent *Pandora* rate court decision, in which the court found that withdrawing publishers did not supply catalog data that would have allowed Pandora to pull their songs from its service.[686] Some were troubled by this tactic, and urged that, if this type of publisher withdrawal is allowed, the withdrawing publisher must be required to "provide immediate transparency as to the musical works that are no longer subject to license."[687]

On the licensor side of the equation, the lack of reliable data means that royalty payments may be delayed, misdirected, or never made.[688] SoundExchange highlighted in particular the problems caused when digital services fail to include standard identifiers in their reports of usage under the section 112 and 114 statutory licenses. It explained that basic data elements—featured artist name, track title, album name, and label name—"simply are not sufficient to distinguish unambiguously among the tens of millions of recordings actively being commercialized today."[689] Instead, "standard identifiers are the only practicable way to identify and accurately account for usage of all those recordings."[690]

RIAA similarly noted that "[a] flourishing musical work licensing marketplace requires both that potential licensees can get licensed and that royalties flow properly to music publishers and songwriters," and that "reliable and accessible information is critical to making that happen."[691] NMPA agreed, saying that a "database where we know the rights" would be valuable.[692] Flawed or missing data is not a problem unique to major labels or famous artists, and A2IM commented that inaccurate data is "especially problematic for the independent label community" because it is harder to identify lesser-known artists without accurate data.[693]

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[686] *Pandora Ratesetting*, 6 F. Supp. 3d at 358-60.

[687] Spotify First Notice Comments at 11.

[688] RIAA First Notice Comments at 46; *Music Licensing Hearings* at 74-75 (statement of Jim Griffin, OneHouse LLC).

[689] SoundExchange First Notice Comments at 25.

[690] *Id.*

[691] RIAA Second Notice Comments at 17; *see also Music Licensing Hearings* at 75 (statement of Jim Griffin, OneHouse LLC) ("[A]bsent the use of [global universal identifiers] money disappears along its path to its intended receiver. Where does that money go? To pools of unattributed income, divided through market share formulas at the organizations that collect the money.").

[692] Tr. 38:05-08 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb).

[693] A2IM Second Notice Comments at 2.

b. Parties' Views

In light of the concerns identified above, there appears to be widespread agreement that authoritative and comprehensive data related to the identity and ownership of works would substantially enhance transparency in the music licensing system, reduce transaction costs, and facilitate direct licensing through private negotiation in the open market.[694] There is, however, less harmony about the best way to achieve this goal.

Some suggested that the government should play a central role. DiMA, for example, proposed that the Copyright Office create and maintain a music database, while others called for the Office to identify and publicize data standards, and facilitate or require submission of such data in the registration or recordation process.[695] Others conceived of quasi-governmental solutions. FMC stated that Congress might consider creating a "nonprofit to oversee the development of a global registry database (or databases) that could be overseen by government, in cooperation with international bodies."[696] Several licensees suggested ASCAP and BMI should be required to provide better and more usable repertoire data.[697] Some proposed more market-based solutions, such as data expert Jim Griffin's proposal to emulate the registration system for websites, whereby the government would engage in standards-setting to encourage the creation of profit-seeking private registries, similar to domain name registries like GoDaddy.[698]

Others groups—principally representing copyright owners—believed that government involvement was unnecessary. In NMPA's view, if the market for creative works were unregulated and free of governmental price controls (including the section 115 license), "transactional hubs, syndication platforms and other supply chain management platforms" would develop to match buyers to sellers and to allocate and distribute revenues.[699] For their part, the PROs highlighted their online repertoire databases and efforts such as MusicMark to enhance access to reliable repertoire data.[700] The PROs

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[694] DiMA Second Notice Comments at 3-4, 7; Tr. at 381:08-11(June 23, 2014) (Waleed Diab, Google/YouTube).

[695] DiMA Second Notice Comments at 5; *see* Sirius XM First Notice Comments at 6-7; SoundExchange Second Notice Comments at 6; A2IM Second Notice Comments at 2; *see also* CCIA Second Notice Comments at 3.

[696] FMC First Notice Comments at 22; *see* Public Knowledge & CFA First Notice Comments at 28.

[697] NAB Second Notice Comments at 2; CTIA First Notice Comments at 7; DiMA Second Notice Comments at 6-7.

[698] *Music Licensing Hearings* at 72 (statement of Jim Griffin, OneHouse LLC).

[699] NMPA & HFA Second Notice Comments at 3.

[700] ASCAP Second Notice Comments at 12-13 (citing "ASCAP's searchable database, named ASCAP Clearance Express or ACE, at http://www.ascap.com/ace"); BMI Second Notice Comments at 9 (citing BMI's extensive searchable repertoire database at http//www.bmi.com).

acknowledged that their plans do not include making all of their data available to the public, however, stressing that they face significant confidentiality concerns.[701]

RIAA noted that assignment of ISRCs and ISWCs could be better coordinated (*e.g.,* by having the record company first recording a new song assign the ISRC and ISWC in tandem to ensure that the ISWC will be available to relevant stakeholders upon a song's release).[702] Stakeholders generally shared the view that such solutions are worth exploring.[703]

Both SoundExchange and RIAA observed that there are fewer problems with sound recording than musical work data.[704] According to them, sound recording identification and ownership information is generally available from product packaging, or from publicly available internet sources such as allmusic.com and discogs.com.[705] Additionally, digital services generally receive metadata from record companies and distributors providing music files.[706] RIAA pointed out that, unlike musical works, ownership of sound recordings is rarely divided among multiple co-owners, and record companies owning commercially significant recordings are less numerous than music publishers, with less frequent changes in ownership.[707]

SoundExchange additionally explained that it maintains robust identification and ownership information, including ISRCs for approximately 14 million sound recordings.[708] SoundExchange is actively exploring means by which it might provide statutory licensees with access to its database for statement of account purposes. For example, SoundExchange may offer music services the capability to search for ISRCs or supply music services with ISRCs that are missing from their reports of use.[709]

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[701] *Id.* at 5; ASCAP Second Notice Comments at 7-8.

[702] *See, e.g.*, RIAA Second Notice Comments at 35-36; Tr. at 346:01-349:13 (June 23, 2014) (Lynn Lummel, ASCAP; Andrea Finkelstein, SME; Jacqueline Charlesworth & Sarang Damle, U.S. Copyright Office) (discussing assignment of ISRC in relation to ISWC).

[703] *See, e.g.*, Pipeline Project Second Notice Comments at 9; DiMA Second Notice Comments at 6-8; RIAA Second Notice Comments at 35-36.

[704] *Id.* at 33; SoundExchange Second Notice Comments at 4.

[705] RIAA Second Notice Comments at 33.

[706] SoundExchange Second Notice Comments at 4; RIAA Second Notice Comments at 33; Tr. at 336:02-12 (June 23, 2014) (Andrea Finkelstein, SME; Sarang Damle, U.S. Copyright Office) (describing metadata delivered by record companies).

[707] RIAA Second Notice Comments at 33.

[708] SoundExchange Second Notice Comments at 4-5.

[709] *Id.* at 5.

SoundExchange and RIAA together emphasized that licensees operating under the section 112 and 114 licenses should use available identifying information, particularly ISRCs, when reporting usage to SoundExchange.[710] Such an obligation would increase automatic matching of reported usage to known repertoire and facilitate accurate manual matching when necessary, thus enhancing the data maintained by SoundExchange.[711] Both parties noted that adoption of such a requirement would encourage broader use of the ISRC standard.[712]

2. Usage and Payment Transparency

Incomplete or inaccurate data frustrates the ability of creators and sellers of music to track how music is used and what payments are made. Even when accurate data is available, however, stakeholders had concerns about the effectiveness of music usage and payment tracking for payment allocation and about the lack of audit rights for certain licenses. At bottom, the issue in the music industry is that participants want reassurance that they are being treated fairly by other actors.[713]

a. Advances and Equity Deals

There was a growing concern that payments received by record companies and music publishers from new digital music services as part of direct deals are not being shared fairly with songwriters and recording artists.[714] SAG-AFTRA and AFM warned that while direct licensing deals between digital music services and record labels or publishers may result in more compensation from licensees, direct deals may actually result in lower payments to artists than under the statutory licensing scheme.[715]

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[710] *Id.*; RIAA Second Notice Comments at 35.

[711] SoundExchange Second Notice Comments at 5.

[712] *Id.*; RIAA Second Notice Comments at 35. These parties noted that the CRB is currently considering updates to the relevant notice and recordkeeping regulations.

[713] Tr. at 86:01-03 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP) (explaining that "there's a lack of trust between the record companies and the publishers"); Tr. at 77:15-17 (June 16, 2014) (Eric D. Bull, Create Law) (noting that "there's such distrust because of the amount of the money that is going to be exchanged"); Tr. at 14:03-05 (June 17, 2014) (Garry Schyman, SCL) ("[W]e really don't trust a publisher who is not in a position to tell us what we are entitled to.").

[714] Resnick Second Notice Comments at 2 ("Spotify alone is reported to have paid hundreds of millions in dollars in upfront and non-recoupable payments for the privilege of licensing major label catalogues.").

[715] SAG-AFTRA & AFM First Notice Comments at 7; SAG-AFTRA & AFM Second Notice Comments at 2 ("Whatever the individual royalty artist's share, it will not be paid directly, it will be subject to recoupment, and it will only be verifiable (if at all) through a complex and expensive individual audit under the royalty contract.").

A major objection to direct licensing is that labels and publishers do not necessarily share advance payments of royalties—in particular, unrecouped advances or "breakage" monies—with creators.[716] Advance payments of royalties can be significant; Google, for instance, reportedly paid more than $400 million to WMG under a recent three-year deal to license the label's music for YouTube and its subscription offerings.[717] In many cases, if an advance is not fully recouped (*i.e.*, fully applied to royalties due) by the end of the license term, the excess fees are retained by the label or publisher rather than returned. The question is whether these funds are accounted for and paid out by the label or publisher to its artists or songwriters.

Some record labels and publishers may share unrecouped advances with performers and writers, but the practice is not universal.[718] And while well-established musicians may occasionally negotiate a right to collect on breakage,[719] others are not as successful.[720] Negotiating for these payments can be difficult, as artists and songwriters are not necessarily aware of deal terms. For example, SGA commented that without the testimony of an executive representing DMX in a BMI rate court proceeding, the songwriting community would never have known of a $2.4 million advance paid by DMX to Sony/ATV.[721]

Similarly suspect for creators are equity deals between major labels and digital services. It has been reported, for instance, that the major labels collectively acquired an 18% ownership interest in Spotify.[722] Referencing Spotify, as well as YouTube and Musicmaker, Perry Resnick, who conducts music audits, commented that "[m]any deals are not done unless the major labels receive a share of equity in the licensee, which also lowers the royalty rates paid for specific recordings, sometimes down to zero."[723] There

[716] *See* A2IM Second Notice Comments at 5-6 (defining breakage as "excess revenue that cannot be attributed to specific recordings or performances and, therefore, is not required to be shared with artists, songwriters or the actual sound recording copyright owner"); Resnick Second Notice Comments at 2 ("[E]xcess payments are not shared with recording artists.").

[717] Karp, *Artists Press for Their Share*.

[718] For example, Martin Bandier of Sony/ATV has stated that his company does not share extra advance money because "there [isn't] much to share." Karp, *Artists Press for Their Share*.

[719] A2IM Second Notice Comments at 6; Tr. at 143:08-11 (June 23, 2014) (Richard Bengloff, A2IM).

[720] Tr. at 109:13-110:03 (June 5, 2014) (Robert Meitus, Meitus Gelbert Rose LLP).

[721] SGA Second Notice Comments at 14-15 (Sony/ATV was also paid $300,000 for administrative expenses).

[722] *See* Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*.

[723] Resnick Second Notice Comments at 2.

seems to be no reliable practice, however, under which artists and songwriters are compensated for such equity arrangements.[724]

b. PRO Distributions

PROs create value by licensing, administering, and enforcing music creators' public performance rights. Yet some songwriters voiced concerns that part of this value is lost through inaccurate payment allocation. PROs frequently use sampling surveys to estimate how many times a song has been performed during a payment period, and rely upon those estimates to allocate royalties among their members.[725]

An alternative, and more comprehensive, form of measurement is census reporting, whereby licensees account for each use of a musical work (*e.g.*, each individual stream) to the collecting entity. Census reporting is more common for digital services, where it is easier to track individual performances.[726] ASCAP relies upon census data only when it is "economically feasible" to process.[727] For many uses—including terrestrial radio uses and some digital uses—ASCAP uses a sample survey.[728] BMI similarly relies upon extrapolated data to pay royalties in many instances.[729] Information concerning ASCAP's and BMI's distribution practices is publicly available on their websites.[730]

Some musicians and publishers commented that increased use of census data instead of surveys would result in more accurate payments by PROs to their members under blanket licenses. For instance, Music Services stated that survey-based distribution, particularly for radio and live performances, is "antiquated" and that "[m]any

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[724] Karp, *Artists Press for Their Share*.

[725] According to one source, "[m]ost performance data is drawn from broadcast sources, under the assumption that the music being performed over radio and television is roughly the same as the music being performed in cafes, hotels, sports arenas, . . . restaurants, and nightclubs." KOHN at 1281.

[726] *See* NMPA & HFA First Notice Comments at 9. For instance, SoundExchange pays almost entirely on a census basis, and does not generally use sampling. *See* SoundExchange Second Notice Comments at 7.

[727] *ASCAP Payment System: Keeping Track of Performances*, ASCAP, http://www.ascap.com/members/payment/keepingtrack.aspx (last visited Jan. 30, 2014).

[728] *Payment System: The ASCAP Surveys*, ASCAP, http://www.ascap.com/members/payment/surveys.aspx (last visited Jan. 30, 2014).

[729] *Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print/detail (last visited Jan. 16, 2015).

[730] *ASCAP's Survey and Distribution System: Rules & Policies*, ASCAP (June 2014), http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf; *Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print/detail (last visited Jan. 16, 2015).

publishers and writers believe they are not receiving their fair share of the PRO pot."[731] Other participants observed that under a sampling system, musicians who do not have "mainstream" songs on the radio are underpaid.[732] Under this view, since sampling is more likely to identify hit songs, the PRO will likely undercount performances of works by emerging or fringe musicians.

In response, a representative from ASCAP sympathized, stating "ideally, yes, I wish everyone would get paid for every performance," but noted the administrative impracticality of identifying every use.[733] Others echoed this sentiment, commenting that even if uses could be precisely tracked, some would be so small that they would not be payable.[734] Nonetheless, ASCAP notes that "[a]s new technologies make surveying a given medium such as broadcast radio economically efficient, we implement those technologies to move closer to a full census."[735] For its part, BMI commented that there is competition between PROs for members and the market will sufficiently drive distribution methodologies.[736]

Despite these concerns, songwriters generally expressed confidence in the PROs.[737] The PROs are seen as relatively transparent[738] and protecting the writers' share of performance royalties.[739] SGA noted that "licensing through the PROs . . . has benefited and given protection to the community of American music creators for over one hundred years" by "provid[ing] music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO."[740] Similarly, in NSAI's estimation, "ASCAP and BMI essentially act as not-for-profit collection arms for songwriters and composers."[741]

c. "Pass-Through" Licensing

As noted above, under section 115, compulsory licensees can authorize third-party streaming services to transmit downloads and streams of musical works. Songwriters

[731] Tr. at 261:20-262:03 (June 5, 2014) (Phil Perkins, Music Services).

[732] Tr. at 22:14-25:19 (June 5, 2014) (Royal Wade Kimes, Wonderment Records); *see* Simpson First Notice Comments at 2.

[733] Tr. at 28:17-29:02 (June 5, 2014) (Sam Mosenkis, ASCAP).

[734] Modern Works Music Publishing Second Notice Comments at 6-7.

[735] ASCAP Second Notice Comments at 17.

[736] BMI Second Notice Comments at 15.

[737] Council of Music Creators First Notice Comments at 2-3.

[738] SCL First Notice Comments at 11.

[739] Music Choice First Notice Comments at 20.

[740] SGA First Notice Comments at 7.

[741] NSAI Second Notice Comments at 4.

and publishers complain vigorously about this system.[742] SGA pointed out that pass-through licensing "creates a situation in which the creators and owners of musical compositions have no privity of contract with online music distribution giants such as Apple iTunes, and must therefore rely on sometimes adversarial record company 'intermediaries' for the monitoring and payment of royalties earned via online download usage."[743] Another commenter explained that "pass-through licensing, where record labels can license mechanical rights directly on publishers' behalf and without publishers' input, leaves songwriters with no clue as to whether or not they are properly paid."[744]

Stakeholders appear largely to agree that the pass-through approach—which mimics the traditional physical model, where record labels ship product to stores and report sales back to publishers—is unnecessary in the digital environment, since it is feasible for music owners to have a direct relationship with consumer-facing distributors. Significantly, even RIAA, a presumed beneficiary of the section 115 pass-through license, appears to favor the end of this pass-through licensing: "The major record companies generally support in principle the elimination of pass-through licensing . . . within the context of a structure that makes it unnecessary."[745]

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[742] ASCAP and BMI also express displeasure with the analogous "through-to-the-audience" licenses required under the ASCAP and BMI consent decrees, where a party that procures a license from the PRO is able to authorize transmissions by additional distributors. *See* ASCAP Consent Decree § V; BMI Consent Decree § IX. Originally conceived to allow networks to obtain licenses that extend to downstream broadcasts by affiliates, the concept has been extended to online services such as YouTube that allow their video content to be shared and embedded on third-party websites that may be generating revenue through advertisements or otherwise. ASCAP First Notice Comments at 19. Per ASCAP, "a through-to-the-audience license request can give unfettered permission to a huge number of users without the benefit of full remuneration to music creators." *Id*. at 20.

[743] SGA First Notice Comments at 6-7. In recently promulgated regulations, the Copyright Office added a new requirement for section 115 licensees that requires them to break down royalty statements to indicate usage by third-party services, so copyright owners can at least see what is being reported to the section 115 licensee. 37 C.F.R. §§ 210.16-210.17.

[744] LaPolt Second Notice Comments at 11; *see also* NMPA &HFA First Notice Comments at 12 ("To the extent compulsory licensees pass through mechanical rights to a third-party digital music distributor and do not report who the third-party distributor is, songwriters and music publishers do not even know how their compositions are being used and cannot evaluate the accuracy of the compulsory licensees reporting."); Kohn First Notice Comments at 9 ("Pass-through licenses, at least insofar as they apply to digital transmission, should be eliminated.").

[745] RIAA Second Notice Comments at 19.

IV. Analysis and Recommendations

It may be the very power of music that has led to its disparate treatment under the law. The songs we enjoy in our early years resonate for the rest of our lives. Human beings have a deep psychological attachment to music that often seems to approach a sense of ownership; people want to possess and share the songs they love. Perhaps this passion is one of the reasons music has been subject to special statutory treatment under the law.

Regardless of what has animated our century-old embrace of government regulation of music, the Copyright Office believes that the time is ripe to question the existing paradigm and consider meaningful change. In recent years, we have seen piecemeal efforts to address particular issues through focused legislation: there have been bills directed to the lack of a terrestrial performance right for sound recordings, ratesetting inequities, and payment for pre-1972 sound recordings. Each has targeted a specific issue or issues within the existing system. In the current environment, however, these sorts of limited proposals—standing alone—seem unlikely to generate broad enough support to become law. It is for this reason, perhaps, that some members of Congress have recently indicated interest in a more holistic approach.[746]

How ambitious should any such approach be? As a number of commenters remarked during the course of this study, if we were to do it all again, we would never design the system that we have today. But as tempting as it may be to daydream about a new model built from scratch, such a course would seem to be logistically and politically unrealistic. We must take the world as we find it, and seek to shape something new from the material we have on hand.

In this section, based on the information and commentary gathered in the study, the Office analyzes critical areas of concern and—considering the record and merits of disparate viewpoints—suggests ways to reshape our music licensing system to better meet the demands of the digital era. Following a discussion of the role of government in the music marketplace, the Office outlines a series of interrelated changes that might be implemented to modernize our struggling system. The recommendations below seek to capitalize on the value that existing institutions and methods could continue to provide under an updated framework.

Rather than presenting a detailed plan, the Office's recommendations should be understood as high-level and preliminary in nature—more of a sketch than a completed picture. It is also important that the proposals be contemplated together, rather than in

[746] *See, e.g.*, Daryl P. Friedman, *MusicBus Gaining Speed as Members of Congress Climb On*, GRAMMY NEWS (June 18, 2014), http://www.grammy.com/blogs/musicbus-gaining-speed-as-members-of-congress-climb-on (noting support for omnibus legislation by Rep. Jerrold Nadler, Rep. Kevin McCarthy and Rep. Nancy Pelosi]).

isolation. The Office seeks to present a series of balanced tradeoffs among the interested parties to create a fairer, more efficient, and rational system for all.

A. Guiding Principles

The Copyright Office appreciates and agrees with the four grounding principles that were articulated by many during the course of this study, as discussed above. These are:

- Music creators should be fairly compensated for their contributions
- The licensing process should be more efficient
- Market participants should have access to authoritative data to identify and license sound recordings and musical works
- Usage and payment information should be transparent and accessible to rightsowners

As much as there may be consensus on these points, however, the opposite could be said of stakeholders' views as to how best to achieve them. Having considered the plethora of issues that plague our current licensing system—and how they might practically be addressed—the Office has identified some additional principles that it believes should also guide any process of reform. These are:

- Government licensing processes should aspire to treat like uses of music alike
- Government supervision should enable voluntary transactions while still supporting collective solutions
- Ratesetting and enforcement of antitrust laws should be separately managed and addressed
- A single, market-oriented ratesetting standard should apply to all music uses under statutory licenses

Each of these principles is explored below in the context of the Office's overall recommendations.

B. Licensing Parity and Fair Compensation

Questions of licensing parity and fair compensation are closely tied to the relative treatment of music rights and rightsholders under the law.[747] The Office believes that

[747] During the course of the study, the Office and others employed the term "platform parity" in referencing the concern that existing licensing policies have a disparate impact on different distribution platforms. The Office now adopts the broader term "licensing parity" in recognition

any overhaul of our music licensing system should strive to achieve greater consistency in the way it regulates (or does not regulate) analogous platforms and uses. In addition to rewarding those distribution models that are most resource-efficient and appealing to consumers, evenhanded treatment will encourage more equitable compensation for creators.

From today's vantage point, at least, the impact of our current system on different classes of copyright owners and users—favoring some while disadvantaging others—seems to be more the product of historical happenstance than conscious design. To the extent our policies require copyright owners to subsidize certain business models through reduced royalties, as copyright owners claim, this is not the result of a present-day judgment that it is a fair way to treat creators, or promotes the values of our copyright system. The same can be said of policies that impose higher royalty obligations on one business model over competing platforms.

The policy rationales that animated the creation of the section 115 compulsory license, the PRO consent decrees, and even the section 112 and 114 framework for digital performances, are now decades behind us. The Office believes that the current widespread perception that the system is outmoded and broken may provide an opportunity to review and rationalize the playing field.

1. Equitable Treatment of Rights and Uses

As suggested above, the Copyright Office believes that an important element of a robust and fair music marketplace is to treat equivalent uses of sound recordings and musical works—and competing platforms—alike, or as alike as can practically be achieved.

a. Musical Works Versus Sound Recordings

Which is more important, the song or the sound recording? "It all begins with a song," runs the oft-cited refrain;[748] but then again, the song is brought to life through a sound recording. While there is, of course, no definitive answer to this question, as reflected throughout this report, the law nonetheless treats sound recordings and musical works differently.

In the case of noninteractive streaming uses, sound recordings are subject to compulsory licensing at government-set rates. But apart from this, sound recordings are licensed by their owners in the free market.

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of the fact that the current licensing framework also disparately impacts different classes of copyright owners and creators.

[748] NSAI, http://www.nashvillesongwriters.com (last visited Jan. 18, 2014).

As for musical works, while synch uses (including consumer-generated videos) are not subject to government oversight,[749] the other core segments of the market (mechanical reproduction and performance uses) are regulated. As indicated above, a recurring complaint from publishers and songwriters is that significantly higher rates are paid for sound recordings than for musical works in the online world—whether those rates are set by the CRB or by one of the rate courts. At least some of this disparity appears to arise from publishers' inability to negotiate free from government constraint where record companies can.

In keeping with the guiding philosophy that government should aspire to treat like uses of music alike, the Office believes this should change, at least in the digital realm. That is, where sound recording owners have the ability to negotiate digital rates in the open market, so should owners of musical works.

Although the path to enabling this type of parity is complicated by the divergent licensing frameworks for mechanical and performance rights on the musical work side, the Office's approach would offer a free market alternative to musical work owners, in the form of an opt-out right, in the most significant areas where sound recording owners enjoy unfettered digital rights—namely, interactive streaming uses and downloads. And where sound recording owners are subject to statutory ratesetting—*i.e.*, in the case of noninteractive streaming—musical works would remain regulated. To further promote uniformity of approach, as discussed below, the Office is recommending that all music ratesetting activities—whether on the sound recording or musical work side—take place before the CRB.

The Office believes that treating analogous uses alike in the digital environment is more likely to yield equitable rates as between sound recordings and musical works—or will at least make that goal more attainable.[750] This does not mean that the Office assumes

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749 While synch uses by consumer video sites such as YouTube are not subject to compulsory licensing, the degree of copyright owner control with respect to sites featuring user-posted content is complicated by the safe harbor provisions of section 512, which limit such sites' liability for hosting the content.

750 While the same argument can of course be made with respect to physical formats such as CDs and vinyl records—where labels also have the freedom to negotiate and publishers do not—in pursuing issues of fair compensation, stakeholders appear overwhelmingly to be concerned with digital, rather than physical, uses. Likely this is because they are looking to the future, and the future is digital. In addition, even though section 115 applies to both digital and physical uses, the licensing situation for physical goods is somewhat distinguishable. Most physical goods are in album format, and thus generate significantly higher mechanical revenues by virtue of their inclusion of multiple songs. Additionally, because the first use of a musical work is not subject to compulsory licensing, publishers have the right to demand a higher than statutory rate when licensing the original recording—at least in theory; for reasons that are not entirely clear, it appears that publishers almost never exercise this option. *See* RIAA First Notice Comments at 16

that the rates for sound recordings and musical works necessarily should be equal. Rather, the goal is to encourage evenhanded consideration of both rates by a single body, under a common standard, to achieve a fair result.

The benefits of parallel treatment would not be limited to licensing at government-set rates. Where a music publisher had chosen to opt out of the statutory license to negotiate a direct deal, both the publisher and the sound recording owner would have the same ability to make their case to the licensee. The licensee would then be in a position to assess the value of each right and proceed accordingly, as happens in the synch market today.

Finally, such an approach would also allow for the possibility of achieving an all-in rate—and simplified rate structure—covering both sound recordings and musical works for noninteractive uses under the section 112 and 114 licenses (including terrestrial radio, which the Office proposes be brought under those licenses, as discussed below).[751] As suggested by the record labels, it might be possible for labels and publishers to agree to a royalty split as between them—or have the split set in an initial phase of a CRB proceeding—and then proceed together as allies in litigating the rates to be paid by statutory licensees.[752]

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n.31 (stating that "the system should recognize the reality that songwriters and publishers have always chosen to license first uses at the same royalty rates as other recordings and allow that to happen by means of the same business processes."); *see also* Tr. at 251:07-252:04 (June 4, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP) (explaining that standard record agreement provisions, such as controlled composition clauses, often prevent publishers and songwriters from negotiating first use rates higher than the compulsory rate). Unlike in the digital realm, once the original recording is released by the record company, it is not nearly as common for third parties to seek a mechanical license to reproduce and distribute that same recording in a physical format. For these reasons—as well as the scant record before the Office concerning physical product—the Office believes that the question of whether the proposed opt-out right should extend to physical uses is perhaps best left for future consideration.

[751] Both digital music services and record companies have urged the Office to consider such an approach. DiMA First Notice Comments at 25 (noting that "[i]n an ideal world, services that require a combination of musical work public performance rights, as well as reproduction and distribution rights under Section 115, would be able to acquire such rights from a single licensing source under a single statutory license and pay a single royalty to a common agent"); Spotify First Notice Comments at 10 (stating that "[a] licensing regime in which public performance rights and mechanical reproduction rights could be obtained from a single source or pursuant to a single license is an interesting idea and could in theory lead to efficiencies."); RIAA First Notice Comments at 16-17 (supporting single blanket license covering all rights in a song).

[752] If such an approach were adopted, some thought would need to be given as to whether and how a separate settlement would be accommodated on the part of the sound recording owners or musical work owners once the ratesetting aspect of the proceeding was underway.

b. Terrestrial Radio

In the case of terrestrial radio, federal law exempts what is currently a 17 billion dollar industry[753] from paying those who contribute the sound recordings that are responsible for its success.[754] Apart from being inequitable to rightsholders—including by curtailing the reciprocal flow of such royalties into the United States—the exemption of terrestrial radio from royalty obligations harms competing satellite and internet radio providers who must pay for the use of sound recordings. In a world that is more and more about performance and less about record sales, the inability to obtain a return from terrestrial radio increases the pressure on paying sources. The market-distorting impact of the terrestrial radio exemption probably cannot be overstated.

The Office has long supported the creation of a full sound recording performance right, advocating for Congress to expand the existing right so it is commensurate with the performance right afforded to other classes of works under federal copyright law.[755] As one of the few remaining industrialized countries that does not recognize a terrestrial radio performance right, the United States stands in stark contrast to peer nations.[756] In her recent testimony before Congress, the Register of Copyrights described the

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[753] According to figures from the Radio Advertising Bureau, radio revenues have increased each year since 2009, when revenues were $16,029,000,000, to 2013, when revenues totaled $17,649,000,000—an increase of nearly 10%. *RAB Revenue Releases*, RADIO ADVERTISING BUREAU, http://www.rab.com/public/pr/rev-pr.cfm?search=2013&section=press (click on "Annual Radio Revenue Trends") (last visited Jan. 22, 2015).

[754] Although the Copyright Act exempts terrestrial performances of sound recordings, following recent judicial decisions in California and New York—which interpreted those states' laws as supporting a right of public performance to sound recording owners—it is not clear that over-the-air broadcasters enjoy a complete exemption under state law. *See Flo & Eddie v. Sirius XM CA*, 2014 U.S. Dist. LEXIS 139053; *Capitol Records, LLC v. Sirius XM Radio Inc.*, No. BC520981 (order regarding jury instruction); *Flo & Eddie v. Sirius XM NY*, 2014 U.S. Dist. LEXIS 166492. Although those cases were brought against digital providers, the courts' reasoning does not appear to be limited to digital performance rights.

[755] *See*, *e.g.*, *Performance Rights Act Hearing* (statement of Marybeth Peters, Register of Copyrights); *Ensuring Artists Fair Compensation Hearing* (statement of Marybeth Peters, Register of Copyrights); *Internet Streaming of Radio Hearing* at 8-22 (statement of David O. Carson, General Counsel, U.S. Copyright Office); PERFORMANCE RIGHTS REPORT.

[756] *See Public Performance Right for Sound Recordings*, FUTURE OF MUSIC COALITION (Nov. 5, 2013) https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings; A2IM First Notice Comments at 8; Modern Works Music Publishing First Notice Comments at 7; SoundExchange First Notice Comments at 16-17. Supporters of a more complete terrestrial sound recording performance right point out that the U.S. position on this is "in contrast to nearly every developed nation on the planet [with] notable exceptions includ[ing] Iran and North Korea." FMC First Notice Comments at 14*; see also The Register's Call for Updates Hearing* at 3 (statement of Rep. Melvin L. Watt).

terrestrial performance right issue as "ripe for resolution,"[757] recommending that any congressional efforts to update the Copyright Act include a legislative answer.[758]

Radio broadcasters argue that a sound recording performance royalty would unfairly impose a "tariff" to subsidize the recording industry at the expense of broadcasters— their opinion, the limited performance right and lack of royalties in terrestrial radio have not impacted the "growth or supremacy of the United States recording industry."[759] This argument would seem to ring hollow, however, given the current challenges faced by that industry.

Radio broadcasters also point to the promotional effect of traditional airplay on sales of sound recordings as a reason for maintaining the status quo. Undoubtedly, sound recording owners recognize value in radio airplay, in particular for new releases.[760] But any such value must be considered and weighed in the context of the overall earnings of the broadcast industry. Significantly, as consumer preferences shift away from music ownership, the potential for sales is becoming less relevant, and the promotional value of radio less apparent.

In this regard, the creation of a terrestrial sound recording performance right need not overlook or negate the question of promotional value, because this factor can be taken into account by a ratesetting authority, or in private negotiations, to arrive at an appropriate royalty rate. Such an approach would appear to be a rational solution because it seems fair to assume that a willing buyer and willing seller would do the same.[761]

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[757] *The Register's Call for Updates Hearing* at 7 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J. L. & ARTS 315, 320-21 (2013).

[758] *The Register's Call for Updates Hearing* at 63 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).

[759] NAB First Notice Comments at 29.

[760] Although the practice of "payola"—whereby record companies pay radio stations to play certain recordings—has been banned, labels still devote resources to encouraging broadcasters to perform their songs. *See* GAO REPORT at 50 (explaining that although "payola" has been formally outlawed unless the station announces any arrangements to play songs in exchange for consideration, it is common industry practice for record companies to employ independent promoters).

[761] Interestingly, despite the lack of legal recognition for such a right, there has been forward movement on this issue in the private marketplace. Media conglomerate iHeartMedia (formerly Clear Channel)—which offers both terrestrial and streamed radio—has entered into voluntary license agreements with WMG and a number of smaller record labels that cover both digital and terrestrial performance rights (with the digital rates apparently more favorable to iHeartMedia than those established by the CRB). *See* Christman, *Here's Why Warner Music's Deal with Clear*

c. Pre-1972 Sound Recordings

Another area where the law diverges in the way it treats sound recordings and musical works is the lack of federal protection for pre-1972 sound recordings, many of which remain commercially valuable. This, too, impedes a fair marketplace. Satellite and internet radio services appear to rely heavily on pre-1972 recordings in curating their playlists, presumably because (at least until recent court rulings) these selections have been viewed as free from copyright liability on the sound recording side.[762] At the same time, the owners of the musical works embodied in these sound recordings are paid for the same uses.

The Office is of the view that pre-1972 recordings should be brought under the protection of federal copyright law. Such a change would serve the interests of licensing parity by eliminating another market distortion. In addition, it would allow for a federal compensation mechanism for the artists responsible for pre-1972 works.

In 2009, Congress instructed the Office to conduct a study on the "desirability and means" of extending federal copyright protection to pre-1972 sound recordings.[763] After considering input from stakeholders, the Office concluded that pre-1972 sound recordings should be brought under federal copyright law with the same rights, exceptions, and limitations as sound recordings created on or after February 15, 1972.[764] In the Office's view, full federalization of pre-1972 sound recordings (with special provisions to address ownership issues, terms of protection, and registration) would improve the certainty and consistency of copyright law, encourage more preservation

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Channel Could be Groundbreaking for the Future of the U.S. Music Biz (Analysis); Sisario, *Clear Channel-Warner Music Deal Rewrites the Rules on Royalties*. Reportedly, iHeartMedia was motivated to do this by it desire to have a more predictable cost structure to grow the digital side of its business. *Id.* Such a step may point to the potential for broader industry compromise on this issue.

762 Tr. at 183:07-18 (June 24, 2014) (Jim Mahoney, A2IM) ("One only need to turn on Sirius XM and see the many stations that programmed fully with pre-1972 copyright songs, recordings and conclude that they still have value to listeners. They still want to hear those songs a lot. To programmers who program multiple stations there's a 40's station, a 50's station, a 60's station. There's classic rock, all the pre-1972 sound recordings. So, the public still values them, corporations still value them. They should still maintain a value for the recording artists.").

763 Specifically, Congress directed the Office to discuss: "(1) the effect that federal protection would have with respect to the preservation of pre-1972 sound recordings; (2) the effect that federal protection would have with respect to providing public access to the recordings; and (3) the impact that federal protection would have on the economic interests of right holders of the recordings" and to provide appropriate recommendations. PRE-1972 SOUND RECORDINGS REPORT at vii.

764 *Id.* at viii.

and access activities, and provide the owners of pre-1972 sound recordings with the benefits of any future amendments to the Copyright Act.[765]

The Office has not changed its mind. Indeed, since the Office issued its 2011 report, there have been significant developments under both California and New York state law which underscore the need for a unified federal approach to sound recordings. As a result of lawsuits brought by pre-1972 sound recording owners against Sirius XM and Pandora, there have been trial court decisions in California and New York upholding claims that performances of the plaintiffs' sound recordings in those jurisdictions are protected under applicable state law.[766] Subject to any further judicial developments, this means that the defendant services need to obtain licenses from sound recording owners to perform the recordings. But because the requirement to do so is based on state, rather than federal law, users may not rely upon the section 112 and 114 licenses for this purpose.

The legal question of state protection of pre-1972 sound recording performance rights will undoubtedly continue to percolate in other states as well.[767] In addition, there is the significant related question of whether and how the pre-1972 rulings may be applied to performances by terrestrial broadcasters, which of course currently enjoy an exemption under federal law. This aspect of the story has yet to unfold.

In the last Congress, SoundExchange, joined by others, pursued legislation known as the RESPECT Act that would expand the jurisdiction of that organization to collect royalties for pre-1972 performances and provide a safe harbor from state liability for paying services.[768] But this proposed amendment to federal law would not offer the full panoply of federal copyright protection to pre-1972 rightsowners, nor would it allow for application of the DMCA harbors or rights-balancing exceptions such as fair use. In addition, there are important policy considerations relating to the preservation of older works and access to "out-of-print" recordings still subject to state protection that the RESPECT Act does not address. For these reasons, while the Copyright Office recognizes the potential value of enacting a relatively expedient fix to make sure older artists get paid and to eliminate liability concerns of digital services seeking to exploit

[765] *Id.* at ix-x.

[766] *See Flo & Eddie v. Sirius XM CA*, 2014 U.S. Dist. LEXIS 139053; *Capitol Records, LLC v. Sirius XM Radio Inc.*, No. BC520981 (order regarding jury instructions); *Flo & Eddie v. Sirius XM NY*, 2014 U.S. Dist. LEXIS 166492, *reconsideration denied*, 2014 U.S. Dist. LEXIS 174907.

[767] Paul Resnikoff, *What the pre-1972 Decision Really Means for the Future of Radio . . . .*, DIGITAL MUSIC NEWS (Oct. 13, 2014), http://www.digitalmusicnews.com/permalink/2014/10/13/pre-1972-decision-really-means-future-radio-2 (noting pending litigation by Flo & Eddie (of the band The Turtles) against Sirius XM in Florida, in addition to suits in California and New York).

[768] RESPECT Act, H.R. 4772 § 2.

pre-1972 recordings, it continues to believe that full federalization remains the best alternative.

2. Consistent Ratesetting Standards

Where the government has stepped in to establish rates for the use of music, it has likewise acted in an inconsistent fashion. While in some cases the law provides that the ratesetting authority should attempt to emulate the free market, in other cases it imposes a more policy-oriented approach.[769]

In this regard, the ratesetting standards under the section 112 and 114 licenses have been a persistent source of unhappiness for both music owners and users. This is hardly surprising, as these licenses prescribe different rate standards for competing platforms—internet radio versus satellite radio—thus allowing both sides to complain.

Satellite radio and "pre-existing" subscription services (such as those provided through cable television) are able to benefit from the four-factor section 801(b)(1) test, which allows the CRB to ponder broader concerns than what negotiating parties might consider in the marketplace—for example, whether a contemplated rate will result in "disruptive impact on the structure of the industries involved and on generally prevailing industry practices."[770] Many interpret the section 801(b)(1) language as enabling the ratesetting body to protect the vested interests of licensees by establishing rates lower than what would (at least theoretically) prevail in the free market.

Rates for the reproduction and distribution of musical works in digital and physical formats are also set under the more policy-oriented 801(b)(1) standard. This is a significant point of contention for music publishers and songwriters, who have been lobbying for legislation to substitute the willing buyer/willing seller standard.[771]

By contrast, rates paid by internet radio services are set by the CRB according to a "willing buyer/willing seller" rate standard. Most perceive the willing buyer/willing seller standard to be more market-oriented in its approach.[772] But internet radio providers have twice taken their case to Congress to override the rates set by the CRB

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[769] *See* "Existing Ratesetting Framework" chart, Appendix D., for a depiction of the current ratesetting standards and bodies.

[770] 17 U.S.C. § 801(b)(1)(D).

[771] *See* SEA, H.R. 4079.

[772] *See* EMF First Notice Comments at 6, 8 n.14 (noting negotiated agreements are rare for webcasters, but noncommercial rates were successfully negotiated before a final decision in Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026 (Mar. 9, 2011)).

under that rubric,[773] and Congress has given them the opportunity to negotiate substitute agreements with SoundExchange.[774]

As for public performance rights in musical works, by virtue of the consent decrees, ASCAP and BMI are subject to a "reasonable fee" approach, which seeks to approximate hypothetical "fair market value."[775] Though the term "reasonable fee" is not defined in either consent decree, each places the burden of proof on the PRO to establish that its proposed rates are reasonable.[776] The PROs attempt to meet this burden by offering negotiated rates as benchmarks, which economic evidence may or may not be accepted by the court after considering its relevance—often through the lens of quasi-antitrust analysis.[777]

While there are those who might argue that the particular wording of a discretionary rate standard will not have much impact on a results-oriented tribunal, there is at least some evidence to the contrary. For example, in 2008, in establishing rates for satellite radio services, the CRB found it "appropriate to adopt a rate . . . that is lower than the upper boundary most strongly indicated by marketplace data," stating that they did so "in order to satisfy 801(b) policy considerations related to the minimization of disruption that are not adequately addressed by the benchmark market data alone."[778] In any event, there appears to be a shared perception among many industry participants—both those that chafe at the section 801(b)(1) standard and those that like it—that the standard yields lower rates.[779]

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[773] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002) (codified as amended at 17 U.S.C. § 114(f) (2010)); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008) (codified as amended at 17 U.S.C. § 114(f) (2010)).

[774] 17 U.S.C. § 114(f)(3)(B).

[775] *Pandora Ratesetting*, 6 F. Supp. 3d at 353-54*; see also BMI v. DMX, Inc.*, 726 F. Supp. 2d 355, 356 (S.D.N.Y. 2010) (citing "well-established" reasonable fee approach to determine fair market value).

[776] *BMI v. DMX*, 683 F.3d at 45 n.14 (noting in both the ASCAP and BMI consent decree, the burden of proof is on the PRO to establish the reasonableness of the fee it seeks).

[777] *United States v. BMI*, 316 F. 3d 189, 194 (2d Cir. 2003) ("This determination [of whether a rate is reasonable] is often facilitated by the use of a benchmark—that is, reasoning by analogy to an agreement reached after arms' length negotiation between similarly situated parties."); *see ASCAP v. MobiTV*, 681 F. 3d at 82 ("In [setting a rate], the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music.").

[778] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4097 (Jan. 24, 2008).

[779] *See, e.g.*, DiMA First Notice Comments at 33-34 (noting relatively higher rates under the willing buyer/willing seller standard); NMPA & HFA First Notice Comments at 27 ("Pandora . . . paid

The Office believes that all government ratesetting processes should be conducted under a single standard, especially since the original justifications for differential treatment of particular uses and business models appear to have fallen away. There is no longer a threatened piano roll monopoly, and satellite radio is a mature business. Further, however that rate standard is formulated—*i.e.,* whether it is articulated as "willing buyer/willing seller" or "fair market value"—it should be designed to achieve to the greatest extent possible the rates that would be negotiated in an unconstrained market. To the extent that it enumerates specific factors, they should be ones that might reasonably be considered by copyright proprietors and licensees in the real world. In the Office's view, there is no policy justification to demand that music creators subsidize those who seek to profit from their works.

Under such a unified standard, the CRB or other ratesetting body would be encouraged to consider all potentially useful benchmarks—including for analogous uses of related rights (*e.g*., fees paid for the comparable use of sound recordings when considering musical work rates[780])—in conducting its analysis. But again, it should take into account only those factors that might be expected to influence parties who negotiated rates in the open market. These might include, for example, the substitutional impact of one model on other sources of revenue, or whether a service may promote sales of sound recordings or musical works through other channels.[781] But upon arriving at rates believed to reflect what would be agreed in the open market, those rates would not be discounted on the basis of abstract policy concerns such as "disruptive" impact on

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48% of its revenue to artists and labels using the willing buyer willing seller standard and only 4% of its revenue to publishers and songwriters using rates set by the rate court."); Spotify First Notice Comments at 7.

[780] *But see* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,094-95 (May 1, 2007) (musical work benchmark rejected as being "flawed" for sound recordings because the sellers are different and selling different rights, use of the benchmark would ignore the different investments and incentives of the each seller, and the record contained ample empirical evidence that the markets are not necessarily equivalent); *Pandora Ratesetting*, 6 F. Supp. 3d at 333, 366-67 (court declined to use royalty rates for sound recordings as a benchmark, explaining, "[t]he disparity between rates for the public performance of compositions versus sound recordings does not exist for most of ASCAP's revenue streams since . . . the need to acquire sound recording licenses only applies to services who conduct digital audio transmissions[,]" for those digital audio transmissions, whose rates are set by the CRB, there is a "statutory prohibition on considering sound recording rates in setting a rate for a license for public performance of a musical work" and otherwise "the record is devoid of any principled explanation given . . . why the rate for sound recording rights should dictate any change in the rate for composition rights.").

[781] As expressed in section 114, the willing buyer/willing seller standard includes consideration of several specific factors, including these. *See* 17 U.S.C. § 114(f)(2)(B).

prevailing industry practices or solicitude for existing business models notwithstanding their competitive viability in the marketplace.

C. Role of Government in Music Licensing

Government regulation of music has focused on the interrelated concerns of access, pricing and competition. As noted above, section 115—the first compulsory license in our copyright law—was enacted to prevent a single piano roll company from exercising exclusive control over song copyrights. The PRO consent decrees are the result of the government's attempt to balance the efficiencies of collective licensing with concerns about anticompetitive conduct. More recently, Congress chose to extend the public performance right for digital uses of sound recordings on the condition that certain of those uses would be subject to compulsory licensing under sections 112 and 114 of the Copyright Act, thus further extending the practice of regulatory oversight.

As a result of these policy determinations, an administrative tribunal, the CRB, sets the fees paid for the reproduction and distribution of musical works, as well as the royalties due for radio-style digital performance of sound recordings. Two federal judges in New York City are responsible for establishing the fees for the public performance of musical works across traditional and digital platforms. For better or worse, these decades-old regimes are deeply embedded in our licensing infrastructure.[782]

Viewed in the abstract, it is almost hard to believe that the U.S. government sets prices for music. In today's world, there is virtually no equivalent for this type of federal intervention—at least outside of the copyright arena.[783] The closest example is the retransmission by cable and satellite providers of copyrighted television programming (including the music embodied in that programming), which is also subject to compulsory licensing under the Copyright Act and government-set rates.[784] But

[782] Notably, in the deliberations leading to the adoption of the 1976 Act, then Register of Copyrights Abraham L. Kaminstein recommended elimination of the section 115 compulsory license, concluding that the underlying concerns about a publisher monopoly were no longer relevant. *See* GENERAL REVISION OF COPYRIGHT REPORT at 36. Publishers did not ultimately pursue that opportunity, however, instead agreeing to maintain the compulsory license in exchange for a statutory rate hike from 2 to 2.75 cents per use. *See Music Licensing Reform Hearing* (statement of Marybeth Peters, Register of Copyrights); S. REP. NO. 94-473, at 88-92.

[783] Outside of the copyright context, rare instances of government price-fixing involve commodities, not differentiated goods. The Federal Energy Regulatory Commission conducts a ratesetting process for interstate transmission of electricity and natural gas, *see* 16 U.S.C. §§ 824d, 824e, 15 U.S.C. §§ 717c, 717d, and the United States Department of Agriculture issues federal milk marketing orders that set minimum (not maximum) prices for the sale of milk in most regions of the United States, *see* 7 U.S.C. § 608c(5).

[784] 17 U.S.C. §§ 111, 119, 122; *see also* U.S. COPYRIGHT OFFICE, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT: § 302 REPORT 129-40 (2011), *available at* http://www.copyright.gov/reports/

retransmission rights represent a much more limited segment of the overall revenues for the television industry than do the core music markets subject to government ratesetting, and even there, broadcasters are permitted separately to negotiate non-government-controlled fees for access to the signals that carry the copyrighted works.[785]

1. Antitrust Considerations

As explained above in discussing the section 115 statutory license and PRO consent decrees, much of the rationale—indeed, the original rationale—for government regulation of the music marketplace revolves around antitrust concerns. The government has long wanted to ensure that the market is not unduly influenced by monopoly power. Thus, Congress' uneasiness with the dominant position of the Aeolian piano roll company in 1909 led it to enact a compulsory license for musical works so others could compete with that company.

Concerns about potential monopoly effects are heightened when would-be competitors decide on the prices to be charged for products or products are required to be purchased together, as is the case when musical works are licensed by multiple owners on a blanket basis through ASCAP or BMI. The government, including the Supreme Court, has acknowledged the social benefits of this type of collective blanket licensing, and has endorsed it under a "rule of reason" approach rather than finding it per se unlawful.[786] But the government has also, since the World War II era, subjected ASCAP and BMI to extensive regulation under their respective consent decrees.

It is worth noting that the longevity of these two decrees represents a rather extreme exception to the modern DOJ guidelines which, since 1979, have required that such decrees terminate, generally after a period of no longer than ten years.[787] More recently, in March 2014, the DOJ announced a policy to facilitate the "fast track" review and termination of most perpetual or "legacy" decrees.[788] Under that policy, the DOJ will

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section302-report.pdf ("STELA REPORT") (recommending ways in which the cable and satellite compulsory retransmission licenses might be phased out).

[785] *See* 47 U.S.C. § 325.

[786] *BMI v. CBS,* 441 U.S. at 23-25 (holding that the blanket license should be subject to rule of reason analysis and remanding to lower courts to apply that analysis); *CBS v. ASCAP*, 620 F.2d at 932 (on remand from Supreme Court, sustaining blanket license under rule of reason analysis because CBS had failed to prove the non-availability of alternatives to the blanket license); *Buffalo Broad. v. ASCAP*, 744 F.2d at 926-32 (sustaining blanket license under rule of reason analysis in context of local television stations*).*

[787] U.S. DOJ, ANTITRUST DIV., ANTITRUST DIV. MANUAL III 146-47 (5th ed. 2014), *available at* http:// www. justice.gov/atr/public/divisionmanual/atrdivman.pdf.

[788] *Id.* (explaining that the DOJ's adoption of a policy that favors sunset provisions was "based on a judgment that perpetual decrees were not in the public interest"). In addition to policy

"advise courts that pre-1980 'legacy' decrees, except in limited circumstances, are presumptively no longer in the public interest."[789] The DOJ has suggested, however, that among those "limited circumstances" is "when there is a long-standing reliance by industry participants on the decree."[790] The revised DOJ policy would thus appear to exclude the PRO decrees.

The word "monopoly" came up many times in the written and oral presentations of participants in this study in discussing the continuing significance of the decrees and antitrust oversight. But it is important to understand that there are two distinct types of "monopoly" being referenced, and each requires separate analysis.

The first type of "monopoly" refers to alleged anticompetitive practices on the part of the PROs, and also sometimes of the major publishers and record labels with significant market share. Here the concern is that licensees—for example, a television network or online service—have insufficient leverage to negotiate appropriate licensing fees with the licensor.[791] Excessive market power is the linchpin of antitrust analysis, whether in a government-initiated enforcement action or private litigation;[792] typically, however—and as discussed below in connection with the *Pandora* litigation—the remedies for civil

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concerns, there may be some interesting due process questions concerning the length of the consent decrees.

[789] Press Release, U.S. DOJ, Antitrust Div., Antitrust Division Announces New Streamlined Procedure for Parties Seeking to Modify or Terminate Old Settlements and Litigated Judgments (Mar. 28, 2014), *available at* http://www.justice.gov/atr/public/press_releases/2014/304744.pdf (noting that "[s]ince 1980, there have been significant changes in markets and technology and substantial changes in antitrust law").

[790] *Id.*

[791] Interestingly, the Office heard considerably less about the market power of large technology companies or other dominant distributors of music and whether that poses similar concerns. *But see, e.g.*, MMF & FAC Second Notice Comments at 21-22 (noting the "market power of a few tech giants").

[792] *See* U.S. DOJ & FTC, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 110 (2007), *available at* http://www.justice.gov/atr/public/hearings/ip/222655.pdf ("ANTITRUST ENFORCEMENT AND IP RIGHTS REPORT") ("Whether the legal analysis applied to intellectual property bundling is some form of the per se rule or the more searching rule of reason, a plaintiff will have to establish that a defendant has market power in the tying product."); *cf. Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42-43 (2006) (explaining the following about tying arrangement involving patented products: "While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a market wide conspiracy, . . . that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof."); *see also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 2 (4th ed. 2011) ("An important goal of antitrust law-arguably its only goal—is to ensure that markets are competitive.").

antitrust violations do not involve long-term government price controls. Such remedies instead tend to focus on injunctive relief to address the particular anticompetitive behavior in question and/or the payment of one-time fines.[793]

The second type of monopoly referenced by participants is a wholly different one, namely, the limited "monopoly" in an individual work that is conferred by virtue of the exclusive rights granted under the Copyright Act. Even though it is not a product of collective activity, these exclusive rights probably play no less of a significant role in debates about music licensing. Many licensees—for example, large online providers—believe they must have access to complete, or virtually complete, catalogs of sound recordings and musical works in order to compete in the marketplace. A compulsory license—at least in theory—can make that possible.

But compulsory licensing removes choice and control from copyright owners who seek to protect and maximize the value of their assets. An increasingly vocal number of copyright owners believe they should be able to withhold their works from low-paying or otherwise objectionable digital services, in part because such services may cannibalize sales or higher-paying subscription models. Taylor Swift's widely publicized decision to pull her catalog from the leading streaming provider Spotify because she did not want her songs available on Spotify's free tier of service has been widely reported, and other artists appear to be following suit.[794] Similarly, artist manager Irving Azoff of GMR has reportedly threatened YouTube with a billion-dollar lawsuit if they do not remove his clients' repertoire from their site.[795] In order to take such action—and demand higher

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[793] *See, e.g.*, Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, 3 J. COMPETITION L. & ECON. 471, 477 (2007) (explaining that, in expressing its preference for structural remedies over conduct remedies in situations involving anticompetitive merger, the DOJ "explicitly criticizes price agreements as a component of consent decrees" and that the "[DOJ] disfavors using consent decrees to fix a price or an allowable range of prices for the post-merger firm"); *see also* HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY & CHRISTOPHER R. LESLIE, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW 22-62 (2d ed. Supp. 2013) ("As a general matter, antitrust should not favor solutions that turn the federal courts into price control agencies.").

[794] Dickey, *Taylor Swift on* 1989, *Spotify, Her Next Tour and Female Role Model (*quoting Taylor Swift: "I think that people should feel that there is a value to what musicians have created, and that's that.") *see* Mitchell Peters, *Big Machine's Scott Borchetta Explains Why Taylor Swift Was Removed From Spotify*, BILLBOARD (Nov. 8, 2014), http://www.billboard.com/articles/news/6312143/big-machine-scott-borchetta-explains-taylor-swift-1989-removal-from-spotify-nikki-sixx (quoting Big Machine Label Group CEO Scott Borchetta: "We determined that her fan base is so in on her, let's pull everything off of Spotify, and any other service that doesn't offer a premium service . . . Now if you are a premium subscriber to Beats or Rdio or any of the other services that don't offer just a free-only, then you will find her catalogue."); Bogursky, *Taylor Swift, Garth Brooks and other artists lead the fight against Spotify*.

[795] Gardner, *Pharrell Williams' Lawyer to YouTube: Remove Our Songs or Face $1 Billion Lawsuit*.

compensation—the use cannot be subject to mandatory licensing.[796] But for those under a compulsory license or a consent decree, it is not possible to say no.

In this regard, it is interesting to compare music to other types of copyrighted works, for example, television shows and movies. Like music, a particular television show or movie may not be a fully satisfying substitute for another—or a substitute at all. But consumers do not expect to be able to access every television show through Hulu, or every movie through Netflix. It is understood that different services can and will offer different content.

Even within the music universe, the law treats sound recordings and musical works differently with respect to the right to say no. We seem to accept the fact that a licensee offering downloads or interactive streaming will need to negotiate deals with major and independent record labels, or forgo the content. On the musical work side, however, government policy has subjected these same uses to government-mandated licensing.

Even given greater latitude to make licensing decisions, it would seem that musical work owners would be strongly incentivized to license services that they believed would pay a reasonable return. This seems to be true of the record labels, which have authorized a wide range of download and interactive music services outside of a mandatory licensing regime.[797] But the labels are not required to license services that show little promise or value. Why is this demanded of music publishers and songwriters?

The Office believes that the question of whether music copyright owners should be able to choose whether to agree to a license is an especially critical one. Understandably, those seeking permission to use music appreciate the security of compulsory licensing processes and certainty of government-set rates—as buyers of content likely would in any context.[798] But modern competition law does not view the rights enjoyed by copyright owners as intrinsically anathema to efficient markets. As the DOJ itself has explained, "antitrust doctrine does not presume the existence of market power from the mere presence of an intellectual property right."[799]

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[796] Notably, Swift's sound recordings are not subject to compulsory licensing when used for interactive services, and GMR's clients—who are not represented by ACSCAP or BMI—have asserted rights not covered by the consent decrees.

[797] RIAA First Notice Comments at 30 n.43; *see also Find a Music Service*, WHYMUSICMATTERS.COM, http://whymusicmatters.com/find-music (last visited Feb. 2, 2015) (listing licensed music services).

[798] For example, in a 2011 study conducted by the Copyright Office, cable and satellite operators operating under the section 111, 119 and 122 compulsory licenses expressed strong opposition to the possibility of phasing them out. STELA REPORT at 8.

[799] ANTITRUST ENFORCEMENT AND IP RIGHTS REPORT at 2.

As a general matter, the Office believes that certain aspects of our compulsory licensing processes can and should be relaxed. But this does not mean that antitrust concerns should be overlooked. Many pertinent considerations have been raised in the DOJ's parallel consideration of the ASCAP and BMI consent decrees. The Office strongly endorses that review, and—in light of the significant impact of the decrees in today's performance-driven music market—hopes it will result in a productive reconsideration of the 75-year-old decrees. At the same time, the Office observes that it is Congress, not the DOJ, that has the ability to address the full range of issues that encumber our music licensing system, which go far beyond the consent decrees.

2. The PROs and the Consent Decrees

Since the first part of the twentieth century, ASCAP and BMI have provided critical services to songwriters and music publishers on the one hand, and myriad licensees on the other, in facilitating the licensing of public performance rights in musical works. SESAC, though smaller, has also played an important role in this area, administering performance rights for a select group of clients. More recently, GMR has come onto the scene as a fourth contender in the performance rights arena with an impressive client roster. Each of these organizations offers repertoire-wide—or "blanket"—licenses for the musical works they represent, with the four together essentially representing the entire spectrum of musical works available for licensing in the U.S., including many foreign works. Blanket licenses are available for a wide range of uses, including terrestrial, satellite, and internet radio, on-demand music streaming services, website and television uses, the performance of recorded music in bars, restaurants, and other commercial establishments, and live performances as well.

As detailed above, both ASCAP and BMI, unlike their smaller competitors SESAC and GMR, are subject to continuing consent decrees. The decrees, overseen by federal district courts in New York City (typically referred to as the "rate courts"), were last updated before the rise of licensed digital music services—in the case of BMI, in 1994, and in the case of ASCAP, in 2001. The consent decrees impose significant government-mandated constraints on the manner in which ASCAP and BMI may operate. Among other things, ASCAP and BMI are required to grant a license to any user who requests one, without payment of royalties until a royalty rate is set by negotiation or following litigation before the rate court. Under its decree, ASCAP may not issue mechanical licenses for the reproduction or distribution of musical works; while the BMI consent decree is silent on this point, BMI has not itself issued mechanical licenses. Except to the extent a licensee seeks a narrower license—such as a "per-program" license or a blanket license with "carveouts" for directly licensed works—ASCAP and BMI are required to license all works in their repertoire.

a. *Pandora* Analysis

Publisher Withdrawals

In 2013, as part of pending ratesetting litigation with the internet radio service Pandora, both the ASCAP and BMI rate courts—applying slightly different logic—interpreted the consent decrees as prohibiting music publishers from withdrawing authorization to license their songs for particular types of uses.[800] Major music publishers had sought to withdraw their "new media" (*i.e.*, online and mobile usage)[801] rights from the PROs in an effort to negotiate with Pandora directly to achieve higher rates than what they believed they would otherwise be awarded in court.[802]

Following their decisions to withdrawal, EMI agreed to a rate equivalent to the existing ASCAP rate of 1.85% for services like Pandora (but without deductions for ASCAP's fees); Sony/ATV negotiated for a prorated share of an industrywide rate of 5% (which translated to a 2.28% implied rate for ASCAP); and UMG obtained a prorated share of 7.5% (or a 3.42% ASCAP rate).[803] Subsequently, however, the two rate courts held that these publishers could not selectively withdraw specific rights from ASCAP or BMI to be negotiated independently. Instead, the publishers had to be "all in" or "all out."[804]

In the wake of these decisions, the three publishers who had sought to withdraw, (now two, as Sony/ATV has since become affiliated with EMI), are, for the moment, back "in," and ASCAP and BMI have petitioned the DOJ to modify their decrees to allow these sorts of partial withdrawals by their publisher members. With the petitions pending, however, both Sony/ATV and UMPG—which together represent some 50% of the music publishing market[805]—have made it clear that they may well choose to withdraw *all* rights from the PROs in the future.

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800 *In re Pandora*, 2013 WL 5211927, at *11; *BMI v. Pandora*, 2013 WL 6697788, at *5.

801 "New media" services are those available by means of the internet, a wireless mobile telecommunications network, and/or a computer network. *In re Pandora*, 2013 WL 5211927, at *2; *BMI v. Pandora*, 2013 WL 6697788, at *2.

802 To some degree, the move to withdraw was also likely spurred by technological evolution. Unlike traditional media such as broadcast radio stations, digital providers are equipped to track and report each use of a musical work (for example, each time a song is streamed to an individual subscriber) and thus provide full census reporting to a copyright owner. When such census reporting is available, there is no need for an intermediary organization such as a PRO to survey or sample the service to allocate royalty payments among songwriters; a publisher has the means to allocate the royalties itself. Thus, it is more feasible for the publisher to self-administer a directly negotiated license.

803 *Pandora Ratesetting*, 6 F. Supp. 3d at 330, 339-40, 355.

804 *In re Pandora*, 2013 WL 5211927, at *11; *BMI v. Pandora*, 2013 WL 6697788, at *5.

805 Christman, *First-Quarter Music Publishing Rankings: SONGS Surges Again*.

The specter of across-the-board withdrawal by the major publishers from ASCAP and BMI is concerning to many in the music sector. The three major publishers—Sony/ATV, UMPG, and Warner/Chappell—together represent approximately 63% of the U.S. music publishing market,[806] and the songwriters they represent (as well as the publishers themselves) currently license the vast majority of their performance rights through the PROs.[807] The Office agrees that the full withdrawal of leading publishers from ASCAP and BMI would likely significantly disrupt the music market by fundamentally altering the licensing and payment process for the public performance of musical works without an established framework to replace it, at least in the short run.

On the user side, as might be predicted, many strongly prefer the government-supervised PRO system over the unregulated negotiation of rights, and oppose the movement toward withdrawal. While many licensees—such as commercial radio and television stations represented by RMLC and TMLC—are successful in negotiating (rather than litigating) rates with ASCAP and BMI under the current regime, it is reassuring to them to know that they can turn to a federal court if they view it as a better option. Like the radio and television sectors, digital services, including Pandora (whose recent rate court litigation is discussed below), also strongly favor government oversight of music publishers' licensing practices.

Notably, although SESAC is not subject to a consent decree, television and radio licensees recently sued that organization in separate actions for alleged anticompetitive licensing practices.[808] SESAC settled the television case by agreeing to reimburse the television station plaintiffs almost $60 million in licensing fees[809] (the radio case remains pending). Without opining on their merits, the Office observes that these cases illustrate the importance and corrective potential of private enforcement actions outside of the consent decree environment.

Concerns about the impact of large publisher withdrawals are not limited to the user side. Songwriters, too, are apprehensive. According to longstanding industry practice, songwriters are paid their "writer's share" of performance royalties directly by the PROs; these monies do not flow through the publishers. In a world of direct licensing, publishers would not be required to adhere to established standards for the reporting and payment of royalties, such as those employed by ASCAP and BMI. Songwriters

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806 *See id.*

807 *See* Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*.

808 *See Meredith Corp.*, 1 F. Supp. 3d 180; *RMLC v. SESAC*, 29 F. Supp. 3d 487.

809 *See* Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement 1-2, *Meredith Corp. v. SESAC, LLC.*, 1 F. Supp. 3d 180 (S.D.N.Y. 2014) (No. 09-cv-9177); *Meredith Corp. v. SESAC, LLC*, No. 09-cv-9177 (S.D.N.Y. Oct. 31, 2014) (order granting preliminary approval of settlement).

worry that direct licensing could thus result in a system with much less accountability and transparency than they currently enjoy under the PROs.

There is a particular concern about publishers' treatment of advance payments and licensing fees by music services, as such monies may not be accounted for by the publisher in a transparent fashion. This, in turn, raises a question in songwriters' minds as to whether withdrawal would exacerbate this problem.[810] In addition, apart from any contractual issues in relation to American songwriters, non-U.S. writers who assign their rights exclusively to their local societies—which in turn enter into contractual relationships with ASCAP and BMI to collect royalties on their behalf in the United States—do not see how they can properly be subject to U.S. publisher withdrawal.[811] On top of all this, a precipitous decline in overall royalty throughput would almost certainly result in markedly increased—and perhaps prohibitive—administrative costs for those who remained affiliated with ASCAP and BMI.

An interesting question is whether significantly decreased market shares on the part of ASCAP and BMI due to major publisher withdrawals would, paradoxically, obviate the need for ongoing government control of those organizations. From a practical perspective, one might question why ASCAP and BMI would remain subject to significant government controls if larger market competitors (*i.e.*, the major publishers) were not subject to such supervision. We assume that the DOJ may address this issue in its forthcoming analysis.

Rate Decision

Following the rulings on withdrawal, the ASCAP court, in a lengthy opinion, proceeded to determine a "reasonable fee" of 1.85% for Pandora, applying a "hypothetical" "fair market value" standard.[812] In so doing, the court was dismissive of the publishers' frustrations with the rate court process and their "envy" of the much higher rates being paid by Pandora to sound recording owners (over 50% of revenues versus the publishers' combined market share of 4%)[813]—which sound recording rates in any event the court could not consider as a result of the statutory bar in section 114(i).[814]

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[810] *See, e.g.*, SGA First Notice Comments at 8-9.

[811] MMF & FAC Second Notice Comments at 46 (reproducing the "MMF Public response to the Sony/ATV Statement").

[812] *Pandora Ratesetting*, 6 F. Supp. 3d at 353-54, 372.

[813] *Id.* at 333, 366.

[814] 17 U.S.C. § 114(i) provides that "[l]icense fees payable for the public performance of sound recordings . . . shall not be taken into account in any . . . proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."

The court sharply criticized Sony/ATV's and UMPG's efforts to negotiate higher rates with Pandora outside of the confines of the consent decree that could then serve as benchmarks in the rate court proceeding. Finding the publishers' tactics objectionable—especially in light of the fact that Pandora could face large-scale copyright liability if it failed to conclude licenses—it rejected the outside agreements as suitable benchmarks.[815] Among other things, the court took issue with Sony/ATV's and UMPG's failure to provide lists of the compositions they owned to Pandora so Pandora could remove their respective works from its service if necessary.[816]

While the court's opinion suggests that Sony/ATV and UMPG may have engaged in anticompetitive behavior by "purposefully set[ting] out" to "create higher benchmarks," and also expressed concern about the publishers' "coordinated" behavior in withdrawing new media rights—as well as their aggressive negotiation strategies—the court ultimately concluded that it had "no need to explore which if any of [their] actions was wrongful or legitimate."[817] In this regard, while it was not the only aspect of the publishers' conduct that troubled the court, it is hard to see how the mere desire to seek higher royalty rates could constitute an antitrust violation—or the fact that the CEO of Sony/ATV appeared in a news article "in shirt sleeves with a large cigar in his mouth" to boast of the higher rate he had negotiated with Pandora.[818]

Undoubtedly, the *Pandora* court believed itself to be carrying out the purpose of the ASCAP decree, and the decree, of course, is meant to address antitrust concerns. But the opinion is notable for its focus on the behavior of a handful of actors instead of an empirically based economic analysis of the proper rate for Pandora. For example, rejecting ASCAP's arguments that the court should consider Pandora's commercial success as part of its inquiry, the court opined that "market share or revenue metrics are poor foundations on which to construct a reasonable fee."[819] Yet it seems that these factors might well be considered by parties in an actual market negotiation.

Additionally, even assuming for the sake of argument that Sony/ATV's and UMPG's negotiation tactics had unequivocally been found by the court to cross the line from forceful negotiations to anticompetitive conduct, it must be remembered that the rate set by the court applies not only to those companies, but to all other publisher and songwriter members of ASCAP as well. Such a court-ordered rate is also likely to heavily influence the market for the other PROs, and hence the industry as a whole. A question arises, then, as to whether the court's repudiation of specific conduct on the

[815] *Pandora Ratesetting*, 6 F. Supp. 3d at 360-61

[816] *Id.* at 345-46, 361.

[817] *Id.* at 357-58.

[818] *Id.* at 347.

[819] *Id.* at 369.

part of some by rejecting the possibility of a higher rate represents a fair outcome for the rest of the industry.

Availability of Song Data

As a general matter, the Office concurs with the apparent view of the *Pandora* court that a service should be able to ascertain what works are covered under a license so as to permit the service to remove unauthorized works if necessary. Infringement liability should not arise from a game of "gotcha." Since the *Pandora* decision, it appears that both Sony/ATV and UMPG have made efforts to make their song data available to licensees.[820] In addition to such voluntary efforts, the Office believes that government policies should strongly incentivize the public availability of song ownership data for works in the marketplace, a topic that is addressed in more depth below.

b. PRO Ratesetting Process

This above section reviews the *Pandora* decision in some detail because it illuminates an important policy concern: namely, whether we should continue to blend antitrust oversight with industry rate proceedings as envisioned under the consent decrees. In the *Pandora* litigation, this approach appears to have yielded a mixture of competition and ratesetting considerations, without a satisfying analysis of either. The Office is of the view that allegations of anticompetitive conduct are worthy of evaluation (and, if appropriate, remedial action) separate and apart from the question of a fair rate—and vice versa. Each of these two critical policy objectives merits government attention in its own right.[821]

The Office therefore proposes that the ratesetting aspects of PRO oversight be separated from whatever government supervision is determined still to be necessary to address antitrust concerns.

Migrate to Copyright Royalty Board

Assuming PRO ratesetting is separated from any ongoing antitrust oversight, the Office proposes that the function of establishing rates be migrated to the CRB.[822] Industry

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[820] *See* Ed Christman, *Sony/ATV Makes Organized Catalog Available Online*, BILLBOARD (July 16, 2014), http://www.billboard.com/biz/articles/news/publishing/6157855/sonyatv-makes-organized-catalog-available-online; Ed Christman, *UMPG to Make Entire Database Easier for Licensees*, BILLBOARD (June 27, 2014), http://www.billboard.com/biz/articles/news/publishing/6140985/umpg-to-make-entire-database-easier-for-licensees.

[821] *See* EPSTEIN at 36 (concluding that "there is no comparative advantage in using a judicial body as opposed to some administrative agency" for ratesetting).

[822] ASCAP and BMI also seek to have rate disputes decided outside of federal court. Both have recommended some sort of system of (apparently private) arbitration without providing much detail. ASCAP First Notice Comments at 4, 23-24 (recommending "expedited private

ratesetting is, of course, a primary function of the CRB, and the CRB has the benefit of experience assessing a broader spectrum of rate-related questions than the federal rates courts. Significantly, the CRB sets rates on the sound recording side as well as for musical works. It also has in-house economic expertise. While, as discussed below, interested parties appear to agree that the statutory framework governing the CRB's procedures could stand some improvement, on the whole it seems only logical to consolidate music ratesetting proceedings in a single specialized tribunal.

In offering the suggestion that the CRB assume responsibility for the rates applicable to the public performance of musical works, the Office does not mean to suggest that the CRB should not question the legitimacy of particular benchmarks if there is reason to do so (as the CRB in fact routinely does in ratesetting proceedings). But the ultimate aim of the proceeding should be a fair rate for the industry as a whole, rather than the enforcement of antitrust policy. The Office believes that a process focused on industry economics rather than antitrust analysis offers a more auspicious framework to establish broadly applicable rates.

Under the Office's proposal, discussed in more detail below, the CRB, like the rate courts, would step in to set a rate only when it could not be agreed as between the relevant parties. Such ratesetting activities would not need to occur on a five-year schedule, as under the current CRB system, but would be commenced on an as-needed basis, like today's proceedings before the ASCAP and BMI rate courts. Additional parties seeking to resolve the same rate issue could be offered the opportunity to join the proceeding. Assuming the experience were similar to that of the rate courts, the vast majority of rates would be agreed voluntarily rather than litigated.

Assuming the ratesetting authority for the public performance of musical works were transferred from the rate courts to the CRB, a question arises as to whether the separation of ratesetting and antitrust responsibilities would provide the occasion to sunset the decrees and adopt a more modern approach to antitrust oversight in this area. Under a more flexible approach, the DOJ would investigate and address potential anticompetitive behavior on an as-needed basis, rather than continue to impose presumptive restrictions under the consent decrees. As noted above, private

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arbitration"); *Music Licensing Hearings* at 52(statement of Michael O'Neill, CEO, BMI) ("We believe that replacing the current rate court with arbitration in New York under the American Arbitration Association rules would be a faster, less expensive, and a more market-responsive mechanism for all parties to obtain fair, market-value rate decisions."). For the reasons discussed above, the Office believes the CRB is the logical venue to determine public performance rates. As an added benefit, the CRB does not depend upon the payment of private arbitration fees (a significant factor in the demise of the CARPs that preceded the CRB). *See* H.R. REP. NO. 108-408, at 21, 99-100. At the same time, based on stakeholders' input, the Office is recommending certain changes to the CRB system, which are outlined below.

enforcement actions, as well, could play a role in policing alleged misconduct. We leave such questions of antitrust policy for the DOJ to answer.

Section 114(i)

Regardless of whether PRO ratesetting is migrated to the CRB, as further discussed below, the Copyright Office endorses the proposal—embodied in the proposed SEA legislation[823]—that the prohibition in 114(i) that currently prevents ratesetting tribunals from considering sound recording performance royalties be eliminated. Originally designed as a protective measure to benefit songwriters and publishers, it appears to be having the opposite effect. Contrary to the suggestion of the *Pandora* court,[824] the Office does not understand why, absent such a restriction, it might not be relevant to consider sound recording royalties in establishing a fair rate for the use of musical works should a ratesetting authority be so inclined.[825]

Interim Fees

Under the consent decrees, anyone who applies for a license receives one. There is no requirement of immediate payment. As discussed above, an applicant has the right to perform musical works in a PRO's repertoire pending the completion of negotiations or rate court proceedings resulting in an interim or final fee.[826] Since the consent decrees do not provide for immediate and concurrent payment for uses made during these periods—and do not establish a timeframe for the commencement of a rate court proceeding—an applicant is able to publicly perform a PRO's catalog of works for an indefinite period without paying.[827] Needless to say, commercial entities do not typically receive a steady supply of product for months or years based on a mere letter request. But such is the case with music.

The problem is exacerbated by the substantial burden and expense of litigating a rate in federal court—a contingency both sides seek to avoid. Licensees may pay nothing or greatly reduced fees for years as negotiations drag on, while still enjoying all of the benefits of a license. The Office agrees with those commenters who have suggested that this system—under which services may launch and continue to operate without an agreed rate—significantly increases the leverage of licensees at the expense of the PROs

[823] SEA, H.R. 4079; SEA, S. 2321, 113th Cong. (2014).

[824] *Pandora Ratesetting*, 6 F. Supp. 3d at 366-67.

[825] The Office does not believe that the fact that the limitation was originally proposed by musical work owners, even if ill-conceived, is a sufficient basis to determine it should continue in effect.

[826] *See* ASCAP Consent Decree § IX.E; BMI Consent Decree § XIV.A.

[827] ASCAP First Notice Comments at 15-16; BMI First Notice Comments at 16-17.

and their members.[828] Because the licensee already has access to the works it needs, there is no urgency to agree to a rate.

Once again, the Office does not see why music is treated differently from the goods of other suppliers in the marketplace. A fair and rational system should require licensees to pay at least an interim rate from the inception of their service, subject to a true-up when a final rate is negotiated with the PRO or established by the ratesetting authority.

Notably, both the ASCAP and BMI consent decrees include a process for the rate court to set interim rates. In practice, however, it seems that this option—which, at least for BMI, entails up to four months of discovery and motion practice[829]—is not commonly exercised. Likely this is due to parties' reluctance to undertake the considerable burden and expense of federal court litigation, especially when the result is only a temporary one.[830]

The Office is of the view that to the extent a licensing entity is required to grant a license upon request, there should be a viable (not merely theoretical) mechanism—for example, a brief, single-day hearing before the ratesetting authority (*e.g.*, the CRB)—to set an interim royalty rate without undue burden or expense. While nothing is ever as simple as it seems, the Office believes that a workable system should be feasible. For example, a licensee could be required to share a written description of the material aspects of its proposed service, after which both parties would proffer lists of relevant rates already in effect, which together would serve as guidance for the decisionmaker. It should not be necessary to have an elaborate procedure when the temporary rate can be adjusted retroactively. In addition to being more equitable for music owners, the Office believes requiring licensees to pay an interim rate would provide greater incentive to resolve rates through voluntary negotiations at the outset.

c. Partial Withdrawal of Rights

A primary focus of the commentary to the Copyright Office—and to the DOJ in its review of the consent decrees—is music publishers' ability (or inability) to withdraw specific categories of licensing rights from their authorizations to the PROs. The

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828 *See also, e.g.*, MMF & FAC Second Notice Comments at 10 ("As far as we know most of the societies in the EU require potential licensees to provide important financial and operational data (and in the case of a startup, their business projections, and projected user numbers) when making their application. To us this seems sound common sense and, coupled with an ability by societies to require an interim payment, would rebalance the negotiating process more fairly.").

829 *See* BMI Antitrust Consent Decree Review Comments at 20-21. The ASCAP consent decree requires that the court set an interim rate within 90 days of a request. *See* ASCAP Antitrust Consent Decree Review Comments at 12.

830 *See* ASCAP Antitrust Consent Decree Review Comments at 14 n.20; BMI Antitrust Consent Decree Review Comments at 21.

purpose of such withdrawals would be to allow music owners to negotiate in the marketplace for the exploitation of their songs—or, if not satisfied with the price offered, to withhold their songs from particular services. This has an analog in much of the discussion surrounding section 115, another area where publishers and songwriters seek the ability to escape from mandatory licensing.

As noted above, except in the case of internet radio providers that qualify for the section 112 and 114 statutory licenses, record companies are free to negotiate with potential licensees in the open market. But for music publishers, it is the exception rather than the norm, as the licensing of both mechanical and performance licenses is largely subject to government mandate.

There is substantial evidence to support the view that government-regulated licensing processes imposed on publishers and songwriters have resulted in depressed rates, at least in comparison to noncompulsory rates for the same uses on the sound recording side. Setting aside efficiency concerns, the Office does not see a principled reason why sound recording owners are permitted to negotiate interactive streaming rates directly while musical work owners are not. The Office is therefore sympathetic to the publishers' position that they should be permitted to withdrawal certain rights from the PROs to permit market negotiations. The Office believes that partial withdrawal—in the form of a limited right to "opt out"—should be made available to those who want it. This view is reinforced by the possibility of wholesale defections by major (and perhaps other) publishers from ASCAP and BMI if government controls are not relaxed, and the potential chaos that would likely follow.

Any such opt-out process would need to be carefully managed to ensure licensees did not face undue burdens in the licensing process as a result. At least for now, the Office believes that withdrawal of performance rights should be limited to digital rights equivalent to those that the record labels are free to negotiate outside of section 112 and 114—essentially, interactive streaming rights for new media services. In the case of such a partial withdrawal, the publisher would be free to pursue a direct deal for the rights in question (or, if not satisfied with a licensee's offer, withhold songs from the service in question).

Publishers who chose to opt out would need publicly to identify the particular uses subject to withdrawal, the licensing organization from which they were being withdrawn, each of the affected works, where a direct license might be sought, and other pertinent information.[831] As discussed below, it is the Office's recommendation that a non-profit general music rights organization ("GMRO") be designated by the Copyright Office to receive, maintain and offer access to this information. The Office additionally proposes that the current PROs be permitted to expand to become to become music

[831] The proposed opt-out right would be by publisher, not by individual work.

rights organizations ("MROs") that would be capable of administering not just performance rights but mechanical and perhaps other musical work rights as well.[832]

While the publisher would presumably choose to be paid directly by the licensee under any resulting outside licensing arrangement rather than through an MRO, in order to ensure songwriters' confidence in the accounting and payment process, the Office believes that songwriters affiliated with that publisher should retain the option of receiving their writer's share of royalties directly from the licensee through their chosen MRO.[833]

Finally, to the extent publishers failed to affiliate with an MRO, their performance rights would fall under the default licensing authority of the GMRO, which, as described below, would collect royalties and distribute them to publisher claimants. The combination of direct deals, MRO-issued licenses, and the GMRO backstop would allow licensees to secure full licensing coverage for necessary performance rights.

d. Bundled Licensing

During the study, industry stakeholders broadly supported increased bundling of rights to facilitate greater licensing efficiency. On the sound recording side of the equation, this does not appear to be much of an issue. To the extent noninteractive services procure licenses under section 112 and 114, they obtain both digital performance rights and the reproduction rights (*e.g.*, server copy rights) needed to engage in the streaming process. When services negotiate licenses outside of the statutory scheme, the labels are free to bundle all necessary rights together.

On the musical work side, however, the story is different. Licenses for the reproductions necessary to support an interactive streaming service are issued under section 115, whereas licenses for the streamed performances of the works are obtained from the PROs. In 2008, following a lengthy Copyright Office administrative proceeding and industrywide settlement, the CRB adopted regulations that effectively establish bundled rates for various types of streaming activities, under which the total cost of licensees' PRO performance licenses is deducted from the overall percentage rate applicable to the relevant service under section 115.[834] But while the royalty rate problem may have been

[832] As discussed above, the concept of MROs was proposed by former Register Marybeth Peters in testimony before Congress in 2005. *Copyright Office Views on Music Licensing Reform Hearing* at 21-36 (statement of Marybeth Peters, Register of Copyrights).

[833] This option could also help to alleviate concerns about the status of non-U.S. writers affiliated with foreign PROs if the U.S. publisher of their works chooses to pursue partial withdrawal.

[834] *See* Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4531-32 (setting forth the CRB's proposed regulations that established the rates and terms for the use of musical works in limited downloads, interactive streaming and incidental digital phonorecord deliveries); *see also* Compulsory License for Making and Distributing Phonorecords,

addressed, an interactive service must still obtain separate mechanical and performance licenses and report complex accounting information under these two different licensing regimes (song-by-song licensing under section 115 versus blanket licensing by the PROs).

In 2005, former Register of Copyrights Marybeth Peters proposed moving from a dualistic approach for the licensing of musical works for mechanical and performance purposes to a system of integrated music rights organizations, or MROs.[835] At the time—when mechanical royalties represented a more significant income stream then they do today—music publishers and songwriters expressed considerable skepticism about such a bundled approach.[836] Today, in an era where mechanical royalties are becoming more marginal, Register Peters' proposal appears prescient, and enjoys support among publishers, songwriters and—not surprisingly—digital licensees.[837] It now seems apparent that the government should pursue appropriate changes to our legal framework to encourage bundled licensing, which could eliminate redundant resources on the part of both licensors and licensees.

As touched upon above, the most obvious step in this regard would be to allow existing music licensing organizations to expand to fill this role—the PROs would be permitted to take on mechanical licensing, and mechanical licensing entities such as HFA or MRI could integrate performance rights into their businesses. To satisfy reporting and payment obligations under songwriter or other agreements that distinguish between these rights, some sort of allocation of income as between the two rights would likely be required. This perhaps could be addressed by the CRB in establishing bundled rates (as under the section 112 and 114 licenses), or by the individual MROs in administering negotiated licenses.[838]

Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173, 66,180 (adopting rule that permitted server and other copies necessary to certain streaming processes to be licensed under section 115).

[835] *See Copyright Office Views on Music Licensing Reform Hearing* at 6 (statement of Marybeth Peters, Register of Copyrights).

[836] *See, e.g.*, *id.* at 62 (statement of NMPA) ("[W]e believe the Copyright Office proposal is fatally flawed and would be harmful to songwriters and music publishers.").

[837] Such a unified licensing model has been in effect for 17 years in the United Kingdom. *Our History*, PRSFORMUSIC, http://www.prsformusic.com/aboutus/ourorganisation/ourhistory/Pages/default.aspx (last visited Jan. 22, 2015).

[838] The U.K.'s unified licensing system may provide a helpful model in this regard. PRS for Music was created by joining together the U.K. Performing Right Society ("PRS") and the Mechanical Copyright Protection Society ("MCPS"). For royalties received under its unified licenses, the PRS for Music distribution committee determines various splits between PRS and MCPS depending upon the type of use, which allocations are subject to ratification by the PRS and MCPS boards.

3. Mechanical Licensing and Section 115

As sales of CDs continue to slip away, mechanical licensing revenues for the reproduction and distribution of musical works under section 115—once the primary source of income for publishers and songwriters—likewise continue to decline.[839] Although sales of digital downloads through services like Apple iTunes have bolstered mechanical royalties in recent years, even DPD sales have fallen off with the rise of streaming services such as Spotify. Even so, mechanical revenues still currently represent about 23% of income for musical works (as compared to 52% generated by performances, 20% by synch uses, and 5% by other uses).[840] Of the mechanical share, a small amount is generated by the server and other reproductions of musical works required for online providers to operate interactive streaming services which, as noted above, also pay performance royalties.

Commenting parties have focused on two primary areas of concern with respect to the 106-year old compulsory license embodied in section 115. The first, put forth by music publishers and songwriters, is that the compulsory license does not permit them to control the use of their works or seek higher royalties. Relatedly, rightsowners also complain about the lack of an audit right under section 115 and practical inability to enforce reporting or payment obligations against recalcitrant licensees.

The second overarching concern with respect to section 115 is its song-by-song licensing requirement, which dates back to the original incarnation of the compulsory license in 1909. Song-by-song licensing is viewed by music users as an administratively daunting—if not sisyphean—task in a world where online providers seek licenses for millions of works.

a. Free Market Negotiation Versus Collective Administration

One of the most challenging issues to arise in this study has been whether musical work owners should be liberated from the section 115 compulsory licensing regime. Citing

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PRS Distribution Policy Rules, PRSFORMUSIC, http://www.prsformusic.com/creators/memberresources/Documents/Distribution%20policy/Distribution%20Policy%20Rules%20as%20at%20November%202014.pdf (last visited Jan. 22, 2015). Out of those splits, 100% of mechanical royalties are paid to the publisher, while performance royalties are split 50/50 between writer and publisher unless an alternate division of royalties is specified. *Music Registration Policy*, PRSFORMUSIC, http://www.prsformusic.com/creators/memberresources/how_it_works/musicregpolicy/Pages/musicregpolicy.aspx (last visited Jan. 22, 2015).

[839] *See* ASCAP Second Notice Comments at 23.

[840] Ed Christman, *NMPA Puts U.S. Publishing Revenues at $2.2 Billion Annually*, BILLBOARD (June 11, 2014), http://www.billboard.com/biz/articles/news/publishing/6114215/nmpa-puts-us-publishing- revenues-at-22-billion-annually.

the significantly higher rates paid to sound recording owners for uses where musical work owners are regulated and sound recording owners are not—and the contrasting example of the unregulated synch licensing market, where in many cases licensing fees are evenly apportioned—music publishers and songwriters have made a convincing case that government regulation likely yields rates below those they would enjoy in a free market. Motivated by concerns similar to those raised in connection with the consent decrees, many musical work owners would like to see an end to section 115. The Office—which, as noted, believes that compulsory licensing should exist only when clearly needed to address a market failure—is sympathetic to these claims.

On the other hand, in comparison to the record industry—where three major companies can issue licenses for much of the most sought-after content, with independent labels representing the balance[841]—U.S. musical work ownership is more diffusely distributed over a greater number of entities and self-published songwriters.[842] Unlike sound recordings—which are typically wholly owned by an individual label—many musical works are controlled by two, three or even more publishers. Notwithstanding the default rules of joint copyright ownership, publishers and songwriters frequently have understandings that they are not free to license each other's respective shares.[843] And there are millions of musical works in the marketplace. Spotify, for instance, reports that it offers some 30 million songs on its service.[844]

Understandably, as described above, digital music providers are intensely opposed to a system that would require individual licensing negotiations with thousands of musical work owners. Even publisher proponents of the proposal to sunset section 115 do not

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[841] Although three record companies dominate, independent record labels enhance the market with a rich variety of content, including well-known hit recordings. A2IM First Notice Comments at 1 ("Billboard Magazine, using Nielsen SoundScan data, identified the Independent music label sector as 34.6 percent of the music industry's U.S. recorded music sales market in 2013."). Many independent labels are represented by organizations that aggregate repertoire for collective licensing, such as the U.K.-based Merlin, which issues licenses to digital services such as YouTube and Spotify on a global basis. *Merlin Strikes Licensing Deal with YouTube*, MERLIN (Oct. 19, 2011), http://www.merlinnetwork.org/news/post/merlin-strikes-licensing-deal-with-youtube.

[842] In recent years, as with recorded music, there has been significant consolidation in the music publishing industry, such that the three major publishers now represent some 63% of the market—approaching the record company figure of 65%. *See* Christman, *First-Quarter Music Publishing Rankings: SONGS Surges Again*; Bruce Houghton, *Indie Labels Now Control 34.6% Of U.S. Market*, HypeBot (Jan. 16, 2014), http://www.hypebot.com/hypebot/2014/01/indie-labels-now-control-346-of-us-market.html.

[843] *See, e.g*, PASSMAN at 304-05 (explaining that "[t]rue co-administration" deals, in which all parties retain the right to administer their own share of a composition, are among the most common arrangements for songs co-owned by publishers of approximately equal status).

[844] *Information,* SPOTIFY, https://press.spotify.com/us/information/ (last visited Jan. 22, 2015).

deny that it would be extraordinarily difficult for services to negotiate with myriad small copyright owners for all of the mechanical licenses they seek, and concede that there must be some sort of collective system to facilitate licensing from smaller rightsowners.[845] But apart from the optimistic view that should section 115 be retired, new entities will spring forth to meet this need, there is little detail concerning how a collective solution would reliably be implemented.

The difficulty, then, is how to reconcile the competing values of free market negotiation and collective management of rights. Each represents an express goal of reform: fair compensation to creators, on the one hand, and licensing efficiency, on the other. A middle path may provide the best answer.

Publisher Opt-Out Right

The Office believes that rather than eliminating section 115 altogether, section 115 should instead become the basis of a more flexible collective licensing system that will presumptively cover all mechanical uses except to the extent individual rightsowners choose to opt out. At least initially, the mechanical opt-out right would extend to the uses that could be withdrawn from blanket performance licenses—that is, to interactive streaming rights—and, in addition, to downloading activities[846] (which, by judicial interpretation, do not implicate the public performance right[847]). To reiterate, these are uses where sound recording owners operate in the free market but publishers do not.[848]

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[845] IPAC First Notice Comments at 6 ("Owners of musical works are sympathetic to those entities that need an efficient process by which to obtain licenses for musical works. In that regard, IPAC supports the creation of one or more licensing agencies to negotiate fair market license rates and grant licenses on behalf of the copyright owners of the musical works on a blanket license or individual song basis."); NMPA First Notice Comments at 18 ("Compulsory licensing is not needed to achieve the efficiency of bundled licenses . . . the only thing stopping performance rights organizations such as ASCAP and BMI from offering a bundle of reproduction, performance, and distribution rights from songwriters/publishers willing to appoint them as their agents for such rights are outdated consent decrees.").

[846] The category of downloads includes both permanent downloads and limited downloads. While permanent downloads are available to the purchaser indefinitely, limited downloads can be accessed for only a limited period of time or limited number of plays. 37 C.F.R. § 385.11. Download uses also include ringtones, for which a separate rate has been established under section 115. 37 C.F.R. § 385.3; *see also* Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. at 64,316 (setting forth the Copyright Office's 2006 Memorandum Opinion concluding ringtones qualify as DPDs).

[847] *See United States v. ASCAP*, 627 F.3d 64, 68 (2d. Cir. 2010) (holding that downloading a digital music file over the internet does not constitute a public performance of the work embodied in that file); *In re Cellco Partnership*, 663 F. Supp. 2d 363, 374 (S.D.N.Y. 2009) (holding that downloading a ringtone to a cellular phone does not in and of itself constitute a public performance of a musical work). Also note that musical work owners do not collect mechanical

Full Market Coverage

As envisioned by the Office, the collective system would comprise MROs (as noted, with the ability to represent both performance and mechanical rights) acting on behalf of their respective publisher members; individual publishers (including self-published songwriters) representing their own mechanical licensing interests who had exercised their opt-out right; and the GMRO. Unless they had a direct deal in place, publishers would be paid through their chosen MRO. The GMRO would collect for works (or shares of works) not covered by a direct deal or represented by an MRO—including works with unknown owners—and attempt to locate and pay the relevant rightsholders. Licensees could thus achieve end-to-end coverage through the combination of MROs, direct licensors, and the GMRO.

As in the case of those seeking to withdraw specific performance uses from mandatory licensing, publishers who wished to opt out from one or more of the categories of mechanical licensing would need to identify the uses in question and provide this information (via their MRO if applicable) to the GMRO, along with identification of their works, licensing contact information, and other relevant data.[849] They would then be free to negotiate directly with, and be paid directly by, the licensee.[850] Absent provision of a notice that the publisher was exercising its right to opt out, that publisher's works would be licensed through its MRO.[851]

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royalties for noninteractive streaming uses subject to section 112 and 114 statutory licensing. *See* NMPA First Notice Comments at 24; Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4513.

[848] Although physical products, such as CDs and vinyl records, also fall into this category, stakeholder concerns have focused far less on the physical marketplace, which (despite a recent increase in the niche market of vinyl records) continues to decline. As noted above, the Office believes that the question of opt-out rights for physical product could be deferred for future consideration.

[849] As noted above, at least for the time being, the Office believes that opt-out rights for publishers should be by publisher, not by individual work. Thus, opt-out publishers would be responsible for their entire catalog.

[850] In contrast to performance rights, songwriter agreements do not assume that the writer's share of mechanical royalties will flow through a PRO. Accordingly, while it may be a matter worthy of further discussion, the Office is not now suggesting that songwriters should have the right to redirect their mechanical shares through a chosen MRO.

[851] Some publishers could opt out only to find that the licensee declined to pursue individual negotiations with them. For this reason, it seems it would be useful to have some sort of mechanism for such a rightsowner to reverse its opt-out and return to the collective system if it wished.

Cover Recordings

Section 115 permits digital services and others to reproduce and distribute copies of musical works embodied in existing recordings, provided that the user is also authorized to use the recording.[852] Another dimension of section 115 is that it can be used for permission to make new, "cover" recordings of songs, so long as the new version does not change the basic melody or "fundamental character" of the work.[853]

While the ability to make a cover recording has long been a feature of the law, it is not without controversy, especially among recording artists who write their own works. While some artist songwriters may view imitation as flattery, others do not appreciate that they are unable to prevent the re-recording of their songs by others. Many music creators seek more control over their works. As some artists see it, "[a]pproval is by far the most important right that an artist possesses."[854]

With respect to cover recordings, the Office recommends an approach whereby those who seek to re-record songs could still obtain a license to do so, including in physical formats. But the dissemination of such recordings for interactive new media uses, as well as in the form of downloads, would be subject to the publisher's ability to opt out of the compulsory regime. Thus, a publisher's choice to negotiate interactive streaming and DPD rights for its catalog of songs would include the ability to authorize the dissemination of cover recordings by those means. Or, put another way, where the

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[852] 17 U.S.C. § 115(a)(1).

[853] *Id.* § 115(a)(2).

[854] *See, e.g.*, Dina LaPolt and Steven Tyler, Comments Submitted to the Department of Commerce's Green Paper on Copyright Policy, Creativity, and Innovation in the Digital Economy, at 2 (Feb. 10, 2014), *available at* http:// www.uspto.gov/ip/global/copyrights/lapolt_and_tyler_comment_paper_02-10-14.pdf (objecting to a compulsory remix license). This perspective was voiced by a number of prominent artists in response to a suggestion to consider a new licensing framework for remixes that has been put forth by USPTO and NTIA as part of the "Green Paper" process of the Internet Policy Task Force. *See* GREEN PAPER; Steve Knopper, *Don Henley, Steven Tyler Condemn Potential Copyright Law Change*, ROLLING STONE (Feb. 13, 2014), http://www.rollingstone.com/music/news/don-henley-steven-tyler-condemn-potential-copyright-law-change-20140213. The Green Paper suggestion—motivated by a desire to facilitate the reuse of creative works—would extend to music. *See* GREEN PAPER at 28-29 (citing concerns about music sampling). Various commenters addressed the Green Paper suggestion in their comments to the Copyright Office. Because it is not a Copyright Office initiative, this report does not address the remix issue other than to note that, based on the comments submitted to the Office, it appears to have drawn opposition within the music community. *See, e.g.*, CCC Second Notice Comments at 3; LaPolt First Notice Comments at 15; NMPA & HFA Second Notice Comments at 37-38. *But see* Menell First Notice Comments at 3 (advocating for the creation of a compulsory license for remixes). The Office hopes that this report will prove useful to the USPTO and NTIA in their evaluation of the remix issue as it relates to music.

publisher had opted out, someone who produced a cover recording would need to obtain a voluntary license to post the song on an interactive streaming or download service (just as would someone who wished to offer streams or downloads of the original recording of that work).

Audiovisual Uses

In their comments, the record companies explain that because consumers now access music on computers, phones and other devices with screens, they expect to see something when a song is playing—whether it is a video, album cover, or lyrics. The labels' observation corresponds to the fact that for music fans of today, YouTube—with a billion users a month—is "the largest service in terms of listening to music."[855]

The record companies urge that the licensing system for musical works needs to be updated to respond to the consumer desire for more—and more innovative—audiovisual content. To illustrate the point, the labels cite a recent record release—involving a variety of distinct consumer products—that necessitated over 1,400 individual licenses.[856]

The combination of music with visual content requires a synchronization license—and synch rights are not subject to government oversight. Section 115 is limited to audio-only uses of musical works. While not proposing a specific approach, the labels would like to see section 115 replaced with an updated blanket system that would extend to consumer audiovisual products.[857] In their view, such a change would facilitate many common synch transactions, such as the licensing of music videos to online services and incorporation of music in user-posted videos.

In the eyes of music publishers and songwriters, however, the labels' suggestion represents a dramatic and unacceptable expansion of the compulsory system. This reaction is perhaps not terribly surprising in light of the publishers' present desire to phase out mandatory audio-only licensing under section 115.[858]

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[855] Tr. at 155:16-17 (June 4, 2014) (Steven Marks, RIAA); *see also* Glenn Chapman, *YouTube debuts subscription music service*, YAHOO NEWS (Nov. 12, 2014) http://news.yahoo.com/youtube-debuts-subscription-music-video-190223540.html ("YouTube is the world's biggest online source of free streaming music and the site has about a billion users a month.").

[856] RIAA First Notice Comments at 10 ("The record company responsible for one current, successful release obtained 1481 licenses for the project.").

[857] The labels are not proposing to extend any synch licensing solution to uses in "third-party created product[s]," such as in advertisements and television, which have always required individualized negotiations with both labels and publishers. *See id.* at 17.

[858] *See* NMPA Second Notice Comments at 32-33 ("The RIAA rationalizes this approach by claiming a total abdication of approval rights by musical work owners combined with expanding

The Office is sympathetic to the labels' concerns, but cannot at this time recommend that consumer synch uses be incorporated into a government-supervised licensing regime. As may be apparent from much of the foregoing discussion, once a compulsory license is implemented it becomes deeply embedded in industry practices and—even when its original rationale is lost in time—is difficult to undo. That alone should counsel caution in all but the most manifest instances of market failure.

Here, the Office does not observe such a failure and believes there is even some reason to be optimistic about private market solutions. First, in the case of new releases, the labels presumably have some ability (and leverage) to work through audiovisual licensing issues by virtue of their role with respect to the creation of music videos, album art, etc. Notably, in the RIAA's own example of "a single album project" requiring over a thousand licenses, it seems that licenses were obtained.[859]

Additionally, over the last decade, labels and publishers have entered into a series of NDMAs to facilitate the labels' licensing of music videos and other products from music publishers.[860] And in another significant development, YouTube, has developed a robust licensing program and entered into voluntary agreements that enable large and small labels and publishers to claim and monetize their content.[861] Taken together, these

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the scope of formats authorized under Sec. 115 would promote greater efficiency and would simplify the music licensing process. With an Orwellian spin, they promote the idea that musical work owners would be enriched if they are, ultimately, disempowered in the digital music marketplace."); NSAI Second Notice Comments at 8 ("While the concept of a more efficient licensing system is something everyone agrees on, the RIAA proposal would basically eliminate the ability of music publishers or self-published songwriters and composers to initiate or directly negotiate their own agreements."). Interestingly, just a few years ago, the publishers were of a somewhat different mindset, with NMPA advocating for a blanket-style license to cover synch uses by YouTube and similar services: "If we don't . . . figure out a way to do mass synchronizations, we are going to miss out on many business opportunities that could provide solutions to the declining fortunes of the whole music industry." David Israelite, *David Israelite, NMPA President's Guest Post: Why Music Publishers Must Adopt Blanket Licensing*, BILLBOARD (June 24, 2011), http://www.billboard.com/biz/articles/news/publishing/1177339/david-israelite-nmpa-presidents-guest-post-why-music-publishers.

[859] RIAA First Notice Comments at 6, 10.

[860] For example, in 2012 NMPA negotiated a licensing framework with UMG to permit independent publishers to grant UMG the synch rights necessary to stream videos containing their works on VEVO and YouTube. *See* NMPA Second Notice Comments at 33; Butler, *UMG/NMPA Broker Model License Agreement*; Christman, *NMPA Inks Deal With Universal Music Group Over VEVO, YouTube Videos*.

[861] In this regard, however, it is worth noting that independent publishers had to pursue an infringement action against YouTube before YouTube presented them with a licensing offer under

examples suggest that the market appears to be responding to the need for licensing of audiovisual uses by consumers and that there is probably no pressing need for government intervention.

b. Shift to Blanket Licensing

Regardless of its scope or whether it includes an opt-out right, the Office believes that section 115 should be updated to better meet the needs of the digital age. Congress attempted to do this in 2006 with the proposed SIRA legislation, which would have created a blanket mechanical license for digital uses. Although that bill got as far as passing the relevant House subcommittee,[862] it faced a degree of resistance from certain industry participants and ultimately foundered.

Based on stakeholders' sentiments, however—especially those of the digital services—the time seems ripe to revisit the concept of blanket mechanical licensing. Users have made a strong case in pointing out the inefficiencies of a system that requires multiple licensees to ascertain song-by-song licensing information and maintain it in redundant databases. At the same time, they have repeatedly expressed a willingness to pay royalties in cases where they are unable to track down licensing information for particular songs in order to mitigate their potential liability for unmatched works.[863]

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a settlement negotiated by NMPA. *See Football Ass'n Premier League v. YouTube*, 633 F. Supp. 2d 159.

[862] *See* SIRA, H.R. 5553. In 2006, the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property forwarded SIRA to the full Judiciary Committee by unanimous voice vote. *See H.R. 5553*, CONGRESS.GOV (June 8, 2006), https://www.congress.gov/bill/109th-congress/house-bill/5553.

[863] Notably, section 115 has, since its inception, provided a mechanism to file a notice of intent to use a musical work with the Copyright Office if the owner of the work cannot be found in Copyright Office records. *See* 17 U.S.C. § 115(b)(1). Under section 115, no royalties are required to be collected by the Office in connection with these filings. *See id.* It is the Office's understanding, however, that this provision does little to ameliorate concerns of digital services in light of the filing fees that the Office must charge to administer such song-by-song notices, which may number in the thousands or perhaps even the millions for a large service. *See* DiMA First Notice Comments at 20 ("[T]o the extent that a service chooses to file statutory license notices with the Copyright Office for the many musical works for which the relevant rightsowners cannot be identified, the costs can be overwhelming given the volume of works at issue."). Under its current fee schedule, the Office charges a fee of $75 for a notice of intention covering a single title, and for notices incorporating additional titles, a fee of $20 per 10 additional titles submitted on paper, and $10 per 100 additional titles submitted electronically. 37 C.F.R. § 201.3(e). Moreover, due to IT constraints within the Library of Congress, the Office is still not able to accept such submissions in bulk electronic form.

But while considerably more user-friendly for licensees, blanket licensing cannot be viewed as a panacea. It does not cure the problem of bad or missing data, or the inability to match sound recordings with the musical works they embody. In any situation where a licensed transaction takes place, in order for a royalty to be paid to the rightsowner, there must be a link between the work used and the owner of that work. Especially in the case of lesser known works, it can be challenging to match a sound recording with the musical work it embodies, and that musical work to its owner.

Today, under section 115, the burden of identifying the song and its owners is on the licensee (or sometimes a third-party agent retained by the licensee); the link is made in the song-specific license that issues. Blanket licensing merely kicks this responsibility obligation down the road for another actor to address. Under a blanket system, the obligation to make the match between the exploited work and its owner falls on the licensing organization—for example, the PRO—which must identify the use and connect it to the owner.

Nonetheless, the Office believes that on the whole, the benefits of a blanket licensing approach clearly outweigh the conceded challenges of matching reported uses with copyright owners. Throughout this study, the Office has heard consistent praise for the efficiencies of blanket licensing by SoundExchange and the PROs, and widespread frustration with the song-by-song process required under section 115—including from publishers who find themselves burdened with deficient notices and accountings.

Ultimately, it is in the interest of music owners as well as licensees to improve the licensing process so it is not an obstacle for paying services. To further facilitate the rights clearance process and eliminate user concerns about liability to unknown rightsowners, the Office believes that mechanical licensing, like performance licensing, should be offered on a blanket basis by those that administer it. This would mean that a licensee would need only to file a single notice to obtain a repertoire-wide performance and mechanical license from a particular licensing entity. Song-by-song licensing is widely perceived as a daunting requirement for new services and an administrative drag on the licensing system as a whole. The move to a blanket system would allow marketplace entrants to launch their services—and begin paying royalties—more quickly.

c. Ratesetting

As explained above, the Office supports integration of mechanical with performance rights administration to simplify the licensing process, especially where both rights are implicated, as in the case of interactive streaming.[864] Even if both rights are not

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[864] Although publishers traditionally have not sought royalties for the server and other reproductions necessary to facilitate noninteractive streaming, it would probably be helpful to clarify the law to provide that any necessary mechanical rights were covered as part of a bundled

implicated—as in the case of DPD licensing—it would still appear to make sense to combine licensing resources into unified MROs, especially in a world of declining mechanicals. In order to reap the rewards of a more unified licensing structure, the Office further recommends that the ratesetting procedures for mechanical and performance also be combined.

"As-Needed" Ratesetting

The CRB establishes mechanical rates for the various categories of use that fall under section 115.[865] The Office believes this responsibility should continue, though with an important modification: as is now the case with performance rights, rather than establish rates across the board every five years, the CRB should set rates for particular uses only on an as-needed basis when an MRO and licensee are unsuccessful in reaching agreement.

There are currently 17 distinct rate categories under the section 115 license,[866] each with its own specific rate. Under the current CRB regime, the parties are required to identify at the outset of the ratesetting proceeding every business model that may be relevant in the next five years so that a rate can be established for that use. As digital business models proliferate, so do the rates. The determination of government rates for a plethora of specific distribution models would seem to be an inefficient way to go about the ratesetting process. In the first place, new digital models spring up every day, so it is impossible to keep up with the changing marketplace prospectively. In addition, many of the rates required to be included in a global ratesetting process might be easily agreed by the parties without the need for government intervention—especially in the case of uses that are less economically significant.

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license. *Cf.* Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. at 66,180-81 ("[I]f phonorecords are delivered by a transmission service, then under the last sentence of 115(d) it is irrelevant whether the transmission that created the phonorecords is interactive or non-interactive.").

[865] A section 115 license is only available after phonorecords of the work in question have first been distributed to the public in the United States under the authority of the copyright owner. 17 U.S.C. § 115(a)(1). The Office is not recommending any change to this aspect of the statutory system, which permits musical work owners to control the so-called "first use" (or initial recording) of their works.

[866] These categories include: physical phonorecords and permanent digital downloads (*see* 37 C.F.R. § 385.3(a)); ringtones (*see* 37 C.F.R. § 385.3(b)); five compensation models for services offering interactive streams and limited downloads (*see* 37 C.F.R. § 385.13(a)); three types of promotional activities involving interactive streams and limited downloads (*see* 37 C.F.R. § 385.14(b)-(d)); mixed service bundles, music bundles, limited offerings, paid locker services, and purchased content locker services (*see* 37 C.F.R. § 385.23(a)); and free trial periods for certain service offerings (*see* 37 C.F.R. § 385.24).

Under the Office's approach, the CRB would be called upon to set a rate only in the case of an impasse between two parties. But to borrow from the existing CRB system, other interested parties (such as other MROs and other users) could choose to join the relevant proceeding, in which case those parties would be bound by the CRB-determined rate (except for publishers opting out of the MRO for the use in question.[867])

Use of Benchmarks

Throughout the study, there has been significant debate concerning the ratesetting standard that should be employed by the CRB—some supporting section 801(b)(1)'s four-factor test that applies to satellite radio and pre-existing subscription services under section 114, as well as mechanical uses under section 115, while others favor the willing buyer/willing seller standard that governs internet radio. As discussed above in connection with the issue of licensing parity, the Office believes that all music users should operate under a common standard, and that standard should aim to achieve market rates to the greatest extent possible.

But regardless of the rate standard invoked by the CRB (or for that matter, a rate court), a critical aspect of the ratesetting analysis is comparison of the requested rates with relevant market benchmarks, to the extent they exist. In the case of compulsory licensing, this is an elusive enterprise, since there are no freely negotiated licenses to inform the tribunal.

As noted above, the Office believes that all potentially informative benchmarks should be reviewed and evaluated in the ratesetting process. An advantage of the proposed opt-out system is that there would be a greater likelihood that actual market benchmarks would exist to inform the ratesetting tribunal. Even where rates remain subject to government oversight, the Office believes that copyright policy—and specifically the desire to fairly compensate creators—will be better served by a greater opportunity to establish rates with reference to real market transactions.[868]

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[867] Section 115 already recognizes that a voluntary agreement can supersede the statutory rate. 17 U.S.C. § 115(c)(3)(E)(i). As a practical matter, however, while voluntary rates for uses subject to mandatory licensing may be lower, they will not exceed the statutorily fixed rate because the user may always resort to the compulsory process.

[868] Of course, this was the concept pursued by the publishers who withdrew from ASCAP and BMI to negotiate separate rates with Pandora. There, as explained above, the court rejected two of the proffered benchmarks due to what it viewed as coercive conduct on the part of the publishers in the negotiation process. The CRB, too, is free to reject benchmarks that it perceives to be unreasonable or otherwise without merit. *Music Choice v. Copyright Royalty Board*, Nos. 13-1174, 13-1183, 2014 WL 7234800, at *7 (D.C. Cir. Dec. 19, 2014) ("The [CRJs] were within their broad discretion to discount [SoundExchange's proposed] benchmarks and look elsewhere for guidance," as the CRJs' "mandate to issue determinations . . . does not hamstring the Judges when neither party proposes reasonable or comparable benchmarks."). Copyright owners would

Interim Rates

There is no current process for establishing an interim rate under the section 115 license. As with performance rights, the Office believes there should be a simple and expeditious procedure available to have the CRB establish a temporary mechanical rate for a new user pending final resolution of the applicable royalty by agreement of the parties or through a ratesetting proceeding.

d. Audit Right

Publishers and songwriters have long complained about the lack of an audit right under section 115.[869] In addition to monthly statements of use, the statute provides that each licensee must provide to the copyright owner a cumulative annual statement that is certified by a CPA.[870] But section 115 confers no express right for a copyright owner to audit a licensee's statements.[871]

Although section 114 does not include such an express audit right, it does provide that the CRB shall "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under [section 114], and under which records of such use shall be kept and made available by entities performing sound recordings."[872] Based on this authority, the CRB has promulgated regulations to permit audits of royalty payments of statutory licensees by SoundExchange.[873] Notably, there is parallel language in section 115, though it is limited to reporting in connection with the making of DPDs, and no equivalent royalty verification rules have been promulgated by the CRB under that provision.[874]

Regardless of any other potential adjustments to section 115, the Office believes that the mechanical licensing system should be amended to provide for an express audit right

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of course need to ensure that they proceeded carefully and independently in their dealings with licensees so as not to undermine the value of their agreements for ratesetting purposes.

[869] *See, e.g.*, Castle First Notice Comments at 2-3; NMPA & HFA First Notice Comments at 14-15.

[870] In a notable departure from the terms of section 115, HFA, which licenses mechanical rights on behalf of numerous publishers, does not rely upon the submission of certified annual statements but instead conducts royalty examinations of significant licensees to verify their payments.

[871] By contrast, the section 111 and 119 cable and satellite compulsory licenses, as well as the Audio Home Recording Act ("AHRA"), provide for a royalty verification process for the benefit of copyright owners. *See* 17 U.S.C. §§ 111(d)(6) (cable licensees); 119(b)(2) (satellite licensees); 1003(c)(2) (manufacturers of digital audio recording devices and media).

[872] 17 U.S.C. § 114(f)(4)(A).

[873] 37 C.F.R. §§ 380.6, 380.15, 380.25.

[874] 17 U.S.C. § 115(c)(3)(D).

covering the full range of uses under section 115, with the particular logistics of the audit process to be implemented by regulation.[875]

The Office was not made aware during the study of any audit issue in relation to the PROs.[876] But the Office notes that in any updated system, it would be critical for copyright owners to be able to verify not just mechanical royalties but performance income as well (which could be combined under a bundled license). Audit activities could perhaps be coordinated through the GMRO; once an audit was noticed by one MRO, others could choose to participate in the audit process, sharing in its costs and any recovery.[877] This type of coordinated audit process has been implemented under the cable and satellite licenses as well as under the AHRA.[878]

e. Sunset of Existing Section 115 Licenses

PRO licenses typically have an initial term of up to five years.[879] A licensee may therefore need to renegotiate its license with one or more PROs every several years. For this reason, while specific details would undoubtedly need to be addressed, existing

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[875] In light of the Office's primary responsibility under the existing section 115 framework for determining the requirements for statements of account, it may be sensible to assign rulemaking responsibility for audits of these statements to the Office rather than the CRB. *See* 17 U.S.C. § 115(c)(5); 17 U.S.C. § 803(c)(3) (CRBs may specify recordkeeping requirements as part of a ratesetting determination); *see also* Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License, 73 Fed. Reg. 48,396 (Aug. 19, 2008) (explaining responsibilities of the Office versus the CRB in this area).

[876] It appears that currently, PROs do not have any significant audit rights, compelling them to accept "payments at best-effort levels and face value, but not necessarily accurate." Derek Crownover, *Small Music Publishers Face Uphill Battle*, THE TENNESSEAN (Aug. 14, 2014), http://www.tennessean.com/story/money/industries/music/2014/08/15/small-music-publishers-face-uphill-battle/14075783/. In fact, the ASCAP consent decree merely suggests that ASCAP "may require its . . . licensees to provide ASCAP with all information reasonably necessary to administer the per-program or per-segment license," while the BMI consent decree has no such requirement. ASCAP Consent Decree § VIII.C; BMI Consent Decree.

[877] Publishers who had negotiated direct licenses with digital providers would be responsible for managing their own audits in keeping with their individual contracts.

[878] *See* 37 C.F.R. § 201.30 (setting forth the procedure for verification of statements of account submitted by cable operators and satellite carriers).

[879] *See* ASCAP Consent Decree § IV.D (ASCAP is prohibited from "[g]ranting any license to any music user for rights of public performance in excess of five years' duration."). This restriction is not found in the BMI Consent Decree, although the Office understands that BMI's licensing practices tend to track ASCAP's in this regard, perhaps due to the fact that "the DOJ often takes the view that BMI and ASCAP should operate under similar rules." BMI First Notice Comments at 16. It is the Office's further understanding that such licenses may be subject to automatic extensions unless terminated by either the PRO or licensee.

PRO licenses would not appear to present an obstacle to implementing the changes proposed here. A license granted under section 115, on the other hand, does not have an end date. A question therefore arises as to how the millions of existing section 115 licenses would be retired.

The Office believes there is an answer to this question—as, apparently, do the digital companies who have advocated for a new blanket system (as well as the publishers that have advocated for an end to section 115 altogether). Significantly, the rates and terms in a section 115 license do not continue in perpetuity but instead are adjusted every five years in accordance with the CRB's statutory schedule.[880] Thus, there can be no expectation on the part of a licensee that particular rates or terms will continue beyond the five-year statutory period.

In sunsetting the song-by-song licensing system, there would need to be a period of transition, of course, during which the user would apply for licenses from the several MROs. Assuming, however, that that period of transition were tied to the then-applicable rate period, the changeover should not harm any legitimate expectation concerning rates.

4. Section 112 and 114 Licenses

One of the few things that seems to be working reasonably well in our licensing system is the statutory license regime under sections 112 and 114, which permits qualifying digital services to engage in noninteractive streaming activities at a CRB-determined (or otherwise agreed) rate. The section 112 and 114 licenses—administered by SoundExchange, a nonprofit entity designated by the CRB—cover both internet and satellite radio providers and certain subscription music services. Although the differing ratesetting standards for these licenses—as well as some of the rates established under those standards—have been a source of controversy, from the record in this study, the licensing framework itself is generally well regarded.

Recording artists, as well as backup musicians and vocalists, appreciate the fact that they are paid their respective shares of royalties for digital performances under the statutory formula administered by SoundExchange.[881] SoundExchange deducts a modest

[880] Notably, because HFA licenses incorporate the key aspects of section 115, they too are subject to the periodic statutory rate adjustments.

[881] Section 114 provides that 45% of royalties are to be paid to the featured artist, 2.5% to the union that represents nonfeatured musicians, and 2.5% to the union for nonfeatured vocalists, with the remaining 50% paid to the owner of the sound recording, typically a record label. 17 U.S.C. § 114(g)(2).

administrative fee from distributed royalties—currently approximately 4.5%—to offset its costs of operations.[882]

SoundExchange engages in significant efforts to locate and register artists whose royalties it is holding. By regulation, unattributed royalties that remain unclaimed after a period of at least three years may be used to help defray SoundExchange's ongoing administrative expenses.[883] In recent years, the pool of unclaimed royalties that are three or more years old has ranged as high as $31 million dollars.[884] By comparison, however, SoundExchange's annual distributions totaled $773 million in 2014.[885]

a. Scope of Licenses

Notwithstanding the comparatively positive reviews of the section 112 and 114 licenses, there are a few ways in which some have suggested they should be tweaked.

Adjust to Include Terrestrial

In contrast to the general sentiments of musical work owners, some independent record labels and artists—who may be more challenged in negotiating with music services than their larger counterparts, and also like being paid through SoundExchange—have suggested that the section 112 and 114 compulsory licenses be expanded to cover interactive streaming in addition to noninteractive models.[886] Digital providers, too, would welcome such a change.[887]

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[882] SoundExchange First Notice Comments at 4.

[883] 37 C.F.R. § 380.8.

[884] Press Release, SoundExchange, SoundExchange Releases List of Recording Artists and Record Labels with Unclaimed Digital Performance Royalties (Aug. 15, 2012), http://www.soundexchange.com/pr/soundexchange-releases-list-of-recording-artists-and-record-labels-with-unclaimed-digital-performance-royalties/. SoundExchange recently reallocated $9.3 million from its unclaimed royalty pool to its administrative fund. Glenn Peoples, *SoundExchange Finally Releases Old, Unclaimed Royalties*, BILLBOARD (Jan. 31, 2014), http://www.billboard.com/biz/articles/news/5893782/soundexchange-finally-releases-old-unclaimed-royalties.

[885] *See* Glenn Peoples, *SoundExchange Paid Out a Whopping $773 Million in 2014*, BILLBOARD (Jan. 29, 2015), http://www.billboard.com/articles/business/6457827/soundexchange-digital-performance-royalty-distributions-2014.

[886] *See* FMC First Notice Comments at 11-12; Kohn First Notice Comments at 13-14; SAG-AFTRA & AFM First Notice Comments at 6; *see also* A2IM First Notice Comments at 5 (supporting a narrower definition of "interactive").

[887] *See* Tr. at 138:19-139:09 (June 4, 2014) (Lee Knife, DiMA) ("The idea that we [DiMA services] have to go to all of these different people, depending on whether you're interactive, you're noninteractive, whether you're downloading, whether you're streaming it and the download is available to be heard while it's downloading . . . most of my services want to or do engage in all

While the Office understands these points of view, it seems unlikely as a political matter that the major record labels could be persuaded to give up their current ability to negotiate such rates in the open market. Moreover, the Office does not perceive that the voluntary market for licensing of sound recording rights is not functioning.

That said, assuming Congress broadens the sound recording performance right to include terrestrial broadcasts, in keeping with the principle that analogous uses should be treated alike, it would seem only logical that terrestrial uses should be included under the section 112 and 114 licenses. The CRB would be in the best position to establish equitable rates to apply to both over-the-air and internet radio.

Qualifying Versus Nonqualifying Services

The section 112 and 114 licensing framework excludes interactive streaming and imposes additional technical requirements as well on those seeking a statutory licenses. While licensees complain about the constraints of section 114, on the other side of the coin, questions arise as to how much control a listener should be able to have over a customized radio playlist before the service is considered to be offering more of an on-demand than passive experience.

Section 114 defines an interactive service in relevant part as "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not part of a program, which is selected by or on behalf of the recipient."[888] In 2009, the Second Circuit Court of Appeals held that the Launchcast music service—which did not offer on-demand streaming but customized its programming for recipients based on their individual ratings of songs—was not interactive within the meaning of this definition.[889] As a result of this precedent, internet radio services offering customized listening experiences are able to operate under the compulsory license regime.

Some question the Second Circuit's interpretation of the line between interactive and noninteractive streaming.[890] As articulated by the RIAA, "[t]he [*Launch Media*] decision has emboldened services to offer listeners an increasingly personalized listening experience under color of the statutory license, and all but extinguished voluntary

of those different activities at once. We'd love to be able to just get a license for music and simply report what the type of use was and pay for it.").

888 17 U.S.C. § 114(j)(7).

889 *Launch Media,* 578 F.3d at 164.

890 *See* RIAA First Notice Comments at 33-34; SAG-AFTRA & AFM First Notice Comments at 5-6; *see also* NARAS First Notice Comments at 5; NAB First Notice Comments at 4; NRBMLC First Notice Comments at 24; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

licensing of personalized streaming services at a premium to the statutory rate."[891] The RIAA's chief concern appears to be that the rate for customized radio is the same as that for completely nonpersonalized offerings.

While the Office has some reservations about the interpretation of section 114 by the *Launch Media* court—which seems somewhat in tension with the statutory language—there appears to be no overwhelming entreaty to remove custom radio from the statutory regime.[892] Within that regime, however, it may be appropriate to distinguish between custom and noncustom radio, as the substitutional effect of personalized radio on potentially competing interactive streaming services may be greater than that of services offering a completely noncustomized experience. While the issue could be addressed legislatively, such an approach would not appear to require statutory change, as the CRB has the discretion to set different rate tiers today when the record supports such an outcome.[893]

For their part, internet providers have criticized the constraints that section 114 imposes on services that seek to operate under the compulsory license.[894] These include the "sound recording performance complement," a restriction that limits the frequency with which songs from the same album or by the same artist may be played by the service.[895] There is also a statutory prohibition against announcing upcoming songs—a practice that is common in the terrestrial world, and therefore presents problems for online simulcasters.[896] Congress included these limitations in the section 114 license to mitigate the potential substitutional impact of noninteractive streaming on sales or other revenue streams.[897]

In the Office's view, these sorts of requirements fall into a category of relative fine-tuning of the license. But for the fact that they are laid out in the statute itself, their

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[891] RIAA First Notice Comments at 34.

[892] *See, e.g.*, *id.* ("While, at this juncture, we do not necessarily advocate excluding from the statutory license services that have been generally accepted as operating within the statutory license based on the [*Launch Media*] decision, we do think it is important, at a minimum, that services offering more functionality, such as personalization features, should pay higher rates.").

[893] *See* 17 U.S.C. § 114(f)(1)(A)-(2)(A) (rates and terms "shall distinguish among different types of . . . services in operation"); *id.* § 803(c)(3) (CRB's determination to be supported by written record).

[894] *See* NAB First Notice Comments at 4; NRBMLC First Notice Comments at 24; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

[895] 17 U.S.C. § 114(j)(13).

[896] 17 U.S.C. § 114 (d)(2)(C)(ii). *See, e.g.,* NAB First Notice Comments at 4-5; NRBMLC First Notice Comments at 24; NPR First Notice Comments at 5; SRN Broadcasting First Notice Comments at 1.

[897] *See* H.R. REP. No. 104-274, at 13-15, 20-21.

particulars would seem to be more appropriately the province of regulation. As suggested below, the Office believes that in updating the music licensing system, Congress should commit more of its nuances to administrative oversight. The technical conditions for eligibility under the section 112 and 114 licenses would seem to fall into this category, as the effectiveness and impact of these provisions has likely changed, and will continue to change, over time.

Finally, some have suggested a modification of the provisions of section 112 and 114 that permit the making of server—or "ephemeral"—copies to facilitate licensed services. These parties seek to confirm that multiple server copies may be made and retained indefinitely by a licensed service.[898] Although the main provision at issue—17 U.S.C. § 112(e)—is less than a model of clarity,[899] the Office is not aware that the imprecision has resulted in any real-world disputes, and does not see this as an especially pressing issue.[900] Nonetheless, it would probably be worthwhile in any general update of section 112 and 114 to refine the statutory language with respect to the number and retention of server copies so as to eliminate any doubt as to the operation of the section 112 license.

b. Ratesetting

The embattled ratesetting standards for internet and satellite radio—section 801(b)(1) versus willing buyer/willing seller—are discussed at some length above in connection with overall questions of licensing parity. As explained there, the Office believes that government ratesetting processes for both sound recordings and music should be conducted under a single, market-oriented standard. Accordingly, in the Office's view,

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898 CTIA First Notice Comments at 16-18; NAB First Notice Comments at 2, 7; Music Choice First Notice Comments at 11-13; DiMA Second Notice Comments at 18.

899 Section 112(e) somewhat cryptically indicates that only a single phonorecord (*i.e.*, server copy) can be made "unless the terms and conditions of the statutory license allow for more." 17 U.S.C. § 112(e).

900 A larger question may be whether the provisions of the section 112 license pertaining to the copies made to support section 114 services should be folded into section 114 to create a truly unified license covering both performances and necessary reproduction rights. As it currently stands, the CRB is obligated in the relevant ratesetting proceedings to set a separate (and in practice, essentially nominal) rate for the ephemeral uses. *See* 17 U.S.C. § 112(e)(3); *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1225-26 (D.C. Cir. 2009) (remanding to the CRB to specify a royalty for the use of the ephemeral recordings); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 75 Fed. Reg. 5513 (Feb. 3, 2010) (setting a separate rate for the 112(e) license). The proportion of royalties payable under section 112 is of some economic consequence, however, as unlike section 114 royalties—which are paid directly to performing artists and musicians as well as to record labels—section 112 royalties are paid only to sound recording owners. *See* Review of Copyright Royalty Judges Determination, 73 Fed. Reg. at 9146. Because it was not a focus of discussion during the study, the Office has not formed an opinion on this.

the section 112 and 114 rates currently set under the 801(b)(1) standard (*i.e.*, those applicable to satellite radio and pre-existing subscription services) should be migrated to the willing buyer/willing seller standard or some alternative formulation aimed at establishing rates equivalent to those that would be negotiated in the free market.[901] The Office further recommends that ratesetting should occur on an "as-needed" basis, as described above.

c. Producer Payments

The Office notes the further concern of some that the section 112 and 114 royalty allocations do not recognize the contributions of sound recording producers, who in many instances not only supervise, but also have significant creative input into, finished recordings. Despite the fact that many producers are creators of sound recordings in their own right, they are not among the parties entitled by statute to direct payment by SoundExchange.[902]

Compensation of producers is contractually based. They may be paid an up-front fee for their efforts and/or receive a share of the artist's future royalties.[903] In some cases, an artist may provide a letter of direction requesting SoundExchange to pay the producer's share of the artist royalties collected by SoundExchange, which SoundExchange will honor.[904] NARAS has suggested that this informal practice—which is not contemplated by the statutory payment mechanism set forth in section 114—be recognized through a legislative amendment. In NARAS' words, this will provide producers "the same fair, direct-payment option available to performers."[905]

Because the producer's share comes out of the featured artist's statutory entitlement, such recognition would not require a change in the current statutory allocation, but would merely clarify the authority of SoundExchange to honor a letter of direction.

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[901] Section 114 provides for an interim ratesetting process for new services. *See* 17 U.S.C. § 114(f)(2)(C) (allowing copyright owners or new services to initiate out-of-cycle proceeding). It does not provide for expedited proceedings, however. The Office did not hear much about the use or efficacy of this process in the course of its study, perhaps because it is rarely invoked. As discussed in connection with musical work performance and mechanical licenses, however, the Office believes it is important to have a cost-effective and expeditious interim ratesetting procedure, which could be implemented for the section 112 and 114 licenses as well under the Office's proposed system.

[902] These include sound recording owners, featured artists, and unions representing nonfeatured musicians and vocalists. 17 U.S.C. § 114(g)(2).

[903] PASSMAN at 121-126.

[904] *2013 SoundExchange Letter of Direction*.

[905] *See* NARAS First Notice Comments at 5-6.

Though it would be beneficial to hear more from artists on this issue,[906] the Office agrees that NARAS' proposal to confirm the existing practice through a technical amendment of the statute merits consideration.

d. Termination Provision

Unlike section 115, sections 112 and 114 do not include a right to terminate a licensee that fails to account for and pay royalties. This not only severely undermines the ability of SoundExchange to police noncompliant licenses, but also allows such licensees to continue to exploit valuable sound recordings without payment to their owners. As SoundExchange explains it:

> "Noncompliance with statutory license requirements is commonplace. For 2013, approximately a quarter of royalty payments were not made on time; two-thirds of licensees required to deliver reports of the recordings they used have not delivered at least one required report; and at least one quarter of such licensees have not delivered any such reports at all."[907]

SoundExchange observes that it tries to work with problem licensees to improve their compliance. But when such efforts prove unsuccessful, SoundExchange—and the copyright owners it represents—should have a remedy. The Office does not see a justification for continued licensing of a user that is not meeting its obligations. The Office therefore agrees with SoundExchange that the section 112 and 114 statutory licenses should be amended to include a termination provision akin to that in section 115.[908]

5. Public and Noncommercial Broadcasting

Public broadcasters—including noncommercial educational broadcasters—lament the inefficiencies and limitations of the statutory provisions in sections 114 and 118 that

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[906] Recording artists did not comment on this proposal in the course of the study.

[907] SoundExchange First Notice Comments at 5.

[908] Section 115 provides that:

> If the copyright owner does not receive the monthly payment and the monthly and annual statements of account when due, the owner may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders either the making or the distribution, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

17 U S.C. § 115(c)(6).

govern their use of music content.[909] The Office concurs that these provisions are unwieldy and believes that they should be reviewed and updated to better reflect Congress' desire to accommodate public broadcasting activities.[910]

Especially in light of the relatively low royalty rates paid by public broadcasters, it makes little sense to require them to engage in a multitude of negotiations and ratesetting proceedings in different fora—before the CRB under sections 112 and 114 for digital sound recording performance rights, before the CRB under section 118 for over-the-air musical work performance and associated reproduction rights, under the consent decrees for digital musical works performance rights covered by ASCAP and BMI, and through private negotiations for musical work performance and reproduction rights falling outside of the foregoing categories.[911] Instead, the Office suggests that the ratesetting processes applicable to public broadcasters be consolidated within a unified license structure under section 118 under the auspices of the CRB.[912] By separating out all noncommercial uses for consideration under a single framework, the royalty rates for public broadcasters would likely be much more efficiently resolved.[913]

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909 *See* EMF First Notice Comments at 5-15; NPR First Notice Comments at 4-7; NRBNMLC First Notice Comments at 14-22; PTC at 3-12.

910 *See, e.g.*, H.R. REP. NO. 94-1476, at 117 (noting "that encouragement and support of noncommercial broadcasting is in the public interest" and "that the nature of public broadcasting does warrant special treatment in certain areas").

911 *See generally* NRBNMLC First Notice Comments at 14-15.

912 *See* EMF First Notice Comments at 14-15. In so amending the section 118 license to cover both sound recording and public performance rights, it may be appropriate to expand the antitrust exemption currently contained in section 118 to facilitate collective negotiation of rights between noncommercial users and copyright owners for uses outside the statutory license as well. *See* PTC First Notice Comments at 11.

913 *Compare* NRBNMLC First Notice Comments at 14 (noting that "[f]or the last several license terms, religious broadcasters . . . have been able to agree upon rates and terms with ASCAP, BMI, and SESAC without the need for a rate-setting proceeding"), *with* EMF First Notice Comments at 8-9 (noting that the section 114 rulemaking joins both commercial and noncommercial entities, and that noncommercial entities "are rarely able to negotiated a pre-litigation settlement—forcing their participation in the CRB litigation process").

In establishing a unified license for public broadcast activities, the Office sees no need to depart from its view that, as with other statutory uses, the CRB should consider such rates under a generally applicable, market-based standard. Experience with the section 112 and 114 ratesetting process for noncommercial entities has shown, for example, that the willing buyer/willing seller standard can adequately account for the limited financial resources of, and other factors particular to, noncommercial users. *See* NRBNMLC First Notice Comments at 11-13 (noting that the CARP and CRB have consistently set lower rates for noncommercial broadcasters).

In reforming the section 118 license, Congress should ensure it appropriately facilitates digital transmissions by public broadcasters, including the streaming of archived programming.[914] But absent a significant change in congressional policy, the Office sees no need to expand the statutory license to include permanent uses such as downloads or physical products, as some noncommercial broadcasters have suggested.[915] The current statutory provisions for public broadcasting focus on performances in the course of over-the-air programming rather than the distribution of copyrighted works. Permanent uses by noncommercial entities—or even on-demand streaming of individual songs outside of the context of the original programming—could displace commercial sales, making it less clear that that special treatment is appropriate.

D. Licensing Efficiency and Transparency

There seems to be universal agreement among industry participants that accurate, comprehensive, and accessible licensing information, as well as transparent usage and payment data, are essential to a better functioning music licensing system.

1. Industry Data

a. Publicly Accessible Database

Some stakeholders have suggested that the government—for example, the Copyright Office—could undertake the task of creating and maintaining a comprehensive database of musical work and sound recording information, including a system of standard identifiers.[916] As appealing as such a vision may be, the Office believes that it would not be the best result for the twenty-first century marketplace to have the government start from scratch. The relevant universe of music data comprises tens of millions of musical works, sound recordings and information about them. Setting aside any legal impediments, as a practical matter, it would be extremely challenging for the government to gather, ingest, and standardize this ocean of information to be made available within a useful time frame. Any such database would be highly dynamic and require a constant flow of information from MROs, publishers and others concerning newly created works, transfers of ownership, and changes in licensing authority to be kept up to date. These are functions already performed in varying degrees by existing private organizations in collaboration with individual stakeholders.

In light of the above considerations, the Office believes that any solution to the music data problem should not compete with, but instead draw upon, existing industry resources. As a threshold matter, any centralized database should be closely tied to the

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914 NRBNMLC First Notice Comments at 14.

915 *See* NPR First Notice Comments at 7.

916 ABKCO First Notice Comments at 4; DiMA Second Notice Comments at 5.

interests of the copyright owners and licensees it serves. That said, the government should establish incentives through the statutory licensing regime to encourage private actors to coordinate their efforts and contribute to a publicly accessible and authoritative database. In other words, there is a role for both the government and private sector alike.[917]

b. Adoption of Data Standards

The lack of unique and universally employed identifiers for the millions of musical works and sound recordings in the marketplace has been a topic of discussion—and source of discouragement—among industry participants for many years. As a result, there have been some laudable efforts within the industry to address the data problem by persuading market participants to adopt standard identifiers and messaging formats, with some amount of success. The DDEX messaging system appears to have emerged as a leading industry standard for the formatting and delivery of metadata relating to transactions involving digital music.[918] A more recent example of collaboration is the MusicMark initiative, which would rationalize and reconcile sometimes conflicting PRO song data among the American and Canadian PROs ASCAP, BMI, and SOCAN.[919]

But despite these efforts, so far, no comprehensive solution to the data issue has emerged.[920] In part, this appears to be a problem of coordinating private actors, many of whom are invested in, and understandably rely upon, their own data systems and do not wish to undermine these important assets. It is also a legacy problem, in that much of the data used today originated in the pre-digital era, when standardization and interoperability were not critical concerns. For example, the industry did not implement standard conventions for the treatment of artist or songwriter names. Some actors may

[917] This does not mean that the Copyright Office should not itself seek to maintain more robust music data. To the extent it has the resources to modernize its systems to accommodate more comprehensive data, it should. For example, the copyright registration database could be modified to incorporate identifiers such as ISRCs and ISWCs. The Office's paper-based recordation system should be reengineered to become an electronic process so it is easier to record and research transfers of ownership. Both of these changes would help would-be licensees locate music owners. The Office has been reviewing these and other technology and data-driven questions in separate public processes. *See, e.g.*, BRAUNEIS; *see also* Maria Pallante, *Next Generation Copyright Office: What it Means and Why it Matters*, 61 J. Copyright Soc'y U.S.A. 213 (2014).

[918] *About DDEX*, DDEX, http://www.ddex.net/about-ddex (last visited Jan. 9. 2015).

[919] Tr. at 263:21-264:03 (June 24, 2014) (Stuart Rosen, BMI); *see also ASCAP, BMI and SOCAN Collaborate on MusicMark*, ASCAP (Apr. 2, 2014), http://www.ascap.com/playback/2014/04/action/ascap-bmi-socan-musicmark-collaboration.aspx.

[920] *PRS 'disappointed' at Global Repertoire Database collapse*, MUSIC ALLY.

see little short-term gain to be realized from the substantial investment of resources it would take to clean up and harmonize older records.

Some stakeholders advocate for an entirely new approach to tracking creative works and usage, suggesting that we should look to new technologies to attach unique identifiers to each different version of a song, each different recording of that song, each individual's interest in that song, and each individual use of that song.[921] One interesting proposal would rely on audio fingerprinting rather than just metadata to identify songs.[922] The Office hopes that these or other technological innovations may someday be deployed to the benefit of the music marketplace.

For now, though, the Office believes it is important to focus on what might be reasonably achieved in the near term—again taking into consideration and capitalizing upon industry practices as they exist today. To this end, the Office solicited comments on the most commonly used and useful identifiers, and received helpful guidance from a number of parties.[923] Based on these comments, it appears that the most critical and widely (though not universally) used identifiers are, in the case of musical works, the ISWC, and in the case of sound recordings, the ISRC. The Office believes these two identifiers should, over a period of time (*e.g.*, five years) become required elements within the proposed GMRO-managed database, as described below.

A more recent standard is the ISNI, which can be used to identify songwriters and recording artists, and is gaining acceptance in the industry. There appears to be general agreement that, as new users and uses continue to proliferate, and individual writers and artists seek to participate in the marketplace, it is of critical importance to be able to identify creators unambiguously.[924] ASCAP and BMI have already begun implementing use of ISNI.[925] This is another data standard that the Office believes should be encouraged and possibly made mandatory over a plausible time frame.

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921 *Music Licensing Hearings* at 71-72 (statement of Jim Griffin, OneHouse).

922 Tr. at 243:13-18 (June 17, 2014) (Helene Muddiman, CEO, Hollywood Elite Composers); *see also How Content ID Works*, GOOGLE, https://support.google.com/youtube/answer/2797370?hl=en (last visited Jan. 23, 2015).

923 Of particular assistance was the student submission from the Pipeline Project 2014, Belmont University's Mike Curb College of Music Business and Entertainment, which provided an insightful summary and analysis of relevant data standards based on a series of interviews the students conducted with music industry professionals. *See* Pipeline Project Second Notice Comments.

924 Kristin Thomson, *Metadata for Musicians*.

925 ASCAP Second Notice Comments at 8; *see also* Pipeline Project Second Notice Comments at 4-5.

The ISWC standard and the ISRC standard are internationally recognized, as is the ISNI. The ISWC, developed by CISAC, is assigned by individual qualified regional or local numbering agencies; in the U.S. and Canada, ASCAP is the appointed ISWC administrator.[926] The ISRC, administered by IFPI, is allocated by appointed regional agencies in each country; the U.S. ISRC agency is the RIAA.[927] The ISNI standard, launched with CISAC's participation, is meant to replace existing, disparate identification standards for individual creators.[928] ISNIs are assigned to U.S. authors by one or more designated private registration agencies.[929]

The Office's focus on the above standards does not mean that others are unimportant or irrelevant.[930] Legacy standards remain useful for particular entities,[931] and new standards may come into play. The possibility of identifying sound recordings and musical works through audio-based sampling technologies is especially intriguing. Based on the current state of affairs, however, the Office believes that the most realistic strategy to address the data issues plaguing the music industry at present would be to strongly incentivize the universal adoption and dissemination of at least the three data standards described above. Beyond this, as discussed below, it would make sense to provide for regulatory authority to allow for the consideration and adoption of additional data standards over time as appropriate.

2. Fair Reporting and Payment

a. Writer and Artist Shares

Throughout the study, a paramount concern of songwriters and recording artists is transparency in reporting and payment. As digital licensing deals multiply and increase in complexity, it can become quite difficult to follow the money. Songwriters and artists

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926 *Frequently Asked Questions*, ISWC INTERNATIONAL AGENCY, http://www.iswc.org/en/faq.html (last visited Jan. 23, 2015); Pipeline Project Second Notice Comments at 5.

927 *Obtaining Code*, USISRC.ORG, http://www.usisrc.org/about/obtaining_code.html (last visited Jan. 23, 2015); Pipeline Project Second Notice Comments at 6.

928 *See* Gatenby & MacEwan at 5-6.

929 The first U.S. registration agency is Bowker, an affiliate of the research and technology company ProQuest. *See id.*; *Bowker Becomes First ISNI Registration Agency in the U.S.*, BOWKER (June 21, 2012), http://www.bowker.com/en-US/aboutus/press_room/2012/pr_06212012a.shtml; Bowker, *Use of ISNI Is Growing Fast Among Authors, Says New Bowker Analysis*, YAHOO FINANCE (May 7, 2014), http://finance.yahoo.com/news/isni-growing-fast-among-authors-144800650.html.

930 As suggested below, additional standards that might be useful in either the short or longer term could be evaluated and potentially adopted by regulation.

931 For example, if IPIs and UPCs (discussed above) continue to be relevant in some contexts, and might be considered as potential additional data elements to be collected in the GMRO database.

want to ensure that they understand the royalty scheme, are able to track the use of their works, and are paid what they are owed.

In the case of performance royalties, such concerns are greatly diminished when the songwriter or artist is paid through a PRO or SoundExchange. PROs employ distribution rules that are generally known by their members,[932] while SoundExchange allocates royalties according to the statutory formula. In the case of a direct deal, however, the label or publisher is obligated only by the terms of the artist or songwriter agreement, which may not expressly address these issues.[933]

Of particular concern are the sometimes sizeable advances against future royalties that are paid by online services to major record labels and music publishers, and whether and how these are reported to and shared with artists and writers. Sometimes, if royalty obligations are less than anticipated, such an advance may not be fully recouped by the service during the licensing period, so there are leftover funds. In such a situation, there may be no clear understanding—or contractual provision—that addresses whether those funds should be paid out to the songwriter or artist, and if so, on what basis. A recent example of the advance issue cited by songwriters is a direct deal between the publisher Sony/ATV and DMX music service for public performance rights, in which Sony/ATV apparently received a large advance from the service—possibly in exchange for a lower royalty rate.[934] Songwriters worry that they are not able to monitor this type of arrangement to ensure that they receive their fair share of the total consideration paid for the use of their works.

Also concerning to music creators is the fact that labels and publishers are now known to take equity stakes in online services as part of their licensing arrangements. For example, the major labels together reportedly negotiated a nearly 18% stake in Spotify.[935]

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[932] *ASCAP's Survey and Distribution System: Rules & Policies*, ASCAP (June 2014), http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf; *Royalty Policy Manual*, BMI, http://www.bmi.com/creators/royalty_print (last visited Jan. 16, 2015). Although songwriters appear generally to have confidence that the PROs are reporting to them accurately, there are some writers who take issue with the distribution rules themselves. For example, ASCAP and BMI pay substantial bonuses for current hits, which reduce the royalty pool for "evergreen" titles. In addition, PROs rely on sampling techniques rather than census data to calculate royalties in many contexts, which some complain may cause less popular songs to be overlooked. Tr. at 22:11-27:01 (June 5, 2014) (Royal Wade Kimes, Wonderment Records) ("We do need a collective, ASCAP, BMI, somebody to collect the stuff, but we also need it to be distributed rightly.").

[933] Indeed, at least until recently, songwriter agreements with publishers simply assumed payment of the writer's share of performance royalties by a PRO. *See, e.g.*, Tr. at 71:13-72:03 (June 5, 2014) (Brittany Schaffer, NMPA/Loeb & Loeb LLP).

[934] MMF & FAC Second Notice Comments at 16-17, 47 n.70; SGA Second Notice Comments at 14-15, Exhibit 2 n.7.

[935] *See* Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*.

Questions arise as to how such equity deals are (or are not) reported to artists and songwriters, and whether the value received by the label or publisher impacts the royalties that are paid.[936] Again, the artist or songwriter contract may not address such issues.[937]

These concerns must be addressed as part of any updated licensing framework, especially one that allows publishers to opt out of the statutory licensing system and pursue direct deals. As mentioned above, under any such deal, songwriters should have the option of being paid their writer's share of performance royalties directly through their preferred MRO. That is, even if the music service is paying the publisher's royalties (including mechanicals) to the publisher directly, it would transmit a copy of its usage report and the writer's share of performance royalties to the MRO for the MRO to administer.[938] The Office trusts that such an approach could be acceptable to the publishers, since the major publishers who have been contemplating withdrawal from the PROs appear also to be considering the possibility of continuing administration of royalty distributions by the PROs under directly licensed deals.[939]

While there has been less focus on this issue in relation to SoundExchange—which is not facing a large-scale "withdrawal" problem[940]—the Office notes that the same principle

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[936] *See* A2IM Second Notice Comments at 5-7 (explaining that some of the largest digital music services have entered into direct licensing deals with record labels or publishers that include compensation in the form of advances or equity, but that such compensation is not necessarily shared with creators); SGA Second Notice Comments at 14-15.

[937] Notably, however, music publishers have addressed this issue in their negotiated streaming settlement under section 115, since adopted as regulation. 37 C.F.R. § 385. The definition of revenue to which the percentage royalty rate is applied in the streaming regulations requires record companies to account for "anything of value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration . . ." *Id.* § 385.11, 385.21 (definition of "applicable consideration").

[938] To ensure the transparency of such a hybrid arrangement, the withdrawing publishers should make the material financial terms of their direct deals—the royalty rates, advances, and any other consideration from the licensee attributable to the use of the songwriter's work—available to their songwriters.

[939] *See Pandora Ratesetting*, 6 F. Supp. 3d at 337; *see also* Tr. at 38:06-08 (June 17, 2014) (David Kokakis, UMPG); BMI Second Notice Comments at 14 ("In the context of partial rights withdrawal, BMI can still assist publishers in providing certain royalty administration services for their direct licenses covering the withdrawn rights, with administration terms and fees as agreed to by the parties. BMI would continue to provide its customary licensing and distribution services to the publishers and songwriters with regard to all other aspects of the public performing right.").

[940] In this regard, however, it should be noted that there has recently been some direct licensing of noninteractive digital performance rights outside of SoundExchange. As mentioned above,

should apply there. To the extent record companies enter into direct licensing relationships with digital providers, artists and musicians should have the option of continuing to receive their share of royalties through that organization.

b. Best Practices for Transparency

More generally, issues surrounding transparency in reporting and payment by music publishers and record labels under songwriter and artist agreements are concerns that might be productively addressed through the consideration and adoption of best practices to ease friction in this area. In 2009, for instance, record labels and music publishers agreed to a series of voluntary changes to improve licensing practices and the flow of royalties under section 115, which have been memorialized in a continuing memorandum of understanding.[941] A similar effort might be undertaken to establish best practices to ensure transparency in label and publisher reporting and payment to creators. The Office hopes that major labels and publishers will consider engaging with artists and publishers in a voluntary fashion to make progress on these issues in the private realm.

E. An Updated Music Licensing System

As noted above, nearly ten years ago, music publishers and digital media companies appealed to Congress to pass SIRA, legislation that would have created a new collective licensing system under section 115 for the digital use of musical works. While SIRA was more limited in scope than what would seem to be called for today, it nonetheless featured some concepts that the Office believes could help to inform a more general overhaul of our licensing system.

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iHeartMedia has entered into licensing agreements with WMG and some independent labels for deals covering both terrestrial and internet radio. Christman, *Here's Why Warner Music's Deal with Clear Channel Could be Groundbreaking for the Future of the U.S. Music Biz (Analysis)*. Pandora recently struck a direct deal with Merlin, an entity that negotiates on behalf of independent record labels; under this arrangement, though, Pandora agreed to continue to pay artist royalties through SoundExchange. Glenn Peoples, *Pandora Signs First Direct Label Deal with Merlin*, BILLBOARD (Aug. 6, 2014), http://www.billboard.com/articles/business/6207058/pandora-label-deal-merlin.

[941] *See NMPA Late Fee Program*, NMPA LATE FEE SETTLEMENT.COM, http://www.nmpalatefeesettlement.com/index (last visited Jan. 22, 2015) (explaining the terms of the MOU in which record labels and music publishers (represented by RIAA and NMPA/HFA respectively) agreed to improve mechanical licensing practices and encourage prompt resolution of disputes); *see also Memorandum of Understanding (MOU 2)*, NMPA LATE FEE SETTLEMENT.COM, http://www.nmpalatefeesettlement.com/docs/mou2.pdf (last visited Jan. 22, 2015) (in which the record labels and music publishers extended the 2009 MOU through 2017).

First, SIRA recognized that it could be appropriate to allow more than one entity (referred to as a "designated agent") to administer licenses, so long as each such entity represented at least a certain prescribed share of the publishing market. Second, SIRA would have offered licensees the opportunity to obtain licenses on a blanket, rather than song-by-song, basis by serving notice on the designated agents. Third, SIRA recognized that one such agent (the "general designated agent") should serve as a default licensing entity for publishers that had not selected a different agent. And finally, SIRA provided for each designated agent to maintain a database listing ownership information for the musical works it administers.[942] While there was disagreement about the details of SIRA, these basic organizing principles were appealing to many.[943] The Office's proposal for an updated licensing framework also draws upon these concepts.

But even though SIRA may represent a good starting point, it is only that. As digital models have proliferated, the drawbacks of our current system have become more pronounced. The intervening decade has produced a greater sense of urgency concerning the strains on the current system.

Stakeholders focus in particular on the lack of reliable licensing data, which leads to inefficiencies and failures in the licensing process. The Office agrees with commenting parties that much of what is ailing our system would be greatly ameliorated if all those who needed it had access to authoritative data concerning the ownership of musical works and sound recordings. In addition, because digital services typically receive only track-based information for sound recordings that is not tied to the underlying musical work, there needs to be an efficient mechanism for licensees to associate the sound recordings they use with the musical works they embody.

1. MROs

Under the Office's proposal, except to the extent they chose to opt out of the blanket statutory system, publishers and songwriters would be obligated to license their public performance and mechanical rights through their MROs.[944] As explained above, an

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[942] SIRA, H.R. 5553.

[943] *See* HFA, *Legislative News: Section 115 Reform Act of 2006 (SIRA) Introduced*, SOUNDCHECK, June 2006, at 1, *available at* https://secure.harryfox.com/public/userfiles/file/Soundcheck/viewSoundCheck606.pdf ("While [DiMA, the NMPA, and the RIAA] have not reached complete agreement on all aspects of this legislation, we are optimistic that in the coming weeks we will work together with Chairman Smith and Representative Berman to ultimately pass historic legislation that will promote greater innovation and competition among digital music providers, deliver fair compensation to music creators and most importantly, greatly expand music choice and enjoyment for music fans.").

[944] Regardless of opt-out status, however, just as is the case today, a willing publisher could agree to a voluntary license with a willing licensee outside of the statutory regime. But in order to *require* the licensee to negotiate outside of the statutory process, the publisher would need to

MRO would have the ability to administer, and bundle, performance and mechanical rights on behalf of the publishers and songwriters it represented. It would also collect and distribute the royalties due under such licenses.[945]

An MRO could be any entity representing the musical works of publishers and songwriters with a market share in the mechanical and/or performance market above a certain minimum threshold, for example, 5%. Existing rights organizations, such as ASCAP, BMI, HFA and others, could thus qualify as MROs. Each MRO would enjoy an antitrust exemption to negotiate performance and mechanical licenses collectively on behalf of its members—as would licensee groups negotiating with the MROs—with the CRB available to establish a rate in case of a dispute.[946] But MROs could not coordinate with one another and, as discussed above, would be subject to at least routine antitrust oversight to guard against anticompetitive behavior. They would also be subject to potential CRB ratesetting for all uses of their members' works except for those that had been withdrawn.

Each MRO would be required to supply a complete list of the publishers, works, percentage shares and rights it represented, as well as the MRO's licensing contact information, to the GMRO, and would be obligated to keep that information current. The requirement to identify the titles and writers of represented works essentially tracks what is required today under the ASCAP consent decree and has long been voluntarily provided by the PROs and HFA through their public "lookup" databases.[947] The critical

assert its opt-out right. Additionally, to effectuate such a voluntary arrangement, the publisher would need to notify the MRO of the agreement, so that the MRO could make appropriate adjustments to its collection and distribution processes.

[945] Under the new MRO-based system, record labels would no longer engage in "pass-though" licensing of musical works as they are entitled to do today under section 115. Third-party services would instead seek blanket licenses from the MROs, or directly from any publishers who had opted out. Apart from long-time concerns by publishers and songwriters about their inability to receive direct payment from digital services under the pass-through regime, the possibility of varying rates under the updated licensing framework being proposed would seemingly render pass-through licensing inefficient at best. In their comments, record labels indicated a willingness to eliminate this aspect of section 115. *See* RIAA Second Notice Comments at 19 ("The major record companies generally support in principle the elimination of pass-through licensing.").

[946] The section 112, 114, and 115 licenses contain antitrust exemptions to allow copyright owners and users to negotiate collectively, and the PROs are permitted to do so under the consent decrees. *See* 17 U.S.C. §§ 112(e)(2), 114(e)(1), 115(c)(3)(B).

[947] *See* ASCAP Consent Decree § X; *Ace Title Search*, ASCAP, https://www.ascap.com/Home/ace-title-search/index.aspx (last visited Jan. 29, 2015); *BMI Repertoire*, BMI, http://repertoire.bmi.com/startpage.asp (last visited Jan. 29, 2015); HFA, *Songfile Search*, SONGFILE, https://secure.harryfox.com/songfile/public/publicsearch.jsp (last visited Jan. 16, 2015).

difference is that the publicly accessible data would be available in a more sophisticated database format that would facilitate automated matching functions, bulk licensing processes, and reconciliation of third-party databases.

MROs would also be responsible for notifying the GMRO of any members that had exercised opt-out rights by providing the relevant opt-out information, including where a direct license might be sought, for the central database so potential licensees would know where to go for license authority. Additionally, under requirements that would be phased in over time, MROs would need to supply the ISWC—and over time, the ISNI—identifiers for each of the works they represented. As everyone appears to agree, the move to unique identifiers as a primary means to recognize both musical works and sound recordings is essential to an efficient licensing system.

But MROs would not have to share all of their data for purposes of the public database. For example, there would be no need for an MRO to provide contact information for its members (other than those that opted out) since the MRO would be responsible for distributing royalties under the licenses it issued. Details about contractual arrangements between publishers and their songwriters that the MROs might need for their own distribution purposes would seem to be unnecessary to provide for public use. Under the Office's approach, MROs would only be required to furnish such information as would be necessary to facilitate accurate licensing transactions and usage reporting in a system of multiple MROs. As suggested below, the specific data to be supplied could be subject to regulatory oversight and adjusted over time.

2. The GMRO

Even though the preponderance of licensing activity would be carried out by the MROs and directly licensing publishers, the hub of the new licensing structure would be the GMRO. Similar to SoundExchange, the GMRO ("SongExchange"?) would be a non-profit entity designated, and regulated, by the government.[948] The GMRO would be overseen by a board that included representatives from both the music publishing and songwriter communities.

By virtue of maintaining authoritative and accessible ownership data, the GMRO would help to coordinate licensing and royalty payments across the MROs and individual publishers. But it would not serve as a centralized collection facility other than with respect to unidentified royalty recipients. The Office believes that adding an additional administrative layer to core royalty collection and distribution functions would add time

[948] SoundExchange is regulated by the Copyright Royalty Board as the designated collective. *See, e.g.* 37 C.F.R. §§ 380.2(c), 380.4.

and expense to these processes and should be avoided if possible.[949] At the same time, the GMRO would serve as the recipient for payments on behalf of unidentified owners.

a. Data-Related Responsibilities

The GMRO would ingest data from MROs and other authoritative sources to create its master database. The GMRO database would list the publishers, musical works, percentage shares and rights represented by the various MROs, along with prescribed identifiers such as ISWCs and ISNIs. In addition, the database would flag opt-out publishers, the specific rights and works that were opted out, and provide the publishers' licensing contact information.

In addition to musical work data, it seems that the GMRO could and should also incorporate sound recording data into the public database, including track titles, record labels, featured artists, play times and ISRCs. It is the Office's understanding that SoundExchange currently has identification and ownership information—including ISRCs—for approximately 14 million sound recordings.[950] The GMRO could absorb this data from SoundExchange. Through SoundExchange's continuing administration of the section 112 and 114 licenses, an ISRC requirement for remaining tracks—as well as the ISNI standard—could be phased in under those licenses, with the ongoing results to be shared with the GMRO.[951]

Like SoundExchange, the GMRO would play an active role in gathering missing data, reconciling conflicting data, and correcting flawed data. It would need to establish a process to handle competing ownership claims as necessary.

But perhaps most important among the data-related responsibilities of the GMRO. would be to gather or generate "matches" of musical works with sound recordings. There is simply no easy means for licensees to acquire generalized data identifying the musical works embodied in individual sound recordings. Some private entities such as HFA have made substantial progress on this front through a combination of automated and manual matching protocols, but there is no comprehensive source for this information, and even HFA has yet to match millions of titles.[952]

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[949] SIRA took a similar approach by providing for direct payment to the individual designated agents. SIRA, H.R. 5553.

[950] SoundExchange Second Notice Comments at 4-5.

[951] SoundExchange is currently exploring making its data available to others. *See id.* at 5 ("SoundExchange is actively exploring means by which it might provide interested services a means of accessing [its sound recording] data for use in identifying to SoundExchange with greater precision the recordings they use under the statutory licenses.").

[952] Tr. at 217:02-218:16 (June 23, 2014) (Christos P. Badavas, HFA).

A matching database would represent a huge advance in music licensing, as it would enable digital services efficiently to identify musical works and their owners based on the tracks they are using. Undoubtedly it is a significant undertaking, but given an appropriate level of resources it would seem to be achievable, at least with respect to the most frequently used songs. As HFA reports, 1-2 million sound recordings account for almost 95% of usage in a typical digital music service.[953] Happily (and not surprisingly), it is the most commercially valuable sound recordings and musical works that tend to be the easiest to identify and associate with one another.

On the licensee side of the equation, whenever an ISWC, IRSC or ISNI (or other prescribed identifier) appeared in the database, it would be a required element in a licensee's report under a section 114 or 115 license. The consistent use of these standards would undoubtedly facilitate the GMRO's efforts to match musical works to sound recordings and distribute royalties to their owners.

Finally, as noted above, the song data and licensing information collected by the GMRO would be publicly accessible—not only in the form of individual records through a "lookup"-style database, but also in bulk form and/or via APIs that would allow licensees the ability to use it to update their records or perform matching or other functions relating to their licensing needs.

b. Default Licensing and Payment

Notwithstanding the GMRO database and other available resources, there would still be works (and shares of works) for which the owners were not identified.[954] The GMRO would therefore also serve as the default licensing and collection agent for musical works (or shares of works) that licensees were unable to associate with an MRO or opt-out publisher. Services relying on blanket performance and/or mechanical licenses for musical works that had usage-based payment obligations would transmit records of use for unmatched works, along with associated payments, to the GMRO.[955] The GMRO

[953] NMPA & HFA First Notice Comments at 13.

[954] This is a particular concern with respect to new releases, as publisher and songwriter disagreements over their respective ownership shares in songs often delay the finalization of mechanical licenses for months or even years after the record is released. Tr. at 340:05-341:14 (June 23, 2014) (Andrea Finkelstein, SME).

[955] Since royalty obligations might vary among MROs and publishers, the default payments would need to be made in an amount sufficient to cover the highest potential rate payable to any entity with which the licensee had a licensing arrangement. In some cases, a blanket license might require payment of a set amount for the reporting period in question regardless of usage (for example, a fixed percentage of the service's revenues, as in the case of ASCAP's license with Pandora), with the royalty pool to be allocated by the collecting agent. In such a case, there would be no need to pay into the GMRO, and any reporting issues would need to be addressed by the MRO.

would then attempt to identify the MRO or individual rightsowner itself and, if successful, pay the royalties out.[956] If unsuccessful in its research efforts, the GMRO would add the usage record to a public unclaimed royalties list and hold the funds for some period of time—*e.g.*, three years—to see if a claimant came forward. As is the case with SoundExchange, after that period, the GMRO could use any remaining unclaimed funds to help offset the costs of its operations. Such a default licensing and payment option would provide protection for licensees—by reporting unmatched works and paying the associated royalties to the GMRO, they could avoid liability for infringement for those uses.

But any such system would require appropriate incentives to ensure that both licensees and publishers were holding up their respective ends of the bargain. Setting aside any general funding obligations in relation to the GMRO, which are discussed below, the Office believes that licensees should be required to pay an administrative fee (perhaps assessed on a per-title basis) for any unmatched uses reported to the GMRO.[957] In addition to encouraging due diligence on the part of licensees to locate missing information before resorting to the default system, such fees would help underwrite the GMRO's efforts to locate and pay rightsholders.

At the same time, MROs and their members should also be encouraged to maintain complete and reliable data with the GMRO. The primary incentive to do so, of course, would be to facilitate prompt and accurate payments by licensees. In this regard, the Office believes it could be useful to establish phased-in compliance targets over a period of several years for the provision of the most critical publisher data, including missing ISWCs, to the GMRO.[958] If, after an appropriate review of the situation and an

[956] Any difference between the royalties paid to the GMRO and the actual rate of a subsequently identified publisher could be contributed to the GMRO to offset costs. In the case of a publisher not affiliated with an MRO and hence not subject to any rate agreement, the publisher should receive the lowest potential rate that the licensee might pay for that use and the GMRO could also deduct a reasonable administrative fee not greater than any fee currently charged by any of the MROs. This latter rule would incentivize publishers to affiliate with an MRO of their choice rather than rely on the much less efficient GMRO claims procedure.

[957] A somewhat analogous fee is currently required for the filing of an NOI with the Office under section 115 in lieu of serving it on a licensee when the licensee cannot be found in the Office's records (though no royalty payment is required). *See* 37 C.F.R. § 201.3(e)(1). As noted above, large-scale licensees appear to be reluctant to avail themselves of this process due to the filing fees (which reflect the costs incurred by the Office in administering these notices, as per 17 U.S.C. § 708(a)). The level of the administrative fee that would be assessed by the GMRO—which would receive more general funding from users, as discussed below—would need to be carefully assessed in relation to its purpose.

[958] By way of illustration, in year one, 20% of works listed by an MRO might be required to include the ISWC; in year two, 40%; and so on up to near-total compliance.

opportunity to rectify concerns, an MRO were found to fall short of the mark, any licensee required to pay the GMRO's administrative fee for unmatched works to that publisher would be entitled to recoup some portion of that fee (say half) from its royalty payments to that publisher pending correction of the problem.

c. Resources and Funding

A question that will inevitably arise in any discussion concerning an overhaul of our music licensing system is how the new system—more specifically, the startup costs and various activities of the GMRO—would be funded. The Office has some suggestions to offer on this point.

First, the Copyright Office believes that both copyright owners and users should bear the costs of the new system, as both groups will share in its benefits. Traditionally, publishers and songwriters have underwritten much of the cost of licensing performance and mechanical rights and distributing royalties through commissions paid to the PROs and HFA. But record labels and digital services have also borne significant administrative costs in gathering and compiling the data necessary to obtain and report under licenses.

As envisioned by the Office, the GMRO would build and maintain a public database of ownership and licensing information for musical works and sound recordings. As part of this obligation, it would be responsible for matching sound recording data to musical works. The GMRO would also be responsible for collecting and distributing royalties for unclaimed works. These are substantial undertakings. Some licensees have expressed willingness to help fund a more workable system.[959] The Office believes that publishers and songwriters will also need to contribute, although much of their contribution might be in the form of shared data.

As explained above, under the Office's proposal, every MRO, as well as SoundExchange, will be required to contribute key elements of data to create and maintain a centralized music database. MROs will be responsible for allocating and distributing the vast majority of royalties (and will charge commissions to publishers and songwriters for those services). In exchange for these contributions on the part of copyright owners, the Office believes that the primary financial support for the data-related and default licensing activities of the GMRO should come from fees charged to users of the section 112, 114, and 115 licenses.

[959] *See, e.g.*, DiMA Second Notice Comments at 5 (suggesting that the government "designate a small portion of license fees" paid by licensees to cover costs); RIAA First Notice Comment at 22 ("Record companies are prepared to contribute information concerning new works, and potentially a share of start-up costs.").

Although music users would be paying royalties directly to MROs and individual publishers—and to SoundExchange as well—they would have a separate obligation to pay a licensing surcharge to the GMRO in recognition of the value it would be providing to the licensee community. The licensing surcharge might, for example, be assessed as a small percentage of royalties due from the licensee under its section 112, 114, and/or 115 statutory licenses, including any direct deals for equivalent rights. In order to fund startup costs, licensees could perhaps contribute a lump sum against future surcharge assessments, to be recouped over time.

The surcharge to be paid by statutory licensees could be determined by the CRB through a periodic administrative process based on the GMRO's costs, and would be offset by other sources of funding. For example, in addition to the generally applicable surcharge, as explained above, the Office believes that individual licensees should be charged an administrative fee in connection with reporting and paying unattributed uses to the GMRO.[960] Publishers not affiliated with an MRO who claimed works from the unmatched list would also be expected to pay a processing fee, as they would at an MRO. Nonstatutory licensees could be required to pay the GMRO's reasonable costs for the bulk provision of data. Such fees—which would help to offset the costs of the GMRO—could be considered by the CRB in establishing the surcharge.

An additional source of funding would be any royalties that remained unclaimed by publishers after the prescribed holding period (perhaps three years). Such unattributed monies—or "black box" funds—would also be available to offset the GMRO's administrative costs. As with the GMRO's other sources of income, these funds, too, could be considered by the CRB in establishing the licensing surcharge.[961]

3. The CRB

a. New Ratesetting Protocol

Under the Office's proposal, ratesetting by the CRB would shift from a five-year cycle to a system under which the CRB would step in only as necessary—that is, only when an MRO or SoundExchange and licensee could not agree on a rate.

The unfortunate reality is that the costs of ratesetting are very high, whether the proceeding occurs in federal court or before an administrative tribunal. The Office believes that the current approach under the section 112, 114, and 115 licenses—under which rates are required to be established for the full spectrum of uses for the upcoming five years—is probably not the most efficient use of resources. Such an approach

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[960] As noted above, an MRO that failed to contribute adequate data to the GMRO could be required to absorb some portion of such administrative fees.

[961] If the black box funds were ever to exceed the GMRO's costs, the excess could be distributed to publishers by the GMRO based on a market-share-based allocation process.

presents the nontrivial problem of how to identify, evaluate and price still-nascent business models. Even if they are identified, some of these uses might be easily settled outside of the context of a CRB proceeding. In the case of existing models, the extant rates may be sufficiently satisfactory for both sides to continue in effect. Greater flexibility in the ratesetting process would allow the ratesetting body to address only those rates that were worthwhile to litigate.

In support of its proposal, the Office observes that ASCAP and BMI have operated under such an *ad hoc* system in the federal rate courts, with only a relatively small number of their rates actually litigated. A likeminded CRB approach could yield more voluntary agreements and less litigation. Further, licensees would no longer have to shoehorn themselves into an existing rate category to take advantage of statutory licensing, because MRO licenses could be specifically tailored to address the nuances of the business model at hand.

Last but not least, it is difficult to see how an integrated licensing framework such as that proposed by the Office could function under two different ratesetting paradigms, as exist in their separate worlds today. In order to bundle performance and mechanical licensing—or, as discussed below, sound recording and musical work rights—in an efficient manner, there should be a unified ratesetting process. The CRB would face enormous administrative challenges if it had to administer both periodic and *ad hoc* ratesetting proceedings simultaneously.[962]

b. All-In Rates for Noninteractive Streaming

During the study, various commenting parties floated the suggestion of all-in blanket licensing that would encompass both sound recording and musical work rights.[963] Our current framework presents seemingly insuperable hurdles to achieving what many view as a tantalizing goal. Even under the framework proposed by the Office—which notwithstanding publisher opt-out rights still contemplates ratesetting for musical works that has no equivalent on the sound recording side—it would be difficult to implement all-in rates on a broad basis.

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[962] In this regard, Congress might also wish to amend the statutory framework for the CRB to allow for greater flexibility in staffing. Currently, the statute is highly specific, in that it provides for three full-time staff members: one to be paid no more than the basic rate for level 10 of GS-15 of the General Schedule; one to be paid between the basic rate for GS-13 and level 10 of GS-14; and one to be paid between the basic rate for GS-8 and level 10 of GS-11. 17 U.S.C. § 802(b), (e)(2). Especially if its duties were expanded to include additional licensing activities and fee-setting responsibilities, the CRB would seemingly be better served with a statute that provided more discretion with respect to the number and seniority of the legal staff that assist the three Judges.

[963] *See, e.g.*, RIAA First Notice Comments at 14-17 (proposing a blanket licensing solution for all rights implicated when using musical works); Tr. at 194:05-18 (June 4, 2014) (Scott Sellwood, Google/YouTube) ("I certainly like the idea of an all-in valuation of the music copyright.").

In one area, however—the licensing of noninteractive streaming uses by internet services, satellite and terrestrial radio, and others—such a model might be achievable. Here the Office has suggested that government supervision of the public performance right be moved from the federal rate courts to the CRB. Accordingly, both sound recording owners and musical work owners would be subject to CRB ratesetting to the extent they were unable to negotiate agreements with digital providers. The Office believes that any such proceedings could potentially be combined.

Taking the suggestion of the RIAA, for example, record labels and music publishers could agree up front to a split of royalties as between them for the category of use to be litigated.[964] They could then participate jointly in the ratesetting proceeding vis-à-vis the licensee. The licensee's focus before the CRB would thus be on its total royalty obligation, rather than the particular amounts to be paid to labels or publishers. Even barring an up-front agreement between the labels and publishers, ratesetting for the service in question might still proceed on an all-in basis, with the CRB to establish the split between sound recordings and musical works in a separate phase of the proceeding that did not include the licensee.

c. GMRO Surcharge

As noted above, under the Office's proposal, the GMRO would be funded in part by a licensing surcharge to be paid directly by licensees to the GMRO. The Office believes that the CRB, with its in-house economic expertise, would be well equipped to determine the surcharge through a periodic review process. That process would be conducted separate and apart from any ratesetting activities. Indeed, an important element of such a proceeding would be to preclude any consideration of royalty rates in establishing the licensing surcharge (and vice versa). The surcharge would be set independently, based on licensee data and the GMRO's costs and capital needs.[965]

d. Procedural Improvements

In addition to the substance of the CRB's ratesetting determinations, a number of seasoned stakeholders addressed the procedural rules that currently govern the CRB's work. The CRB is constrained by procedural mandates set forth in section 803 of the Copyright Act, which govern the initiation and conduct of ratesetting proceedings, including such matters as filing rules for participants, the timing and content of direct cases, the handling of various evidentiary and discovery matters, and settlement

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[964] RIAA First Notice Comments at 15-17. Any such agreement concerning the royalty split would presumably need to address the parties' obligations to each other in relation to a settlement rather than a litigated outcome.

[965] As it does in CRB proceedings today, in considering appropriate fees, the CRB could impose safeguards to protect against public dissemination of confidential business information.

negotiations.[966] This sort of procedural detail is unusual in a federal statutory scheme and is more typically left to regulation or the discretion of the tribunal.

Stakeholders complain that the current CRB system is unduly burdensome and expensive. Currently, ratesetting participants are required to put in their written direct statement before they conduct discovery—that is, they are required to construct and support their rate proposals to the CRB without the benefit of economic information from the other side.[967] This is completely counterintuitive to anyone familiar with ordinary litigation practice.

In keeping with this construct, ratesetting proceedings are divided into separate direct and rebuttal phases, with discovery conducted after each phase.[968] Parties may seek to amend their rate proposals in response to what they learn in discovery.[969] In practical effect, this means there are two trial proceedings, with overlapping arguments and evidence, instead of one. As might be expected, stakeholders would prefer to have the issues for trial fully joined and addressed in single proceeding. The Office is sympathetic to these concerns and believes the CRB process should be modified so it more closely resembles typical litigation. As has been suggested by some, this could include greater reliance on the Federal Rules of Civil Procedure and Federal Rules of Evidence, albeit with appropriate modifications (such as relaxation of hearsay rules).[970]

Multifactor ratesetting standards also contribute to the length and expense of proceedings, as parties feel compelled to furnish evidence and argument on each statutorily prescribed factor. A move to a simpler standard such as willing buyer/willing seller—perhaps unembellished by specific considerations (in contrast to the standard as currently embodied in section 114[971])—might also help to streamline the ratesetting process by permitting each side to focus on the most salient aspects of their case.

Many CRB participants complained that the existing process does not facilitate early settlement. In order for a settlement to be the basis for an industrywide rate, it must be adopted by the CRB.[972] The CRB does not appear always to be comfortable in adopting settlement agreements that settle less than the entire proceeding—for example, a settlement among fewer than all participants—while the rest of the proceeding remains

[966] *See generally* 17 U.S.C. § 803.

[967] *Id.* § 803(b)(6)(C)(ii).

[968] *Id.* § 803(b)(6)(C)(i)-(ii).

[969] *Id.* § 803(b)(6)(C)(i).

[970] *See id.* § 803(b)(6)(C)(iii) (allowing hearsay to be admitted upon CRB discretion).

[971] *Id.* § 114(f)(2)(B).

[972] *Id.* § 801(b)(7).

pending.[973] And the record shows that participants feel obligated to continue litigating until a settlement is adopted.[974] This is not an efficient system. The Office agrees that this should be rectified by clarifying the statutory provisions governing the CRB to favor partial settlements at any stage of the proceeding when requested by the settling participants.[975]

Finally, while the Office believes that the high-level procedural concerns described should be addressed by legislative amendments, Congress may also wish to remove unnecessary procedural details in the statute that are better left to regulation. The CRB should have the latitude to develop specific procedural rules—and modify them as appropriate—within the basic parameters set forth in the statute.

4. Regulatory Implementation

Should Congress decide to restructure the music licensing system, the Office believes that it might be most productive for any resulting legislation to set out the essential elements of the updated system and leave the particulars to regulation. Such a construct would likely be more realistic to enact than an exhaustive statutory prescription—especially in the case of music licensing, where the particulars can be overwhelming. In addition to whatever legislative advantages it might confer, a more general approach would have added benefit of flexibility, since regulations can be adjusted over time to address new developments and unforeseen contingencies.

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[973] The CRB has occasionally adopted settlements resolving some but not all rate concerns. *See, e.g.*, Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services, 72 Fed. Reg. 71,795 (Dec. 19, 2007); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080. But adoption of partial settlements is not the norm.

[974] *See, e.g.*, Tr. at 122:15-22 (June 23, 2014) (Colin Rushing, SoundExchange) ("But it was this group, College Webcasters, Inc. We entered into a settlement with them. We also did a settlement with NAB. Neither of these settlements were actually adopted by the CRB until the very end of the proceeding. And so we found ourselves unsure of what, you know, whether the settlements were, actually, going to be adopted."); Tr. at 99:16-100:03 (June 16, 2014) (Brad Prendergast, SoundExchange) (the current system "leaves a lot of parties still in the litigation proceeding, when they'd rather not be"); Tr. at 129:17-130:03 (June 23, 2014) (Steven Marks, RIAA) ("I also think that the CRB, it would be nice to have, maybe, some set times for the CRB to rule on settlements that are proposed. We had, our last mechanical settlement that was offered, a delay of almost a year.").

[975] Notably, this problem would also likely be ameliorated by a move to an "as-needed" ratesetting system as recommended by the Office, where rate determinations would bind only the participants to the proceeding (notwithstanding their potential influence on other market actors). Such proceedings would focus on narrower disputes and should therefore be easier to resolve than proceedings covering a multitude of rates and stakeholders.

Logically, the Copyright Office should have primary regulatory responsibility for the many issues that would need to be addressed in implementing a new statutory framework. For example, the Office could establish rules for the provision of data to the GMRO, licensee reporting requirements, and collective audits. It could also promulgate technical requirements for the statutory licenses, with the power to update such specifications as necessary.

The CRB, too, would have regulatory responsibilities. In addition to its periodic review of the surcharge to be assessed by the GMRO, the CRB would enact rules that would govern the filing and conduct of the ratesetting proceedings it would oversee. Like the Copyright Office, the CRB should have the requisite regulatory authority to carry out its responsibilities.

5. Further Evaluation

Should Congress choose to embark upon a series of changes to our licensing system such as those described above, the Office recommends that the new system be evaluated by the Copyright Office after it has been operation for a period of several years. Assuming that the new licensing framework includes an opt-out mechanism as described above, the efficacy of that process would be of particular interest. If the opt-out system were found to be having adverse effects on the marketplace, Congress could consider narrowing those rights. If, on the other hand, the opt-out option were working well, Congress might wish to expand it to other categories.

APPENDIX A FEDERAL REGISTER NOTICES

search_cfm under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington DC, this 20th day of February 2014.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2014–05760 Filed 3–14–14; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply For Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 27, 2014.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 27, 2014.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 20th day of February 2014.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

Appendix—13 TAA Petitions Instituted Between 2/10/14 and 2/14/14

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
85059	Avery Dennison (Company)	Clinton, SC	02/10/14	02/10/14
85060	Fresenius Medical Care NA (Workers)	Livingston, CA	02/11/14	02/10/14
85061	IBM (State/One-Stop)	San Jose, CA	02/11/14	02/10/14
85062	Computer Sciences Corporation (State/One-Stop)	Oakland, CA	02/11/14	02/10/14
85063	EPIC Technologies, LLC (Company)	El Paso, TX	02/11/14	02/10/14
85064	Southside Manufacturing (Workers)	Blairs, VA	02/11/14	02/04/14
85065	Woodcraft Industries (Company)	Belletonte, PA	02/12/14	02/10/14
85066	Sun Edison (previously MEMC) (State/One-Stop)	St. Peters, MO	02/12/14	02/12/14
85067	FLSmidth Spokane Inc (Workers)	Meridian, ID	02/12/14	02/11/14
85068	GE Hitachi Nuclear Energy (Company)	Canonsburg, PA	02/12/14	02/11/14
85069	Allstate Insurance Company (Workers)	Roanoke, VA	02/12/14	01/28/14
85070	Time Machine, Inc. (Company)	Polk, PA	02/14/14	02/12/14
85071	General Electric (GE) (Union)	Ft. Edward, NY	02/14/14	02/04/14

[FR Doc. 2014–05758 Filed 3–14–14; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2014–03]

Music Licensing Study: Notice and Request for Public Comment

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The United States Copyright Office announces the initiation of a study to evaluate the effectiveness of existing methods of licensing music. To aid this effort, the Office is seeking public input on this topic. The Office will use the information it gathers to report to Congress. Congress is currently conducting a review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.,* to evaluate potential revisions of the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works.

DATES: Written comments are due on or before May 16, 2014. The Office will be announcing one or more public meetings to address music licensing issues, to take place after written comments are received, by separate notice in the future.

ADDRESSES: All comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at *http://www.copyright.gov/docs/musiclicensingstudy*. The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: The Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

Congress is currently engaged in a comprehensive review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.,* to evaluate potential revisions to the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works. The last general revision of the Copyright Act took place in 1976 (''Copyright Act'' or ''Act'') following a lengthy and comprehensive review process carried out by Congress, the Copyright Office, and interested parties. In 1998, Congress significantly amended the Act with the passage of the Digital Millennium Copyright Act (''DMCA'') to address emerging issues of the digital age. Public Law 105–304, 112 Stat. 2860 (1998). While the Copyright Act reflects many sound and enduring principles, and has enabled the internet to flourish, Congress could not have foreseen all of today's technologies and the myriad ways consumers and others engage with creative works in the digital environment. Perhaps nowhere has the landscape been as significantly altered as in the realm of music.

Music is more available now than it has ever been. Today, music is delivered to consumers not only in physical formats, such as compact discs and vinyl records, but is available on demand, both by download and streaming, as well as through smartphones, computers, and other devices. At the same time, the public continues to consume music through terrestrial and satellite radio, and more recently, internet-based radio. Music continues to enhance films, television, and advertising, and is a key component of many apps and video games.

Such uses of music require licenses from copyright owners. The mechanisms for obtaining such licenses are largely shaped by our copyright law, including the statutory licenses under Sections 112, 114, and 115 of the Copyright Act, which provide government-regulated licensing regimes for certain uses of sound recordings and musical works.

A musical recording encompasses two distinct works of authorship: The musical work, which is the underlying composition created by the songwriter or composer, along with any accompanying lyrics; and the sound recording, that is, the particular performance of the musical work that has been fixed in a recording medium such as CD or digital file. The methods for obtaining licenses differ with respect to these two types of works, which can be—and frequently are—owned or managed by different entities. Songwriters and composers often assign rights in their musical works to music publishers and, in addition, affiliate themselves with performing rights organizations (''PROs''). These intermediaries, in turn, assume responsibility for licensing the works. By contrast, the licensing of sound recordings is typically handled directly by record labels, except in the case of certain types of digital uses, as described below.

Musical Works—Reproduction and Distribution. Under the Copyright Act, the owner of a musical work has the exclusive right to make and distribute phonorecords of the work (*i.e.,* copies in which the work is embodied, such as CDs or digital files), as well as the exclusive right to perform the work publicly. 17 U.S.C. 106(1), (3). The copyright owner can also authorize others to engage in these acts. *Id.* These rights, however, are typically licensed in different ways.

The right to make and distribute phonorecords of musical works (often referred to as the ''mechanical'' right) is subject to a compulsory statutory license under Section 115 of the Act. *See generally* 17 U.S.C. 115. That license—instituted by Congress over a century ago with the passage of the 1909 Copyright Act—provides that, once a phonorecord of a musical work has been distributed to the public in the United States under the authority of the copyright owner, any person can obtain a license to make and distribute phonorecords of that work by serving a statutorily compliant notice and paying the applicable royalties. *Id.*

In 1995, Congress confirmed that a copyright owner's exclusive right to reproduce and distribute phonorecords of a musical work, and the Section 115 license, extend to the making of ''digital phonorecord deliveries'' (''DPDs'')—that is, the transmission of digital files embodying musical works. *See* Digital Performance Right in Sound Recordings Act of 1995 (''DPRSRA''), Public Law 104–39, sec. 4, 109 Stat. 336, 344–48; 17 U.S.C. 115(c)(3)(A).[1] The Copyright Office has thus interpreted the Section 115 license to cover music downloads (including ringtones), as well as the server and other reproductions necessary to engage in streaming activities. *See* In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, Docket No. RF 2006–1 (Oct. 16, 2006), *http://www.copyright.gov/docs/ringtone-decision.pdf;* Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 FR 66173 (Nov. 7, 2008).

Licenses under Section 115 are obtained on a song-by-song basis. Because a typical online music service needs to offer access to millions of songs to compete in the marketplace, obtaining the licenses on an individual basis can present administrative challenges.[2] Many music publishers have designated the Harry Fox Agency, Inc. as an agent to handle such song-by-song mechanical licensing on their behalf.

The royalty rates and terms for the Section 115 license are established by an administrative tribunal—the Copyright Royalty Board (''CRB'') [3]—which applies a standard set forth in Section 801(b) of the Act that considers four different factors. These include: The availability of creative works to the public; economic return to the owners and users of musical works; the respective contributions of owners and users in making works available; and the industry impact of the rates.[4]

The Section 115 license applies to audio-only reproductions that are primarily made and distributed for private use. *See* 17 U.S.C. 101, 115. Reproductions and distribution of musical works that fall outside of the Section 115 license—including ''synch'' uses in audiovisual media like

[1] Under the terms of Section 115, a record company or other entity that obtains a statutory license for a musical work can, in turn, authorize third parties to make DPDs of that work. *See* 17 U.S.C. 115(c)(3). In such a ''pass-through'' situation, the statutory licensee is then responsible for reporting and paying royalties for such third-party uses to the musical work owner.

[2] Concerns about the efficiency of the Section 115 licensing process are not new. For instance, in 2005, then-Register of Copyrights Marybeth Peters testified before Congress that Section 115 had become ''outdated,'' and made several proposals to reform the license. *See Copyright Office Views on Music Licensing Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 109th Cong. 4–9 (2005). In 2006, the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property forwarded the Section 115 Reform Act (''SIRA'') to the full Judiciary Committee by unanimous voice vote. *See* H.R. 5553, 109th Cong. (2006). This bill would have updated Section 115 to create a blanket-style license. The proposed legislation was not reported out by the full Judiciary Committee, however.

[3] The Copyright Royalty Board (''CRB'') is the latest in a series of administrative bodies Congress has created to adjust the rates and terms for the statutory licenses. The first, the Copyright Royalty Tribunal (''CRT''), was created in 1976. *See* Public Law 94–553, sec. 801, 90 Stat. 2541, 2594–96 (1976). In 1993, Congress replaced the CRT with a system of ad-hoc copyright arbitration royalty panels (''CARPs''). *See* Copyright Royalty Tribunal Reform Act of 1993, Public Law 103–198, sec. 2, 107 Stat. 2304, 2304–2308. Congress replaced the CARP system with the CRB in 2004. *See* Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, 118 Stat. 2341.

[4] *See* 17 U.S.C. 801(b)(1).

television, film, and videos; advertising and other types of commercial uses; and derivative uses such as ''sampling''—are licensed directly from the copyright owner according to negotiated rates and terms.

Musical Works—Public Performance. The method for licensing public performances of musical works differs significantly from the statutory mechanical license provided under Section 115. Licensing fees for such performances are generally collected on behalf of music publishers, songwriters, and composers by the three major PROs: the American Society of Composers, Authors and Publishers (''ASCAP''), Broadcast Music, Inc. (''BMI''), and SESAC. Songwriters and composers, as well as their publishers, commonly affiliate with one of the three for purposes of receiving public performance income. Rather than song-by-song licenses, the PROs typically offer ''blanket'' licenses for the full range of music in their repertories. These licenses are available for a wide variety of uses, including terrestrial, satellite, and internet radio, on-demand music streaming services, Web site and television uses, and performance of music in bars, restaurants, and other commercial establishments. The PROs monitor the use of musical works by these various entities and apportion and distribute collected royalties to their publisher, songwriter, and composer members.

Unlike the mechanical right, the public performance of musical works is not subject to compulsory licensing under the Copyright Act. Since 1941, however, ASCAP and BMI's licensing practices have been subject to antitrust consent decrees overseen by the Department of Justice.[5] These consent decrees were designed to protect licensees from price discrimination or other anti-competitive behavior by the two PROs. Under the decrees, ASCAP and BMI administer the public performance right for their members' musical works on a non-exclusive basis. They are required to provide a license to any person who seeks to perform copyrighted musical works publicly, and must offer the same terms to similarly situated licensees. In addition, ASCAP's consent decree expressly bars it from offering mechanical licenses.[6] Since 1950, prospective licensees that are unable to agree to a royalty rate with ASCAP or BMI have been able to seek a determination of a reasonable license fee in the federal district court for the Southern District of New York.[7]

The two PRO consent decrees were last amended well before the proliferation of digital music: The BMI decree in 1994,[8] and the ASCAP decree in 2001.[9] The consent decrees have been the subject of much litigation over the years, including, most recently, suits over whether music publishers can withdraw digital licensing rights from the PROs and negotiate public performance licenses directly with digital music services.[10]

Sound Recordings—Reproduction and Distribution. Congress extended federal copyright protection to sound recordings in 1972. That law, however, did not provide retroactive protection for sound recordings fixed prior to February 15, 1972, and such works therefore have no federal copyright status.[11] They are, however, subject to the protection of applicable state laws until 2067. *See* 17 U.S.C. 301(c).[12]

The owner of a copyright in a sound recording fixed on or after February 15, 1972, like the owner of a musical work copyright, enjoys the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. 17 U.S.C. 106(1), (3), 301(c). Except in the limited circumstances where statutory licensing applies, as described below, licenses to reproduce and distribute sound recordings—such as those necessary to make and distribute CDs, transmit DPDs, and operate online music services, as well as to use sound recordings in a television shows, films, video games, etc.—are negotiated directly between the licensee and sound recording owner (typically a record label). Thus, while in the case of musical works, the royalty rates and terms applicable to the making and distribution of CDs, DPDs, and the operation of interactive music services are subject to government oversight, with respect to sound recordings, licensing for those same uses takes place without government supervision.

Sound Recordings—Public Performance. Unlike musical works, a sound recording owner's public performance right does not extend to all manner of public performances. Traditionally, the public performance of sound recordings was not subject to protection at all under the Copyright Act. In 1995, however, Congress enacted the DPRSRA, which provided for a limited right when sound recordings are publicly performed ''by means of a digital audio transmission.'' Public Law 104–39, 109 Stat. 336; 17 U.S.C. 106(6), 114(a). This right extends, for example, to satellite radio and internet-based music services.[13] Significantly, however, the public performance of sound recordings by broadcast radio stations remains exempt under the Act. 17 U.S.C. 114(d)(1).[14]

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[5] *See generally United States* v. *Broadcast Music, Inc.,* 275 F.3d 168, 171–72 (2d Cir. 2001) (describing the history). SESAC, a smaller performing rights organization created in 1930 to serve European publishers, is not subject to a similar consent decree, although it has been involved recently in private antitrust litigation. *See Meredith Corp.* v. *SESAC LLC,* No. 09–cv–9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

[6] *United States* v. *ASCAP,* No. 41–cv–1395, 2001–2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999, *3 (S.D.N.Y. June 11, 2001). Although BMI has taken the position that a strict reading of its consent decree does not bar it from offering mechanical licenses, it generally has not done so. *See* Broadcast Music, Inc., Comments on Department of Commerce Green Paper 4–5 (Nov. 13, 2013), *available at http://www.ntia.doc.gov/files/ntia/bmi_comments.pdf.*

[7] Significantly, musical work owners are precluded from offering evidence concerning the licensing fees paid for digital performances of sound recordings as a point of comparison in the district court ratesetting proceedings. Section 114 of the Copyright Act provides that license fees payable for the public performance of sound recordings may not be taken into account ''in any administrative, judicial, or other governmental proceeding to set or adjust the rates payable to'' musical work copyright owners. 17 U.S.C. 114(i).

[8] *United States* v. *Broadcast Music, Inc.,* No. 64–cv–3787, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *as amended,* 1996 Trade Cases (CCH) ¶ 71,378, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

[9] *United States* v. *ASCAP,* No. 41–cv–1395, 2001–2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

[10] *See In re Pandora Media, Inc.,* Nos. 12–cv–8035, 41–cv–1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc.* v. *Pandora Media, Inc.,* Nos. 13–cv–4037, 64–cv–3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

[11] In 2009, Congress asked the Copyright Office to study the ''desirability and means'' of extending federal copyright protection to pre-February 15, 1972 sound recordings. Public Law 111–8, 123 Stat. 524 (2010) (explanatory statement). In 2011, the Office completed that study, issuing a report recommending that federal copyright protection be so extended. United States Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* (2011), *available at http://www.copyright.gov/docs/sound/pre-72-report.pdf.*

[12] Thus, a person wishing to digitally perform a pre-1972 sound recording cannot rely on the Section 112 and 114 statutory licenses and must instead obtain a license directly from the owner of the sound recording copyright. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23073 (Apr. 17, 2013) (determination of the CRB finding that ''[t]he performance right granted by the copyright laws for sound recordings applies only to those recordings created on or after February 15, 1972'' and adopting provisions allowing exclusion of performances of pre-1972 sound recordings from certain statutory royalties).

[13] In 1998, as part of the DMCA, Congress amended Sections 112 and 114 of the Copyright Act to clarify that the digital sound recording performance right applies to services like webcasting. *See* Public Law 105–304, secs. 402, 405, 112 Stat. 2860, 2888, 2890.

[14] The Copyright Office has long supported the extension of the public performance right in sound

Continued

For certain uses, including those by satellite and internet radio, the digital public performance right for sound recordings is subject to statutory licensing in accordance with Sections 112 and 114 of the Act. Section 112 provides for a license to reproduce the phonorecords (sometimes referred to as ''ephemeral recordings'') necessary to facilitate a service's transmissions to subscribers, while Section 114 licenses the public performances of sound recordings resulting from those transmissions. This statutory licensing framework applies only to noninteractive (*i.e.,* radio-style) services as defined under Section 114; interactive (or on-demand services) are not covered. *See* 17 U.S.C. 112(e); 17 U.S.C. 114(d)(2), (f). For interactive services, sound recording owners negotiate licenses directly with users.

The rates and terms applicable to the public performance of sound recordings under the Section 112 and 114 licenses are established by the CRB. *See* 17 U.S.C. 801 *et seq.* The royalties due under these licenses are paid to an entity designated by the CRB—currently SoundExchange, Inc.—which collects, processes, and distributes payments on behalf of rights holders.[15]

Notably, under Section 114, the rate standard applicable to those satellite radio and music subscription services that existed as of July 31, 1998 (*i.e.,* ''preexisting'' services[16]) differs from that for other services such as internet radio.[17] Royalty rates for pre-existing satellite radio and subscription services are governed by the four-factor standard in Section 801(b) of the Act—that is, the standard that applies to the Section 115 license for musical works.[18] By contrast, under the terms of Section 114, rates and terms for noninteractive public performances via internet radio and other newer digital music services are to be determined by the CRB based on what a ''willing buyer'' and ''willing seller'' would have agreed to in the marketplace.[19]

Subjects of Inquiry

The Copyright Office seeks public input on the effectiveness of the current methods for licensing musical works and sound recordings. Accordingly, the Office invites written comments on the specific subjects above. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

Musical Works

1. Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.

2. Please assess the effectiveness of the royalty ratesetting process and standards under Section 115.

3. Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?

4. For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

6. Please assess the effectiveness of the royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. 114(i), which provides that ''[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.''

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?

Sound Recordings

8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.

9. Please assess the effectiveness of the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

11. Is the distinction between interactive and noninteractive services adequately defined for purposes of eligibility for the Section 114 license?

Platform Parity

12. What is the impact of the varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms. Do these differences make sense?

13. How do differences in the applicability of the sound recording

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recordings to broadcast radio. *See Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 108th Cong. 6–7 (2004) (statement of David Carson, General Counsel, U.S. Copyright Office), *available at http://www.copyright.gov/docs/carson071504.pdf.* Only a handful of countries lack such a right; in addition to the United States, the list includes China, North Korea, and Iran. This gap in copyright protection has the effect of depriving American performers and labels of foreign royalties to which they would otherwise be entitled, because even countries that recognize a public performance right in sound recordings impose a reciprocity requirement. According to one estimate, U.S. rights holders lose approximately $70 million each year in royalties for performances in foreign broadcasts. *See generally* Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings,* 2 Harv. J. of Sports & Ent. L 221, 226 (2011).

[15] The Act requires that receipts under the Section 114 statutory license be divided in the following manner: 50 percent to the owner of the digital public performance right in the sound recording, 2½ percent to nonfeatured musicians, 2½ percent to nonfeatured vocalists, and 45 percent to the featured recording artists. 17 U.S.C. 114(g)(2).

[16] 17 U.S.C. 114(j)(10), (11). Today, Sirius/XM is the only preexisting satellite service that seeks statutory licenses under Section 114. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23055 (Apr. 17, 2013). There are two preexisting subscription services, Music Choice and Muzak. *Id.*

[17]

[18] *See* 17 U.S.C. 114(f)(1), 801(b)(1).

[19] 17 U.S.C. 114(f)(2)(B) instructs the CRB to ''establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and willing seller.'' The provision further requires the CRB to consider ''whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings,'' and ''the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.'' *Id.*

For all types of services eligible for a Section 114 statutory license, the rates for the phonorecords (ephemeral recordings) used to operate the service are to be established by the CRB under Section 112 according to a ''willing buyer/willing seller'' standard. 17 U.S.C. 112(e). In general, the Section 112 rates have been a relatively insignificant part of the CRB's ratesetting proceedings, and have been established as a subset of the 114 rate. *See, e.g.,* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23055–56 (Apr. 17, 2013).

public performance right impact music licensing?

Changes in Music Licensing Practices

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

Revenues and Investment

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?

21. How do licensing concerns impact the ability to invest in new distribution models?

Data Standards

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

Other Issues

23. Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

Dated: March 11, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate, Register of Copyrights.

[FR Doc. 2014–05711 Filed 3–14–14; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2014–020]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before April 16, 2014. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepares appraisal memoranda that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments on the schedule.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001
Email: *request.schedule@nara.gov*
FAX: 301–837–3698

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, Records Management Services (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media-neutral unless specified otherwise. An item in a schedule is media-neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media-neutral unless the item is specifically limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

85,099, Harrington Tool Company, Ludington, Michigan.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

85,046, AIG Claims, Houston, Texas.
85,097, SuperMedia Services, LLC., Middleton, Massachusetts.
85,122, Bimbo Bakaries USA, Inc., Wichita, Kansas.
85,144, IP & Science (Patent Payments), Bingham Farms, Michigan.
85,145, AXA Equitable Life Insurance Company, Charlotte, North Carolina.

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 USC 2271), the Department initiated investigations of these petitions.

None.

I hereby certify that the aforementioned determinations were issued during the period of March 31, 2014 through April 4, 2014. These determinations are available on the Department's Web site *tradeact/taa/taa_search_form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC this 10th day of April 2014.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2014–10166 Filed 5–2–14; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2014–03]

Music Licensing Study

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of public roundtables.

SUMMARY: The U.S. Copyright Office is undertaking a study to evaluate the effectiveness of current methods for licensing musical works and sound recordings. The study will assess whether and how existing methods serve the music marketplace, including new and emerging digital distribution platforms. In addition to soliciting written comments, the Office is conducting three two-day public roundtables on music licensing issues. A Notice of Inquiry soliciting written comments in response to a number of subjects was issued on March 17, 2014, and written comments are due on or before May 16, 2014. *See* 78 FR 14739 (Mar. 17, 2014). At this time, the Copyright Office announces three public roundtables to be held in June 2014 in Nashville, Los Angeles, and New York.

DATES: The two-day public roundtable in Nashville will be held on June 4 and 5, 2014, on both days from 9:00 a.m. to 5:00 p.m. The two-day public roundtable in Los Angeles will be held on June 16 and 17, 2014, on both days from 9:00 a.m. to 5:00 p.m. The two-day public roundtable in New York will be held on June 23 and 24, 2014, from 9:00 a.m. to 5:00 p.m. on June 23, and from 8:30 a.m. to 4:00 p.m. on June 24. Requests to participate in the roundtables must be received by the Copyright Office by May 20, 2014.

ADDRESSES: The Nashville roundtable will take place at Belmont University's Mike Curb College of Entertainment and Music Business, 34 Music Square East, Nashville, Tennessee 37203. The Los Angeles roundtable will take place at the UCLA School of Law, 385 Charles E. Young Drive East, Los Angeles, California 90095. The New York roundtable will take place at the New York University School of Law, 40 Washington Square South, New York, New York 10012. Requests to participate in the roundtables should be submitted using the form available on the Office's Web site at *http://www.copyright.gov/docs/musiclicensingstudy.* If electronic submission is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION: Congress is currently engaged in a comprehensive review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.,* to evaluate potential revisions to the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works. In light of Congress's review and significant changes to the music industry in recent years, the U.S. Copyright Office is conducting a study to assess the effectiveness of current methods for licensing sound recordings and musical works. The Office published a Notice of Inquiry on March 17, 2014, seeking written comments on twenty-four subjects concerning the current environment in which music is licensed. *See* 78 FR 14739 (Mar. 17, 2014).

At this time, the Copyright Office is providing notice of its intention to seek further input for its study through three two-day public roundtables to be held in Nashville, Los Angeles, and New York. The public roundtables will offer an opportunity for interested parties to comment on pertinent music licensing issues. The roundtables will address topics set forth in the Notice of Inquiry, including: The current music licensing landscape; licensing of sound recordings, including under the Section 112 and 114 statutory licenses and the treatment of pre-1972 recordings; licensing of musical works, including under the Section 115 statutory license and through the performing rights organizations (''PROs''); fair royalty rates and platform parity; industry data standards; industry incentives and investment; and potential future developments in music licensing. Following discussion of the various agenda topics by roundtable participants, observers at the roundtables will be provided a limited opportunity to offer additional comments.

The roundtable hearing rooms will have a limited number of seats for participants and observers. Those who seek to participate should complete and submit the form available on the Office's Web site at *http://www.copyright.gov/docs/musiclicensingstudy* so it is received by the Office no later than May 20, 2014. For individuals who wish to observe a roundtable, the Office will provide public seating on a first-come, first-serve basis on the days of the roundtable.

Dated: April 30, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2014–10242 Filed 5–2–14; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA 2014–026]

Creation of Freedom of Information Act Advisory Committee

AGENCY: National Archives and Records Administration.

U.S.C. § 300j–9(i), 33 U.S.C. § 1367, 15 U.S.C. § 2622, 42 U.S.C. § 6971, 42 U.S.C. § 7622, 42 U.S.C. § 9610, 42 U.S.C. § 5851, 49 U.S.C. § 42121, 18 U.S.C. § 1514A, 49 U.S.C. § 60129, 49 U.S.C. § 20109, 6 U.S.C. § 1142, 15 U.S.C. § 2087, 29 U.S.C. § 218c, 12 U.S.C. § 5567, 46 U.S.C. § 2114, 21 U.S.C. § 399d, and 49 U.S.C. § 30171.

Signed at Washington, DC on July 18, 2014.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2014–17342 Filed 7–22–14; 8:45 am]

BILLING CODE 4510–26–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2014–03]

Music Licensing Study: Second Request for Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The U.S. Copyright Office has undertaken a study to evaluate the effectiveness of current methods for licensing musical works and sound recordings. At this time, the Office seeks additional comments on whether and how existing music licensing methods serve the music marketplace, including new and emerging digital distribution platforms.

DATES: Written comments are due on or before August 22, 2014.

ADDRESSES: All comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at *http://www.copyright.gov/200B;docs/200B;musiclicensingstudy.* The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: The Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on its Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Copyright Office is conducting a study to assess the effectiveness of the current methods for licensing musical works and sound recordings. To aid with this study, the Office published an initial Notice of Inquiry on March 17, 2014 (''First Notice'') seeking written comments on twenty-four subjects concerning the current environment in which music is licensed. 78 FR 14739 (Mar. 17, 2014). The eighty-five written submissions received in response to this initial notice can be found on the Copyright Office Web site at *http://www.copyright.gov/docs/musiclicensingstudy/200B;comments/Docket2014_3/.* In June 2014, the Office conducted three two-day public roundtables in Nashville, Los Angeles, and New York City. The three roundtables provided participants with the opportunity to share their views on the topics identified in the First Notice and other issues relating to music licensing. *See* 79 FR 25626 (May 5, 2014). Transcripts of the proceedings at each of the three roundtables will be made available on the Copyright Office Web site at *http://www.copyright.gov/docs/200B;musiclicensingstudy/.*

In the initial round of written comments and during the roundtable sessions, a number of significant issues were discussed that the Office believes merit additional consideration.

First, as explained in the First Notice, in 2013, the two federal district courts overseeing the antitrust consent decrees governing the largest performance rights organizations (''PROs''), American Society of Composers, Authors and Publishers (''ASCAP'') and Broadcast Music, Inc. (''BMI''), held in separate opinions that under those decrees, music publishers could not withdraw selected rights—such as ''new media'' rights—to be directly licensed outside of the PROs; rather, a particular publisher's song catalog must either be ''all in'' or ''all out.'' [1] Following these rulings, both in public statements and at the recent roundtables, certain major music publishers have indicated that, if the consent decrees remain in place without modification, they intend to withdraw their entire catalogs from the two PROs and directly license public performances.[2] Such a move would affect not only online services, but more traditional areas of public performance such as radio, television, restaurants, and bars.

Stakeholders at the roundtables expressed significant concerns regarding the impact of major publishers' complete withdrawal from the PROs. Notably, traditional songwriter contracts typically include provisions that assume that a songwriter's performance royalties will be collected by and paid directly to the songwriter through a PRO, without contemplating alternative arrangements. Songwriters and composers raised questions as to how withdrawing publishers would fulfill this responsibility in the future, including whether they would be in a position to track and provide adequate usage and payment data under a direct licensing system. Another concern is how such withdrawals would affect the PROs' cost structures and the commission rates for smaller entities and individual creators who continued to rely upon these organizations to license and administer their public performance rights. At the same time, some stakeholders questioned the existing distribution methodologies of the PROs, suggesting that the PROs should rely more on census-based reporting (as is typically supplied by digital services) and less on sampling or non-census-based approaches to allocate royalty fees among members.

Next, many stakeholders appear to be of the view that the Section 115 statutory license for the reproduction and distribution of musical works should either be eliminated or significantly modified to reflect the realities of the digital marketplace. While music owners and music users have expressed a range of views as to the particulars of how this might be accomplished, much of the commentary and discussion has centered on two

[1] *In re Pandora Media, Inc.,* Nos. 12–cv–8035, 41–cv–1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc.,* v. *Pandora Media, Inc.,* Nos. 12–cv–4037, 64–cv–3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

[2] *See* Ed Christman, *Universal Music Publishing Plots Exit From ASCAP, BMI,* Billboard (Feb. 1, 2013), *http://www.billboard.com/biz/articles/news/publishing/1537554/universal-music-publishing-plots-exit-from-ascap-bmi; see also* Ed Christman, *Sony/ATV's Martin Bandier Repeats Warning to ASCAP, BMI, Billboard* (July 11, 2014), *http://www.billboard.com/biz/articles/news/publishing/6157469/sonyatvs-martin-bandier-repeats-warning-to-ascap-bmi.*

possible approaches. The first would be to sunset the Section 115 license with the goal of enabling musical work owners to negotiate licenses directly with music users at unregulated, marketplace rates (as the synchronization market for musical works currently operates). Some stakeholders have acknowledged, however, that such a market-based system might still have to allow for the possibility of collective licensing to accommodate individuals and smaller copyright owners who might lack the capacity or leverage to negotiate directly with online service providers and others.

A second model, advocated by the record labels, would be to eliminate Section 115 and instead allow music publishers and sound recording owners collectively to negotiate an industrywide revenue-sharing arrangement as between them. For the uses falling under this approach, a fixed percentage of licensing fees for use of a recorded song would be allocated to the musical work and the remainder would go to the sound recording owner. Record labels would be permitted to bundle musical work licenses with their sound recording licenses, with third-party licensees to pay the overall license fees to publishers and labels according to the agreed industry percentages. While musical work owners would retain control over the first recordings of their works, such an arrangement would cover not only audio-only uses but would extend to certain audiovisual uses not currently covered by the Section 115 license, such as music videos and lyric display.

Another theme that emerged from the first round of written comments and the public roundtables relates to the Section 112 and 114 statutory licenses for the digital performance of sound recordings.[3] Although there appeared to be substantial agreement that these licenses are largely effective, there was also a general consensus that improvements could be made to the Copyright Royalty Judges' (''CRJs'') statutorily mandated ratesetting procedures. For instance, under 17 U.S.C. 803(b)(6), parties in proceedings before the CRJs must submit written direct statements before any discovery is conducted. A number of commenters believed that the ratesetting process could be significantly streamlined by allowing for discovery before presentation of the parties' direct cases, as in ordinary civil litigation. Stakeholders were also of the view that it would be more efficient to combine what are now two separate direct and rebuttal phases of ratesetting hearings, as contemplated by 17 U.S.C. 803(b)(6)(C), into a single integrated trial—again as is more typical of civil litigation. There was also general agreement that more could be done to encourage settlement of rate disputes, such as adoption of settlements earlier in the process and allowing such settlements to be treated as non-precedential with respect to non-settling participants.

Finally, many commenting parties pointed to the lack of standardized and reliable data related to the identity and ownership of musical works and sound recordings as a significant obstacle to more efficient music licensing mechanisms. Stakeholders observed that digital music files are often distributed to online providers without identifiers such as the International Standard Recording Code (''ISRC'') and/or International Standard Musical Work Code (''ISWC''), and that the lack of these identifiers (or other unique or universal identifiers) makes it difficult for licensees or others to link particular music files with the copyrighted works they embody. In addition to problems identifying the musical works and sound recordings themselves, commenters noted the difficulties of ascertaining ownership information, especially in the case of musical works, which frequently have multiple owners representing varying percentages of particular songs. These issues, in turn, relate to a more general ''transparency'' concern of music creators that usage and payment information—including information about advances and equity provided by licensees to publishers and labels—may not be fully and readily accessible to songwriters, composers and artists.

At this time, the Office is soliciting additional comments on these subjects, as set forth in the specific questions below. Parties may also take this opportunity to respond to the positions taken by others in the first round of comments and/or at the roundtables. Those who plan to submit additional comments should be aware that the Office has studied and will take into consideration the comments already received, so there is no need to restate previously submitted material. While a party choosing to respond to this Notice of Inquiry need not address every subject below, the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

Subjects of Inquiry

Data and Transparency

1. Please address possible methods for ensuring the development and dissemination of comprehensive and authoritative public data related to the identity and ownership of musical works and sound recordings, including how best to incentivize private actors to gather, assimilate and share reliable data.

2. What are the most widely embraced identifiers used in connection with musical works, sound recordings, songwriters, composers, and artists? How and by whom are they issued and managed? How might the government incentivize more universal availability and adoption?

3. Please address possible methods for enhancing transparency in the reporting of usage, payment, and distribution data by licensees, record labels, music publishers, and collective licensing entities, including disclosure of non-usage-based forms of compensation (*e.g.,* advances against future royalty payments and equity shares).

Musical Works

4. Please provide your views on the logistics and consequences of potential publisher withdrawals from ASCAP and/or BMI, including how such withdrawals would be governed by the PROs; whether such withdrawals are

[3] Based upon written comments and discussion at the roundtables, it appears that certain language in the First Notice concerning the lack of availability of licenses for pre-1972 recordings under Sections 112 and 114 may have been misinterpreted by some. In a footnote, the First Notice observed that ''a person wishing to digitally perform a pre-1972 sound recording cannot rely on the Section 112 and 114 statutory licenses and must instead obtain a license directly from the owner of the sound recording copyright.'' 78 FR 14739, 14741 n.12. In making this statement, the Office was not opining on the necessity of obtaining such a license under state law, but merely observing that licenses for the digital performance of pre-1972 sound recordings, and for the reproductions to enable such performances, are not available under Section 112 or 114. A licensee seeking such a license would thus need to obtain it directly from the sound recording owner (as the Office understands to be the current practice of some licensees with respect to performances of pre-1972 recordings).

On the other side of the coin, it appears that others have misread the Office's observation in its report on pre-1972 sound recordings that ''[i]n general, state law does not appear to recognize a performance right in sound recordings'' as an official statement that no such protection is (or should be) available under state law. *See U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sound Recordings* 44 (2011). This, too, is a misinterpretation. While, as a factual matter, a state may not have affirmatively acknowledged a public performance right in pre-1972 recordings as of the Office's 2011 report, the language in the report should not be read to suggest that a state could not properly interpret its law to recognize such a right. As the Office explained, ''common law protection is amorphous, and courts often perceive themselves to have broad discretion.'' *Id.* at 48.

compatible with existing publisher agreements with songwriters and composers; whether the PROs might still play a role in administering licenses issued directly by the publishers, and if so, how; the effect of any such withdrawals on PRO cost structures and commissions; licensees' access to definitive data concerning individual works subject to withdrawal; and related issues.

5. Are there ways in which the current PRO distribution methodologies could or should be improved?

6. In recent years, PROs have announced record-high revenues and distributions. At the same time, many songwriters report significant declines in income. What marketplace developments have led to this result, and what implications does it have for the music licensing system?

7. If the Section 115 license were to be eliminated, how would the transition work? In the absence of a statutory regime, how would digital service providers obtain licenses for the millions of songs they seem to believe are required to meet consumer expectations? What percentage of these works could be directly licensed without undue transaction costs and would some type of collective licensing remain necessary to facilitate licensing of the remainder? If so, would such collective(s) require government oversight? How might uses now outside of Section 115, such as music videos and lyric displays, be accommodated?

Sound Recordings

8. Are there ways in which Section 112 and 114 (or other) CRB ratesetting proceedings could be streamlined or otherwise improved from a procedural standpoint?

International Music Licensing Models

9. International licensing models for the reproduction, distribution, and public performance of musical works differ from the current regimes for licensing musical works in the United States. Are there international music licensing models the Office should look to as it continues to review the U.S. system?

Other Issues

10. Please identify any other pertinent issues that the Copyright Office may wish to consider in evaluating the music licensing landscape.

Dated: July 18, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate, Register of Copyrights.

[FR Doc. 2014–17354 Filed 7–22–14; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2014–044]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before August 22, 2014. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: request.schedule@nara.gov.

Fax: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, Records Management Services (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov*.

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit

Total Responses: 1,643.

Average Time per Response: 60 minutes.

Estimated Total Burden Hours: 1,643 hours.

Total Other Burden Cost: $0.

Comments submitted in response to this request will be summarized and/or included in the request for Office of Management and Budget approval; they will also become a matter of public record.

James H. Moore, Jr.,

Deputy Assistant Secretary for Policy, U.S. Department of Labor.

[FR Doc. 2014–18184 Filed 7–31–14; 8:45 am]

BILLING CODE 4510–23–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2014–03]

Music Licensing Study

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of extension of comment period.

SUMMARY: The United States Copyright Office is extending the deadline for public comments regarding the effectiveness of existing methods of licensing music that were solicited in a July 23, 2014 Notice of Inquiry. *See* 79 FR 42833 (July 23, 2014).

DATES: Written comments are now due on or before September 12, 2014.

ADDRESSES: All comments shall be submitted electronically. A comment page containing a comment form is posted on the Office Web site at *http://www.copyright.gov/docs/musiclicensingstudy*. The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: The Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Copyright Office is conducting a study to assess the effectiveness of current methods for licensing sound recordings and musical works. The Office received written comments responding to an initial Notice of Inquiry, and held three public roundtables in Nashville, Los Angeles and New York. *See* 78 FR 13739 (Mar. 17, 2014); 79 FR 25626 (May 5, 2014).

On July 23, 2014, the Office published a second Notice of Inquiry, seeking additional written comments on ten subjects concerning the music licensing environment. 79 FR 42833. To ensure commenters have sufficient time to address the topics set forth in the July 2014 Notice of Inquiry, the Office is extending the time for filing written comments from August 22, 2014 to September 12, 2014.

Dated: July 28, 2014.

Maria A. Pallante,

Register of Copyrights.

[FR Doc. 2014–18096 Filed 7–31–14; 8:45 am]

BILLING CODE 1410–30–P

LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2014–02]

Extension of Comment Period; Study on the Right of Making Available; Request for Additional Comments

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Extension of comment period.

SUMMARY: The U.S. Copyright Office is extending the deadline for public comments that address topics listed in the Office's July 15, 2014 Request for Additional Comments.

DATES: Comments are now due no later than 5:00 p.m. EDT on September 15, 2014.

ADDRESSES: All comments should be submitted electronically. To submit comments, please visit *http://www.copyright.gov/docs/making_available/*. The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (''MB'') in one of the following formats: a Portable Document File (''PDF'') format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (''RTF''); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post all comments publicly on the Office's Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–1027 for special instructions.

FOR FURTHER INFORMATION CONTACT: Maria Strong, Senior Counsel for Policy and International Affairs, by telephone at 202–707–1027 or by email at *mstrong@loc.gov,* or Kevin Amer, Counsel for Policy and International Affairs, by telephone at 202–707–1027 or by email at *kamer@loc.gov*.

SUPPLEMENTARY INFORMATION: On July 15, 2014, the Copyright Office issued a Request for Additional Comments on the state of U.S. law recognizing and protecting ''making available'' and ''communication to the public'' rights for copyright holders.[1] The Request listed several questions for interested members of the public to address in the context of U.S. implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) rights of ''making available'' and ''communication to the public,'' and also invited views on specific issues raised during the public roundtable held in Washington, DC on May 5, 2014. To provide sufficient time for commenters to respond, the Office is extending the time for filing additional comments from August 14, 2014 to September 15, 2014.

Dated: July 28, 2014.

Karyn A. Temple Claggett,

Associate Register of Copyrights.

[FR Doc. 2014–18097 Filed 7–31–14; 8:45 am]

BILLING CODE 1410–30–P

[1] Study on the Right of Making Available; Request for Additional Comments, 79 FR 41309 (July 15, 2014).

APPENDIX B COMMENTING PARTIES AND ROUNDTABLE PARTICIPANTS

Parties Who Responded to First Notice of Inquiry

1. ABKCO Music & Records, Inc. (ABKCO)
2. American Association of Independent Music (A2IM)
3. American Society of Composers, Authors and Publishers (ASCAP)
4. Audiosocket
5. Barnett III, William
6. Brigham Young University Copyright Licensing Office
7. Broadcast Music, Inc. (BMI)
8. Camp, Ben
9. Center for Copyright Integrity
10. Castle, Christian L.
11. Cate, John
12. Consumer Federation of America (CFA) and Public Knowledge
13. Content Creators Coalition
14. Continental Entertainment Group
15. Copyright Alliance
16. Council of Music Creators
17. CTIA – The Wireless Association (CTIA)
18. Digital Data Exchange, LLC (DDEX)
19. Digital Media Association (DiMA)
20. DotMusic
21. Educational Media Foundation (EMF)
22. Ferrick, Melissa
23. Future of Music Coalition (FMC)

24. Gear Publishing Company and Lisa Thomas Music Services, LLC
25. Geo Music Group & George Johnson Music Publishing
26. Global Image Works
27. Greco, Melanie Holland
28. Harris, Jim
29. Hayes, Bonnie
30. Henderson, Linda S.
31. Herstand, Ari
32. Indiana University, Archives of African American Music and Culture
33. Interested Parties Advancing Copyright (IPAC)
34. Jessop, Paul
35. Kohn, Bob
36. LaPolt, Dina
37. Library of Congress
38. Lincoff, Bennett
39. Lowery, David
40. McAuliffe Esq., Emmett
41. Menell, Peter S.
42. Mitchell, John T.
43. Modern Works Music Publishing
44. Music Choice
45. Music Library Association
46. Music Reports, Inc. (MRI)
47. National Academy of Recording Arts & Sciences (NARAS)

48. National Association of Broadcasters (NAB)

49. National Music Publishers' Association (NMPA) and Harry Fox Agency, Inc. (HFA)

50. National Public Radio, Inc. (NPR)

51. National Religious Broadcasters Music License Committee (NRBMLC)

52. National Religious Broadcasters Noncommercial Music License Committee (NRBNMLC)

53. National Restaurant Association

54. Nauman, Vickie

55. Newman Esq., Deborah

56. Netflix, Inc.

57. Novak, Adam

58. Pagnani, Aidan

59. Pala Rez Radio

60. Pattison, Pat

61. Public Knowledge and Consumer Federation of America (CFA)

62. Public Television Coalition (PTC)

63. Radio Music License Committee, Inc. (RMLC)

64. Recording Industry Association of America, Inc. (RIAA)

65. Robin Green, Lynne

66. Rys, Jason

67. Schlieman, Derek S.

68. Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) and American Federation of Musicians of the United States and Canada (AFM)

69. SESAC, Inc. (SESAC)

70. Shocked, Michelle

71. Simpson, Jerrod

72. Sirius XM Radio Inc.

73. Society of Composers & Lyricists (SCL)

74. Songwriters Guild of America, Inc. (SGA)

75. SoundExchange, Inc.

76. Spotify USA Inc.

77. SRN Broadcasting

78. St. James, Charles

79. Television Music License Committee, LLC (TMLC)

80. Traugh, David

81. United States Marine Band

82. Willey, Robert

83. Wixen Music Publishing, Inc.

84. Yates, James M.

Participants in Nashville Hearings

1. Barker, John (ClearBox Rights and IPAC)
2. Buresh, Heather (Music Row Administrators Group)
3. Chertkof, Susan (RIAA)
4. Coleman, Dan (Modern Music Works Publishing)
5. Driskill, Marc (Sea Gayle Music and AIMP, Nashville Chapter)
6. Earls, Kent (UMPG)
7. Gervais, Daniel (Vanderbilt University Law School)
8. Gottlieb, Tony (Get Songs Direct, LLC)
9. Herbison, Barton (NSAI)
10. Johnson, George (Geo Music Group and George Johnson Music Publishing)
11. Kass, Fritz (Intercollegiate Broadcasting System, Inc.)
12. Kimes, Royal Wade (Wonderment Records)
13. Knife, Lee (DiMA)
14. Marks, Steven (RIAA)
15. McIntosh, Bruce (Codigo Music and Fania Records)
16. Meitus, Robert (Meitus Gelbert Rose LLP)
17. Mosenkis, Sam (ASCAP)
18. Oxenford, David (Wilkinson Barker Knauer LLP)
19. Schaffer, Brittany (NMPA and Loeb & Loeb LLP)
20. Sellwood, Scott (Google and YouTube)
21. Soled, Janice (My Music Screen)
22. Stollman, Marc (Stollman Law, PA)
23. Turley-Trejo, Ty (Brigham Young University Copyright Licensing Office)
24. Waltz, Reid Alan (SESAC)

Participants in Los Angeles Hearings

1. Anthony, Paul (Rumblefish)
2. Arrow, Ed (UMPG)
3. Barker, John (ClearBox Rights and IPAC)
4. Bernstein, Keith (Crunch Digital)
5. Blake, Lawrence J. (Concord Music Group, Inc.)
6. Bull, Eric D. (Create Law)
7. Cate, John (American Music Partners)
8. Cohan, Timothy A. (PeerMusic)
9. Goldberg, Ilene (IMG Consulting)
10. Greaves, Deborah (Label Law, Inc.)
11. Greenstein, Gary R. (Wilson Sonsini Goodrich & Rosati)
12. Harbeson, Eric (Music Library Association)
13. Hauth, Russell (Salem Communications and NRBMLC)
14. Irwin, Ashley (SCL)
15. Kokakis, David (UMPG)
16. Kossowicz, Tegan (UMG)
17. LaPolt, Dina (Dina LaPolt P.C.)
18. Lemone, Shawn (ASCAP)
19. Lipsztein, Leonardo (Google and YouTube)
20. Lord, Dennis (SESAC)
21. Marks, Steven (RIAA)
22. Menell, Peter (UC Berkeley School of Law)
23. Miller, Jennifer (Audiosocket)
24. Muddiman, Hélène (Hollywood Elite Composers)

25. Nauman, Vickie (CrossBorderWorks)

26. Prendergast, Brad (SoundExchange, Inc.)

27. Rudolph, John (Music Analytics)

28. Rys, Jason (Wixen Music Publishing, Inc.)

29. Sanders, Charles J. (SGA)

30. Schyman, Garry (SCL)

31. Watkins, Les (MRI)

Participants in New York Hearings

1. Albert, Eric (Stingray Digital Group)
2. Badavas, Christos P. (HFA)
3. Barker, John (ClearBox Rights and IPAC)
4. Barron, Gregg (BMG Rights Management)
5. Bengloff, Richard (A2IM)
6. Bennett, Jeffrey (SAG-AFTRA)
7. Besek, June (Columbia Law School, Kernochan Center for Law, Media and the Arts)
8. Carapella, Cathy (Global Image Works)
9. Carnes, Rick (SGA)
10. Coleman, Alisa (ABKCO)
11. Conyers III, Joe (Downtown Music Publishing)
12. DeFilippis, Matthew (ASCAP)
13. Diab, Waleed (Google and YouTube)
14. Donnelley, Patrick (Sirius XM Radio Inc.)
15. Duffett-Smith, James (Spotify USA Inc.)
16. Dupler, Todd (NARAS)
17. Fakler, Paul (NAB and Music Choice)
18. Finkelstein, Andrea (SME.)
19. Gibbs, Melvin (Content Creators Coalition)
20. Greer, Cynthia (Sirius XM Radio Inc.)
21. Griffin, Jodie (Public Knowledge)
22. Hoyt, Willard (TMLC)
23. Huey, Dick (Toolshed Inc.)

24. Kass, Fritz (Intercollegiate Broadcasting System, Inc.)
25. Knife, Lee (DiMA)
26. Kohn, Bob (Kohn on Music Licensing)
27. Lee, Bill (SESAC)
28. Lummel, Lynn (ASCAP)
29. Mahoney, Jim (A2IM)
30. Malone, William (Intercollegiate Broadcasting System, Inc.)
31. Marin, Aldo (Cutting Records, Inc.)
32. Marks, Steven (RIAA)
33. Merrill, Tommy (The Press House and #IRespectMusic)
34. Morgan, Blake (ECR Music Group and #IRespectMusic)
35. Potts, Cheryl (Crystal Clear Music & CleerKut)
36. Rae, Casey (FMC)
37. Raff, Andrew (Shutterstock, Inc.)
38. Raffel, Colin (Prometheus Radio Project)
39. Reimer, Richard (ASCAP)
40. Resnick, Perry (RZO, LLC)
41. Rich, Bruce (RMLC)
42. Rinkerman, Gary (Drinker, Biddle & Reath LLP)
43. Rosen, Stuart (BMI)
44. Rosenthal, Jay (NMPA)
45. Rushing, Colin (SoundExchange, Inc.)
46. Steinberg, Michael G. (BMI)
47. Wood, Doug (National Council of Music Creator Organizations)

Parties Who Responded to Second Notice of Inquiry

1. ABKCO Music & Records, Inc. (ABKCO)
2. American Association of Independent Music (A2IM)
3. American Society of Composers, Authors and Publishers (ASCAP)
4. Bean, David
5. Broadcast Music, Inc. (BMI)
6. Buckley, William Jr.
7. Carapetyan, Gregory
8. Castle, Christian L.
9. Columbia Law School, Kernochan Center for Law, Media and the Arts
10. Computer & Communications Industry Association (CCIA)
11. Concord Music Group, Inc.
12. Content Creators Coalition
13. Deutsch, L. Peter
14. Digital Media Association (DiMA)
15. Future of Music Coalition (FMC)
16. Geo Music Group & George Johnson Music Publishing
17. Guyon, Cindy
18. Guyon, Rich
19. Interested Parties Advancing Copyright (IPAC)
20. LaPolt, Dina
21. Modern Works Music Publishing
22. Music Choice
23. Music Managers' Forum (MMF) and Featured Artists' Coalition (FAC)
24. Music Reports, Inc. (MRI)

25. Nashville Songwriters Association International (NSAI)
26. National Academy of Recording Arts & Sciences (NARAS)
27. National Association of Broadcasters (NAB)
28. National Music Publishers' Association (NMPA) and Harry Fox Agency, Inc. (HFA)
29. National Public Radio, Inc. (NPR)
30. Office of the County Attorney, Montgomery County, Maryland
31. Pangasa, Maneesh
32. Parker, Brad
33. Pilot Music Business Services, LLC
34. Pipeline Project 2014, Belmont University's Mike Curb College of Music Business and Entertainment
35. Production Music Association (PMA)
36. Public Knowledge
37. Radio Music License Committee, Inc. (RMLC)
38. Recording Industry Association of America, Inc. (RIAA)
39. Resnick, Perry (RZO, LLC)
40. Righeimer, Carolyn
41. Rinkerman, Gary (Drinker, Biddle & Reath LLP)
42. Samuels, Jon M.
43. Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) and American Federation of Musicians of the United States and Canada (AFM)
44. Sirius XM Radio Inc.
45. Songwriters Guild of America, Inc. (SGA)
46. SoundExchange, Inc.
47. Stone, Bob

48. Szajner, Robert
49. Television Music License Committee, LLC (TMLC)
50. U.S. Chamber of Commerce, Global Intellectual Property Center (GIPC)
51. Wager, Gregg

APPENDIX C ABBREVIATIONS

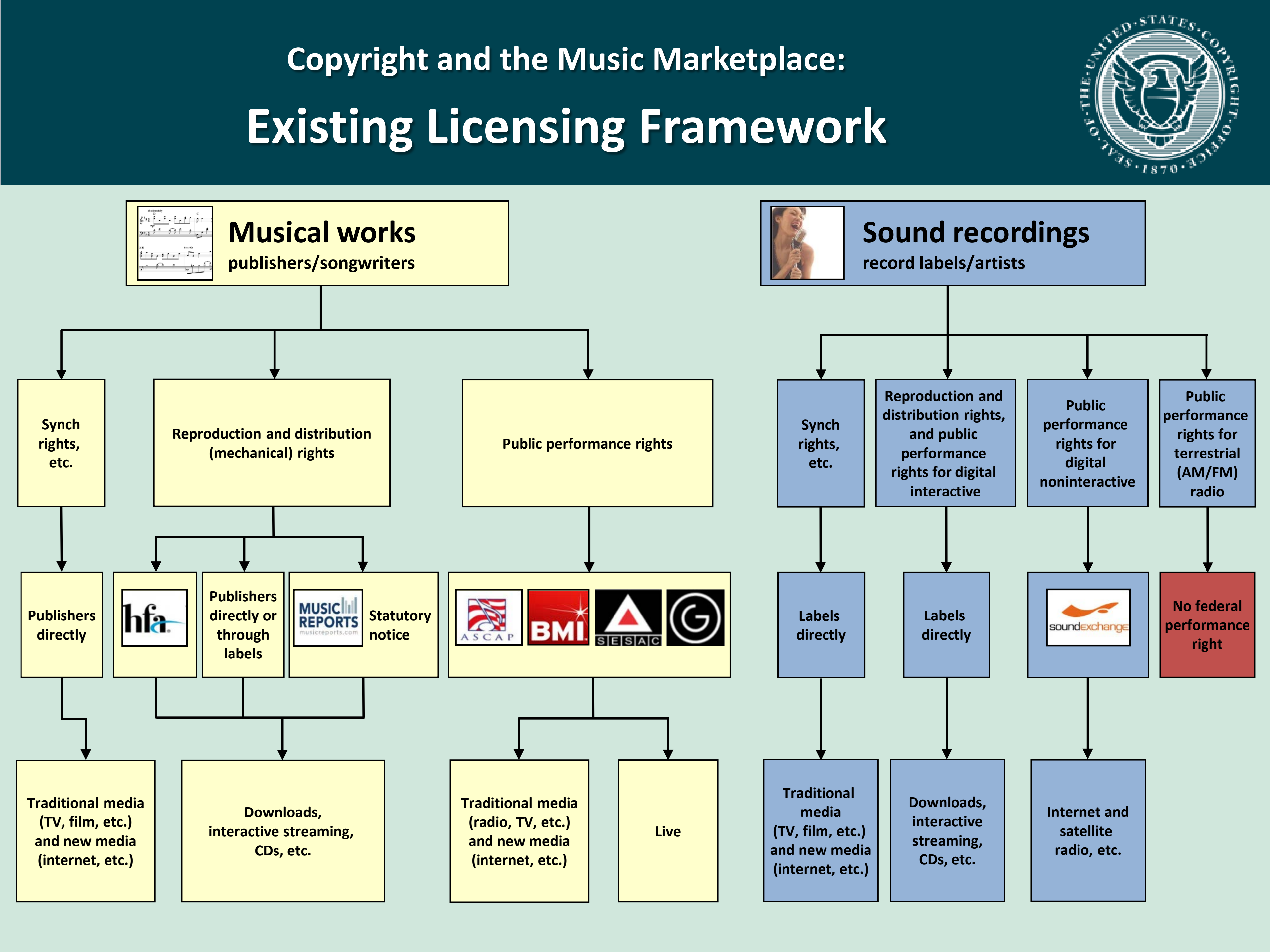
ABBREVIATIONS

A2IM	American Association of Independent Musicians
ABKCO	ABKCO Music & Records, Inc.
AFM	American Federation of Musicians of the United States and Canada
AHRA	Audio Home Recording Act
AIMP	Association of Independent Music Publishers
ASCAP	American Society of Composers, Authors and Publishers
BMI	Broadcast Music, Inc.
BYU	Brigham Young University Copyright Licensing Office
CARP	Copyright Arbitration Royalty Panel
CCIA	Computer & Communications Industry Association
CFA	Consumer Federation of America
CISAC	International Confederation of Societies of Authors and Composers
CRB	Copyright Royalty Board
CRT	Copyright Royalty Tribunal
CTIA	CTIA—The Wireless Association
DDEX	Digital Data Exchange, LLC
DiMA	Digital Media Association
DMCA	Digital Millenium Copyright Act
DOJ	United States Department of Justice
DPD	Digital phonorecord delivery
DPRSRA	Digital Performance Right in Sound Recordings Act
EMF	Educational Media Foundation
EMI	EMI Music Publishing Ltd.
FAC	Featured Artists' Coalition
FMC	Future of Music Coalition
FTC	United States Federal Trade Commission

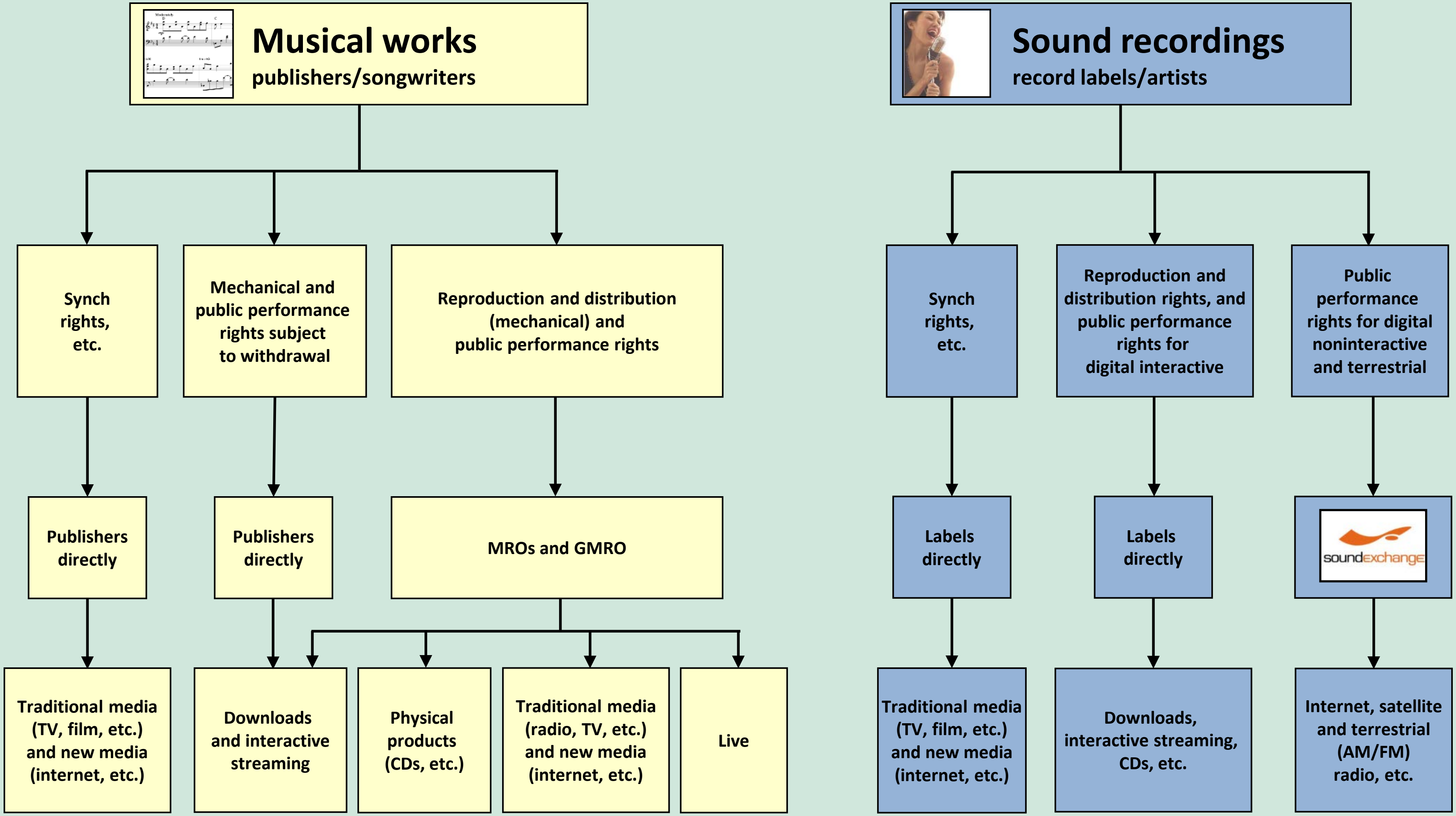
GMR	Global Music Rights
GMRO	General music rights organization
GIPC	U.S. Chamber of Commerce, Global Intellectual Property Center
GRD	Global Repertoire Database
HFA	Harry Fox Agency, Inc.
IFPI	International Federation of the Phonographic Industry
IMR	International Music Registry
ISNI	International Standard Name Identifier
IPAC	Interested Parties Advancing Copyright
IPI	Interested Parties Information
ISO	International Organization for Standardization
ISRC	International Standard Recording Code
ISWC	International Standard Musical Work Code
MMF	Music Managers' Forum
MRI	Music Reports, Inc.
MRO	Music rights organization
Music Biz	Music Business Association
NAB	National Association of Broadcasters
NARAS	National Academy of Recording Arts & Sciences
NCTA	National Cable & Telecommunications Association
NDMA	New digital media agreement
NMPA	National Music Publishers' Association
NOI	Notice of Intent
NPR	National Public Radio, Inc.
NRBMLC	National Religious Broadcasters Music License Committee
NRBNMLC	National Religious Broadcasters Noncommercial Music License Committee

NSAI	Nashville Songwriters Association International
NTIA	National Telecommunications and Information Administration
PPL	Phonographic Performance Ltd.
PRO	Performing rights organization
PTC	Public Television Coalition
RESPECT Act	Respecting Senior Performers as Essential Cultural Treasures Act
RMLC	Radio Music License Committee, Inc.
RIAA	Recording Industry Association of America, Inc.
SAG-AFTRA	Screen Actors Guild-American Federation of Television and Radio Artists
SCL	Society of Composers & Lyricists
SEA	Songwriters Equity Act
SGA	Songwriters Guild of America, Inc.
SIRA	Section 115 Reform Act of 2006
SME	Sony Music Entertainment, Inc.
Sony/ATV	Sony/ATV Music Publishing LLC
SOCAN	Society of Composers, Authors and Music Publishers of Canada
TMLC	Television Music License Committee, LLC
UMG	Universal Music Group
UMPG	Universal Music Publishing Group
UPC	Universal Product Code
USPTO	U.S. Patent and Trademark Office
WIPO	World Intellectual Property Organization
WMG	Warner Music Group

APPENDIX D LICENSING AND RATESETTING CHARTS

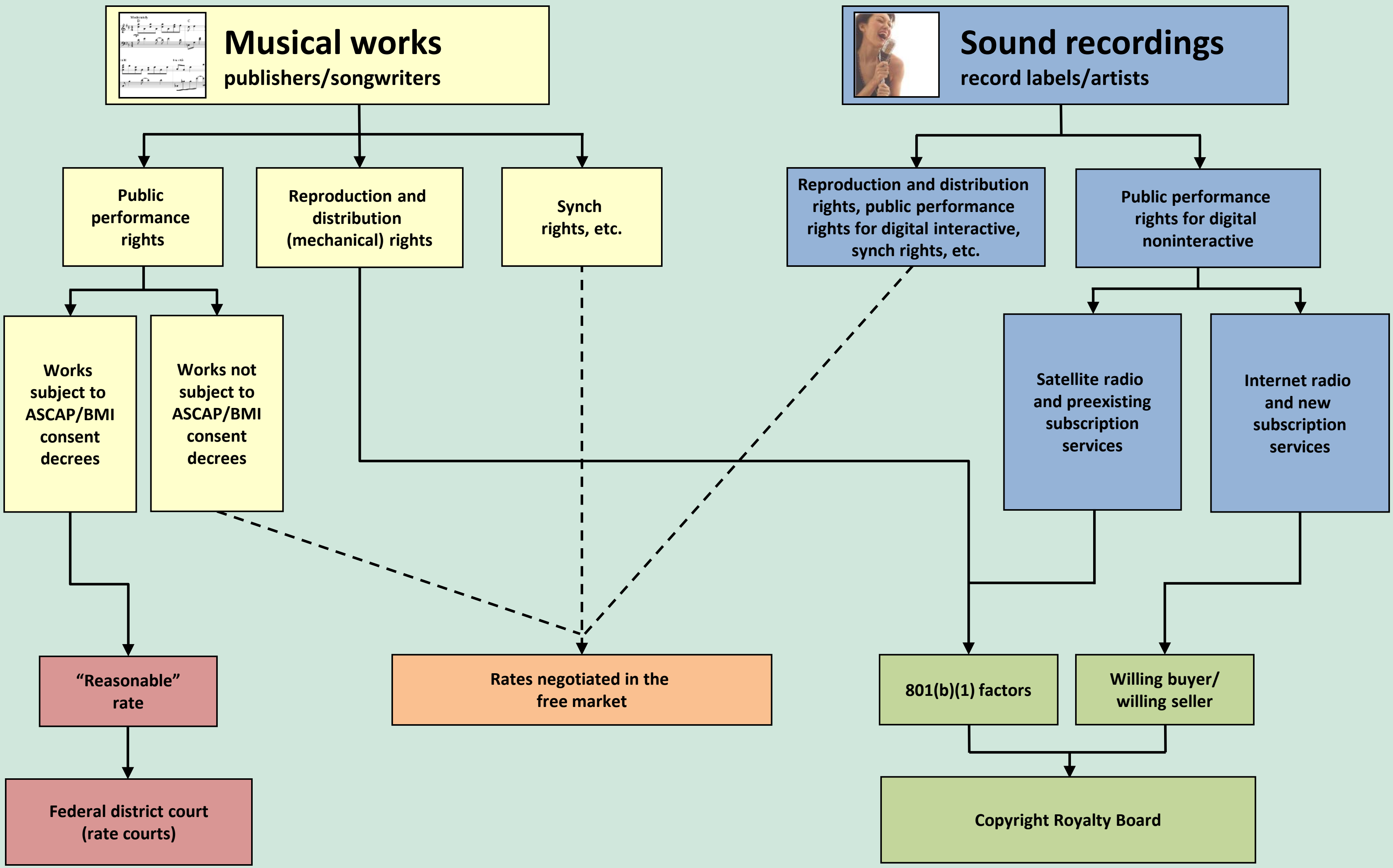

Copyright and the Music Marketplace:
Existing Licensing Framework
Musical works
publishers/songwriters
Sound recordings
record labels/artists
Synch rights, etc.
Reproduction and distribution (mechanical) rights
Public performance rights
Synch rights, etc.
Reproduction and distribution rights, and public performance rights for digital interactive
Public performance rights for digital noninteractive
Public performance rights for terrestrial (AM/FM) radio
Publishers directly
hfa
Publishers directly or through labels
MUSIC REPORTS
musicreports.com
Statutory notice
ASCAP
BMI
SESAC
Labels directly
Labels directly
soundexchange
No federal performance right
Traditional media (TV, film, etc.) and new media (internet, etc.)
Downloads, interactive streaming, CDs, etc.
Traditional media (radio, TV, etc.) and new media (internet, etc.)
Live
Traditional media (TV, film, etc.) and new media (internet, etc.)
Downloads, interactive streaming, CDs, etc.
Internet and satellite radio, etc.

Copyright and the Music Marketplace:
Proposed Licensing Framework



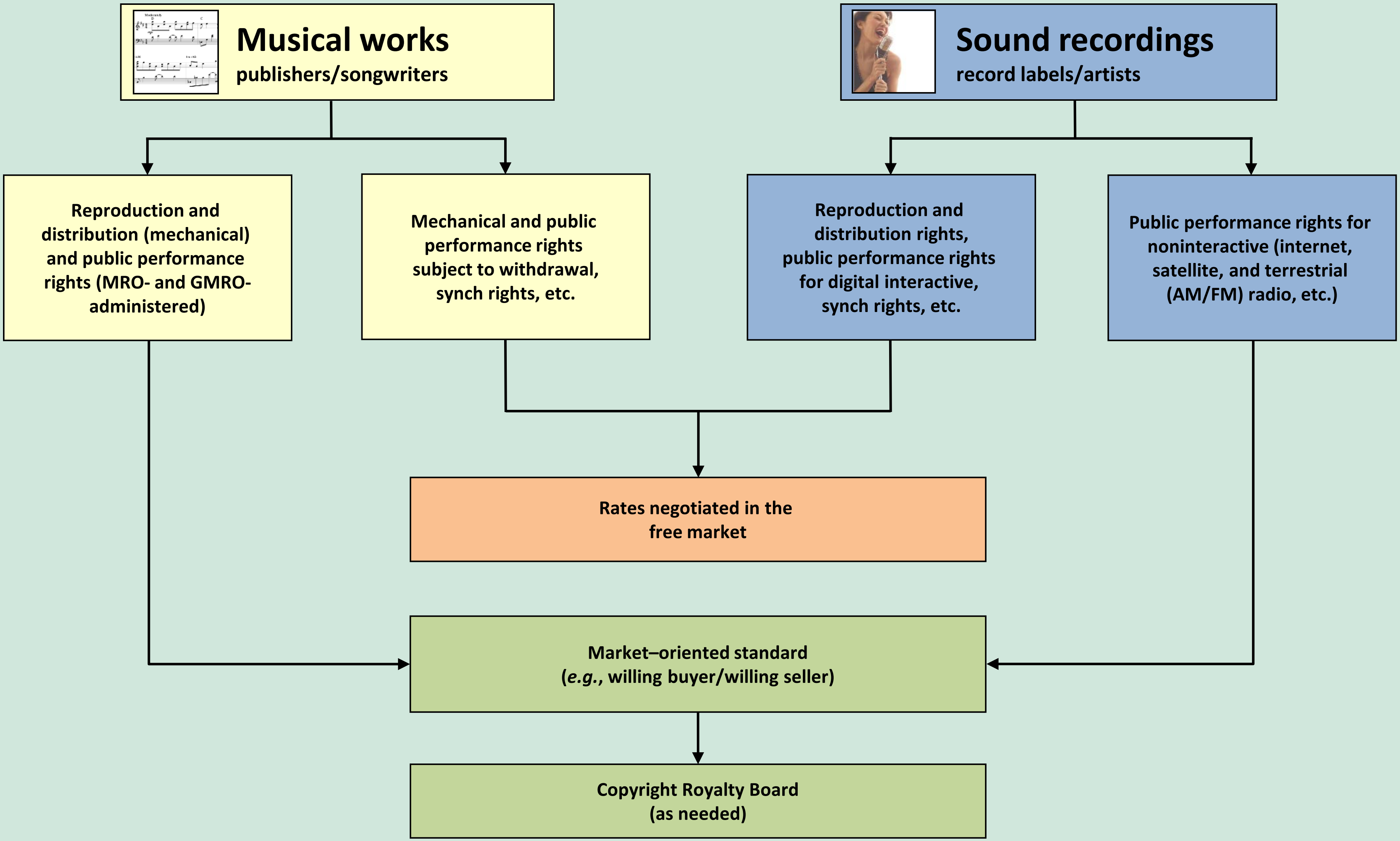
Copyright and the Music Marketplace:

Existing Ratesetting Framework



Copyright and the Music Marketplace:

Proposed Ratesetting Framework



Federal Register

Monday,

July 8, 2002

Part III

Library of Congress

Copyright Office

37 CFR Part 261

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 261

[Docket No. 2000–9 CARP DTRA 1&2]

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the determination of the reasonable rates and terms for two compulsory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings.

EFFECTIVE DATE: July 8, 2002.

ADDRESSES: The full text of the public version of the Copyright Arbitration Royalty Panel's report to the Librarian of Congress is available for inspection and copying during normal working hours in the Office of the General Counsel, James Madison Memorial Building, Room LM–403, First and Independence Avenue, SE., Washington, DC 20540. The report is also posted on the Copyright Office website at *http://www.copyright.gov/carp/webcasting_rates.html.*

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya Sandros, Senior Attorney, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

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I. Background

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (''DPRA''), Public Law 104–39, which created an exclusive right for copyright owners of sound recordings, subject to certain limitations, to perform publicly their sound recordings by means of certain digital audio transmissions. Among the limitations on the performance right was the creation of a new compulsory license for nonexempt, noninteractive, digital subscription transmissions. 17 U.S.C. 114(f).

The scope of this license was expanded in 1998 upon passage of the Digital Millennium Copyright Act of 1998 (''DMCA'' or ''Act''), Public Law 105–304, in order to allow a nonexempt eligible nonsubscription transmission [1] (the ''webcasting license'') and a nonexempt transmission by a preexisting satellite digital audio radio service to perform publicly a sound recording in accordance with the terms and rates of the statutory license. 17 U.S.C. 114(a). In addition to expanding the section 114 license, the DMCA also created a new statutory license for the making of an ''ephemeral recording'' of a sound recording by certain transmitting organizations (the ''ephemeral recording license''). 17 U.S.C. 112(e). The new statutory license allows entities that transmit performances of sound recordings to business establishments, pursuant to the limitations set forth in section 114(d)(1)(C)(iv), to make an ephemeral recording of a sound recording for purposes of a later transmission. The new license also provides a means by which a transmitting entity with a statutory license under section 114(f) can make more than the one phonorecord permitted under the exemption set forth in section 112(a). 7 U.S.C. 112(e).

The statutory scheme for establishing reasonable terms and rates is the same for both of the new licenses. The terms and rates for the two new statutory licenses may be determined by voluntary agreement among the affected parties, or if necessary, through compulsory arbitration conducted pursuant to Chapter 8 of the Copyright Act.

In this case, interested parties were unable to negotiate an industry-wide agreement. Therefore, a Copyright Arbitration Royalty Panel (''CARP'') was convened to consider proposals from interested parties and, based upon the written record created during this process, to recommend rates and terms for both the webcasting license and the ephemeral recording license.

[1] An ''eligible nonsubscription transmission'' is a noninteractive, digital audio transmission which, as the name implies, does not require a subscription for receiving the transmission. The transmission must also be made a part of a service that provides audio programming consisting in a whole or in part of performances of sound recordings; the purpose of which is to provide audio or entertainment programming, but not to sell, advertise, or promote particular goods or services.

II. The CARP Proceeding to Set Reasonable Rates and Terms

These proceedings began on November 27, 1998, when the Copyright Office announced a six-month voluntary negotiation period to set rates and terms for the webcasting license and the ephemeral recording license for the first license period covering October 28, 1998–December 31, 2000. 63 FR 6555 (November 27, 1998). During this period, the parties negotiated a number of private agreements in the marketplace, but no industry-wide agreement was reached. Consequently, in accordance with the procedural requirements, the Recording Industry Association of America, Inc. (''RIAA'') petitioned the Copyright Office on July 23, 1999, to commence a CARP proceeding to set the rates and terms for these licenses. The Office responded by setting a schedule for the CARP proceeding. See 64 FR 52107 (Sept. 27, 1999).

However, the schedule proved unworkable for the parties. RIAA filed a motion with the Copyright Office on November 23, 1999, requesting a postponement of the date for filing direct cases. It argued that the Office should provide more time for the parties to prepare their cases in light of the complexity of the issues and the record number of new participants. The Office granted this request and held a meeting to clarify the procedural aspects of the proceeding, especially for the new participants, and to discuss a new schedule for the arbitration phase of the process. Order in Docket No. 99–6 CARP DTRA (dated December 22, 1999). In the meantime, the Office commenced the six-month negotiation period for the second license period, covering January 1, 2001–December 31, 2002. 66 FR 2194 (January 13, 2000). Ultimately, the Copyright Office consolidated these two proceedings into a single proceeding in which one CARP would set rates and terms for the two license periods for both the webcasting license and the ephemeral recording license. See Order in Docket Nos. 99–6 CARP DTRA and 2000–3 CARP DTRA 2 (December 4, 2000). The 180-day period for the consolidated proceeding began on July 30, 2001, and on February 20, 2002, the panel submitted its report (the ''CARP Report'' or ''Report''), in which it proposed rates and terms to the Copyright Office. It is the decision of this Panel that is the basis for the Librarian's decision today.[2]

A. The Parties

The parties [3] to this proceeding are: (i) The Webcasters,[4] namely, BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corporation, Radio Active Media Partners, Inc.; RadioWave.com, Inc., Spinner Networks Inc. and XACT Radio Network LLC; (ii) the FCC-licensed radio Broadcasters,[5] namely, Susquehanna Radio Corporation, Clear Channel Communications Inc., Entercom Communications Corporation, Infinity Broadcasting Corporation, and National Religious Broadcasters Music License Committee (collectively ''the Broadcasters''); (iii) the Business Establishment Services,[6] namely, DMX/AEI Music Inc. (also referred to as ''Background Music Services''); (iv) American Federation of Television and Radio Artists (''AFTRA''); [7] (v) American Federation of Musicians of the United States and Canada (''AFM'');[8] (vi) Association For Independent Music (''AFIM'');[9] and (vii) Recording Industry Association of America, Inc. (''RIAA'').[10] Music Choice, a Business Establishment Service, was initially a party to this proceeding, but on March 26, 2001, it filed a motion to withdraw from the proceeding. Its motion was unopposed and, on May 9, 2001, its motion to withdraw was granted.

B. The Position of the Parties at the Commencement of the Proceeding

1. Rates Proposed by Copyright Owners

RIAA proposed rates derived from an analysis of 26 voluntarily negotiated agreements between itself and individual webcasters. RIAA claims that these agreements ''involve the same buyer, the same seller, the same right, the same copyrighted works, the same time period and the same medium as those in the marketplace that the CARP must replicate.'' CARP Report at 26, citing RIAA PFFCL [11] (Introduction at 8). Based upon these agreements, RIAA proposed the following rates for DMCA compliant webcasting services:

(i) For basic ''business to consumer'' (B2C) webcasting services:

0.4c for each transmission of a sound recording to a single listener, or 15% of the service's gross revenues.

(ii) For ''business to business'' (B2B) webcasting services, where transmissions are made as part of a service that is syndicated to third-party websites:

0.5c for each transmission of a sound recording to a single listener

(iii) For ''listener-influenced'' webcasting services:

0.6c for each transmission of a sound recording to a single listener

(iv) Minimum fee (subject to certain qualifications): $5,000 per webcasting service

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[2] Section 802 (e) of the Copyright Act requires the CARP to report its determination concerning the royalty fee to the Librarian of Congress 180 days after the initiation of a proceeding. In this particular instance, the Panel submitted its report approximately three weeks later than anticipated under this provision due to a suspension of the proceedings during the period November 9, 2001, through December 2, 2001. The Copyright Office granted the suspension at the parties' request in order to allow them to engage in further settlement discussions. At the same time, the Office granted the Panel an additional period of time, commensurate with the suspension period, for hearing evidence and preparing its report. See Order, Docket No. 2000–9 CARP DTRA 1&2 (November 9, 2001). Additional details concerning the earlier procedural aspects of this proceeding are set forth in the CARP Report at pp. 10–18.

[3] At the outset of the proceeding, Webcaster parties also included Coollink Broadcast Network, Everstream, Inc., Incanta, Inc., Launch Media, Inc., MusicMatch, Inc., Univision Online, and Westwind Media.com, Inc., which have since withdrawn or been dismissed from the proceeding. Late in the proceeding, National Public Radio (''NPR'') reached a private settlement with RIAA and withdrew prior to the conclusion of the 180-day hearing period. Because RIAA, AFTRA, AFM, and AFIM propose the same rates and take similar positions on most issues, they are sometimes referred to collectively as ''RIAA'' or ''Copyright Owners and Performers'' for convenience. Similarly, Webcasters, Broadcasters, and the Business Establishment Services are sometimes referred to collectively as ''the Services.''

[4] The Webcasters are *Internet* services that each employ a technology known as ''streaming,'' but comprise a range of different business models and music programming.

[5] The Broadcasters are commercial AM or FM radio stations that are licensed by the Federal Communications Commission (''FCC'').

[6] The Business Establishment Services, DMX/AEI Music, deliver sound recordings to business establishments for the enjoyment of the establishments' customers. See Knittel W.D.T. 4. DMX/AEI Music is the successor company resulting from a merger between AEI Music Network, Inc. (''AEI'') and DMX Music, Inc. (''DMX'').

[7] AFTRA, the American Federation of Television and Radio Artists, is a national labor organization representing performers and newspersons. See Tr. 2830 (Himelfarb).

[8] AFM, the American Federation of Musicians, is a labor organization representing professional musicians. See Bradley W.D.T. 1.

[9] AFIM, the Association For Independent Music, is a trade association representing independent record companies, wholesalers, distributors and retailers. See Tr. 2830 (Himelfarb)

[10] RIAA is a trade association representing record companies, including the five ''majors'' and numerous ''independent'' labels.

[11] Hereinafter, references to proposed findings of fact and conclusions of law shall be cited as ''OFFCK'' preceded by the name of the party that submitted the filing followed by the paragraph number. References to written direct testimony shall be cited as ''W.D.T.'' preceded by the last name of the witness and followed by a page number. References 9to written rebuttal testimony shall be cited as ''W.R.T.'' preceded by the last name of the witness and followed by a page number. References to the transcript shall be cited asd ''TR.'' followed by the page number and the last name of the witness.

(v) Ephemeral license fee:

10% of each service's performance royalty fee payable under (i), (ii), or (iii).

For the section 112 license applicable to the business establishment services, the copyright owners proposed a rate set at 10% of gross revenues with a minimum fee of $50,000 a year.

2. Rates Proposed by Services

Webcasters proposed per-performance and per-hour sound recording performance fees, based upon an economic model, that considered the aggregate fees paid to the three performance rights organizations (ASCAP, BMI, and SESAC) that license the public performances of musical works for radio programs that are broadcast over-the-air by FCC-licensed broadcasters, by 872 radio stations during 2000. From this model, the webcasters derived a per-song and a per-listener hour base rate of 0.02¢ per song and 0.3¢ per hour, respectively. These figures were then adjusted to account for a number of factors, including the promotional value gained by the record companies from the performance of their works. This adjustment resulted in a fee proposal of 0.014¢ per performance or 0.21¢ per hour.

At the end of the proceeding, Webcasters suggested in their proposed findings of fact and conclusions of law an alternative method for calculating royalty fees, namely, a percentage-of-revenue fee structure. Specifically, Webcasters proposed a fee of 3% of a webcaster's gross revenues for all services. The alternative proposal was made with the understanding that the service would be able to elect either option.

Webcasters proposed no additional fee for the making of ephemeral recordings and a minimum fee of $250 per annum for each service operating under the section 114 license.

The Business Establishment Services who need only an ephemeral recording license proposed a flat rate of $10,000 per year for each company.

C. The Panel's Determination of Reasonable Rates and a Minimum Fees

In this proceeding, the Panel had to establish rates and terms of payment for digital transmissions of sound recordings made by noninteractive, nonsubscription services and rates for the making of ephemeral phonorecords made pursuant to the section 112(e) license; either to facilitate those transmissions made or by business establishments which are otherwise exempt from the digital performance right.

The proposed rates are set forth in Appendix A of the CARP Report, which is posted on the Copyright Office website at: *http://www.copyright.gov/carp/webcasting_rates_a.pdf.*

The proposed terms of payment may be found in Appendix B of the CARP Report, which is posted on the Copyright Office website at: *http://www.copyright.gov/carp/webcasting_rates_b.pdf.*

III. The Librarian's Scope of Review of the Panel's Report

The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Pub. L. No. 103–198, 107 Stat. 2304, created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review that result in final orders: one by the Librarian of Congress (Librarian) and a second by the United States Court of Appeals for the District of Columbia Circuit. Section 802(f) of title 17 directs the Librarian on the recommendation of the Register of Copyrights either to accept the decision of the CARP, or to reject it. If the Librarian rejects it, he must substitute his own determination "after full examination of the record created in the arbitration proceeding." 17 U.S.C. 802(f). If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals. 17 U.S.C. 802(g).

The review process has been thoroughly discussed in prior recommendations of the Register of Copyrights (Register) concerning rate adjustments and royalty distribution proceedings. See, e.g., Distribution of 1990, 1991, and 1992 Cable Royalties, 61 FR 55653 (1996); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (October 28, 1997). Nevertheless, the discussion merits repetition because of its importance in reviewing each CARP decision.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP, "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the case law applying the APA "arbitrary" standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency action is generally considered to be arbitrary when:

1. It relies on factors that Congress did not intend it to consider;
2. It fails to consider entirely an important aspect of the problem that it was solving;
3. It offers an explanation for its decision that runs counter to the evidence presented before it;
4. It issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;
5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and
6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983); *Celcom Communications Corp.* v. *FCC,* 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA,* 758 F.2d 685 (D.C. Cir. 1985).

In reviewing the CARP's decision, the Librarian has been guided by these principles and the prior decisions of the District of Columbia Circuit in which the court applied the "arbitrary and capricious" standard of 5 U.S.C. 706(2)(A) to the determinations of the former Copyright Royalty Tribunal (hereinafter "CRT or Tribunal"). See, e.g, *National Cable Tele. Ass'n* v. *CRT,* 724 F.2d 176 (D.C. Cir. 1983) (applying the Administrative Procedure Act's standard authorizing courts to set aside agency action found to be arbitrary, capricious, and abuse of discretion, or otherwise in accordance with law."); see also, *Recording Industry Ass'n of America* v. *CRT,* 662 F.2d 1, 7–9 (D.C. Cir. 1981); *Amusement and Music Operators Ass'n* v. *CRT*, 676 F.2d 1144, 1149–52 (7th Cir.), cert denied, 459 U.S. 907 (1982); *National Ass'n of Broadcasters* v. *CRT*, 675 F.2d 367, 375 n. 8 (D.C. Cir. 1982).

Review of judicial decisions regarding Tribunal actions reveals a consistent theme; while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its award of royalties to each claimant. See *National Ass'n of Broadcasters* v. *CRT*, 772 F.2d 922 (D.C. Cir. 1985), cert. denied, 475 U.S. 1035 (1986) *(NAB* v. *CRT)*; *Christian Broadcasting Network* v.

CRT, 720 F.2d 1295 (D.C. Cir. 1983) *(Christian Broadcasting* v. *CRT)*; *National Cable Television Ass'n* v. *CRT*, 689 F.2d 1077 (D.C. Cir. 1982) *(NCTA* v. *CRT)*; *Recording Indus. Ass'n of America* v. *CRT*, 662 F.2d 1 (D.C. Cir. 1981) (*RIAA* v. *CRT*). As the D.C. Circuit succinctly noted:

We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully. * * *

Christian Broadcasting v. *CRT*, 720 F.2d at 1319 (D.C. Cir. 1983), quoting *NCTA* v. *CRT*, 689 F.2d at 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same ''arbitrary'' standard used by the courts to review the Tribunal, he must be presented by the CARP with a rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history of the Reform Act which notes that a ''clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress.'' H.R. Rep. No. 103–286, at 13 (1993). This goal cannot be reached by ''attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record.'' *Christian Broadcasting* v. *CRT*, 720 F.2d at 1319.

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination. 17 U.S.C. 802(f).

IV. The CARP Report: Review and Recommendation of the Register of Copyrights

The law gives the Register the responsibility to review the CARP report and make recommendations to the Librarian whether to adopt or reject the Panel's determination. In doing so, she reviews the Panel's report, the parties' post-panel submissions, and the record evidence.

After carefully considering the Panel's report and the record in this proceeding, the Register has concluded that the rates proposed by the Panel for use of the webcasting license do not reflect the rates that a willing buyer and willing seller would agree upon in the marketplace. Therefore, the Register has made a recommendation that the Librarian reject the proposed rates ($0.14 per performance for Internet-only transmissions and $0.07 per performance for radio retransmissions) for the section 114 license and substitute his own determination (0.07c per performance for both types of transmissions), based upon the Panel's analysis of the hypothetical marketplace, and its reliance upon contractual agreements negotiated in the marketplace.

These changes necessitate an adjustment to the proposed rates for non-CPB, noncommercial broadcasters[12] for Internet-only transmissions as well. The adjusted rate for archived programming subsequently transmitted over the Internet, substituted programming and up to two side channels is 0.02¢, reflecting a downward adjustment from the 0.05¢ rate proposed by the Panel. The new rate for all other transmissions made by non-CPB, noncommercial broadcasters is 0.07¢ per performance per listener. Using this methodology, the Register recommends that the Librarian also reject the Panel's determination of a rate for the making of ephemeral recordings by those Licensees operating under the webcasting license. Because the Panel had made an earlier determination not to consider 25 of the 26 contracts submitted by RIAA for the purpose of setting a rate for the webcasting license, it was arbitrary for the Panel to use these same rejected licenses to set the Ephemeral License Fee. See section IV.13 herein for discussion. Consequently, the Register proposes a downward adjustment—from 9% of the performance royalties paid to 8.8%—to the Ephemeral License Fee to remove the effect of the discarded licenses.

In determining the Ephemeral License Fee for Business Establishment Services operating under an exemption to the digital performance right, the CARP considered separate licenses negotiated in the marketplace between individual record companies and these services. Its reliance on these agreements as an adequate benchmark for purposes of setting the rate for the section 112 license was well-founded and supported by the record. Therefore, the Register recommends adopting the Panel's proposal of setting the Ephemeral License Fee for Business Establishment Services at 10% of the service's gross proceeds. However, the Register cannot support the Panel's recommendation to set the minimum fee applicable to these services for its use of the ephemeral license at $500 when clear evidence exists in the contractual agreements to establish a much higher range of values for setting the minimum fee. Consequently, the Register evaluated the contracts and proposed a minimum fee consistent with the record evidence. The result is a minimum fee of $10,000 per license pro rated on a monthly basis.

Section 802(f) states that ''[i]f the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 90-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be.'' During that 90-day period, the Register reviewed the Panel's report and made a recommendation to the Librarian to accept in part and reject in part the Panel's report, for the reasons cited herein. The Librarian accepted this recommendation and, on May 21, 2002, he issued an order rejecting the Panel's determination proposing rates and terms for the webcasting license and the ephemeral recording license. See Order, Docket No. 2000–9 CARP DTRA 1&2 (dated May 21, 2002).

The full review of the Register and her corresponding recommendations are presented herein. Within the limited scope of the Librarian's review of this proceeding, ''the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it.'' Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55757 (1997), citing 61 FR 55663 (October 28, 1996) (Distribution of 1990, 1991 and 1992 Cable Royalties). Accordingly, the Register accepts the Panel's weighing of the evidence and will not question findings and conclusions which proceed directly from the arbitrators' consideration of factual evidence. The Register, however, may reject a finding of the Panel where it is clear that its determination is not supported by the evidence in the record.

A. Establishing Appropriate Rates

1. The ''Willing Buyer/Willing Seller Standard''

Sections 112(e)(4) and 114(f)(2)(B), of title 17 of the U.S.C., provide that ''the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller,'' and enumerate two factors that the panel shall consider in making its decisions: (1) The effect of

[12] A non-CPB, noncommercial broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

the use of the sound recordings on the sale of phonorecords, and (2) the relative contributions made by both industries in bringing these works to the public. In applying this standard, the Panel determined that it was to consider the enumerated factors along with all other relevant factors identified by the parties, but that it was not to accord the listed factors special consideration. Report at 21; see also Final Rule and Order, Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96–3 CARP SRA, 62 FR 55742, 55746 (October 28, 1997).

Nevertheless, when the Panel considered the record evidence offered to establish a marketplace rate, it paid close attention to the two factors set forth in the statute. In analyzing the first factor, which focuses on the interplay between webcasting and sales of phonorecords, the panel found that the evidence offered during the proceeding was insufficient to demonstrate whether webcasting promoted or displaced sales of sound recordings. RIAA's evidence to demonstrate that performances of their sound recordings over the Internet displace record sales consisted of unsupported opinion testimony and consequently, the Panel afforded it no weight. Report at 33. Similarly, the Panel rejected the Webcasters' contention that webcasting promoted sales, affording little weight to its empirical studies. It concluded that the Sounddata survey [13] was not useful for purposes of this proceeding because it focused on the promotional value of traditional radio broadcasts and not the promotional value of webcasting. Id. Likewise, the Panel rejected a study by Professor Michael Mazis [14] because the response rates in the survey study fell below generally acceptable standards. All in all, the evidence on either side was not persuasive. Consequently, the Panel concluded that, for the time period under consideration, ''the net impact of Internet webcasting on record sales [was] indeterminate.'' Id. at 34.

Broadcasters, however, disagree with the Panel's conclusions. They argue that the Panel should have made an adjustment for the promotional value of the transmissions, noting that the statute singled out this factor for consideration when setting the rates. Broadcasters Petition at 38. They further contend that the record demonstrates that ''the promotional value of radio play should be far and away the most significant factor in determining the fair market value of broadcasters simulcast rates.'' Id. at 39–40. But all the evidence cited in the record references the interrelationship between radio stations and record companies in the analog world. As noted above, the Panel considered the evidence but did not find it persuasive.

Where the Panel makes a decision based upon its weighing of the evidence, the Register will not disturb its findings and conclusions that proceed directly from the Panel's consideration of the factual evidence. Thus, the Register accepts the Panel's conclusion that performances of sound recordings over the Internet did not significantly stimulate record sales. More importantly, though, the Panel correctly found that promotional value is a factor to be considered in determining rates under the willing buyer/willing seller model, and does not constitute an additional standard or policy consideration to be used after rates are set to adjust a base rate upwards or downwards. Report at 21. Therefore, the effect of any promotional value attributable to a radio retransmission would already be reflected in the rates for these transmissions reached through arms-length negotiations in the marketplace.

As for the second factor, the Panel found that both copyright owners and licensees made significant creative, technological and financial contributions. It concluded, however, that it was not necessary to gauge with specificity the value of these contributions in the case where actual agreements voluntarily negotiated in the marketplace existed, since such considerations, including any significant promotional value of the transmissions, would already have been factored into the agreed upon price. Id. at 35–36. This is not a contested finding.

It is also important at the outset of this review to distinguish the willing buyer/willing seller standard to be used in this proceeding from the standard that applies when setting rates for subscription services that operated under the section 114 license. They are not the same. Section 114(f)(1)(B), governing subscription services, requires a CARP to consider the objectives set forth in section 801(b)(1), as well as rates and terms for comparable types of digital audio transmission services established through voluntary negotiations. See Final Rule and Order, 63 FR 25394, 25399 (May 8, 1998). This standard for setting rates for the subscription services is policy-driven, whereas the standard for setting rates for nonsubscription services set forth in section 114(f)(2)(B) is strictly fair market value—willing buyer/willing seller. Thus, any argument that the two rates should be equal as a matter of law is without merit. See, e.g., Webcasters Petition at 4 (comparing rates set for preexisting subscription services under the policy driven standard with the proposed marketplace rates for nonsubscription services and inferring that the rates should be similar).

2. Hypothetical Marketplace/Actual Marketplace

To set rates based on a willing buyer/willing seller standard, the CARP first had to define the relevant marketplace in which such rates would be set. It determined, and the parties agreed, that the rates should be those that a willing buyer and willing seller would have agreed upon in a hypothetical marketplace that was not constrained by a compulsory license. The CARP then had to define the parameters of the marketplace: the buyers, the sellers, and the product.

In this configuration of the marketplace, the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies, and the product consists of a blanket license from each record company which allows use of that company's complete repertoire of sound recordings. Report at 24. Because of the diversity among the buyers and the sellers, the CARP noted that one would expect ''a range of negotiated rates,'' and so interpreted the statutory standard as ''the rates to which, absent special circumstances, most willing buyers and

[13] Michael Fine is an expert witness for the Webcasters and Broadcasters. He was the chief executive officer to Soundata, SoundScan and Broadcast Data Systems until December 31, 2000, and is now a management consultant to the firms operating these services. He analyzed data collected by these services to determine the promotional effect upon record sales from radio retransmissions and Internet-only transmissions and the displacement effect of record sales due to copying of sound recordings from Internet transmissions. Fine's W.D.T. at 1.

[14] Professor Mazis is a Professor in the Kogod School of Business, American University, who testified on behalf of the Webcasters and Broadcasters. He designed a survey study to analyze usage patterns of people who listen to simulcast of a radio station's over-the-air broadcast programming and transmissions made by services transmitting solely over the Internet. Specifically, the study was designed to measure:

a. The effect listening to transmissions over the Internet had on a listener's music purchases;

b. the extent to which listeners to radio retransmissions are either listeners from the broadcaster's local market or non-local listeners;

c. the amount of time spent listening to programming on the Internet and the proportion of that time spent listening to music programming versus non-music programming; and

d. the reasons why people visit radio station websites and the activities they engage in when they visit these sites. Mazis' W.D.T. at 1–2.

willing sellers would agree'' in a competitive marketplace.[15] Id. at 25.

The Services take issue with the Panel's analysis of the hypothetical marketplace. They argue that the willing sellers should be considered as a group of hypothetical ''competing collectives each offering access to the range of sound recordings required by the Services,'' and not, as the Panel contends, viewed as individual record companies. Broadcasters Petition at 9; Webcasters Petition at 9–10. It is hard to see, however, how competition would be stimulated in a marketplace where every seller offers the exact same product and where more likely than not, the sellers would act in concert to extract monopolistic prices. Possibly sellers would choose to undercut each other, but at some point the price would stabilize. In any event, the Services failed to explain how such collectives would operate in a competitive marketplace. Consequently, the Register rejects the Webcasters' challenge to the Panel's definition on this point and adopts the Panel's characterization of the relevant marketplace, recognizing that for purposes of this proceeding, the major record companies are represented by a single entity, the RIAA.

Turning next to the actual marketplace in which RIAA negotiated agreements with individual services, the Services voice a number of objections to the Panel's decision to rely on the 26 voluntary agreements offered into evidence by RIAA. Specifically, the Services object to the use of the voluntary agreements because they fail to exhibit a range of negotiated rates among diverse buyers and sellers. Broadcasters Petition at 10; Webcasters Petition at 10. They also question the validity of relying on agreements negotiated during the early stages of a newly emerging industry, noting the Panel's admonition to approach such agreements with caution. Report at 47. The reason for the warning was Dr. Jaffe's [16] stated concern that such licenses ''may not reflect fully educated assessments of the nascent businesses'' long-term prospects.''

The Services also argue that the existence of the antitrust exemption in the statutory license gave RIAA an unfair bargaining advantage over the Services because RIAA represented the five major record companies who together owned most of the works. They contend that RIAA used its superior market power to negotiate supra-competitive prices with Services who could not match either RIAA's power in the marketplace or its sophistication in negotiating contracts. Moreover, they utterly reject the Panel's determination that RIAA's perceived market power was tempered by the existence of the statutory license, which, for purposes of negotiating a fair rate for use of sound recordings, leveled the playing field. Webcasters Petition at 12.

Not surprisingly, RIAA agrees with the Panel on this issue. It maintains that the statutory license offers the Services two clear advantages which more than offset any perceived advantage the RIAA may have had in negotiating a voluntary agreement. First, the license eliminates the usual transaction costs associated with negotiating separate licenses with each of the copyright owners. Second, services may avoid litigation costs associated with setting the rates for a statutory license provided they choose not to participate in the CARP process. RIAA reply at 12.

In essence, both sides articulate valid positions which are supported by the record. RIAA is clearly an established market force with extensive resources and sophistication. In fact, the Panel found that when RIAA negotiated with less sophisticated buyers who could not wait for the outcome of this proceeding, the rates were above-market value, and therefore, not considered by this CARP. Report at 54–56. Nevertheless, it would make no sense for RIAA to take any other position in a marketplace negotiation. Sellers expect to make a profit and will extract from the market what they can, just as buyers will do everything in their power to get the product at the lowest possible price. These are the fundamental principles guiding marketplace negotiations.

Such negotiations, however, were few. For the most part, webcasters chose not to enter into negotiations for voluntary agreements, knowing that they could continue to operate and wait for the CARP to establish a rate. Such actions on the part of the users clearly impeded serious negotiations in the marketplace and support the CARP's observation that the statutory license had a countervailing effect on the negotiation process and limited the ability of RIAA to exert undue marketplace power. See Tr. 9075–77, 9490–94 (Marks) (explaining the difficulties of bringing webcasters to the negotiating table due to the statutory license). Thus, the CARP could only consider negotiated rates for the rights covered by the statutory license that were contained in an agreement between RIAA and a Service with comparable resources and market power.

The only agreement that met these criteria was the Yahoo![17] agreement. The Panel found that both parties to that agreement entered into negotiations in good faith and on equal footing. Moreover, RIAA's negotiating advantage disappeared. RIAA could not extract super-competitive rates because Yahoo! brought comparable resources, sophistication, and market power to the negotiating table.

Moreover, Yahoo! could have continued to operate under the license and wait for the outcome of this proceeding. Yet, Yahoo!, unlike most of the other Services, did not take this course of action. It wanted a negotiated agreement so that it could fully develop its business model based on certainty as to the costs of the use of the sound recordings. Consequently, it had every incentive to negotiate a rate that reflected its perception of the value of the digital performance right in light of its needs and position in the marketplace. Had RIAA insisted upon a super competitive rate, Yahoo! could have walked away and waited for the CARP to set the rates. RIAA Reply at 13. Thus, it was not arbitrary for the Panel to consider the negotiated agreement between Yahoo! and RIAA. It met all the criteria identified by the CARP (discussed above) that characterized the hypothetical marketplace: Yahoo! was a DMCA-compliant Service; RIAA represented the interests of five independent record companies, and the license granted the same rights as those offered under the webcasting and the ephemeral recording licenses.

The Webcasters make one final argument concerning use of licenses negotiated in the marketplace. They fault the Panel for its reliance on a contract for which there was no prior marketplace precedent for setting a rate. Webcasters Petition at 15. Yet, that alone cannot be a reason to reject

[15] The panel used the same analysis for setting the rates for the ephemeral recording license because the statutory language defining the standard for setting rates for the ephemeral recording license is nearly identical to the standard set forth in section 114.

[16] Adam Jaffe is a Professor of Economics at Brandeis University. He is also the Chair of the Department of Economics and the Chair of the University Intellectual Property Policy Committee. He testified on behalf of the Webcasters and the Broadcasters.

[17] Yahoo! is a streaming service which provides a retransmissions of AM/FM radio stations and programming from other webcaster sites. Report at 61. Yahoo! is also a global Internet communications, commerce and media company, offering comprehensive services to more than 200 million users each month. Content for its features like Yahoo! Finance, Yahoo! News, and Yahoo! Sports, are typically licensed from third parties. Mandelbrot W.D.T. ¶ 3–5.

The Panel was well aware of the many faces of Yahoo! Nevertheless, it found no reason to reject the Yahoo! agreement merely because it offered other business services. See Report at 76, in 53.

consideration of agreements negotiated in the marketplace, albeit at an early stage in the development of the industry. At some point, rates must be set. Such rates then become the baseline for future market negotiations. RIAA recognized an opportunity to participate in this initial phase and moved forward to negotiate contracts with users with the intention of using these contracts to indicate what a willing buyer would pay in the marketplace. However, that was easier said than done. As discussed above, most Webcasters chose not to enter into marketplace agreements, preferring to wait for the outcome of the CARP proceeding in the hope of getting a low rate. Clearly, such resistance to enter into good faith negotiations made it difficult for the copyright owners to gauge the market accurately and find out just what a willing buyer would be willing to pay for the right to transmit a sound recording over the Internet.

3. Benchmarks for Setting Market Rates: Voluntary Agreements vs. Musical Works Fees

The parties offer two very different methods for setting the webcasting rates. RIAA argued that the best evidence of the value of the digital performance right is the actual rates individual services agreed to pay for the right to transmit sound recordings over the Internet. In support of its position, it offered into evidence 26 separate agreements it had negotiated in the marketplace prior to the initiation of the CARP proceeding. The Services take a different approach. They dispute the validity of the contracts as a bases for marketplace rates and offer in their place a theoretical model (the ''Jaffe model'') predicated on the fees commercial broadcasters pay to use musical works in their over-the-air AM/FM broadcast programs.

The Jaffe model builds on the premise that in the hypothetical marketplace, copyright owners would license their digital performance rights and ephemeral recording rights at a rate no higher than the rates music publishers currently charge over-the-air radio broadcasters for the right to publicly perform their musical works.[18] Report at 28, citing Webcasters PFFCL ¶¶ 276–78; Jaffe W.D.T. 16–19. To find the rate copyright owners would charge under this model, Webcasters calculated a per performance and a per hour rate by using the aggregate fees that 872 over-the-air radio stations paid in 2000 to the performing rights organizations BMI, ASCAP, and SESAC.[19] It combined the fee data with data on listening audiences obtained from Arbitron to generate an average fee paid by an over-the-air broadcaster per ''listening hour.'' From this value, Webcasters calculated a per performance fee by dividing the ''listener hour'' fee by the average number of songs played per hour by music-intensive format stations. Id. These calculations yielded a per song fee of 0.02¢ or, in the alternative, a per listener hour fee of 0.22¢. For purposes of webcasting, these values were adjusted upward to reflect the fact that, on average, webcasters play 15 songs per hour, as compared to the 11 per-hour played on over-the-air radio. The webcaster per hour rate works out to be 0.3 instead of 0.2¢ per hour.

After carefully considering both approaches, the Panel chose to focus on the RIAA agreements. In rejecting Dr. Jaffe's theoretical model, the panel cited three reasons for its conclusion. First, the Panel expressed strong concern regarding the construct of the model, including: 1. The difficulty in identifying all the factors that must be considered in setting a price, and 2. The inherent error associated with predicating a prediction on a ''string of assumptions,'' especially where the level of confidence in many of the assumptions is not high. Second, the Panel was wary of analogizing the market for the performance of musical works with the market for the performance of sound recordings, finding instead that the two marketplaces are distinct based upon the difference in cost and demand characteristics. And finally, the Panel determined that the Jaffe model was basically unreliable. It could not be used to predict accurately the amount of royalty fees owed to the performing rights societies by a particular radio station. It came to this conclusion after using the model to predict the royalty fees owed by a particular station and comparing that figure to the amount the radio station actually paid. For some radio stations, the model severely underestimated the amount owed to the performing rights societies, thus, drawing into serious question the reliability of the model. Report at 42.

a. *Fees paid for use of musical works.* The Broadcasters and the Webcasters fault the Panel for disregarding the fees paid for musical works as a viable benchmark. Webcasters Petition at 15, 47. They maintain that Dr. Jaffe's analysis proves that the value of the performance of the sound recording is no higher than the value of the performance of the musical work. Webcasters argue that the fees for musical works constitute a valid benchmark because these rates are the result of transactions between willing buyers and willing sellers over a long period of time, in a marketplace that shares economic characteristics with the marketplace for sound recordings. Webcasters Petition at 48. The Broadcasters agree. They maintain that even under the willing buyer/willing seller standard, ''the over-the-air musical works license experience * * * has resulted in fees 'to which most willing buyers and willing sellers [have] agree[d]' and constitute 'comparable agreements negotiated over a longer period, which ha[ve] withstood 'the test of time.' '' Broadcasters Petition at 45–46, citing Report at 25, 47.

Broadcasters and Webcasters also object to the Panel's characterization of its proposed benchmark as merely a theoretical model. Webcasters Petition at 51. They maintain that Dr. Jaffe's model was much more than a theoretical model because it used actual data from the musical works marketplace to calculate an analogous rate for use of sound recordings in the digital marketplace. Consequently, these Services contend that the Panel gave inadequate consideration to their proposed benchmark and rejected the model out of hand because it was purported to be only a theoretical model based upon a number of untested assumptions. Broadcasters Petition at 18–19; Webcasters Petition at 18–20, 52.

Finally, the Services argue that the statute does not compel the Panel to consider only negotiated agreements. They also contend, that the reliance on the fees paid for use of the musical works in a prior CARP proceeding to establish rates for subscription services operating under the same license required the panel to give more consideration to the musical works benchmark. Broadcaster's Petition at 1–2; Webcasters Petition at 1–2, 15, 17, 47. Webcasters find support for this last argument in an Order of the Copyright Office issued in this proceeding, dated July 18, 2001.

In that order, the Office acknowledged that in 1998 it had adopted the rates paid for musical works fees as a relevant benchmark for setting rates for

[18] A ''musical work'' is a musical composition, including any words accompanying the music. A ''sound recording'' is a work that results from the fixation of a series of musical, spoken, or other sounds, other than those accompanying a motion picture or other audiovisual work.

[19] BMI, Inc., American Society for Composers, Authors and Publishers, and SESAC, Inc. are performing rights organizations that represent songwriters, composers and music publisehrs in all genres of music. These societies offer licenses and collect and distribute royalty fees for the non-dramatic public performances of the copyrighted works of their members.

subscription services. It stated, however, that the evidence in that case did not support a conclusion that the value of the sound recording exceeded the value of the musical work. Moreover, and directly to the point, the Register's recommendation in the earlier proceeding concurred with the earlier Panel's determination that the musical works benchmark is NOT determinative of the marketplace value of the performance right in sound recordings. The relevant passage states: ''The question, however, is whether this reference point (the musical works benchmark) is determinative of the marketplace value of the performance in sound recordings; and, as the Panel determined, the answer is no.'' 63 FR 25394, 25404 (May 8, 1998).

The July 18 Order went on to note that in the subscription service proceeding, ''[h]ad there been record evidence to support the opposite conclusion, [namely, that the value of sound recordings exceeds the value of musical works], the outcome might have been different.'' This statement was an invitation to the parties to provide whatever evidence they could adduce in this proceeding to establish the value of the sound recording. It was not to be read as an absolute determination, that the value of the sound recording in a marketplace unconstrained by a compulsory license is less than the value of the underlying musical work. Instead, the Order stated that ''the musical work fees benchmark identified in a previous rate adjustment proceeding as the upper limit on the value of the performance of a sound recording may or may not be adopted as the outer boundary of the ''zone of reasonableness'' in this proceeding. This is a factual determination to be made by the CARP based upon its analysis of the record evidence in this proceeding.''

It is also important to note that in the prior proceeding, the only reason the Register and the Librarian focused on the musical works benchmark was because it was the only evidence that remained probative after an analysis of the Panel's decision. Each of the other benchmarks possessed at least one fatal deficiency and, consequently, each was rejected as a reliable indicator of the value of the performance of a sound recording by a subscription service. Of equal importance is the fact that the musical works benchmark had never been fully developed in the record, nor had any party relied on it to any great extent in making its case to that Panel. Consequently, it was not arbitrary for the Panel to reject the Services' invitation to anchor its decision for setting rates for nonsubscription services on the prior decision setting rates for preexisting subscription services.

Moreover, the Panel is not required to justify why the rates it ultimately recommended here are greater than the rates preexisting subscription services pay for use of the musical works. That is merely the result of the analysis of the written record before this Panel, and its decision flows naturally from its reliance upon contractual agreements negotiated in the relevant marketplace for the right at issue. This difference in the rates is also attributable to the different standards that govern each rate setting proceeding. As discussed previously in section IV.1, the standard for setting rates for subscription services is policy based and not dependent upon market rates. Consequently, it is more likely that the rates set under the different standards will vary markedly, especially when rates are being set for a new right in a nascent industry.

Nevertheless, the Register agrees with the Services on a number of theoretical points. Certainly, the Panel could have utilized Dr. Jaffe's model in making its decision, either alone or in conjunction with the voluntary agreements, provided that it considered the model's deficiencies, and made appropriate adjustments for the fact that the model required reliance on a string of assumptions to perform the conversion of a rate for the public performance of a musical work in an analog environment, into a comparable rate for the public performance of a sound recording in a digital format. *See AMOA* v. *CRT,* 676 F2d 1144 (7th Cir. 1982). But the fact remains that it was not required by law to do so. The Panel was free to choose any of the benchmarks offered into the record or to rely on each of them to the degree they aided the Panel in reaching its decision. *See, e.g.,* Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068–69 (CRT found voluntary license between BMI, Inc., and the public broadcasters, Public Broadcasting System and National Public Radio, of no assistance in setting rates for use of ASCAP repertoire).

The Register also rejects the Services' contentions that the Panel failed to consider fully Dr. Jaffe's model. *See* Webcasters Petition at 20, 52. The Panel did consider Jaffe's model and concluded that it need not consider alternative benchmarks that are at best analogous when it had actual evidence of marketplace value of the performance of the sound recordings in the record. Report at 42. It also rejected the offer to utilize the model because the underlying assumptions were in many instances questionable. For example, the Panel did not accept the assumptions that a percentage of revenue model could be converted accurately to a per performance metric, or that the buyers and sellers in the two marketplaces are analogous.

Broadcasters assert that they had established that the value of the musical work is higher than the comparable right for sound recording based on the fees paid for use of these works in movies and television programs. Broadcasters Petition at 24. In addition, they offered a study of the fees paid for these rights in twelve foreign countries where the Services claim these rights are valued more or less equally. *Id.* at 24, 49. Because the Panel failed to analyze this information, the Services argue, the Panel's rejection of the musical benchmark was arbitrary.

RIAA responds that the information offered on the fees paid for the public performance of sound recordings fails to establish that in these countries sound recordings are valued according to a ''willing buyer/willing seller'' standard. RIAA Reply at 20, fn 36. In fact, many of the countries surveyed evidently use an ''equitable remuneration'' standard, which courts have held not to be equivalent to a fair market value. Because it is not possible to ascertain whether any of the rates offered in the survey of foreign countries represented a fair market rate, or that the rights in these countries are equivalent to the rights under U.S. law, the Panel was not arbitrary in its decision to disregard this evidence. The Register also concludes that the Panel's decision not to consider master use and synchronization licenses for use of musical works and sound recordings in motion pictures and television was not arbitrary. At best, these licenses offered potential benchmarks for evaluating the digital performance right for sound recordings, and they may well have been useful had not actual evidence of marketplace value of the sound recordings existed. In any event, they did not represent better evidence than the voluntary agreements negotiated in the marketplace for the sound recording digital performance right.

b. *Voluntary agreements.* On the other hand, the Panel articulated two affirmative reasons for its focus on the negotiated agreements. First, the statute invites the CARP to consider rates and terms negotiated in the marketplace. Second, the Panel accepted the premise that the existence of actual marketplace agreements pertaining to the same rights for comparable services offers the best evidence of the going rate. Report at 43, citing Jaffe Tr. at 6618.

But in choosing this approach, the Panel did not accept the 26 voluntary agreements at face value. It evaluated the relative bargaining power of the buyers and sellers, scrutinized the negotiating strategy of the parties, considered the timing of the agreements, discounted any agreement that was not implemented, eliminated those where the Service paid little or no royalties or the Service went out of business, and evaluated the effect of a Service's immediate need for the license on the negotiated rate. See Report at 45–59.[20] Ultimately, it gave little weight to 25 of the 26 agreements for these reasons and because the record demonstrated that the rates in these licenses reflect above-marketplace rates due to the superior bargaining position of RIAA or the licensee's immediate need for a license due to unique circumstances. At best, the Panel concluded that the rates included in these agreements establish an upper limit on the price of the digital performance right, and where included, the right to make ephemeral copies. Report at 59.

RIAA objects to the Panel's decision to reject 25 of the 26 agreements on the grounds that the Panel's criticisms were overbroad. RIAA Petition at 34. Specifically, it claims that the Panel mischaracterized its agreement with *www.com/OnAir* (''OnAir''), arguing that this Licensee paid substantial royalties and its decision to enter into the agreement was not motivated by special circumstances as the CARP claimed. Id. at 31. This observation, however, is not sufficient to overcome the Panel's conclusion in regard to this agreement, especially in light of the testimony of RIAA's own expert witness, Dr. Nagle, who testified the Panel should give no consideration to any agreement with a licensee who cannot survive in the marketplace. Report at 24. Had OnAir continued to operate in the marketplace and renew its license with RIAA, the Panel might have given it more serious consideration. But again, it was not required to do so, especially when the Panel found more probative evidence in the record upon which to rely.

Likewise, RIAA objected to the Panel's decision not to give any weight to the MusicMusicMusic (''MMM'') agreement, arguing in this case that the Panel assumed MMM had renewed its agreement in 2001 for the same reasons that led it to accept a higher than market value rate in 1999. RIAA Petition at 32. Webcasters respond that RIAA misrepresents the facts of the renewal. They maintain that MMM renewed the agreement in 2001 based on ''many of the same motivating factors'' that led to the initial agreement, including its concerns about its long-term relationship with RIAA in other areas. Webcasters Reply at 29. Because the evidence supports a rationale for MMM to accept a higher than marketplace rate, it was not arbitrary for the Panel to decide not to adopt it as an adequate benchmark. The Panel need not rely on the MMM agreement when it had another agreement negotiated in the marketplace that did not suffer from the same perceived shortcomings.

Specifically, the Panel gave significant weight to the one remaining agreement negotiated—the RIAA-Yahoo! agreement—and used it as a starting point for setting the rates for the webcasting license and the ephemeral recordings license. The Panel found this agreement particularly reliable and probative because: (1) Yahoo! was a successful and sophisticated business which, to date, had made well over half of all DMCA-compliant performances; (2) it had comparable resources and bargaining power to those RIAA brought to the table; and (3) the agreement provided for different rates for different types of transmissions. See Report at 64–67; 70. While the first two reasons offer strong support for the Panel's decision to rely upon the Yahoo! agreement, the third reason is questionable in the context of the Yahoo! agreement because the different rates do not actually represent the parties' understanding of the value of the performance right for these types of transmissions. See discussion infra, section IV.5.

Webcasters, however, argue that the Panel's reliance on the Yahoo! agreement was fatal because it selected a single term out of a multifaceted contract. Webcasters at 22–23. Specifically, they maintain that the webcasting rate did not reflect merely the value of the sound recording, but an abundance of trade-offs that met the needs of RIAA and Yahoo!. Id. at 24. Webcasters make this argument because, in a prior CARP proceeding, the Register had refused to adopt a complicated partnership agreement that purportedly included a rate for the digital performance right as a benchmark for setting the statutory rate. See, Rate Setting Proceeding for Subscription Services, 63 FR 25394 (May 8, 1998). Specifically, the Register concluded that ''it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the [rate] provision would not exist but for the entire agreement.'' Id. at 25402.

The two agreements, however, are not analogous. The primary purpose of the Yahoo! agreement was to set a rate for use of sound recordings over the Internet. Thus, the noted trade-offs in this agreement were all directly tied to considerations relating to the value of the performance right, and did not affect its validity as a benchmark. Such was not the case with the subscription services agreement offered into evidence in the prior proceeding, where the performance right component was merely ''one of eleven interdependent co-equal agreements which together constituted the partnership agreement between [Digital Cable Radio Associates (''DCR'')] and the record companies.'' Id.

Along these same lines, the Services challenge the Panel's dependence upon a single contract negotiated between a single seller (RIAA) and a single buyer (Yahoo!), especially in light of the Panel's construct of the hypothetical marketplace. Broadcasters Petition at 14; Live365 Petition at 5; Webcasters Petition at 9, 14. These parties argue that under 17 U.S.C. 114(f)(2)(B), the Panel had discretion to consider negotiated agreements only when the agreements were for comparable types of services in comparable circumstances. Webcasters, including Live365, maintain that Yahoo! had a unique position among webcasters and argue that it was manifestly arbitrary for the Panel to set rates based solely on the rates paid by this one webcaster which by its own admissions was not similarly situated with other webcasters. Live365 Petition at 11; Webcasters Petition at 27. Specifically, they contend that Yahoo! had little concern about getting a reasonable rate for Internet-only transmissions so long as the rate for RR transmissions was favorable and it could continue to grow in this arena. Webcasters note that Yahoo!'s main business was the retransmission of radio re-broadcasts, and that over 90% of all transmissions made by Yahoo! fall within this category. Id. at 28. Consequently, Webcasters maintain that the rates set for Internet-only transmissions in the Yahoo! agreement cannot be fairly applicable to Webcasters at large. Id. at 29.

Broadcasters have other complaints with the Panel's approach. First, they object to the use of the Yahoo! contract to set rates for broadcasters when the buyer in that case was not a broadcaster

[20] The Panel also considered, and ultimately rejected three offers of corroborating evidence made by RIAA in support of its position that all 26 agreements should be used in setting the royalty rates: (1) License agreements for making [material redacted subject to Protective Order]; (2) prior case law articulating a method for assessing damages in patent infringement cases; and (3) a pricing strategy analysis.

but a third-party aggregator—a completely different type of business. Second, they fault the Panel for its failure to follow its own dictate to proceed cautiously when viewing contracts negotiated in a nascent industry for newly created rights. Broadcaster Petition at 14. Similarly, Webcasters fault the Panel for relying exclusively on the Yahoo! agreement because it offers only a single, uniform rate for each type of transmission, in contrast to the ''range of rates,'' involving ''diverse buyers and sellers,'' that the Panel identified as the hallmark of a willing buyer/willing seller marketplace.'' Webcasters Petition at 14. Webcasters also contend that the Yahoo! agreement should not have been considered because it, like the Lomasoft-RIAA agreement, had not been renewed. Webcasters Petition at 41.

Moreover, Live365 questions the Panel's reliance on the Yahoo! contract when it had rejected use of a second similar agreement between MusicMatch (''MM'') and RIAA because MM had accepted higher than marketplace rates for nearly identical reasons to those that account for the inflation in the Yahoo! rates. MM had wished to settle litigation with RIAA and it received a benefit from the inclusion of a Most Favored Nations (MFN) clause in the contract. Yet, in spite of the similarities, the Panel relied on the Yahoo! agreement and disregarded the second one. Such disparate treatment of similarly situated services is arguably arbitrary. Live365 Petition at 13. A closer examination of the agreements, however, reveals a significant difference between the two contracts which allowed the Panel to disregard the MM agreement for further consideration. Most importantly, the MM agreement contained a MFN clause that [material redacted subject to a protective order]. The Panel reasoned that this provision undermined the usefulness of the agreement to establish a marketplace rate because [material redacted subject to a protective order]. Report at 56–57. Such was not the case with the Yahoo! agreement since the MFN clause only allowed Yahoo! to receive a partial benefit commensurate with [material redacted subject to a protective order]. Report at 62.

The Register concurs and agrees with the Panel's observation that it would be unsound to establish a rate for the statutory license using a rate that itself is subject to change based on the outcome of this proceeding.

The Register also finds the other arguments by the parties unavailing. In spite of their objections, the Services' own expert, Dr. Jaffe, agreed in principle with the Panel's approach. In his testimony, he acknowledged that voluntary agreements between a willing buyer and a willing seller would constitute the best evidence of reasonable marketplace value if such agreements were between parties comparable to those using the webcasting license. Tr. 6618 (Jaffe). The Services' argument, of course, is that the Yahoo! agreement is not a comparable agreement for purposes of setting rates for all webcasters, and this appears to be a valid point. Yahoo!'s business model is somewhat unique. Unlike webcasters that create their own programming, Yahoo! merely offers programming by AM/FM radio stations and other webcasters.

Nevertheless, RIAA offers record evidence that contradicts the Webcasters' assertion that Yahoo! is not a comparable service for purposes of this proceeding, noting that many webcasters affirmatively stated that Yahoo! is a competitor. Moreover, RIAA asserts that the number of the performances made by Yahoo! on its Internet-only channels is roughly equivalent to the number of performances made by the other webcasters in this proceeding and, therefore, Yahoo!'s interest in getting a reasonable rate for its Internet-only stations should be comparable to those of the Webcasters in this proceeding. RIAA reply at 33–34.

Because Yahoo! is engaged in both types of transmissions, it is reasonable to accept this agreement as a basis for setting rates for both types of transmissions. Yahoo! has developed a significant business presence in the marketplace for Internet-only transmissions and understands the marketing and business of Internet-only webcasters. Consequently, allegations that Yahoo! has only a de minimis interest in the webcasting field and is thus less interested in getting a reasonable rate for the right to make digital transmissions are without merit. The question, however, is whether each rate in the Yahoo! agreement reflects the actual value of the particular transmission or whether one must consider both rates in concert to understand the valuation process. For a more detailed discussion on this point, see section IV.5 infra.

4. Alternative Methodology: Percentage-of-Revenue

The Panel also carefully considered and rejected a percentage-of-revenue model for assessing fees and determined that a per performance metric was preferable to a percentage-of-revenue model. A key reason for rejecting the percentage-of-revenue approach was the Panel's determination that a per performance fee is directly tied to the right being licensed. The Panel also found that it was difficult to establish the proper percentage because business models varied widely in the industry, such that some services made extensive music offerings while others made minimal use of the sound recordings. Report at 37. The final reason and perhaps the most critical one for rejecting this model was the fact that many webcasters generate little revenue under their current business models. As the Panel noted, copyright owners should not be ''forced to allow extensive use of their property with little or no compensation.'' Id, citing H.R. Rep. 105–796, at 85–86. Thus, it seemed illogical to set a rate for the statutory license on a percentage-of-revenue basis when in fact a large proportion of the services admit they generate very little revenue, and, therefore, would generate meager royalties even for substantial uses of copyrighted works. Moreover, it is highly unlikely that a willing seller, who negotiates an agreement in the marketplace, would agree to a payment model which itself could not provide adequate compensation for the use of its sound recordings.

Nevertheless, Webcasters and Live365 assert that the Panel acted arbitrarily when it failed to provide a revenue-based royalty option. Webcasters at 54. They maintain that both sides advocated adoption of a percentage-of-revenue option, see RIAA PFFCL, Appendix C; Webcasters PFFCL ¶¶ 283–296, and that it was arbitrary for the Panel to refuse to adopt this approach. See Live365 Petition at 10; see also pg. 11, fn 6. Webcasters also assert that they had made clear that in the event the Panel rejected Jaffe's model, a revenue-based alternative license proposal would be necessary to avoid putting certain webcasters out of business. Webcasters Petition at 56, 60. Moreover, Webcasters reject the Panel's conclusion that the Services' revenue-based fee proposal was untimely. Id.. at 57–60. They maintain that under § 251.43(d) they were allowed to revise their claim or their requested rate ''at any time during the proceeding up to the filing of the proposed findings of fact and conclusions of law,'' and that the Panel had no authority to alter this provision by order under § 251.50.[21]

[21] Section 251.50 of the 37 CFR provides that:

In accordance with 5 U.S.C., subchapter II, a Copyright Arbitration Royalty Panel may issue rulings or orders, either on its own motion or that of an interested party, necessary to the resolution of issues contained in the proceeding before it; Provided, that no such rules or orders shall amend,

Continued

In reply, RIAA notes that the Webcasters cite no evidence for their assertion that they reasonably believed the Panel would offer a percentage-of-revenue option and counters their timeliness argument by setting forth the timeline regarding the parties's submissions concerning the rates. RIAA Reply at 62. Evidently at the request of the Webcasters, the Panel issued an order setting November 2 as the deadline for submitting revised or new rate proposals, so that parties were fully aware of each other's position and could style their findings of fact and conclusions of law accordingly. Consequently, the Panel found that the Services' later submission including a proposed rate based on percentage-of-revenue in their PFFCL was untimely. Report at 31, citing Order of November 3, 2001.

After considering the arguments now advanced by the Services concerning the Panel's authority to require final submissions on rates prior to the filing of the PFFCLs, the Register finds that the Panel acted in a lawful manner and within its authority. As RIAA points out in its reply, the Panel has authority pursuant to 37 CFR 251.42 to waive or suspend any procedural rule in this proceeding, including the time by which parties must make final submissions regarding proposed rates. What the Panel cannot do is engage in a rulemaking proceeding to amend, supplement, or supersede any of the rules and regulations governing the CARP procedures. See 37 CFR 251.7. Moreover, the language in § 251.43 is somewhat ambiguous as to when a party can make its final rate proposal, lending itself to two interpretations. For this reason alone, it was prudent for the Panel to issue an order clarifying the application of the rule for purposes of this proceeding. In fact, Webcasters had asked for this ruling and cannot be heard at the end of the process to argue against a ruling that they sought and to which they never objected. Consequently, the Panel was not arbitrary when it found the Webcasters' request for a percentage-of-revenue fee structure untimely.

Moreover, the Panel was not arbitrary for failing to adopt a percentage-of-revenues model merely because some parties voiced an expectation that the Panel would offer such a model as an alternative means of payment. This complaint of unmet expectations is not a substantive argument for finding the Panel's decision arbitrary and, consequently, it will not be considered further.

On the other hand, Live365 does make a substantive argument concerning the Panel's decision not to adopt a percentage-of-revenue model. It notes that the current marketplace uses two types of rate structures, a revenue based model and a performance rate structure, and that the revenue based model is better for start-up and smaller webcasters. Live365 Petition at 8. In fact, Live365 points out that many of the agreements that RIAA negotiated with webcasters incorporated this model. Moreover, Live365 maintains that it was arbitrary for the Panel to propose rates that ''had the effect of rendering sound recordings substantially more valuable than musical works, even though the CARP acknowledged that it was rendering no opinion on this issue.'' Live365 Petition at 5, 14–15. In its opinion, this result was arbitrary based upon Yahoo!'s stated perception that the value of the performance right for the musical work is comparable to the value of the performance right for the sound recording. Finally, Live365 argues that rates based upon mere perception, as those negotiated in the Yahoo! agreement, are by their very nature arbitrary and should be disregarded. Id. at 15.

RIAA refutes the Services' claim that the Panel was arbitrary because it failed to offer a percentage-of-revenue model. It argues that the record supports the Panel's conclusion that a percentage-of-revenue model would have been difficult to implement because Services use sound recordings to different degrees—a position taken by the Webcasters' own witness. Specifically, Jaffe questioned the appropriateness of using a percentage-of-revenue model where those percentages were based on the economics driving over-the-air broadcasts. RIAA Reply Petition at 52, citing Tr. 6487, 6488, 12582 (Jaffe). Jaffe also acknowledged that it was difficult to assess what the revenue base should be for such a model given the variation of the business models utilized by the webcasters. RIAA also notes that section 114(f)(2)(B) requires the Panel to consider the quantity and nature of the use of the sound recording and argues that a per performance metric automatically accounts for the amount of use by the various services. RIAA Reply at 59.

RIAA also argues that a basic percentage-of-revenue fee structure would frustrate the purpose of the law because it would deny copyright owners fair compensation for use of their works in those situations where a service generates little or no revenue. Certainly, the record contains evidence that a number of webcasters do not expect or intend to earn revenues from their webcasts, see Report at 37; see, e.g., Live365 Petition at 7, maintaining that their use is designed primarily to maintain their over-the-air audience. Because certain Services take this approach, when RIAA did consider using a percentage-of-revenue model, it included a substantial minimum fee proposal in conjunction with the percentage of fee proposal to address the problems associated with low revenue generating businesses. Specifically, the RIAA proposal required that a Service pay either 15% of revenues or $5,000 per $100,000 of a webcasters' operating costs, whichever is greater. RIAA Reply at 61. In this way, RIAA sought to avoid the anomaly of allowing a business unfettered use of the sound recordings without reasonable compensation to the copyright owners. Id. at 54, 61. This formulation, however, would not have given the webcasters the relief they seek through the adoption of a rate based on a percentage-of-revenues. In fact, under RIAA's percentage-of-revenue formulation, many webcasters, including Live365, would have paid more than they will under the Panel's per performance rate structure.

The Register finds that the Panel's decision not to set a percentage-of-revenue fee option was not arbitrary in light of the record evidence. First, it is clear that the Services' primary position was to seek adoption of a fee based upon performances and not a percentage-of-revenue. Indeed, Dr. Jaffe's model proposed a fee model based on listener hours or number of listener songs, and not a rate based upon percentage-of-revenues, because a royalty based upon actual performances would be directly tied to the nature of the right being licensed. Report at 37; Jaffe W.R.T. at 31. Moreover, because they took this position, Services argued for a low minimum rate that would only cover administrative costs and not the value of the performances themselves—an approach the CARP adopted in its Report.

Moreover, the statute does not require the CARP to offer alternative fee structures, and the Services should not have expected the Panel to do so, especially when the Webcasters never advanced a percentage-of-revenues option in their own case. In fact, there is no precedent in the statutory licensing scheme anywhere in the Copyright Act that would support alternative rates for the same right. Clearly, it cannot be arbitrary for the Panel to choose not to deviate from the

supplement or supersede the rules and regulations contained in this subchapter. See § 251.7.

longstanding practice of establishing only one rate schedule for a license.

5. The Yahoo! Rates—Evidence of a Unitary Marketplace Value

The starting point for setting the rates for the webcasting license is the Yahoo! agreement. In that agreement, rates were set for two different time periods. For the initial time period covering the first 1.5 billion performances, Yahoo! agreed to pay one lump sum of $1.25 million. From this information, the Panel calculated a ''blended,'' per performance rate of 0.083¢. This value represents the actual price that Yahoo! paid for each of the first 1.5 billion transmissions without regard to which type of service made the transmission. For the second time period, Yahoo! and RIAA agreed to a differential rate structure. One rate was set for performances in radio retransmissions (RR) (0.05¢ per performance) and another rate was set for transmissions in Internet-only (IO) programming (0.2¢ per performance). These rates were first used in early 2000 and do not apply to the first 1.5 billion performances.

However, the CARP did not accept these differentiated rates at face value. The Panel engaged in a far-ranging inquiry to determine how the parties established the negotiated rates. What it found was that Yahoo! agreed to a higher rate for the IO transmissions in exchange for a lower rate for the RR because this arrangement addressed specific concerns of both parties. In particular, RIAA wished to establish a marketplace precedent for IO transmissions in line with rates it had negotiated in earlier agreements, while Yahoo! sought to negotiate rates which, in the aggregate, yielded a rate it could accept. Consequently, the Panel found the rate for the IO transmissions to be artificially high and, conversely, the rates for the RR to be artificially low. For this reason, it made a downward adjustment to the IO rates and an upward adjustment to the RR rates.

Before making this adjustment, though, the Panel had to consider whether it was reasonable to establish separate rates for the two categories of transmissions. In reaching its decision, the Panel considered two facts, the fact that the Yahoo! agreement provided for two separate rates, and the fact that all parties agreed that performances of sound recordings in over-the-air radio broadcasts promote the sale of records. Report at 74. Based on this finding, the Panel concluded that a willing buyer and a willing seller would agree that the value of the performance right for RR would be considerably lower than for IO transmissions. Moreover, it attributed the existence of the rate differential in the Yahoo! agreement to the promotional value enjoyed by the copyright owners from the performance of the sound recordings by broadcasters in their over-the-air programs, and not to promotional value attributable to transmissions made over the Internet. Report at 74–75. Specifically, the Panel found that, ''to the extent that Internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional effect is any less.'' Report at 75.

This finding, however, did not prompt the Panel to make any further adjustment for promotional value, finding instead that the differential rates in the Yahoo! agreement already reflect ''marketplace assessment of the various promotion and substitution effects, along with a myriad of other factors.'' Report at 87. Primary among these factors were the Most Favored Nations (MFN) clause [22] and the cost savings to Yahoo! in avoiding CARP litigation. The Panel reasoned that Yahoo! was willing to accept somewhat inflated royalty rates in exchange for the costs it saved by not participating in the CARP proceeding, and for the MFN clause which had some indeterminate value for Yahoo!.

RIAA disagrees with the Panel's analysis and these findings. As an initial matter, it maintains that there was no record evidence to support a separate rate for commercial broadcasters. RIAA Broadcaster PFOF 24–52. Second, it argues that the Panel adopted a two-tier rate structure for RR and IO transmissions based on the different rates in the Yahoo! agreement, and its mistaken view of the significance of an exemption in the law for a retransmission of a radio station's broadcast transmission within a 150 mile radius of the radio broadcast transmitter in setting the rate for radio retransmissions.[23] See 17 U.S.C. 114(d)(1)(B).

Although RIAA maintains that in its negotiations with Yahoo! it had argued that the value of the radio retransmission should not be based on the location of the original radio broadcast transmitter, it claims that it was nervous about the application of the 150-mile radius exemption to retransmissions made by third-party aggregators, like Yahoo!. Consequently, RIAA maintains that it agreed to a lower rate for radio retransmissions, knowing that its arguments for not exempting these transmissions were weak, and because Yahoo! agreed to pay for each transmission without regard to the exemption. The resulting adjustment for the 150-mile exemption consisted of a reduction to the base rate, 0.2¢, and reflects the fact that about 70% of all radio retransmissions fall within the 150-mile zone.[24] In addition, RIAA agreed to a further reduction to compensate Yahoo! for any ''competitive disadvantage'' it faced if commercial broadcasters were found to be totally exempt from the digital performance right under a separate exemption.[25]

The Panel, however, did not credit RIAA's explanation and concluded that this concern over the exemptions, especially the 150-mile exemption, had no bearing on Yahoo!'s negotiations. The Panel steadfastly maintained throughout its report that Yahoo!'s only aim in the negotiation process was to achieve a rate that translated into an acceptable overall level of payment, and that it did not concern itself with the legal consequences of the 150-mile exemption. Report at 66–67. Thus, the Panel characterized RIAA's arguments in regard to the 150-mile exemption to be nothing more than a ''red herring'' and without effect in the negotiation process. Id. at 85. Consequently, the Panel found that Yahoo! willingly granted RIAA's request for the ''whereas clause,'' relating to the transmissions within the 150-mile radius, because it

[22] The MFN clause in the Yahoo! agreement is discussed in detail in section IV.3, pg. 27.

[23] Section 114(d)(1)(B)(i) of the Copyright Act provides an exemption from the digital performance right for ''a retransmission of a nonsubscription broadcast transmission: Provided, That in the case of a retransmission of a radio station's broadcast transmission—(i) the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter.''

[24] At the insistence of RIAA, the Yahoo! agreement includes a ''whereas'' clause which states that approximately 70 percent of Yahoo!'s radio retransmissions are within a 150-mile radius of the originating radio station.

[25] Section 114(d)(1)(A) exempts a ''nonsubscription broadcast transmission.'' Following a lengthy rulemaking proceeding to determine the scope of this exemption, the Copyright Office concluded that the exemption applies only to over-the-air broadcast transmissions and does not include radio retransmissions made over the Internet. 65 FR 77292, December 11, 2000. This decision was upheld when challenged in the United States District Court for the Eastern District of Pennsylvania. See Bonneville Int'l, et al. v. Peters, 153 Supp. 2d 763 (E.D. Pa. 2001). The case is now on appeal to the United States Court of Appeals, Third Circuit.

However, during the negotiation period and prior to the Copyright Office's rulemaking decision and the court's decision, Yahoo! had argued that it would be at a competitive disadvantage if the courts adopted the broadcasters interpretation of section 114(d)(1)(A) and found all transmissions made by FCC-licensed broadcasters (those made over-the-air and those made over the Internet) to be exempt from the digital performance right.

cost Yahoo! nothing. Yahoo!'s perception of the clause, however, did not alter the significance of the ''whereas clause'' to RIAA, who wanted the provision included in the agreement because it would allow RIAA to argue before this CARP that the 0.05¢ rate for radio retransmissions represents a real rate of 0.2¢, which was discounted to account for the legal uncertainties at the time of the negotiation. Report at 67.

Webcasters had problems with the Panel's analysis, too. It found fault with the Panel's approach to setting rates for webcasting based on the rates in the Yahoo! agreement. Webcasters object to the methodology used by the Panel in calculating the proposed rates, especially the use of an inflated rate as a starting point for setting the rates for IO transmissions. Moreover, they contest the use of any rate for IO transmissions contained in the Yahoo! agreement because Yahoo! had less interest in negotiating a favorable rate for these transmissions, which constituted only 10% of its business. Webcasters Petition at 30–40. Instead, Webcasters argue that Yahoo! agreed to the 0.2¢ rate for IO transmissions only because it obtained a significantly lower rate for its radio retransmissions, and that any number of possible combinations of rates could have been set to achieve Yahoo!'s targeted rate. Because of this, Webcasters argue that the endpoints settled upon in the agreement were patently arbitrary. The Register concurs with the Webcasters' analysis on this point and finds that the Panel's use of the IO rate was arbitrary because of the IO rate, which, in and of itself, did not reflect what the willing buyers and willing sellers had agreed to in the Yahoo! deal.

Another flaw in the Panel's reasoning, according to Webcasters, was its reliance on the 0.083¢ ''blended rate'' as the lower end of the acceptable range of IO rates. They argue that this rate should not even be considered because it was never negotiated as a performance rate at all. This observation, however, overlooks the fact that Yahoo! actually paid this rate for 1.5 billion performances without regard to the nature of the performances. The fact that the rate was not negotiated as a separate rate for Internet-only transmissions does not diminish its usefulness for purposes of this proceeding. As the Panel asserted throughout this proceeding, it is hard to find better evidence of marketplace value than the price actually paid by a willing buyer in the marketplace.

The question, however, is whether the rates in the Yahoo! agreement represent distinct valuations of Internet-only transmissions and radio retransmissions. Ultimately, the Register concludes that they do not and, therefore, the Panel's reliance on these specific rates for IO transmissions and radio retransmissions as a tool for setting the statutory rates is arbitrary. The fundamental flaw in the Panel's analysis, though, is not its acceptance of the Yahoo! agreement as a starting point. Rather, it is the Panel's determination that the differential rate structure reflects a true distinction in value between Internet-only transmissions and radio retransmissions based upon the promotional value to the record companies and performers due to airplay of their music by local radio stations. The Panel reached this conclusion in spite of the fact that nothing in the record indicates that the parties considered the promotional value of radio retransmissions over the Internet when they negotiated these rates.

RIAA maintains, and the Broadcasters concur, that no evidence exists to support the Panel's determination that Yahoo! and RIAA considered and made adjustments for the promotional value of radio retransmissions. RIAA Reply at 48; Broadcasters Petition at 39. In fact, the Broadcasters argue that it was '' 'patently' arbitrary for the Panel to conclude that promotional value was a ''likely influence'' on Yahoo!'s RR rate when the record evidence showed that neither party had ever suggested anything of the kind.'' Broadcasters Petition at 39. The Register agrees and finds that the Panel's reliance on promotional value to justify the price differential for IO transmissions and radio retransmissions was arbitrary. The Panel's speculative conclusion that ''this factor was likely considered by RIAA and Yahoo!, and is evidently reflected in the resulting difference between RR and IO negotiated rates,'' only serves to undermine the validity of the Panel's final analysis on this point. See Report at 75.

Moreover, the Panel's own earlier findings with regard to the studies offered to show that the Internet has a promotional effect contradicts its later finding concerning the promotional effect derived from radio retransmissions over the Internet. After considering the two studies offered into evidence by the Services, the Panel categorically stated that it ''could not conclude with any confidence whether any webcasting service causes a net substitution or net promotion of the sales of phonorecords, or in any way significantly affects the copyright owners' revenue streams.'' Report at 33–34. It noted that ''the Soundata survey presented by Mr. Fine evinced a net promotional effect of radio broadcasts, but said little about the net promotional effect of the Internet—and nothing about the net promotional effect of webcasting.'' Id. at 33. It went on to say that ''for the time period this CARP is addressing, the net impact of Internet webcasting on record sales is indeterminate. Id. at 34. These observations do not support a conclusion that radio retransmissions have a greater impact than IO transmissions on record sales or that either form of transmission has any impact on record sales.

However, the CARP did conclude that ''to the extent promotional value influences the rates that willing buyers and willing sellers would agree to, it will be reflected in the agreements that result from those negotiations.'' Id. But therein lies the problem. As discussed above, RIAA and Yahoo! did not consider promotional value when negotiating the Yahoo! agreement, therefore, its effect cannot be reflected in the IO and RR rates set forth in the Yahoo! agreement.

However, rejection of the CARP's conclusion on this point does not nullify the usefulness of the Yahoo! agreement. The Register accepts the Panel's determination that the Yahoo! agreement yields valuable information about the marketplace rate for transmissions of sound recordings over the Internet, and is a suitable benchmark for setting rates for all the reasons discussed in section IV.3, supra. Moreover, a careful review of the record support's the Panel's further finding that in effect, the real agreement between Yahoo! and RIAA was for a single, unitary rate for the digital performance of a sound recording and not the two separate rates set forth in the agreement—rates, which the Panel found were artificially high (for IO transmissions) and low (for RR).

The Register accepts the CARP's conclusion that the differential rate structure was developed to effectuate particular objectives of the parties, distinct and apart from establishing an actual valuation of the performances. Specifically, the Panel found that RIAA obtained an artificially high IO rate in an attempt to protect its targeted valuation of IO transmissions for use in this proceeding and Yahoo! received an ''effective rate'' it could accept. Because the record evidence supports this finding, Report at 65, referring to Tr. 11256–57; 11281 (Mandelbrot); Panel Rebuttal Hearing Exhibit 1 at 4; Tr. 11279–81, 11395–96 (Mandelbrot); Tr. 10237–38 (Marks), it was not arbitrary for the Panel to reach this conclusion. Report at 64–65 (noting that ''Yahoo!'s primary concern, as characterized by its negotiator, was to negotiate a license agreement under which it would pay 'the lowest amount possible', that ''Yahoo! was willing to accept a higher IO rate in exchange for a lower RR rate in order to achieve the lowest overall effective rate for all its transmissions'' (emphasis added), and that Yahoo! was pleased to achieve the lowest possible overall rate.''); (noting that ''the bottom line'' combined rate was of paramount importance to Yahoo!). Report at 74. Moreover, Yahoo! maintains that it would not have paid the 0.2 cent rate for the IO transmissions but for the rate it received for radio retransmissions because the two rates, when considered together, yielded an acceptable ''effective rate'' for all transmissions. The testimony of David Mandelbrot, the Yahoo! representative, is particularly informative on this point.

Question: When you entered into the agreement with the RIAA, just looking at the 0.2 cents per performance rate for Internet-only broadcasting, you didn't consider that an unfair rate, did you?

Answer: Mandelbrot: We considered it a higher rate than we would have paid if we were just negotiating an Internet-only rate. I would say we did not consider it an unfair rate in the totality of the entire agreement, which was that we were getting the 0.05 cent rate for the radio retransmissions.

Mandelbrot Tr. at 11347–11348. This statement supports a finding that Yahoo!, the willing buyer in this case, did not accept the stated IO rate as an accurate reflection of what it would be willing to pay for the right to make those transmissions.

There is also scant evidence to indicate that Yahoo! gave any serious consideration to the effect of the 150-mile exemption for certain radio retransmissions when negotiating the IO and RR rates. Mandelbrot maintained that the exemptions were of little significance to Yahoo!, since it was ''looking to use whatever [it] could to get as low a rate as possible.'' Id. at 11381; see also 11331 (Mandelbrot admits using the ambiguities in the law, even though they thought the arguments in their favor were weak, solely for the purpose of getting ''an effective rate that we could live with''). Again it is clear that Yahoo!'s focus was the negotiation of a rate at the lowest possible level that would allow it to conduct business without concerns about copyright violations.

Where such determinations are based on the testimony and evidence found in the record, the Register and the Librarian must accept the Panel's weighing of the evidence and its determination regarding the credibility of a witness. Likewise, the Register and the Librarian may not question findings and conclusions that proceed directly from the arbitrators' consideration of factual evidence in the record. In this instance, the Panel credited Mandelbrot's testimony and his characterization of the negotiation process, specifically concluding that his testimony was credible, and that Yahoo! understood the argument based on the 150-mile exemption had no significant impact on the rates ultimately negotiated.[26] Report at 67. Consequently, we must accept the Panel's assessment on this point, which leads to the conclusion that the ''effective rate'' achieved through the unique rate structure represents the value these parties placed on the performance of a sound recording, without regard to origin of or the entity making the transmission.

Based upon a modification to the Panel's approach for calculating rates for making transmissions of sound recordings under statutory license that accepts as much of the Panel's reasoning as possible, the base rate for each performance is 0.07¢ (rounded to the nearest hundredth). The methodology for calculating this rate is presented and discussed in full in section IV.8.

6. Are Rates Based on the Yahoo! Agreement Indicative of Marketplace Rates?

Many webcasters, including Live365, maintain that the proposed rates derived from the Yahoo! rates do not reflect what a willing buyer would pay in the marketplace for the right to make these transmissions. Live365 maintains that the Panel incorrectly analyzed the evidence in the record. First, it notes that the Panel itself found that many of the rates in the voluntary agreements were prohibitively high, including a revenue-based royalty set at 15% of a webcaster's gross revenue. Live 365 Petition at 16. It then argues that it was arbitrary for the Panel to make this finding and then propose rates that exceed the rates it deemed to be excessive, and more than the market could bear. Id. To make its point, Live365 uses the Panel's per performance rate and calculates how much certain services would pay for the digital performance right and translates that amount into a percentage of revenue metric. In each of the cited examples, the amount to be paid based on the proposed per performance rate (as expressed as a percentage of revenues) is considerably higher than that that would be required under any of the percentage-of-revenue models proposed by any party at any time. For example, under the Panel's proposed rates, one service would purportedly pay 21% of its gross revenue, a figure which is considerably higher than the 15% of gross revenues contained in many of the voluntary agreements ultimately rejected by the Panel. Based on this observation, Live365 contends that the Panel's proposal runs counter to the evidence and, therefore, it is arbitrary. Id. at 18.

Moreover, Live365 argues that the Panel failed to account for relevant market factors, including how much a webcaster can pay. Id. at 19. Webcasters voice similar concerns, arguing that the adoption of a per performance rate will cause ruin to many webcasters who to date have yet to generate a viable income stream. Webcasters Petition at 60. In place of this structure, webcasters assert that a percentage-of-revenue model must be adopted in order to address the economic situation facing small, independent webcasters. They maintain that those Services that entered into voluntary agreements based on a percentage-of-revenue will remain in business while those operating under the statutory license with its per performance royalties will not. Webcasters Petition at 62–63. In the eyes of the Webcasters, such a result reflects unexplained disparate treatment of similarly situated parties, and requires an adjustment to eliminate this unjust and arbitrary result. Webcasters also argue that the Panel failed to articulate a rational basis for failing to offer an alternative rate structure based on percentage-of-revenue.

In addition, Live365 argues, as do the Broadcasters, that Yahoo! is a substantially different type of business from small start-up webcasters who would be unwilling to pay the same rates as Yahoo! for the use of sound

[26] The Register finds that RIAA's explanation for the rate structure is equally plausible. Certainly, at the time the Yahoo! agreement was being negotiated, the application of the general exemption for a nonsubscription broadcast transmission, 17 U.S.C. 114(d)(1)(A), and the more specialized exemption for radio retransmissions within 150 miles of the radio broadcast transmitter, 17 U.S.C. 114 (d)(1)(B)(I), was in dispute. Thus, it would have been totally rational for the parties to fashion a rate structure that accounted for possibly exempt transmissions. It would have been logical to achieve this end by discounting the unitary rate to reflect the number of exempt transmissions which, in this case, was approximately 70% of all the radio retransmissions.

However, it is not for the Register or the Librarian to choose between two equally plausible explanations of the facts. The law requires that the Librarian accept the Panel's determination unless its conclusions are unsupported by the record. Thus, having found record support for the Panel's conclusion that the 150-mile exemption played no role in the final determination of the negotiated rates, we must accept its finding on this point.

recordings. Thus, it contends that the Yahoo! rates do not reflect what these buyers would be willing to pay in the marketplace. The implication is that these businesses have expended significant monies on start-up costs, including software, infrastructure development, and bandwidth, and having not yet established substantial revenue streams would be unable or unwilling to pay the same rates. Live365 Petition at 7, 11. Moreover, Live365 argues that the rates set by the Panel thwart Congressional intent ''by making Internet performances of sound recordings economically unviable for many webcasters.'' Live365 Petition at 21.

RIAA takes exception with the Webcasters and Live365 on these issues. It analyzes how much certain webcasters and Live365 pay, as a percentage-of-revenue, for sales and marketing cost, personnel cost and bandwidth. The results show that a company's costs for these services can amount to more than 100 times the amount of a company's revenue, whereas the projected costs of the royalties for transmitting sound recordings for the same time period are no more than 2 times the amount of a company's revenue. RIAA Reply at 57. In all cases, these costs reflect the start up nature of the industry, and not the ultimate make or break point of the business. Thus, a proposed fee that results in royalty payments above the current revenue stream for a webcaster is not atypical or unexpected. Certainly, if that were the measure of the value of these services, then the costs for employment, hardware, and marketing—so essential to establishing and maintaining the business—must also be viewed as excessive and above the fair market value for each of these services. Clearly, that is not the case, nor can one rationally conclude that it should be the case.

Moreover, RIAA notes that the courts have historically upheld rates set by the CRT, even when users have argued that the rates would cause the business to cease certain operations. Where the intent of Congress is to set a rate at fair market value, as in this proceeding, the Panel is not required to consider potential failure of those businesses that cannot compete in the marketplace. See *National Cable Television Ass'n.* v. *CRT*, 724 F.2d 176 (D.C. Cir. 1983) (holding that rates set at fair market value were proper even though cable operators argued that the rates were prohibitively high and would cause them to cease transmission of the distant signals at issue.).

The law requires only that the Panel set rates that would have been negotiated in the marketplace between a willing buyer and a willing seller. It is silent on what effect these rates should have on particular individual services who wish to operate under the license. Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates. It only needed to assure itself that the benchmarks it adopted were indicative of marketplace rates.

7. Should a Different Rate be Established for Commercial Broadcasters Streaming Their Own AM/FM Programming?

Although RIAA had argued that the rate for commercial broadcasters should be the same as the rate for Internet-only webcasters, the Panel did not agree. It did agree, however, that the rate for commercial broadcasters should be the same as the rate adopted for radio retransmissions and that these rates should be based on the Yahoo! agreement.

It noted that the Yahoo! agreement established rates for retransmissions of the same types of radio station signals as those directly streamed by commercial broadcasters. Consequently, it put the burden of proof on the broadcasters to present evidence to distinguish between the direct transmission of their programs over the Internet and the retransmission of the same programming made by a third-party. Broadcasters were unable to offer any compelling evidence on this point. Thus, in the end, the Panel was unable to distinguish between commercial broadcasters and radio retransmisions, stating that ''the record was utterly devoid of evidence implying a *higher* rate [for commercial broadcasters] and *insufficient* [evidence] to warrant a lower rate.'' Report at 84–85. (emphasis in the original).

Nevertheless, Broadcasters are troubled by the Panel's use of the Yahoo! agreement to set rates for broadcasters for two main reasons. First, they argue that Yahoo! represents a substantially different type of business. Second, they maintain that the Panel must make affirmative findings that the businesses are comparable before applying the same rates to both Services. Broadcasters Petition at 26–27.

Indeed, Yahoo! offers a plethora of services, making available hundreds of radio stations, local television stations, video networks, concerts, CD listening programs, Internet-only music channels and educational and entertainment video programs. Id. at 28. Nevertheless, an examination of the record clearly shows that both business models are fundamentally comparable in at least one all-important way: they simulcast AM/FM programs over the Internet to anyone anywhere in the world who chooses to listen. Even accepting the fact that Broadcasters say their fundamental business is to provide programming to their local audiences, the potential for reaching a wider audience cannot be denied. Given that the record indicates that 70% of Yahoo!'s radio retransmissions are to listeners within 150 miles of the originating radio station's transmitter, Yahoo!'s business with respect to radio retransmissions seems to be very similar. Moreover, the fact that Yahoo! offers many additional services is not relevant to this proceeding because the Yahoo! agreement only addressed the rates Yahoo! paid for streaming sound recordings over the Internet. Had the contract been tied to other services offered by Yahoo!, it might well have been inappropriate to use this contract in this context. That is not the case and so it was not arbitrary for the Panel to rely on the Yahoo! contract to set the rate for broadcasters who stream their own programming over the Internet.

Commercial broadcasters then take another approach and argue that they never would have agreed to the rates that Yahoo! paid because their purposes for streaming differ from Yahoo!'s purposes. Commercial broadcasters assert that they began streaming in order to have a presence ''in the online world, to maintain the local radio brand, and as a convenience to their regular over-the-air listeners.'' Broadcasters Petition at 29. They then note that many commercial broadcasters have already ceased streaming because of an increase in costs. They cite this fact as evidence of their assertion that they would only be willing to pay a significantly lower rate than a third-party aggregator like Yahoo! See Broadcasters Petition at 31, fn 25 (offering examples of decisions made by radio stations to cease their streaming operations because of bandwidth fees and dispute over royalty fees between AFTRA and the advertising agencies). They also cite the testimony of David Mandelbrot, who testified that Yahoo! feared broadcasters would be unwilling to absorb the rates Yahoo! negotiated for streaming AM/FM programming. Id. at 32. Based upon this evidence, the Broadcasters and Live365 conclude that the Panel acted in an arbitrary manner in setting the rates that will put many services out of business. Live365 Petition at 15, 18.

However, the Panel did consider the differences between the two business models, speculating that it was entirely possible that the cost to stream AM/FM programming would be lower for broadcasters than for third-party aggregators like Yahoo! Id. at 84–85. Had Broadcasters made that argument or similar ones to show that Yahoo! received greater value from its streaming activities, the Panel may well have set a lower rate for Broadcasters who stream their own programming. Id. at 85. But as the Panel observed, it cannot make adjustments based on mere speculation. So when the Panel found no record evidence to distinguish these services, it had no reason to offer a separate rate for commercial broadcasters who stream their own AM/FM signal over the Internet. Id. at 84.

Moreover, RIAA points out that Yahoo! never even tried to pass along the costs of the transmissions to the radio stations. Thus, no determination could be made as to whether the broadcasters would have accepted the rate and paid it, or rejected it out of hand. RIAA Reply at 45. RIAA's observation is persuasive, as is the Panel's general observation that the record did not contain any evidence to support a different rate for commercial broadcasters. Thus, the Panel's decision not to set a different rate for commercial broadcasters was not arbitrary.

For these reasons, the Register accepts the Panel's decision not to differentiate between simulcasts made by commercial broadcasters and simulcasts of the same programming made by a third-party aggregator. Accordingly, the rate for commercial broadcasters streaming their over-the-air radio programs on the Internet is the unitary rate gleaned from the Yahoo! agreement.

8. Methodology for Calculating the Statutory Rates for the Webcasting License

a. *Calculation of the unitary rate.* In section IV.5, the Register rejected the Panel's determination that the Yahoo! agreement provided a basis for establishing different rates for Internet-only transmissions and radio retransmissions. Instead, a determination was made that the Yahoo! agreement justified only a single rate applicable to all transmissions, without regard to the source of the transmission. To calculate this unitary rate, it is necessary to determine what Yahoo! paid for the initial 1.5 billion performances, based on the lump sum payment, and what it expected to pay for transmissions after that time.

The first calculation was actually done by the Panel based upon Yahoo!'s agreement to pay RIAA $1.25 million for the first 1.5 billion transmissions made by Yahoo!. It divided the amount paid by the number of performances ($1.25 million/1.5 billion performances) to get a ''blended'' rate of 0.083¢ per performance. Report at 63. To determine the ''effective rate'' for the second period, a calculation must be made to account for the differential IO and RR rates, 0.2¢ and 0.05¢, respectively, set forth in the agreement and the relative proportion of Internet-only transmissions to radio retransmissions. This is a simple arithmetic calculation and one that Yahoo! had already performed in order to gauge the actual costs of the performances under the differentiated rate structure. This calculation yielded an ''effective'' or ''blended'' rate of 0.065¢ per performance based upon Yahoo!'s expectation that 90% of its transmissions would continue to be radio retransmissions with the remaining 10% being Internet-only transmissions [((9 × 0.05¢) + (1 × 0.2¢))/10]. Report at 63, citing Tr. 11279, 11292 (Mandelbrot), Panel Rebuttal Hearing Exhibit 1 at 7.

Now the question is how to reconcile these values to determine the unitary rate. Although an argument can be made for adopting either value, it makes more sense to use both values and take the average of the two. In this way, the final unitary rate captures the actual value of the performances made in the initial period (for which Yahoo! paid a lump sum for the first 1.5 billion performances) and the projected value of the transmissions at the agreed upon rates for the remainder of the license period; and it falls within the range of acknowledged values of these transmissions. Courts have long acknowledged that rate setting is not an exact science, and all that is necessary is that the rates lie within a ''zone of reasonableness.'' See *National Cable Television Assoc. Inc.* v. *CRT,* 724 F.2d 176, 182 (D.C. Cir. 1983) (''Ratemaking generally ''is an intensely practical affair. The Tribunal's work particularly, in both ratemaking and royalty distributions, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a ''zone of reasonableness'''). Thus, the record here supports a ''zone of reasonableness'' between 0.083¢ and 0.065¢.

Accordingly, the Register recommends that the rate for making an eligible nonsubscription transmission of a sound recording over the Internet under section 114 be set at 0.07 cents per performance, per listener, the midpoint of the ''zone of reasonableness.''

Determination of this rate, however, is not necessarily the end of the rate-setting process. Webcasters had argued for a downward adjustment to the rates proposed by the Panel to compensate for litigation cost savings and added value due to MFN clause. Such arguments apply with equal force to the unitary rate proposed by the Register. Webcasters Petition at 42–43. The Webcasters' argument is well taken and, based on the record evidence, it is reasonable to assume that the rates in the Yahoo! agreement are slightly higher to account for these two factors. See Report at 68–69. However, there is a problem in making an adjustment to the proposed rate where the record contains no information quantifying the added value of the factors that purportedly resulted in inflated rates. See Report at 29 (discussing lack of record evidence quantifying value of any factor, other than promotional value, that allegedly influenced the negotiated rates). The potential (but apparently unquantifiable) added value attributable to these 2 factors might present a problem if the Register were proposing a rate at the high end of the 0.065¢–0.083¢ range, but because the Register is recommending a rate in middle of the ''zone of reasonableness,'' it is safe to conclude that the recommended rate falls into that zone of reasonableness even taking these factors into account.

Similarly, Broadcasters argued for a downward adjustment of the simulcast rate to account for the promotional value associated with over-the-air broadcasts. Broadcasters Petition at 41. The record, however, does not support this suggestion. Indeed, the Panel did acknowledge that over-the-air radio retransmissions had promotional value, but it concluded that ''the net impact *of Internet* webcasting on record sales is indeterminate.'' Report at 34. This is not to say that webcasting, including simulcasting of over-the-air radio programming, has no promotional value. It only means that the record companies gain similar benefits from both types of transmissions. Consequently, no adjustment is necessary.

b. *The 150-mile exemption.* Under section 114(d)(1)(B)(I), any retransmission of a nonsubscription broadcast transmission is exempt, as a matter of law, from the digital performance right, provided that ''the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter.'' During the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainty regarding this provision and whether it applied to transmissions made over the Internet. See discussion above, section IV.a.5.

As noted above (section IV.a.5.), in its Petition, RIAA argued that during the course of the negotiations between RIAA and Yahoo!, there was a great deal of uncertainly regarding this provision and whether it applied to transmissions made over the Internet. RIAA argued that because of this uncertainty, it had been willing to agree to a lower radio retransmission rate. In fact, RIAA pointed out that its chief negotiator had advised its negotiating committee that RIAA's arguments against application of the 150-mile exemption to a retransmitter such as Yahoo! ''are not particularly strong.'' RIAA Petition at 20.

Confronted with the assertions made in RIAA's petition which indicated that RIAA itself had had considerable doubts on the subject at the time of the negotiations, the Register felt compelled to determine whether radio retransmissions over the Internet to recipients within 150 miles of the radio transmitter are, in fact, eligible for the section 114(d)(1)(B) exemption.[27] The Register issued an order on June 5, 2002, asking the parties to brief two legal questions concerning the 150-mile exemption. The first question asked whether a retransmission over the Internet of a radio station's broadcast transmission to a recipient located within 150 miles of the site of the radio broadcast transmitter is an exempt transmission pursuant to 17 U.S.C. 114(d)(1)(B). The second question then queried whether the exemption would still apply to radio retransmissions made within the 150-mile radius by a Licensee, in the case where that same service is simultaneously retransmitting the radio station's broadcast transmission of one or more recipients, located more than 150 miles from the site of the radio broadcaster's transmitter.

Section 114 could be read as allowing a Licensee to take advantage of the exemption for all Internet retransmissions of a radio broadcast to recipients within a 150 mile radius of that radio station's transmitter. The statutory language, however, does not make clear whether that same Licensee would retain the benefit of the exemption for those transmissions if additional retransmissions of the radio broadcast signal were also made ''willfully'' or ''repeatedly'' outside the 150-mile radius.

A critical piece in the analysis is the meaning of the word ''retransmission.'' Each retransmission of a radio signal over the Internet may be viewed as a discrete, point-to-point transaction to be considered on its own merit without reference to further retransmissions made by the Licensee. Alternatively, the reference to ''willful and repeated'' may require consideration of each retransmission, together with all other retransmissions, made by the Licensee to multiple listeners over a period of time, both inside and outside the 150-mile radius.

Having considered the parties' responses, the statutory language and its relationship to section 112, the Register now concludes that the exemption is not applicable to radio retransmissions made over the Internet. While Copyright Owners and Performers offer many arguments in support of their position that radio retransmissions within 150 miles of the radio station's transmitter are not exempt, and while Broadcasters offer many arguments to the contrary, the critical piece of the analysis—and the argument that the Register finds persuasive—is found in the text of section 112(e). This section provides a statutory license for making ephemeral recordings only to ''a transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f).'' 17 U.S.C. 112(e)(1).

The statutory license for ephemeral recordings in section 112(e) was enacted as part of the same section of the DMCA—section 104—that expanded the section 114 statutory license to include webcasting. The purpose of this ephemeral recording statutory license was to enable business establishment services and services using the new section 114 statutory license for webcasting to make the ephemeral recordings they need to make in order to facilitate their licensed transmissions, and in recognition of the fact that the exemption in section 112(a) permitting the making of a single ephemeral recording might not be adequate. See H.R. Rep. 105–796, at 89–90.

Congress expressly provided in the DMCA amendments that business establishment services operating under the section 114(d)(1)(C)(iv) exemption are eligible for the section 112(e) statutory license for ephemeral recordings in order to facilitate Internet transmissions by business transmission services. Congress's failure to do the same for services operating under the section 114(d)(1)(B) exemption demonstrates that Congress did not contemplate that that exemption would be available to services making retransmissions via the Internet.

Moreover, if section 114(d)(1)(B) were interpreted as providing an exemption for a radio retransmission over the Internet, when that retransmission is to a recipient located within 150 miles of the radio station's transmitter, the Licensee could not make ephemeral recordings to facilitate such an exempt retransmission. This interpretation would put the Licensee in the illogical position of having a right to retransmit the radio signal, but no means of accomplishing the retransmission without negotiating private licenses to make ephemeral recordings to facilitate the exempt transmissions. At the same time, the Licensee could operate under a statutory license for making the ephemeral recordings to facilitate its non-exempt transmissions beyond the 150-mile radius made pursuant to the section 114(f) statutory license. As RIAA points out in its response to the June 5 Order: ''Such a result is inconsistent with one of the purposes of the DMCA statutory licenses to create efficient licensing mechanisms for copyright owners and webcasters,'' citing H.R. Rep. 105–796, at 79–80 (1998). Consequently, the better interpretation of the section 114(d)(1)(B) exemption is to consider all retransmissions of a License in the aggregate, which logically means that no Internet retransmissions are exempt under section 114(d)(1)(B).

Based on the interplay between sections 112 and 114, the better interpretation of the law is that the exemption does not apply to radio retransmissions made over the Internet.[28]

[27] If the Register had concluded that Internet retransmissions to recipients located within the 150-mile radius are exempt, she most likely would have recommended an adjustment of the 0.07¢ per performance rate as applied to radio retransmissions to take into account the record evidence that approximately 70% of radio retransmissions are to recipients located within 150 miles of the radio transmitter. The result would have been a radio retransmission rate of .02¢ per performance, and correspondingly lower rates for radio retransmissions by non-CPB, noncommercial broadcasters.

[28] Copyright Owners argue that the Copyright Office had already decided this issue twice before: (1) In its decision in a rulemaking announced December 11, 2000 that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A), Public Performance of Sound Recordings: Definition of a Service, 65 FR 77292; and (2) in an Order issued July 16, 2001, in which the Office stated that the ''Panel must use the ''willing seller/willing buyer'' standard to set rates for all non-interactive, nonsubscription transmissions made under the section 114 license, including those within 150 miles of the broadcaster's transmitter.'' (Emphasis added.) The Register made no such decision on either occasion.

9. Rates for Other Webcasting Services and Programming

a. *Business to business webcasting services.* Some Services provide specialized Internet radio-like stations to businesses rather than directly to consumers. These business-to-business webcasting services (B2B) are in many respects analogous to business establishment music services [29] and can provide programming customized to the demographics of the customers of a particular business. Report at 78. For this reason, RIAA had proposed setting a higher rate for business to business webcasting services than for business to consumer (B2C) services. The Panel, however, rejected this suggestion, finding that the evidence did not support a higher rate for B2B services. It found that most of the agreements for such services had rates near or below the predominant rate set for standard Internet-only transmissions. Report at 79. Thus, the Panel concluded that it had ''found insufficient evidence to support a separate rate for syndicator services'', and set the rate accordingly at 0.14¢ per performance, just as it had for Internet-only performances. Id.

RIAA argues for a premium rate for these Services, because they syndicate their programming through third-party non-entertainment websites. RIAA maintains that these transmissions are outside the scope of the webcasting license, and consequently, services should pay a premium when they make transmissions through non-entertainment websites. RIAA Petition at 50–52. In response, Webcasters argue that the ''value of the performance does not change merely because of the technology of the webcaster or the fact that the sound recording is heard when it is accessed at a third-party website rather than the originating webcaster's website.'' Webcasters Reply at 57. Moreover, they maintain that RIAA offered no evidence to demonstrate that these transmissions should be valued at a higher rate. In fact, the record indicates the opposite. Most of the RIAA voluntary agreements which permit the licensee to distribute its webcasts to third-party websites contain no premium for this practice. Id. at 59.

Thus, based on the weight of the evidence, it was not arbitrary for the Panel to conclude that a separate rate should not be set for syndication services. The Panel is responsible for weighing the evidence and so long as the record supports its decision, the Register will not second-guess the Panel's finding of fact. Nevertheless, this determination does not end the inquiry. RIAA correctly cites section 114(j)(6) of the Copyright Act for the proposition that an eligible nonsubscription transmission does not include those made by a service whose primary purpose is to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events. Thus, in any given case a determination would have to be made to ascertain whether such transmissions are covered under the statutory license. This proceeding, however, is not the appropriate vehicle for such a fact-specific determination. If a court determines that the transmissions made by a particular business-to-business service fall outside the scope of the webcasting license, then those transmissions are acts of copyright infringement unless the service obtains licenses from the copyright owners. In such cases, an infringement action would be the appropriate course of action, rather than the imposition of a premium rate for such transmissions as suggested by RIAA. No rate—premium or otherwise—can be set for a transmission that does not comply with the terms of the license.

b. *Listener-influenced services.* There was also much discussion about listener-influenced services that allow the listener some control over the programming through on-line ratings and skip-through features. RIAA's position first and foremost is that these services do not qualify for the webcasting license. However, RIAA also proposed a much higher rate for these services in the event the Panel discerned a need to set a separate rate for these services. Again, the Panel found no record support for setting a separate and higher rate for listener-influenced services. It rejected the agreements between RIAA and non-DMCA compliant services because the rates in those agreements were for rights beyond those granted under the statutory license. Nor could the Panel discern from the record evidence which services would be subject to the basic webcasting rate as distinguished from the rate for listener-influenced services. Consequently, the Panel decided ''that so long as a service complies with, and is deemed eligible for the statutory license, it should not pay a separate rate based upon listener influence.'' Report at 81.

The Register finds the Panel's analysis to be consistent with the law, and thus accepts the Panel's decision not to set a separate rate for transmissions which might not come within the scope of the license. Again, if transmissions made by a listener-influenced service are determined to be outside the scope of the statutory license, the proper course of action would be for the parties to negotiate a voluntary agreement for these transmissions, or for the copyright owner to file a copyright infringement suit against the service. The Panel has no authority to propose a rate for any transmission which cannot be made lawfully under the statutory license.

c. *Other types of transmissions.* A broadcaster may stream three different types of programming in addition to a simulcast of its AM/FM radio signal: (1) ''Archived'' (previously aired) radio programming; (2) ''side channels'' (Internet-only programming); and (3) ''substituted programming'' (programming that replaces over-the-air programming that has not been licensed for simulcast over the Internet). The question for the Panel was whether such programming is the same or substantially similar to radio retransmissions or Internet-only programming.

In making its decision, the Panel first considered the definition of a ''radio retransmission performance.'' It found that the record failed to provide a coherent and workable definition, rejecting both the definition set forth in the Yahoo! agreement and the one that was included in the defunct settlement agreement between RIAA and the commercial broadcasters. Instead, it adopted the definition of the term provided by Congress in the statute which defines the term as ''a further transmission of an initial transmission * * * if it is simultaneous with the initial transmission.'' See 17 U.S.C. 114(j)(12). Based on this definition, the

The scope of section 114(d)(1)(B) was not at issue in the December 2000 rulemaking on the status of broadcasters. Likewise, the July 16 Order was in response to Copyright Owners' Motion for Declaratory Ruling Concerning Statutory Standard, in which Copyright Owners argued that one of the Services' witnesses was ''in effect'' arguing for ''an exemption for AM/FM Webcasts within the 150-mile area.'' However, the testimony in question actually was arguing only that in determining the radio retransmission rate, the CARP should take into account that no royalty is payable on non-Internet radio retransmissions within the 150-mile radius because of the promotional value those retransmissions have on record sales. The witness asserted that because ''local distribution of exactly the same material via the Internet has identical economic effects,'' the Panel should exclude from its calculations ''recipients of those transmissions who lie within 150 miles of the station's transmitter.'' Fisher Testimony at ¶ 52. In their opposition to the motion, the Services made no argument that Internet retransmissions are exempt under section 114(d)(1)(B), and the Office made no ruling with respect to the exemption. Thus, until the responses to the June 5, 2002 order were filed, the issue had never been joined, much less decided, on whether radio retransmissions within the 150-mile radius are exempt, and the issue had never been decided.

[29] See footnote 6, supra, for a description of a Business Establishment Service.

Panel concluded that a transmission made as part of archived programming, side channels or substituted programming was something other than a radio retransmission and, therefore, not entitled to the lower rate proposed for radio retransmissions. Instead, it agreed with RIAA that the programming was essentially the same as Internet-only programming, and without any record evidence to substantiate a different rate, should be subject to the 0.14¢ IO rate.

Broadcasters do not contest the Panel's determination with respect to side channels, and they recommend that the Librarian provide that the side channel rate be set at the webcaster rate expressly without prejudice to reconsideration in a subsequent CARP proceeding. Broadcasters Petition at 56. They do, however, object to the imposition of the rate for IO transmissions on the performances of sound recordings made during the transmission of an archived program or a substituted program. Id. at 55. Broadcasters' arguments no longer have any relevance under the statutory rate structure proposed by the Register, which proposes a single, unitary rate for all transmission. This fact in conjunction with the Panel's observation that the Yahoo! agreement did not differentiate or even recognize these alternative categories supports a determination that no separate rate should be set for these transmissions.

10. Rates for Transmissions Made by Non-CPB, Noncommercial Stations

National Public Radio (''NPR'') and the National Religious Broadcasters Music License Committee (''NRBMLC'') were the only two representatives of non-commercial stations participating in this proceeding. NPR reached a private settlement with the Copyright Owners during the proceeding and withdrew. In considering what the rate should be for the stations represented by NRBMLC and any other noncommercial station operating under the statutory license, the panel first considered past CARP decisions involving the statutory licenses. It found that a prior CARP had considered and distinguished commercial stations and noncommercial stations on the basis of their financial resources, noting that noncommercial stations depend upon funding from the government, business, and viewers, whereas commercial broadcasters generate a revenue stream through advertising. Report at 89, citing CARP report adopted by Librarian on September 18, 1998, Noncommercial Education Broadcasting Rate Adjustment Proceeding, 63 FR 49823. Moreover, the earlier Panel determined that a rate set for a commercial station is an inappropriate benchmark to use when setting a rate for the same right for noncommercial stations because of these economic differences between these businesses. Specifically, it acknowledged that use of a rate set for a commercial broadcaster would overstate the market value of the performance for a noncommercial station.

Next, the Panel examined RIAA's approach, which focused on the amount the performing rights organizations (''PROs'') were awarded in the 1998 Noncommercial Education Broadcasting Rate Adjustment Proceeding for use of their works by noncommercial stations. It adduced that they received ⅓ the amount of the fees paid by the commercial stations. Based on this precedent, RIAA offered the noncommercial stations a rate that corresponds to ⅓ the rate to be paid by commercial broadcasters.[30] The Panel, finding no other evidence in the record to support a different rate, adopted the RIAA proposal for radio retransmissions, and proposed a rate of 0.02¢ per-performance (one-third of the 0.07¢ per performance rate, rounded to the nearest hundredth of a cent) for these transmissions only. Just as with the commercial broadcasters, the Panel found that archived programming subsequently transmitted over the Internet, transmissions of substituted programming, and transmissions of side channels constitute a transmission more akin to an Internet-only event. Consequently, it proposed a per performance rate for noncommercial broadcasters of 0.05¢ (one-third the rate paid by commercial broadcasters and webcasters for IO transmissions) for each sound recording included in these transmissions. This rate, however, is meant to apply only to the first two side channels—and not to additional side channels—in order to avoid the possibility of a noncommercial broadcaster gaining a competitive advantage over the commercial broadcasters and webcasters who initiate Internet-only programs and do so at a higher cost.

Non-CBP broadcasters argue in their petition to set aside the CARP report, that the Panel failed to set the appropriate rates in two ways. They contend that the Panel ignored the record evidence which clearly established that the noncommercial stations are fundamentally different from commercial broadcasters and webcasters, and less viable economically, thus requiring the Panel to establish a lower rate for these stations. They also dispute, like the Webcasters and the commercial broadcasters, the Panel's decision to reject, as a benchmark, the amount of royalty fees these services pay for the use of the underlying musical works in an analog market under a separate compulsory license. Non-CPB Petition at 4. They then calculate a ratio between what a commercial broadcast station pays for use of the musical works in the analog world and what on average the non-CPB stations pay in the same market, based on an estimation of the number of stations, and the amount of royalties the stations paid for use of musical works in their over-the-air broadcasts. From these calculations, they suggest that a noncommercial broadcaster, on average, pays only 1/34th the amount of royalties that a commercial station pays for use of the same musical works and argue for a rate equal to 1/34th the amount that commercial broadcasters will pay. Alternatively, they request a flat rate of $100 per station, see Non-CPB, Noncommercial Broadcasters Reply Petition at 5, and argue that in no case should the rate exceed ⅓ the rate adopted for commercial broadcasters. Non-CPB, Noncommercial Broadcasters Petition at 9.

NRBMLC also turned to the rates for the statutory noncommercial broadcasting license and argued that the rates for the webcasting license should be based upon the rates currently paid to performing rights organizations for use of the musical works in over-the-air programs under this license. The Panel rejected this proposal on a number of grounds. First, it noted that those rates were the subject of prior settlements which stated that the negotiated rates for the noncommercial license were to have no precedential value for future rate setting proceedings for the noncommercial license. In light of this term, the Panel found the rates for the statutory noncommercial license had no relevance to the current proceeding. Not only were the rates for a totally different right, but they apparently have no precedential value for considering

[30] RIAA stated that ''the Noncommercial Broadcasters should pay the same royalty rates that apply to Webcasters and commercial broadcasters, which are based on a benchmark derived from marketplace agreements for the same and closely related rights.'' RIAA PFFCL concerning the Broadcaster Royalty Rate (Jan. 25, 2002) at ¶ 44; but *see,* Reply of Copyright Owners and Performers to Non-CPB Entities (Dec. 18, 2001) at 3 (''Copyright Owners are willing to accept a rate for Noncommercial Broadcasters that is no less than one-third of the rate paid for commercial broadcasters.'').

future statutory noncommercial rates for use of the musical works. Report at 90. Second, the panel considered rates proposed by Dr. Murdoch, the expert witness for NPR, who at the request of the Panel made an attempt to identify an appropriate rate for noncommercial stations based on the fees currently paid to the PROs. Although she complied with the request of the Panel, she expressed severe reservations about her own conclusions, citing numerous problems with her own calculations. Report at 91. For these reasons, the Panel rejected Murdoch's proposed rates.

RIAA supports the Panel's decision, noting that the non-CPB, noncommercial broadcasters failed to offer any differential rate for this type of service in its direct case or an expert witness who could support their ultimate request for a $100 flat rate. The only witness who testified on behalf of this group was Joe Davis, who works for a commercial broadcaster, and had only anecdotal information concerning noncommercial stations. Because of his lack of expertise in this area, the Panel did not credit his testimony. Such action on the part of the panel is not arbitrary.

Nor was it arbitrary for the Panel to decide not to rely on the statutory rates set for use of the musical works by noncommercial broadcasters. The arbitrators rejected the non-CPB, commercial broadcasters' request to look to these rates because the agreements, at the insistence of the parties to the agreements, are not even considered precedent for setting future rates for the use of the musical works. If anything, it would be arbitrary to rely on these values as a benchmark for setting rates for a completely different category of works when they had no acknowledged value for readjusting the rates for the works to which they do apply. Had the Panel wished to use these rates, it needed at the very least an opportunity to examine the circumstances surrounding the adoption of the ''no precedent'' clause. It would have also required record evidence to substantiate such bold assertions on the part of the users as the notion that these rates were set at a rate higher than what would have been negotiated in the marketplace. Non-CPB Broadcasters Reply Petition at 7; RIAA Reply at 11. Because of these infirmities, the Register finds the Panel did not act arbitrarily in rejecting the rates set for the section 118 license as a benchmark.

Thus, in the end, the Panel accepted RIAA's proposal to set the rate for noncommercial broadcasters at one-third the rate established for commercial broadcasters. The Panel also provided a separate rate for archived programming subsequently transmitted over the Internet, substituted programming and up to 2 side channels set at one-third the rate established for Internet-only transmissions. The Panel made this adjustment based on its determination that a noncommercial broadcaster should not be subject to commercial rates when streaming programming consistent with the educational mission of the station, over the Internet. Report at 94. However, the Panel imposed a limitation on the use of this reduced rate for Internet-only transmissions to avoid the possibility that a non-CPB broadcaster could use its unique position to essentially become a commercial webcaster.

The Register accepts the Panel's methodology for setting the rate for noncommercial broadcasters. The rates proposed by the Panel, however, must be adjusted to reflect the Register's recommendation to set a unitary rate for both commercial broadcasters and webcasters. Using the proposed base rate of 0.07¢ and reducing this value by two-thirds, the adjusted rate for non-CPB, noncommercial broadcasters is 0.02¢ (one-third of 0.07¢, the base rate for all transmissions, rounded to the nearest hundredth) per performance, per listener. This rate shall apply to a simultaneous retransmission of the non-CPB, noncommercial over-the-air radio programming, archiving programming subsequently transmitted over the Internet, substituted programming, and up to two side channels. The rate for all other Internet-only transmissions is 0.07¢.

One last disputed issue raised by the non-CPB, noncommercial broadcasters is the imposition of the same $500 minimum fee that the CARP set for all other licensees. They argue that a $500 minimum fee far exceeds any reasonable rate that should be imposed on this category of users in light of the financial considerations that distinguish them from the other services. Non-CPB Broadcasters Reply Petition at 10. In support of this position, the users cite Dr. Murdoch's testimony to illustrate that the Internet license for use of SESAC's repertoire is less than $100. But this is not the total amount that a noncommercial station would pay; it would also have to pay fees to BMI and ASCAP in order to license all the works included in the sound recordings covered by the section 114 license. The minimal amount that a webcaster must pay to cover the combined works administered by the three PROs is $673, more than the proposed minimum rate to operate under the section 114 license. Webcasters PFFCL ¶ 363. In any event, the Panel set the rate at $500 to cover administrative costs to the copyright owners and access to the sound recordings. It was not arbitrary to impose a minimum fee on the Non-CPB, noncommercial broadcasters that merely covers costs for these rudimentary purposes nor can it be deemed excessive in light of what these entities pay the PROs for the public performance of musical works.

11. Consideration of Request for Diminished Rates and Long Song Surcharge

RIAA requested a surcharge for songs longer than five minutes. RIAA PFFCL ¶ 210. Its request was denied because the Panel did not find that such a charge was included in most of the relevant license agreements. Report at 105. RIAA, however, argues that the Panel misread the Yahoo! agreement. RIAA Petition at 42. It notes that Yahoo! could estimate the number of performances it made by multiplying its listening hours by a fixed number of performances and that when it did so, the record companies received compensation for [material redacted subject to a protective order] performances, even though Yahoo! may have only played, for example, 5 12-minute classical recordings in an hour. Id. The Yahoo! agreement, however, does not require that it employ the estimation methodology; it merely states that Yahoo! may make this calculation. Thus, there was no probative evidence that the marketplace valued a classical sound recording, or similar sound recordings of longer than average duration, at a different rate. Consequently, it was not arbitrary for the Panel to reject RIAA's suggestion to impose a ''long song'' surcharge. In any event, it is highly likely that this concern will be addressed for the time period to which these rates apply, since most services will be using the estimation formula for calculating the number of performances which assumes 15 performances for each aggregate tuning hour.[31] See section IV.11, infra.

On the other side, webcasters asked that there be no royalty fee for songs that are less than thirty seconds long, citing technology problems or the use of song-skip functions. Webcasters Petition at 71. The Panel disagreed and saw no

[31] Nevertheless, RIAA has raised a valid point and future CARPs should carefully consider how to value performances of longer recordings, such as classical music, to ensure that the copyright owner is fully compensated. That being said, no party should assume that a particular approach to the problem is being advocated by the Register for adoption by a future CARP.

need to make any adjustment. It noted that the use of the blended rate from which it calculated the proposed rates was itself based upon figures which already took into account problem performances that had occurred during the initial period. This adjustment was expressly made for the first 1.5 billion transmissions only. Report at 106–107. The Panel chose not to make a similar adjustment for subsequent performances because the Yahoo! agreement did not provide for such an adjustment.

Likewise, the Panel determined that the use of the skip function provides a benefit to webcasters and it saw no need to penalize copyright owners for the benefit that flowed to the users through a conscious use of a function provided by the service. Moreover, none of the negotiated agreements provided for any reduction in rate for skipped songs. Report at 107. Consequently, the Panel did not provide a lower rate or exemption for truncated performances resulting from use of the skip song function.

The Webcasters object to the Panel's conclusion, maintaining that the Panel failed to adequately explain its decision and consider relevant evidence. See Webccasters Petition at 71. They contend that the Panel should have given more weight to three of the 26 agreements, which provided an exemption for performances less than thirty seconds in duration. Such action, would itself, have been arbitrary. Clearly, the Panel could not rely on these agreements when it had already disregarded them for purposes of establishing the royalty rates.

Moreover, RIAA makes a number of arguments in support of the Panel's decision. First, it notes that the performance of even a portion of a sound recording without a license is an infringement of a copyright owner's rights. As such, there is no *a priori reason* for making 30-seconds-or-fewer performances exempt from royalty obligations. Second, RIAA cites 17 U.S.C. 114(h)(2)(B) to demonstrate that Congress recognized the value of performances of limited duration and the right to license such performances. Specifically, this section exempts copyright owners licensing public performances of sound recordings from the requirement to make these sound recordings available on no less favorable terms or conditions to all bona fide entities, when they are licensing promotional performances of up to 45 seconds in duration. RIAA Reply at 71–75. These arguments support the Panel's decision not to exempt performances of thirty seconds or less, and as such, its decision is neither arbitrary nor contrary to law.

The Panel did, however, grant the users an exemption for incidental performances, citing the existence of a similar term in the Yahoo! agreement as the basis for its decision. Specifically, the Panel ''exclude[d] transmissions or retransmissions that make no more than incidental use of sound recordings, including but not limited to, certain performances of brief musical transitions, brief performances during news, talk and sports programming, commercial jingles, and certain background music.'' Report at 108. This is not a disputed provision.

With the agreement of the parties, the Panel also exempted performances of sound recordings made pursuant to a private license agreement. Id.

The Register notes, however, that the Webcasters' concerns regarding the Panel's determination not to grant its request to impose no royalty on songs less than 30 seconds in duration are ameliorated for the current licensing period. Under the proposed terms of payment, a service may estimate the number of performances for purposes of determining the extent of copyright liability on an ''Aggregate Tuning Hour'' basis, which calculates payment on the basis of 15 performances per hour.[32] This approach alleviates a Licensee's obligation to account for and pay for each performance, including those that are less than 30 seconds in duration.

12. Methodology for Estimating the Number of Performances

Until each service can account for each performance, and is required to do so, there is a need for a methodology that will allow a service to make a reasonable estimate of the number of performances. Accordingly, the Panel proposes the following procedure:

> For the period up to the effective date of the rates and terms prescribed herein, and for 30 days thereafter, the statutory licensee may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the licensee's total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of retransmissions of AM and FM radio stations reasonably classified as news, business, talk or sports stations, and 12 performances per hour in the case of all other AM and FM radio stations).

Report at 110.

The Broadcasters object to the Panel's formulation for estimating the number of performances, arguing that for many program formats, e.g., news, business, talk, or sports stations, the estimate would likely significantly overstate the use of music by these stations. Broadcasters Petition at 57. However, they do not offer an alternative methodology for calculating these performances. Moreover, a mere likelihood of overstating the values in some cases is not enough to undo the Panel's formulation.

Likewise, Webcasters argue that the 30-day cutoff period for using the methodology for estimating the number of performances is arbitrary because there is no record support for this determination. Webcasters Petition at 72. Instead, they propose allowing the Services to employ this methodology through the remainder of the current licensing period, which ends December 31, 2002, since it will be used, in any event, by most Services for purposes of calculating their liability for their past usage of the sound recordings. Id.

What is troubling about this provision is the Panel's determination to require a full accounting of each performance beginning 30 days after the effective date of the order setting the rates and terms. The Report documents that many services are not currently equipped to track or accurately account for each performance, and the Register agrees. In fact, until the issuance of final rules regarding Records of Use, there are no requirements for tracking these performances. Because the Office has yet to establish just how a service will account for its use of the sound recordings, the Register determines that the proposed timeframe for requiring a strict accounting is arbitrary. Instead, the rule shall require that a Service begin accounting for each performance in accordance with the rules and regulations regarding Records of Use 30 days after the effective date of final rules. These rules shall determine what information needs to be calculated to determine which sound recordings have been performed, how many of such performances occurred, and when and how often such information shall be collected by the Services. Meanwhile, interim rules are being promulgated that

[32] The Webcasters had advocated the use of ''Aggregated Tuning Hours'' as a way to address their concerns regarding the Panel's decision not to provide a lower rate for partial performances. Webcasters Petition at 71–72. Their argument, however, is not the bases for the Register's recommendation to provide for use of the estimation methodology throughout the license period.

The Register is proposing this course of action in the short term merely to address separate concerns of the Register regarding the logistics involved in reporting the number of performances of sound recordings. This recommendation on the part of the Register should in no way be construed as undermining the Panel's decision that transmissions of sound recordings of less than 30 seconds are compensable.

will, for the immediate future, impose more modest reporting requirements on Services.

In the meantime, for the remainder of the period covered by this proceeding (i.e., through December 31, 2002), Services may estimate the number of performances in accordance with the Panel's formulation. While this is not the perfect solution, it represents a reasonable approximation of the number of performances. And in those cases where a Service believes the formulation overestimates the use of the sound recordings, it has the option of actually counting the number of performances and calculating the royalties accordingly. Certainly, it cannot be seriously argued that a Service would be unduly burdened by undertaking this task. Conversely, if after accounting for each of the performances in the programs which are allowed to use the one performance per hour estimate, the Service finds its programming performs more sound recordings than the approximation, a Service benefits from use of the Panel's methodology.

13. Discount for Promotion and Security

RIAA proposed a 25% discount to any service that includes promotional and security features beyond those required under either the webcasting license or the ephemeral recording license. Because that proposal would exceed the scope of the terms set forth in the law, the Panel declined RIAA's invitation to provide for such discounts within the context of the statutory license. Report at 110. It is clear that the Panel may reject such a proposal, as it did here, because the statutory license does not expressly require that such a rate be established. No party contested the Panel's determination on this issue. Therefore, the Register sees no reason to question the Panel's decision.

14. Ephemeral Recordings for Services Operating Under the Section 114 License

A transmitting organization entitled to make transmissions of sound recordings under the webcasting license may also make a single ephemeral copy of each work to facilitate the transmission under an exemption in the law or it may make multiple copies of these works pursuant to a statutory license. See 17 U.S.C. 112(a) and (e), respectively. In addition to setting rates and terms for the webcasting license, the Panel in this proceeding had the responsibility for setting the rates for the ephemeral recordings. The Office combined these section 112 and section 114 proceedings because the licenses are interrelated and the beneficiaries of the license, just as the users, are in most instances the same for both the webcasting license and the ephemeral recording license. However, there is one group of users of the ephemeral recording license that is exempt from the digital performance right—services which provide transmissions to a business establishment for use by the business establishment within the normal course of its business (''business establishment services'').[33] 17 U.S.C. 114(d)(1)(C)(iv).

During the proceeding, the Services argued that these ''ephemeral'' copies have no economic value apart from the value of the performance they facilitate. Webcasters Petition at 67; Broadcasters Petition at 50. In support of this position, the Services cite with approval a Copyright Office Report which stated that the Office found no rationale for ''the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value, and are made solely to enable another use that is permitted under a separate license.'' Report at 98, citing U.S. Copyright Office, DMCA Section 104 Report at 114, fn 434 (August 2001). The Panel also contended that experts on both sides took this view. Webcasters Petition at 66, citing Jaffe W.D.T. 52–54; Tr. at 6556; Tr. at 2632 (Nagle). Had there been nothing more, the Panel might have agreed with the Services and adopted the Office's position. In construing the statute, however, the Panel found that Congress did not share the Copyright Office's view. Instead, the Panel found that Congress required that a rate be set for the making of ephemeral copies in accordance with the willing buyer/willing seller standard.[34] Report at 98–99.

The Panel utilized the same approach in setting rates for the ephemeral recording license as it had in setting the rates for the webcasting license. Report at 104. It first examined the 26 RIAA agreements for evidence that market participants paid a fee to make ephemeral copies and how much they paid. Of the 26 agreements, fifteen did not contain any rate for the ephemeral license and did not purport to convey this right; two used a percentage of overall revenues; eight used a percentage (calculable to 10%) of the performance royalty fees paid; and one paid a flat rate per use of the license for a year (calculable to 8.8% of the performance royalty fees paid). Id. From this, the Panel identified a range of rates between 8.8% and 10% of the performance fees paid.[35] It then chose to place significant weight on the 8.8% value because it was derived from the information in the Yahoo! agreement to which the Panel has given considerable weight throughout this proceeding. Id. However, the Panel did not rely solely on the Yahoo! agreement in this instance, choosing instead to give minimal weight to the eight other agreements that set the ephemeral rate at 10% of the performance rate, and so rounded the 8.8% value up to 9.0%. Id. Both Webcasters and Broadcasters filed Petitions to Modify in which they object to the Panel's approach to setting the ephemeral rate. They argue that the evidence supports their position that the ephemeral copies have no independent economic value apart from the performances they facilitate. In the alternative, they maintain that the value of the ephemeral copies is included in the royalty fee for the performance of the sound recording. Consequently, they contend that the appropriate way to set the ephemeral rate would be to determine the economic value of the ephemeral copies and reduce the performance rate by that amount. Webcasters Petition at 67; Broadcasters Petition at 51.

Moreover, the Services disagree with the Panel's use and analysis of the voluntary agreements for setting this rate. Specifically, they cite the lack of an ephemeral rate in 15 of the 26 agreements, even though it is clear that these recordings are necessary to effectuate a performance, as evidence of RIAA's view that the making of ephemeral copies had only a de minimis

[33] Business establishment services deliver sound recordings to business establishments for the enjoyment of the establishments' customers. Two such services, AEI, Music Network, Inc. and DMX Music, Inc., participated in these proceedings. These companies merged into a single company during the course of this proceeding. AEI/DMX provides music to more than 120,000 businesses, including Pottery Barn, Abercrombie & Fitch, Red Lobster, and Nordstrom. The rate setting process as it pertains to the business establishment services is discussed in Section IV.14.

[34] The Panel and the Services note that the Register has adopted a policy position regarding the making of ephemeral recordings which attributes no economic value to the making of such recordings when ''made solely to enable another use that is permitted under a separate compulsory license.'' U.S. Copyright Office, DMCA Section 104 Report at 144, fn.434. (August 2001). This statement was made in a different context and has no relevance to the current proceeding. The task of the Register in this proceeding is to determine whether the Panel's determination is arbitrary or contrary to law without regard to the Office's own views on how the law should read to implement policy objectives.

[35] Most of the original 26 license agreements did not grant the right to make ephemeral copies, either because the Service did not realize it needed this right or because the Service had assumed the negotiated rate covered all rights needed to make the digital transmissions. However, that trend did not continue. Licenses that were renewed expressly granted the right to make ephemeral copies for a fee. Report at 58, fn 39.

value. Broadcasters Petition at 52. For this reason, webcasters and broadcasters argue that RIAA placed little value on these copies and implicitly acknowledged that the value of these recordings is at best de minimis. They then criticize the Panel's methodology, asserting that the calculation of the ephemeral rate based upon the rates derived from the Yahoo! agreement for a per performance model, totally ignored the fact that Yahoo! agreed to pay a flat fee once it began making payments on a per performance basis, without regard to the number of performances. Webcasters Petition at 69; Broadcasters Petition at 53. Finally, Webcasters object to any use of the non-Yahoo! agreements in calculating this rate because the Panel had already found these agreements to be unreliable for purposes of setting the marketplace rates. Similarly, the Broadcasters question the Panel's reliance on eight of the agreements that it had rejected earlier as ''unreliable benchmarks.'' Id. at 54.

The non-CPB, noncommercial broadcasters adopt the objections to ephemeral recording rate put forth by the commercial broadcasters. Noncommercial Broadcasters Petition at 11.

On the other hand, RIAA supports the Panel's determination in general, noting that the CARP relied primarily on the Yahoo! agreement to calculate the ephemeral rate for webcasters. It maintains, however, that the Panel should have afforded the 25 voluntary agreements more weight and set the rate at 10% of the performance rate in deference to the fact that many RIAA licensees had agreed to a negotiated or effective ephemeral rate of 10%. RIAA Reply at 68. RIAA also challenges the Services' complaints in general, noting that in spite of all the objections to the Panel's determination, the Services fail to offer any evidence regarding an alternative rate.

The Panel's approach in setting the ephemeral rate was not arbitrary. It calculated the rate based on the fees Yahoo! actually paid to RIAA for the right to make ephemeral reproductions. Use of the Yahoo! agreement for this purpose was perfectly logical, and consistent with the general approach taken by the Panel in determining rates for webcasting. What causes concern, however, is the Panel's reliance, even to a small degree, on the ephemeral rates set forth in eight of the 25 voluntary agreements it had previously repudiated. Such action is arbitrary unless the Panel can offer a clear explanation for its actions. It did not do so and, in fact, it stated that its review of the 26 licenses ''reveals an inconsistent, rather than a consistent, pattern.'' Report at 100. Moreover, the Panel conceded that these agreements ''do not represent evidence which establishes RIAA's proposed rate.'' Id. at 104. Nevertheless, the Panel granted ''very modest effect'' to those agreements which have ephemeral rates around 10% to justify its decision to round the 8.8% effective rate up to 9%. Considering those agreements is clearly arbitrary and, consequently, to the extent the Panel gave any weight to any license agreement other than the Yahoo! agreement, it acted in an arbitrary manner. Accordingly, the rate for the ephemeral license for licensees operating under section 114 should be set at 8.8% of the performance rate.

15. Minimum Fees

The Panel established a minimum fee of $500 for each licensee for use of the webcasting license and the ephemeral recording license. These rates are in line with those negotiated by RIAA and the 26 services with which it reached an agreement. The Panel determined that RIAA would not have negotiated a minimum fee that failed to cover at least its administrative costs and the value of access to all the works up to the cost of the minimum fee. Report at 95. The adoption of the $500 minimum, however, is predicated on the adoption of a per performance rate and not a percentage-of-revenues. The Panel implied that had it decided to adopt a percentage-of-revenue model, the minimum fee would have been more substantial because the Panel would have had to consider more carefully the impact of start-up services with little revenue. Report at 95.

Because the minimum rate is calculated to cover at least the administrative costs of the copyright owners in administering the license and access to the sound recordings, the Panel applied the rate to all webcasting services and made it payable as a non-refundable advance against future royalty fees to be paid during that year, due upon the first monthly payment of each year. Moreover, the Panel offered no proration of the fee, making it due in full for any calendar year in which a service operates under the statutory license. Report at 96.

RIAA objects to the low value for the minimum fee set by the Panel because it fails to take into account the broad range of rates established in the licenses RIAA negotiated in the marketplace.[36] Moreover, as a policy matter, RIAA contends that use of the lowest value set forth in a single agreement discourages copyright owners from adopting a low minimum fee in a single instance to accommodate special circumstances for a particular service. RIAA Petition at 44–45. Finally, RIAA faults the Panel for justifying its choice by comparing the $500 minimum fee to the amount that the Services pay the performing rights organizations (PROs) under a blanket license. RIAA rejects this rationale on two fronts. First, the minimum fee does not approximate the amounts that are paid to the PROs, and second, use of the musical works benchmark has been found by the CARP to be an inappropriate measure for establishing fees in this proceeding.

In response, Broadcasters first note that RIAA never disputed the Panel's understanding for the existence of a minimum fee, or claimed that a higher fee is necessary to achieve the stated purposes of the minimum fee. Namely, the minimum fee is meant to cover the costs of incremental licensing, i.e., the cost to the license administrator of adding another license to the system without regard to the number of performances made by the Licensee, see Webcasters PFFCL ¶ 361, and access to the entire repertoire of sound recordings. Broadcasters Reply at 12–13; Webcasters Reply at 52–53. Moreover, they claim that the minimum fee is in line with the fees paid to the performing rights organizations which can serve as a benchmark for the minimum because ''they serve the same purposes that the CARP identified in setting the minimum fees for the statutory license at issue.'' Broadcasters Reply at 14; Webcasters Reply at 52, 55. The Services, however, do not blindly accept the Panel's proposed fee, arguing first that the record supports a much lower minimum fee. They also strenuously object to RIAA's request for a $5,000 minimum, arguing that such a high minimum would be confiscatory for most users of the license, especially for those radio stations that play little featured music. Broadcasters Reply at 16; Webcasters Reply at 56.

None of these arguments compel the Librarian to reject the proposed $500 minimum. The Panel set a minimum rate to accomplish two purposes, and none of the parties argue that the $500 fee falls outside the ''zone of reasonableness'' for such rates. If anything, the fee may be viewed as too low, if one takes into account the

[36] According to RIAA, a $5,000 minimum fee is the typical amount paid by users in the marketplace, without regard to whether the royalties are paid on a percentage of revenue base or in accordance with a per performance metric. RIAA Petition at 43.

minimum amounts paid to the performing rights organizations for the blanket license for performing musical works. Together each Service must pay, at the very least, a total of $673 to the three performing rights organizations to cover access to the musical works for use over the Internet and the incremental cost of licensing—the very purposes for which the minimum fee is being set in this proceeding.

Whether to utilize the musical works benchmark was a decision for the Panel and it chose not to do so. This approach was not arbitrary. As it had done throughout this proceeding, the Panel could choose, as it did, to rely on agreements negotiated in the marketplace between willing buyers and willing sellers. Moreover, the Panel could propose any rate consistent with the agreements so long as the proposed rate would cover costs for administering the license and access to the works.[37] For this reason, the Panel examined the agreements offered into evidence by the RIAA and chose the lowest value that RIAA had accepted in a prior agreement. It did so because it assumed that an entity would not agree to a minimum rate that would result in a loss. Had RIAA truly believed that the $500 minimum fee was inadequate to cover at least the administrative costs and the value of access, the Panel reasoned that it would have required a higher fee. This approach is not arbitrary and, consequently, the proposed minimum fee is adopted for the period covered by this proceeding.

16. Ephemeral Recordings for Business Establishment Services (''BES'')

a. *Rates for use of the statutory license.* Business establishment services are well-established businesses, which have offered their services for many years. Among the established businesses in this group are AEI Music Network, Inc.,[38] DMX Music, Inc., Muzak, Inc., PlayNetwork, Inc. and Radio Programming and Management Inc. Two of the old guard, AEI and DMX, and one new service, Music Choice, participated in this proceeding. At an early stage of this proceeding, but after filing a direct case, Music Choice withdrew from the proceeding.

Of the services offered by AEI and DMX only those services that transmit musical programs to their customers via cable or satellite in a digital format are eligible for the ephemeral recording license. The Panel referred to this aspect of the business as the ''broadcast model'' of the service. Through this process, these services make hundreds of thousands, if not millions, of copies of the sound recordings. The law allows these services to perform sound recordings publicly by means of a digital transmission under an exemption in section 114.[39] However, Congress did not exempt these services from copyright liability when making copies of these works in the normal course of their business. Rather, Congress created a statutory license to cover the making of ephemeral recordings by these services. In its proposed findings of fact and conclusions of law, DMX and AEI proposed a flat fee of $10,000 per year[40] for each company for the making of buffer and cache copies, but argued in the alternative for a zero rate. See DMX/AEI PFFCL ¶ 44. In support of the alternative position, DMX/AEI argued that Congress had only envisioned a minimal rate to compensate the copyright owners for the use of ephemeral copies. It also cited the Copyright Office's Section 104 DMCA Study for the proposition that ephemeral recordings have no independent economic value apart from its use to facilitate transmissions. However, as RIAA points out, these businesses have always paid for such copies. Report at 115–116, citing RIAA Reply to DMX/AEI PFFCL ¶¶ 8–12. RIAA asked that rate be set at 10% of gross revenues with a minimum fee of $50,000 a year and asked the Panel to refrain from setting rates tailored to the needs of specific companies. RIAA made the later request because AEI/DMX asserted that its digital database is already covered by preexisting licenses and therefore, it does not need an ephemeral license in order to make these phonorecords. Consequently, AEI/DMX asked the Panel to set a rate to cover only the cache and buffer copies it needed to facilitate its transmissions and to exclude the value of the database copies when setting the rate for the ephemeral license. In fact, AEI/DMX contends that it was arbitrary for the Panel to set a rate ''for all ephemeral copies which may be utilized in the operation of a broadcast service'' when it had received evidence for setting a rate only for buffer and cache copies. DMX/AEI Petition at 4. It also maintains that the statute contemplates that the Panel set rates according to the needs and desires of the parties. Id. at 8–10.

RIAA disagreed with this approach, asking the panel to establish a technology-neutral rate to cover the making of all copies that a business establishment service may need to make under the license. It also proposed that the CARP rely on license agreements between the copyright owners and Business Establishment Services when fashioning the appropriate rate and not the 26 voluntary licenses considered when setting the webcasting rates.

As an initial matter, the Panel had first to decide which copies and how many are covered by the ephemeral recording license. This is a necessary step in the process, because the statutory license allows a transmitting organization to make and retain no more than a single phonorecord of a sound recording, except as provided ''under the terms and conditions as negotiated or arbitrated under the statutory license.'' Section-by-section analysis of the H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, Committee Print, Serial No. 6, 105th Cong., 2d Sess., p. 61.

Thus, the Panel considered and ultimately rejected DMX/AEI's request for a rate that only covered certain types of ephemeral copies. It did so in large part because it determined that Congress had ''intended to create blanket licenses which would afford each licensee all the rights necessary to operate such a service,'' and noted that in this case, that would include ''the right to make any and all ephemeral copies utilized in a broadcast background music service.'' Report at 118. This interpretation of the law is consistent with the purpose of the section 112 license.

In creating the ephemeral recording license, Congress sought to provide a

[37] Had the Panel recommended a royalty based on a percentage-of-revenues, its recommended minimum fee also would have had to serve the function of ensuring that copyright owners receive adequate compensation in cases where a service makes substantial use of copyrighted works but generates little or no revenue.

[38] AEI and DMX were separate business entities at the beginning of this proceeding. During the course of this proceeding, they merged into a single company.

[39] Section 114(d)(1)(iv) provides that:

(d) Limitations on Exclusive Right.—Notwithstanding the provisions of section 106(6)—

(1) Exempt transmissions and retransmission.—The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6) if the performance is part of—

(C) a transmission that comes within any of the following categories—

(iv) a transmission to a business establishment for use in the ordinary course of its business: Provided, That the business recipient does not retransmit the transmission outside of its premises or the immediately surrounding vicinity, and that the transmission does not exceed the second recording performance complement. Nothing in this clause shall limit the scope of the exemption. Nothing in this clause shall limit the scope of the exemption in Clause (ii).

[40] At the beginning of this proceeding, DMX and AEI each filed a separate direct cause in which each company proposed a flat rate of $25,000 for each year (prorated for the October–December 1998 period) covered by these proceedings for use of the section 112 license. Knittel W.D.T. 19; Troxel W.D.T. 15.

way for any licensee or business establishment service to clear all the reproduction rights involved in making digital transmissions of sound recordings under section 114. Congress ''intended [this provision] to facilitate efficient transmission technologies, such as the use of phonorecords encoded for optimal performance at different transmission rates or use of different software programs to receive the transmissions.'' H.R. Rep. No. 105–796, at 90 (1998). These copies are known as ''ephemeral recordings.'' ''The term ''ephemeral recording'' is a term of art referring to certain phonorecords made for the purpose of facilitating certain transmissions of sound recordings, the reproduction of which phonorecords is privileged by the provisions of section 112.'' Id. Because the purpose of the license is to facilitate a lawful transmission of a sound recording under a statutory license or exemption, it would appear that the license covers not only the first reproduction of the sound recording on a company's server, but also all intermediate copies needed to facilitate the digital transmission of the sound recording.

The mere fact that the license covers different ephemeral recordings that may be catalogued in different ways does not mean that a separate rate must be set for each category. Had the record supported different rates for different categories of ephemeral recordings, or for different types of business establishment services, it is conceivable that the Panel might have chosen to differentiate among these categories or types of businesses by assigning different rates to each one.[41] See also Order (dated July 16, 2001) (advising Panel that it could set different rates for different business models, provided that the record supported such a decision). Whether such an approach would have been arbitrary would depend upon the findings of the Panel in light of the record evidence and, more importantly, upon whether the proposed rates covered the making of all ephemeral copies needed to facilitate the digital transmission of a sound recording under the section 114 business to business exemption.

The section 112 license is without question for the benefit of all services operating under the business to business exemption and not just DMX/AEI. A rate tailored only to meet the specific needs of a single service would by its very nature be arbitrary if the rate failed to cover the entire scope of the license. The fact that DMX/AEI has chosen to license the copies in its database through a private agreement and use the statutory license to cover the remaining ephemeral copies would not relieve the Panel of its responsibility to set rates for all ephemeral copies which fall within the scope of the license, including those copies in a DMCA compliant database. Other business establishment services using a DMCA-compliant database exist and may choose to meet their copyright liability by operating under the statutory license. See RIAA reply at 18; Report at 116. It is without question that such a service may take advantage of the statutory license without participating in a CARP proceeding.

Once these rates are set, a Service can either operate entirely under the statutory license or, alternatively, the Service may choose to make some ephemeral copies under the statutory license and others under a private agreement. These choices, however, have no bearing on the responsibility of the Panel to establish a rate, or a schedule of rates, that would allow a Service to utilize the license to the full extent of the law.

In fashioning the rate, the Panel considered the arguments put forth by the parties and ultimately rejected DMX/AEI's basic premise that Congress had contemplated a *de minimis* rate to compensate for ''leakage'' (use of ephemeral copies to make phonorecords for sale) and, its interpretation of what it characterized as the Copyright Office's view that such copies have no independent economic value. This decision was reached after examining the statute and its legislative history and finding nothing that directly supported the ''leakage'' theory.[42] Moreover, the Panel had already determined that its responsibility was not to give effect to the Copyright Office's view on how the law should change. Instead, it determined that its duty was ''to follow the current Congressional mandate set forth in section 112(e)(4) and determine a separate rate for ephemeral copies' based upon the willing buyer/willing seller standard. Report at 98–99. Thus, the Panel rejected AEI/DMX's proposal to set a low rate based upon its finding that these entities have always paid substantial royalties to record companies in exchange for the use of its complete catalogue. Report at 119.

In any case, the starting point for setting the rates for the ephemeral recording license as it applies to business establishment services is the statute. It provides that, as with the rates for the webcasting license, the rates should be those that ''most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' 17 U.S.C. 112 (e)(4). Thus, the Panel turned to actual agreements that have been negotiated in the marketplace to discover how the market values these rights. As discussed previously, the use of rates negotiated in the marketplace is not arbitrary. It eliminates the need to try to value specific economic, competitive, and programming factors because the parties would have already accounted for these considerations during the negotiation process and their impact would be reflected in the negotiated rates.

Both sides seem to agree with the Panel's approach. RIAA had no complaint with the Panel's use of voluntarily negotiated licenses in setting the ephemeral rates for business establishment services. Moreover, DMX/AEI's own counsel acknowledged that marketplace agreements were appropriate benchmarks for establishing the rates for the rate for the section 112 license and conceded that the agreements relied upon were worthy of consideration. Tr. 9577–78 (Sept. 12, 2001). Nevertheless, DMX/AEI did argue that the proposed rate constitutes an undue financial burden that thwarts Congress' intent to facilitate the adoption of new technologies. DMX/AEI Petition at 11.

The question is which agreements should be considered when setting the rates for the ephemeral reproductions. Having found that the business establishment services offer a completely different type of service from webcasting, the Panel rejected DMX/AEI's invitation to use the ephemeral rates negotiated by the webcasters. Report at 121. Instead, the Panel opted to use the license agreements that had been negotiated between individual record companies and background music services[43] as a benchmark for setting the relevant section 112 rates even though, in some instances, the license conveyed some

[41] As RIAA points out, insufficient evidence exited to support his approach and accommodate DMX/AEI's proposal. RIAA reply at 15, citing Panel report at 118–10/9.

[42] RIAA supports the Panel's determinatin, nothing tha the legislative history makes clear that the purpsoe of the license is ''to create fir and efficient licensing mechanisms.'' RIAA Reply at 20, citing H.R. Conf. Rep. 105–796 at 79–80 (1998).

[43] A background music service is a type of Business Establishment Service that complies and delivers music to business establishments who play the music for the enjoyment of their customers. Among the license agreements considered by the Panel were those negotiated between the major record labels and AEI, DMX, Muzak, Play Network, Inc., and Radio Programming and Management Inc. Report at 123–124.

rights to the licensee beyond the reproduction and distribution of the sound recording. The Panel was not troubled by this observation, however, because it found that in all cases the right to copy and distribute the works was by far the most important right for which the licensee paid royalties. Moreover, it noted that the rates did not fluctuate through the year even when a service altered its method for delivering music. Thus, the Panel used the rates reflected in these licenses to establish a range of rates (10–15% of gross proceeds) for consideration. See Report at 117; see e.g., RIAA Reply to AEI/DMX at 2. From this data, it found that ''background music companies and record companies would agree to a royalty of at least 10% of gross proceeds,'' and set the rate accordingly. Report at 126.

RIAA agrees with the Panel's approach, and that it was appropriate for the Panel not to consider contracts for ephemerals made in the course of webcasting because these businesses are not comparable with Business Establishment Services. They serve different customers and operate under different economic business models with different delivery methods. For example, Business Establishment Services make reproductions of sound recordings and deliver them via cable or satellite for use by the establishment for the enjoyment of their customers. These differences are further underscored by transactions in the marketplace. RIAA notes that within a single license with one business entity, it negotiated a separate rate for webcasting ephemeral copies and a separate rate for ephemeral copies used by the Business Establishment Service. RIAA reply at 24–25. The fact that RIAA negotiated separate rates for the making of ephemeral recordings for different services supports a finding that the businesses are not comparable. Therefore, it was not arbitrary for the Panel to decline to consider the ephemeral rates set forth in the licenses between the webcasters and the record companies when establishing a rate for Business Establishment Services.

Moreover, an examination of the record evidence clearly shows that the 10% of revenues rate set by the Panel is not an arbitrary figure. RIAA Exhibits 9 DR, 10 DR, 11 DR, 12 DR, 13 DR, 14 DR, 26 DR, 27 DR, 28 DR, 60–A DR, 66 DR–X, Knittel Rebuttal Ex. 22; Knittel W.D.T. 14–15. It represents the low end of the range of rates set forth in the agreements between the major record labels and Business Establishment Services. The fact that two agreements, negotiated during a period of uncertainty whether there was a legal obligation to pay anything for the satellite transmissions they covered, reflect a lower rate does not change the outcome. See Report at 124. As RIAA points out, the rate in one of these agreements was reset at a substantially higher rate once the initial contract with the lower rate expired. RIAA Reply to AEI/DMX at 25, fn 25. Nor is there any reason to reject the Panel's determination, as DMX/AEI contends, because the Panel failed to adjust for the promotional value to the record companies or bring these rates into line with those set for Subscription Services in the previous proceeding. As the Panel stated on several occasions, it is unnecessary to adjust a marketplace-negotiated rate for the promotional value that flows to the record companies because that benefit would already be reflected in the contract price, if it were important to the parties.

Likewise, DMX/AEI's second premise for rejecting the Panel's determination must also be discarded. It argued that the Panel set an arbitrarily high rate for Business Establishment Services when compared to the rate set for Subscription Services in an earlier proceeding. DMX/AEI Petition at 19–20. As discussed in a previous section, see section IV.3, rates set for Subscription Services in a prior proceeding are just not comparable to rates under consideration in this proceeding. Marketplace rates for making reproductions of sound recordings for use by a Business Establishment Service have no established relationship to rates set under a totally different standard for the public performance of sound recordings by Subscription Services. There is no established nexus between the industries, the marketplaces in which they operate, or the rights for which the rates are set. To make any adjustments to the ephemeral rate based on the rate for the digital performance rate adopted for the Subscription Services in a previous proceeding would itself be patently arbitrary.

b. Minimum fee. The statute also requires the Panel to set a minimum fee for use of the license. Using the same licenses, it determined that the minimum fee should be $500 a year based on its observation that most, although not all, willing buyers have not agreed to a fee approaching RIAA's proposed rate of $50,000 a year and that some agreements include no minimum fee at all. Because there is no discernable trend in the licenses, the Panel chose to adopt the same fee it proposed for the webcasting licenses because it is calculated to cover at least the administrative costs of the license.

RIAA argues that a $500 minimum is too low and contradicts the record evidence, citing the existence of significantly higher rates in many of the industry agreements and the lack of any agreement with a minimum as low as $500. RIAA Petition at 46–47. RIAA further contends that the CARP by its own reasoning should set a significantly higher minimum fee where, as here, the ephemeral rate is based on a percentage-of-revenue model. Id. at 49. The Copyright Owners are concerned that a low minimum rate will increase ''the risk that a service, especially a new one, will make a large number of ephemeral copies and not generate revenues, effectively giving the service a blanket license for free.'' Id. Consequently, the Copyright Owners ask the Librarian to adopt their proposal and set the minimum fee for use of the ephemeral license at rate no lower than $50,000.

DMX/AEI objects to RIAA's request for a higher minimum fee. It maintains that RIAA requested rate is inconsistent with record evidence, which establishes that either DMX/AEI currently pays [material redacted subject to a protective order] in its direct licensing agreements with the major labels for On-Premises services or that it is disproportionately high when compared with the minimum fees paid by other members of the background music service industry. DMX/AEI Reply at 7. Accordingly, AEI/DMX urges the Librarian not to entertain the RIAA's request.

An examination of the relevant agreements reveals that almost all of these agreements have a substantial minimum fee for the making of ephemeral recordings and that all of those minimum fees are considerably greater than the $500 minimum proposed by the CARP. Consequently, the Panel's decision to adopt a $500 minimum fee when no contract considered by the Panel contained a minimum fee as low as $500 is arbitrary. The minimum fees in the agreements before the CARP were by and large significantly higher than the $500 fee proposed by the CARP and should have served as the guiding principle in setting the minimum fee for the Business Establishment Services, especially in light of the Panel's earlier observation that a percentage of revenue fee requires the establishment of a substantial minimum fee to offset the risk that a start-up Service with little revenue could operate without paying adequate royalty fees for use of the license. Moreover, RIAA notes that each contract before the CARP was between a Business Establishment Service and a single record label. It then makes the argument that ''[i]f a business establishment service is willing to pay a minimum fee [significantly higher than the minimum fee proposed by the Register] for access to just one label's sound recordings, the value of the blanket license to all copyrighted recordings must be higher.'' RIAA Petition at 46. Based on this evidence, the Panel should have set the minimum fee for the section 112 license as it applies to Business Service Establishments at a significantly higher level, and it was arbitrary not to have done so.

The Register notes that minimum fees have been as low as $5,000 and as high as the $50,000 minimum proposed by RIAA. The purposes of the minimum fee, however, are to cover the costs of administration and insure an adequate return to the copyright owners based upon the value of the right with respect to the overall fee for use of the license. For these reasons, the Register proposes a minimum fee of $10,000 per Licensee. The fee is at the low end of the range of negotiated minimum fees and is in line with DMX/AEI's own valuation of the license at $10,000 per year. Admittedly this fee appears high when compared with the minimum fee for the eligible nonsubscription services, but it serves to balance the risk associated with setting a statutory fee based upon a percentage of revenues instead of a fee that would charge a specific fee for each reproduction.

17. Effective Period for Proposed Rates

The rates and terms proposed by the parties were the same for each time period under consideration by the Panel. Consequently, the Panel proposed, and the parties agreed, that the same rates and terms would apply to both periods: (1) October 28, 1998 (the effective date of the DMCA) through December 31, 2000; and (2) January 1, 2001, through December 31, 2002. The Register finds that it was not arbitrary for the Panel to propose the same rates and terms for both periods under consideration.

B. Terms

Sections 112(e)(4) and 114((f)(2)(B) require that the CARP propose and the Librarian adopt terms for administering payment for the two statutory licenses. The Panel stated that, as with rates, the standard for setting these terms is what the willing seller and the willing buyer would have negotiated in the marketplace. The Panel did not interpret the standard to include necessarily setting terms that ''represent the optimum alternative from the standpoint of administrative convenience and workability.'' It reasoned that such considerations were ''not part of the governing standard for the Panel, nor [were they] a matter on which [the Panel] would have either record evidence or institutional expertise.'' Consequently, the Panel made no determination pertaining to administrative efficiency, choosing instead to defer to the expertise of the Librarian. Report at 129.

For the most part, the terms proposed by the Panel are those to which all parties to the CARP proceeding have agreed in negotiations. For this reason, the Panel accepted all terms on which the parties agreed, finding that where there was agreement, the terms meet the statutory standard under which these terms must be set. Moreover, the Panel found that there was evidence in the record to support adoption of most of these terms.

The Register is skeptical of the proposition that terms negotiated by parties in the context of a CARP proceeding are necessarily evidence of terms that a willing buyer and a willing seller would have negotiated in the marketplace. Especially when those terms relate to administration of the receipt and distribution of royalties by collectives that are artificial (but necessary) creations of the statutory license process, rather than entities likely to be created in an agreement between a copyright owner and a licensee, the fiction that those terms reflect the reality of the marketplace is difficult to accept.

Not all of the terms recommended by the Panel are terms that the Register would have adopted if her task were to determine the most reasonable terms governing payment of royalties. However, in light of the standard of review, the Register recommends accepting the terms adopted by the Panel except in the relatively few instances where the Panel's decision was either arbitrary or not feasible. See Report at 129 (''we must defer to the expertise of the Librarian the final evaluation of the administrative feasibility of terms which willing buyers and willing sellers would agree to in marketplace negotiations''). The discussion that follows addresses, first, the terms recommended by the Panel that one or more parties have asked the Librarian to reject. Following that discussion, the Register discusses those terms recommended by the Panel that, although they are acceptable to the parties, she proposes to modify or reject, because they are arbitrary or contrary to law.

1. Disputed Terms

The parties were unable to reach a consensus with respect to two issues: (1) The incorporation of specific definitions for the terms, ''Affiliated,'' ''AM/FM streaming,'' ''Broadcaster,'' and ''Non-Public;'' and (2) the designation of an agent for unaffiliated copyright owners.

a. *Definitions.* The Panel carefully considered the utility of incorporating the proposed terms for Affiliated,'' ''AM/FM streaming,'' ''Broadcaster,'' and ''Non-Public.'' It decided to reject the webcasters'' request to adopt the disputed terms and definitions, noting that the terms were not applicable to the rate structure ultimately adopted by the Panel. The Parties have filed no objection on this point and the Register finds no reason to include a definition of these terms in the regulations.

Notwithstanding the Panel's decision as to these terms, it did incorporate other terms that were necessary for the administration of the license. The proposed definitions for these additional terms are based upon submissions from the parties made at the Panel's request. See, Services' Submission of Definitions; Proposed Definitions of the Recording Industry Association of America, Inc. (Feb. 12, 2002). Again, no party has filed an objection to the Panel's decision to propose additional terms the purpose of which is make the regulatory framework clearer and more functional.

b. *Designated Agent for Unaffiliated Copyright Owners.* Read literally, section 114 appears to require that Services pay the statutory royalties directly to each Copyright Owner. As a practical matter, it would be impractical for a Service to identify, locate and pay each individual Copyright Owner whose works it performed. As a result, in the administration of the predecessor statutory license for noninteractive subscription services, a Collective was appointed to receive and distribute all royalties. The RIAA has served as the Collective for the nonsubscription services.

In this proceeding, the Parties proposed and the CARP agreed to a modification of the single-collective model. Licensees making transmissions of a public performance of a sound recording pursuant to the statutory license in section 114 and/or making ephemeral recordings of these works under the statutory license in section 112(e) would make all payments owed under these licenses to the designated ''Receiving Agent.''[44] The Receiving

[44] A ''Receiving Agent'' is the agent designated by the Librarian of Congress through the rate setting process for the collection of the royalty fees from

Agent would then make further distribution of the royalty fees to the two Designated Agents[45] who would then distribute the royalty fees among the Copyright Owners and Performers in accordance with the methodology set forth in the regulations.

The CARP accepted the proposal of the parties to designate a single Receiving Agent, SoundExchange, in order to maximize administrative efficiencies for the Copyright Owners and Performers, on the one hand, and Licensees, on the other. SoundExchange is a nonprofit organization formed by RIAA for the purpose of administering the sections 112 and 114 statutory licenses. It has over 280 member companies, affiliated with more than 2,000 record labels accounting for over 90% of the sound recordings lawfully sold in the United States. W.D.T. at 4 (Rosen). SoundExchange is governed by a board comprised of representatives of Copyright Owners and Performers and, under a recent reorganization, the Copyright Owners and artists representatives will have equal control over the SoundExchange Board. AFM/AFTRA PFFCL ¶ 6.

In addition to its role as a Receiving Agent, the CARP accepted the Parties' proposal that both SoundExchange and Royalty Logic, Inc. (''RLI'') serve as Designated Agents. RLI is a for profit subsidiary of Music Reports, Inc. and was created to offer a competitive alternative to SoundExchange. W.D.T. at 2 (Gertz). The purpose of having two designated agents is to provide Copyright Owners with the option of electing to receive their royalty distribution from either SoundExchange or RLI. The Receiving Agent will allocate royalties to the two Designated Agents based on the Copyright Owner's designation.[46]

However, the parties could not agree on which Designated Agent would distribute funds to Copyright Owners who failed to make an election. The Webcasters proposed that RLI be named the agent for unaffiliated Copyright Owners, but Copyright Owners and Performers asked the Panel to designate SoundExchange as the agent for those copyright owners.

After carefully considering the role of the Designated Agent for unaffiliated copyright owners and the record evidence, the Panel made a determination to name SoundExchange as the Designated Agent for those copyright owners who fail to expressly designate either SoundExchange or RLI as their agent to receive and distribute royalties on their behalf. The primary reason for this designation was the preference expressed by the Copyright Owners and the Performers. The Panel reasoned that the Services had no real stake in deciding this issue because their responsibilities and direct interest end with the payment of the royalty fees to the Receiving Agent. Moreover, AFM and AFTRA, which represent artists who are among the beneficiaries of the license, expressed a strong preference for the designation of SoundExchange as the agent in these instances. The Copyright Owners made this choice based on the non-profit status of SoundExchange, its experience with royalty payments, and the fact that SoundExchange has agreed to a reorganization that gives artists substantial control over its operations. The Panel agreed with the reasons articulated by the Copyright Owners and Performers and found that the probable outcome of a marketplace negotiation would have been the selection of SoundExchange.

Broadcasters contest the Panel's decision to designate SoundExchange as the agent for unaffiliated copyright owners. They assert that there is no record evidence to support the Panel's observation that this was the inevitable outcome of marketplace negotiations, in spite of the actual requests made by Copyright Owners who participated in this proceeding. Broadcasters Petition at 59–60.

The Copyright Owners and Performers disagree, and assert that unlike the Licensees whose only concern is whom to pay and when, copyright owners and performers have a vital interest in how their royalty fees are collected and distributed and have expressed a strong preference for SoundExchange as the designated agent. See RIAA Reply at 81; AFM/AFTRA Reply at 2. Certainly, Performers believe that SoundExchange will make fair and equitable distributions and not deduct additional costs beyond those necessary costs incurred to effectuate a distribution. AFM/AFTRA Reply at 2–3 (''SoundExchange is subject to the joint and equal control of copyright owner and performer representatives with an interest in maintaining an efficient operation that will distribute the maximum possible license fees, that SoundExchange is a nonprofit organization so that no copyright owner's or artist's royalty share will be diminished by anything other than necessary distribution costs, and that SoundExchange is experienced and has demonstrated its commitment to identifying, finding and paying performers during its distribution of Section 114 and 112 subscription service statutory license fees.''); see also RIAA Reply at 83.

The CARP's decision to designate SoundExchange as the agent for unaffiliated copyright owners is fully supported by the record evidence and, consequently, it is not arbitrary. First, the fact that Copyright Owners and Performers commend SoundExchange to the Panel is direct evidence of their preference for a non-profit organization that has already invested heavily in a system designed to locate and pay Copyright owners and Performers. It would be arbitrary to ignore their wishes where, in fact, the alternative agent represents primarily broadcasters, television stations, and other Licensees—not Licensors. See AFM/AFTRA PFFCL concerning terms ¶ 13. Second, SoundExchange is a non-profit collective that will deduct only necessary distribution costs. On the other hand, RLI, the entity competing for the agency designation, is a for-profit organization whose acknowledged goal is to make a profit. In fact, RLI has suggested that it needs the designation from the CARP in order to generate enough revenues to make it worthwhile to take on the role of an agent for purposes of making distributions of statutory license royalty fees. See Services Proposed Findings (12/18/01) at ¶ 16. In addition, RLI has been unable to say just how much it expects to deduct as reasonable costs, making it impossible to ascertain whether designation of RLI would be in the best interest of the unaffiliated copyright owners. Third, Performers and Copyright Owners have a direct governance role in the operation of SoundExchange, thereby insuring their interests are not neglected or overshadowed by the interests of the agent. AFM/AFTRA Reply at 4; AFM/AFTRA PFFCL concerning terms ¶ 6. Performers have expressed strong concerns about the designation of an agent who has no mechanism or apparent interest in providing the Copyright Owners and Performers with

the Licensees operating under the sections 112 and 114 licenses.

[45] A ''Designated Agent'' is an agent designated by the Librarian of Congress through the same rate setting process who receives royalty fees paid for use of the statutory licenses from the Receiving Agent and makes further distributions of these fees to Copyright Owners and Performers.

[46] The Register is skeptical of the benefit of this two-tier structure, which adds expense and administrative burdens to a process the purpose of which is to make prompt, efficient and fair payments of royalties to Copyright Owners and Performers with a minimum of expense. However, the Register cannot say that the Panel's decision, presumably based on the conclusion that competition among Designated Agents will result in better service to Copyright Owners and Performers, is arbitrary.

a means to voice their concerns. See AFM/AFTRA PFFCL concerning terms ¶ 9 (noting that designation of RLI as the agent for unaffiliated copyright owners would have the undesirable effect of forcing these non-members ''into an agency relationship with an entity that not only is not governed by Copyright Owners and Performers, but also is not even required to obtain their guidance and input regarding policies, procedures or distribution methodologies.'').

For all the foregoing reasons, the Register concludes that the CARP was not arbitrary in designating SoundExchange as the agent for unaffiliated copyright owners. Of the four factors considered by the Panel, each weighs in favor of SoundExchange. Of course, any Copyright Owner or Performer can affirmatively choose RLI to act on its behalf as a Designated Agent.

c. *Gross proceeds.* As discussed earlier, the Panel proposed the adoption of a rate for Business Establishment Services making ephemeral recordings under section 112 at 10% of gross proceeds. The Panel recognized the necessity of also formulating a definition of ''gross proceeds'' in order to make the rate workable. To meet this need, it opted to incorporate, with minor modifications to accommodate the section 112 license, the definition used in many of the background music agreements even though the definition is less than clear on its face as to what constitutes gross proceeds. The lack of specificity, however, did not trouble the Panel because it expected the parties to adopt the understandings within the industry developed during the normal course of dealings.

RIAA does not share the Panel's view. It objects to the proposed definition of ''gross proceeds,'' arguing that the provision fails utterly to define the term in any meaningful way. It also contends that it is arbitrary to rely on industry practices to flesh out the industry's understanding of the term when no record evidence exists about these practices. To remedy this situation, RIAA proposes that the Librarian adopt the definition of ''gross proceeds'' for a Business Establishment Service that is set forth in the agreement between SoundExchange and MusicMusicMusic (''MMM''). RIAA Exhibit No. 60A. RIAA asserts that this is the only record evidence on this point. RIAA petition at 52–54.

DMX/AEI rejects RIAA's suggestion that the Librarian adopt a definition from an agreement with MMM, ''an unsophisticated licensee, who by its own admission is unlikely to pay any significant royalties pursuant to the agreement.'' DMX/AEI Reply at 3. RIAA's proposed definition of ''gross proceeds'' would include fees generated by equipment rental, maintenance services, advertising of all kinds, and revenues payable to a licensee from any source in connection with the licensee's background music service. Id. at 5. DMX/AEI argues that such a definition is utterly contrary to the normal practice of using proceeds derived solely from the delivery of copyrighted sound recordings to business establishments.

As a general principle, terms pertaining to a statutory license must be defined with specificity. At first blush, the proposed definition of ''gross proceeds'' does not appear to meet this standard, merely reciting that a Business Establishment Service must pay a sum equal to ten percent of the licensee's gross proceeds derived from use of the musical programs that are attributable to copyrighted recordings. However, record evidence suggests the definition may be as simple as the CARP's characterization of the term. Barry Knittel,[47] in discussing the promotional funds established for the benefit of the record companies from gross proceeds, stated that the money placed into these accounts comes from the company's gross revenues, and that these revenues are generated from all the billings for music. Tr. 8384 (Knittel). This statement suggests that the determination of what constitutes ''gross revenues'' is not a mystery and that it is merely the amount the Business Establishment Services receive from their customers for use of the music. This approach, however, does not necessarily appear to capture in-kind payments of goods, free advertising or other similar payments for use of the license. See RIAA Petition at 54.

Consequently, the Register proposes to expand on the CARP's approach and adopt a definition of ''gross proceeds'' which clarifies that ''gross proceeds'' shall include all fees and payments from any source, including those made in kind, derived from the use of copyrighted sound recordings to facilitate the transmission of the sound recording pursuant to the section 112 license. See RIAA Exhibit No. 60A DR. (Second Webcasting Performance and Webcasting and Business Establishment Ephemeral Recording License Agreement). The Register finds it necessary to expand upon the proposed definition to avoid any confusion on this point and not as a means to capture additional revenue streams not contemplated by the Panel or by the parties to such agreements. Because the record fails to enumerate the types of revenue that may be received in kind, the Register finds it unwise to include even an illustrative list when there is little evidence of what specific types of revenues should be considered in the calculation of ''gross proceeds.'' Thus, the definition of ''gross proceeds'' shall be as follows:

> ''Gross proceeds'' shall mean all fees and payments, including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

2. Terms Not Disputed by the Parties

a. *Limitation of Liability.* One of the terms proposed by the Parties and adopted by the CARP was that ''A Designated Agent shall have no liability for payments made in accordance with this subsection with respect to disputes between or among recipients.'' The Parties explained that the purpose of this provision was to ''mak[e] clear that so long as a Designated Agent complies with the requirements adopted by the Copyright Office for distributing royalties, then a beneficiary of statutory royalties cannot sue such Designated Agent for payments made in accordance with Copyright Office regulations. Any dispute among recipients should be resolved among themselves.''

The Register understands the desire of SoundExchange and RLI to insulate themselves from liability in cases where Copyright Owners or Performers dispute the Designated Agent's allocation of royalties. The Copyright Office's experience with distribution proceedings for the statutory licenses for which royalties are initially paid to the Copyright Office provides ample evidence that individual copyright owners and performers often believe they are being paid less than their fair share of statutory license royalties, and it is natural for a Designated Agent to wish to avoid having to defend against such claims.

Moreover, as has become apparent in the course of the pending rulemaking proceeding relating to notice and recordkeeping for the use of sound recordings under the statutory licenses, the information that Licensees will be providing to the Designated Agents about which (and how many) sound recordings they have performed will be far from perfect, and the Designated Agents necessarily will have to make

[47] Barry Knittel, formerly President of AEI Music Markets—Worldwide is now DMX/AEI's Senior Vice President of Business Affairs Worldwide.

difficult judgments in determining how to allocate royalties. If the Designated Agents had comprehensive information identifying each and every performance transmitted by a Licensee, and each and every Copyright Owner and Performer for each performance, in theory they could pay each Copyright Owner and Performer his or her precise share of royalties. In the real world—or at least for the remainder of the period for which this proceeding is setting rates and terms—some Copyright Owners and Performers inevitably will receive less than their precise share of the royalty pool, and others will receive more than their precise share. The Designated Agents should not be held to an impossibly high standard of care.

Unfortunately, neither the CARP nor the Librarian have the power to excuse a Designated Agent (or, for that matter, anyone else) from liability for a breach of a legal obligation. If a Designated Agent has in fact wrongfully withheld or underpaid royalties to a Copyright Owner or Performer, the law may provide a remedy to the Copyright Owner or Performer.

Although the Librarian cannot excuse the Designated Agents from potential liability, he can adopt terms that provide a mechanism that will make claims by disgruntled Copyright Owners or Performers less likely, or at least less viable. The Register therefore recommends that in place of the ultra vires provision excusing the Designated Agents from any liability, the Librarian provide that the Designated Agents must submit to the Copyright Office a detailed description of their methodology for distributing royalty payments to nonmembers. This information will be made available to the public, and any Copyright Owner or Performer who believes the methodology is unfair will have an opportunity to raise an objection with the Designated Agent prior to the distribution, thereby giving the Designated Agent the opportunity to address the problem before the Copyright Owner or Performer has suffered any alleged harm. This provision is modeled on a provision proposed by the parties to the previous CARP proceeding to establish rates and terms for noninteractive subscription services under section 114. See proposed 37 CFR 260.3(e), in Notice of Proposed Rulemaking, Determination of Reasonable Rates and Terms for the Public Performance of Sound Recordings, 66 FR 38226, 38228 (July 23, 2001).[48]

The Register also proposes that the Librarian adopt a term that provides a Designated Agent with an optional mechanism pursuant to which the Designated Agent may request that the Register provide a written opinion stating whether the Agent's methodology for distributing royalty payments to nonmembers meets the requirements of the terms for distribution set forth in the implementing regulations. Although such an opinion by the Register would not be binding on a court evaluating a claim against a Designated Agent, it can be assumed that a court would find the opinion of the Register persuasive.

The Register anticipates that under this scheme, a Designated Agent that acts conscientiously and in good faith in the distribution of royalties will not be found liable to a Copyright Owner or Performer who is dissatisfied with his or her share of the distribution.

b. *Deductions from Royalties for Designated Agent's Costs.* The parties had proposed, and the CARP agreed, that Designated Agents be permitted to deduct from the royalties paid to Copyright Owners and Performers ''reasonable costs incurred in the licensing, collection and distribution of the royalties paid by Licensees * * * and a reasonable charge for administration.'' The Register recommends that the provision permitting deductions for costs incurred in licensing be removed from this provision. See § 261.4(i). Although a Designated Agent may happen to engage in licensing activities, licensing per se is not among the responsibilities of a Designated Agent under the terms of the statutory license. The purpose of the Designated Agent is to receive and distribute the statutory royalty fees. There is no justification for permitting a Designated Agent to deduct costs incurred in licensing activity from the statutory royalties, and the CARP's acquiescence in this term was therefore arbitrary.

There was also a suggestion in testimony presented to the CARP that it would be proper for a Designated Agent to deduct from statutory royalties its costs incurred as a participant in a CARP proceeding. Tr. 11891–11893 (Williams). Nothing in § 261.4(i), including the references to ''reasonable costs incurred in the collection and distribution of the royalties paid by Licensees,'' can properly be construed as permitting a Designated Agent to deduct from the royalty pool any costs of participating in a CARP proceeding. Such activity is beyond the scope of collection and distribution of royalties. Of course, Copyright Owners and Performers may enter into agreements with a Designated Agent permitting such deductions, but a Designated Agent may not make such deductions from royalties due to unaffiliated Copyright Owners and Performers or those who have simply designated a Designated Agent without specifically agreeing to permit such deductions.[49]

c. *Ephemeral Recording.* The Register recommends that a definition of ''Ephemeral Recording'' be added to the definitions. This definition incorporates by reference the requirements set forth in section 112(e).

In a related provision, the Register has harmonized the language of §§ 261.3(b) and (c) and makes clear that beneficiaries of the statutory license for ephemeral recordings may make any number of ephemeral recordings so long as they are made for the sole purpose of facilitating the statutory licensees permitted transmissions of performances of sound recordings. The regulatory text proposed by the parties and accepted by the Panel provided that for Business Establishment Services, the section 112 royalty shall be paid ''[f]or the making of unlimited numbers of ephemeral recordings in the operation of broadcast services pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv),'' (emphasis added), but that for webcasters, the section 112 royalty shall be paid ''[f]or the making of all ephemeral recordings required to facilitate their internet transmissions.''

A literal reading of section 112(e) might lead to the conclusion that the ephemeral recording statutory license permits only the making of a single ephemeral recording, but the statute qualifies that provision by stating ''(unless the terms and conditions of the statutory license allow for more),'' and the legislative history makes clear that the terms established by the Librarian in this proceeding may include terms permitting the making of additional

[48] A similar provision is recommended with respect to the methodology for allocating royalties among Designated Agents.

[49] The Register is also troubled by the parties permitting a Designated Agent to deduct ''a reasonable charge for administration'' which is included ''to permit a for-profit Designated Agent to make a reasonable profit on royalty collection and distribution on top of the direct expenses that may be incurred in licensing, collection and distribution.'' Appendix B, p. B–13. But in light of the parties' acceptance and the CARP's adoption of a procedure permitting multiple Designated Agents, including a for-profit Designated Agent, the Register reluctantly cannot conclude that the provision is arbitrary.

ephemeral recordings. H.R.Rep. 105–796, at 89. Therefore, it is appropriate that the terms make clear that statutory licensees may make more than one ephemeral recording to accomplish the purposes of the statutory license.

The reference to ''all'' ephemeral recordings ''required'' to facilitate webcasters'' transmissions, and the reference to ''unlimited'' recordings for Business Establishment Services'' ''operation'', are arguably inconsistent with each other and somewhat ambiguous. To clarify that the scope of the section 112 statutory license is similar for both types of service, and to more accurately reflect the appropriate scope of that license, the Register recommends that the regulatory language provide, in the case of webcasters, ''[f]or the making of *any number* of ephemeral recordings to facilitate the Internet transmission of a sound recording,'' and in the case of Business Establishment Services, ''[f]or the making of *any number* of ephemeral recordings in the operation of a service pursuant to the Business Establishment exemption.'' (Emphasis added).

d. *Definition of ''Listener''.* The definitions of ''Aggregate Tuning Hours'' and ''Performance'' both include references to a ''listener'' or to ''listeners.'' It is not clear from the text of these definitions whether each person who is hearing a performance is a ''listener'' even if all the persons hearing the performance are listening to the same machine or device (e.g., two or more persons listening to a performance rendered on a single computer). Clearly the intent is that all persons listening to a performance on a single machine or device constitute, collectively, a single ''listener,'' because ''listener'' is used here to assist in defining what constitutes a single performance. Indeed, it would be difficult to implement an interpretation that counted all individuals in such circumstances as separate ''listeners.'' Accordingly, the Register recommends including a definition that provides that if more than one person are listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

e. *Timing of Payment by Receiving Agent to Designated Agent.* The terms proposed by the Parties and accepted by the CARP included a provision requiring that the Receiving Agent pay a Designated Agent its share of any royalty payments received from a Licensee within 20 days after the day on which the Licensee's payment is due. While the Register recognizes that such a provision would, in principle, be unobjectionable, she concludes that under current conditions it is administratively unfeasible.

As the parties recognized in their commentary on this provision, ''The parties do not know either the payment methodology that will be used to calculate royalties or the types of information that will be reported by Licensees. Such determinations cannot be made before the conclusion of this proceeding and the Notice and Recordkeeping Proceeding.'' Appendix B, p. B–10. However, they assumed that the Receiving Agent and the Designated Agent could agree on a ''reasonable allocation method'' even in the absence of any firm data.

The Register is skeptical. It is apparent at this point in the rulemaking on notice and recordkeeping that obtaining accurate reports of Licensees' use of sound recordings will be difficult, particularly during the first few months. Moreover, the initial reports of use will require reporting on less than a monthly basis, making it impossible in many instances for the Receiving Agent to make any determination whatsoever as to a Designated Agent's allocated share during at least the first month or two in which royalties are paid. Reports on past use of sound recordings (i.e., from October 28, 1998, to the present) will present an even more formidable challenge. It is difficult to imagine that 20 days after the Receiving Agent has received the first royalty payments from Licensees, the Receiving Agent and the Designated Agent will have any reliable information from which they can ascertain how the proceeds should be allocated. The Register therefore recommends that the proposed requirement that payment be made within 20 days of the day on which the Licensee's payment is due be replaced by a requirement that the payment be made ''as expeditiously as is reasonably possible,'' a more flexible term that recognizes the difficulty in establishing a specific deadline. The Register cautions that during the first few months of operation of the system of reporting and or royalty payment, ''expeditious'' payment under the circumstances may be a matter of many weeks, if not months.

It can reasonably be expected that for future periods governed by future CARPs or negotiated agreements, more stringent requirements of prompt payment will be appropriate. But it must be recognized that in this initial, transitional period, delays will be inevitable.

f. *Allocation of Royalties among Designated Agents and Among Copyright Owners and Performers.* The terms proposed by the Parties and accepted by the Panel provide that the Receiving Agent allocate royalty payments to Designated Agents ''on a reasonable basis to be agreed among the Receiving Agent and the Designated Agents,'' and that the Designated Agents distribute royalty payments ''on a reasonable basis that values all performances by a Licensee equally.'' The Panel accepted these terms, but observed that a ''determination of how royalty payments should be apportioned between the Designated Agents cannot be made until the parties know the rate structure adopted by the CARP (in the first instance) and the Librarian of Congress (on review) and the outcome of the Notice and Recordkeeping Proceeding.'' Appendix B, at p. B–10. Similarly, the Panel remarked that ''The terms do not specifically provide how a Designated Agent should allocate royalties among parties entitled to receive such royalties because such allocation will depend upon the rate structure adopted by the CARP (in the first instance) and by the Librarian of Congress (on review) and may be affected by the types of reporting requirements that are adopted by the Copyright Office in the Notice and Record-keeping Proceeding for eligible nonsubscription transmissions and business establishment services.'' Id., p. B–12.

The Register recommends that the provisions for allocation of royalty payments among Designated Agents and for allocation of royalties among parties entitled to receive such royalties be clarified, making explicit the relationship between the notice and recordkeeping regulations and the allocation of royalties. Each of these provisions should provide that the method of allocation shall be based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances.

The Register has some trepidation about the provision in § 261.4(a), proposed by the Parties and recommended by the CARP, that provides that apportionment among Designated Agents ''shall be made on a reasonable basis that uses a methodology that values all performances equally and *is agreed upon* among the Receiving Agent and the Designated Agents.'' (Emphasis added). The regulation does not provide what happens in the event that the Receiving Agent and the Designated Agents cannot agree on an allocation methodology. One could recommend a provision that gives the ultimate decisionmaking power to one of the parties or to a third party, but instead, the Register proposes the addition of § 261.4(l), which would simply provide that in the event of a stalemate, ''either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute.''

g. *Choice of Designated Agent by Performers.* A literal reading of the terms recommended by the Panel would permit a Copyright Owner to select the Designated Agent of its choice, but would require a Performer to accept the Designated Agent selected by the Copyright Owner; and the Panel's report appears to agree with this interpretation. Report at 132. However, the Report does not articulate any reason for the decision to deprive Performers of the same right to choose that is given to Copyright Owners, and the commentary in Appendix B is silent as well.

As the Panel acknowledged, ''Copyright owners and performers, on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates'' Report at 132 (emphasis added). The Register agrees. It was arbitrary to permit Copyright Owners to make an election that Performers are not permitted to make. The Register can conceive of no reason why Performers should not be given the same choice. Accordingly, the Register recommends that § 261.4 be amended to provide that a Copyright Owner or a Performer may make such an election. See § 261.4(c) of the recommended regulatory text.

The Register has also inserted a housekeeping amendment to provide that for administrative convenience, a Copyright Owner's or Performer's designation of a Designated Agent shall not be effective until 30 days have passed.

h. *Performers' Right to Audit.* The terms proposed by the Parties and accepted by the CARP provided that a Copyright Owner may conduct an audit of a Designated Agent. These provisions also include safeguards to ensure that a Designated Agent is not subjected to more than one audit in a calendar year.

However, the terms do not provide that Performers have a similar right to conduct an audit of a Designated Agent, despite the fact that Performers, like Copyright Owners, depend upon the Designated Agent to make fair and timely royalty payments. The Parties' commentary in Appendix B states that audit rights are limited to Copyright Owners ''rather than the entire universe of Copyright Owners and Performers, which could number in the tens of thousands.'' Appendix B at p. B–24. The commentary suggests that it would be impracticable for a Designated Agent to be subject to audit from individual Performers. Apart from reproducing the Parties' commentary, the Panel offered no observations on this point.

The Register fails to understand how it would be ''impracticable'' to permit Performers, who depend on a Designated Agent for their royalty payments, to initiate an audit of the Designated Agent when the Copyright Owners may do so. The Designated Agent is given sufficient protection by virtue of the provision that it can be subject to only a single audit in a calendar year, by the provision that the party requesting the audit must bear the presumably considerable costs of the audit, and by the provision that any audit ''shall be binding on all Copyright Owners and Performers.'' [50] The Register, therefore, recommends that the audit provisions be amended to permit not only Copyright Owners, but also Performers, to initiate an audit.

i. *Effective date.* Section 114(f)(4)(C) states that payments in arrears for the performance of sound recordings prior to the setting of a royalty rate are due on a date certain in the month following the month in which the rate is set. The effective date of the rates, however, is not necessarily the date of publication in the **Federal Register**. The Librarian has often set the effective date of a rate several months after the initial announcement of the decision. See Determination of Reasonable Rates and Terms for Subscription Services, 63 FR 25394 (May 8, 1998) (setting the effective date for the rate for subscription services three weeks after the date of publication of the final order in the **Federal Register**); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (October 28, 1997) (announcing an effective date of January 1, 1998, set to coincide with the next filing period of the statements of account).

Section 802(g) provides that the effective date of the new rates is ''as set forth in the decision.'' 17 U.S.C. 802(g). The Register has interpreted the term ''decision'' to mean the decision of the Librarian, since section 802(g) only refers to the decision of the Librarian. Thus, this provision has been interpreted as providing the Librarian with discretion in setting the effective date. Moreover, the courts have held that an agency normally retains considerable discretion to choose an effective date, where, as here, the statute authorizing agency action fails to specify a timetable for effectiveness of decisions. *RIAA* v. *CRT,* 662 F.2d. 1, 14 (D.C. Cir. 1981).

In setting an effective date, the Register has considered the impact of the rate on the Licensees and the administrative burden on the Office in promulgating regulations to insure effective administration of the license. Clearly, there will be a burden on many Licensees who, by law, are required to make full payment of all royalties owed for transmissions made since the effective date of the DMCA, October 28, 1998, on or before the 20th day of the month next succeeding the month in which the royalty rate is set. Moreover, the Copyright Office is in the midst of promulgating rules governing records of use that will be used to make distribution of royalty fees in accordance with the terms of payment.

Consequently, the Register proposes an effective date of September 1, 2002, which will require the Licensees to make full payment of the arrears on October 20, 2002. Payment for the month of September shall be due on or before November 14, 2002, the forty-fifth (45th) day after the end of the month on which the rate becomes effective, in accordance with the term proposed by the parties and adopted by the CARP. Similarly, all subsequent payments shall be due on the 45th after the end of each month for which royalties are owed. This payment schedule provides the Licensees with additional time to make the initial payment and any necessary adjustments in their business operations to meet their copyright obligation.

V. Conclusion

Having fully analyzed the record in this proceeding, the submissions of the parties, the Register of Copyrights recommends that the Librarian adopt the statutory rates for the transmission of a sound recording pursuant to section 114, and the making of ephemeral phonorecords pursuant to section 112(e), as set forth below:

[50] It is noteworthy that although the Parties were unwilling to give Performers a right to initiate an audit, they did not hesitate to provide that Performers will be bound by an audit initiated by a Copyright Owner.

SUMMARY OF ROYALTY RATES FOR SECTION 114(F)(2) AND 112(E) STATUTORY LICENSES

Type of DMCA—Complaint service	Performance fee (per performance)	Ephemeral license fees
1. Webcaster and Commercial Broadcaster:		
All Internet transmissions, including simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.07¢	8.8% of Performance Fees Due.
2. Non-CPB, Non-Commercial Broadcaster:		
(a) Simultaneous internet retransmissions of over-the-air AM or FM radio broadcasts.	0.02¢	8.8% of Performance Fees Due.
(b) Other internet transmissions, including up to two side channels of programming consistent with the public broadcasting mission of the station.	0.02¢	8.8% of Performance Fees Due.
(c) Transmissions on any other side channels	0.07¢	8.8% of Performance Fees Due.
3. Business Establishment Service:		
For digital broadcast transmissions of sound recordings pursuant to 17 U.S.C. 114(d)(1)(C)(iv).	Statutorily Exempt	10% of Gross Proceeds.
4. Minimum Fee:		
(a) Webcasters, commercial broadcasters, and non-CPB, non-commercial broadcasters.	$500 per year for each licensee.	
(b) Business Establishment Services		$10,000

In addition, the Register recommends that the Librarian adopt the terms of payment proposed by the CARP, as modified in the recommendation, and set September 1, 2002, as the effective date for the statutory rates and the terms of payment.

VI. The Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter to set rates and terms for Licensees making certain digital performances of sound recordings under section 114(d)(2) and those making ephemeral recordings under section 112(e), the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of the Library and the Copyright Office, announcing the new royalty rates and terms of payment for the sections 112 and 114 statutory licenses.

List of Subjects in 37 CFR Part 261

Copyright, Digital audio transmissions, Performance right, Recordings.

Final Regulation

In consideration of the foregoing, part 261 of 37 CFR is added to read to as follows:

PART 261—RATES AND TERMS FOR ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

§ 261.1 General.

(a) This part 261 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of ephemeral recordings by certain Licensees in accordance with the provisions of 17 U.S.C. 112(e).

(b) Licensees relying upon the statutory license set forth in 17 U.S.C. 114 shall comply with the requirements of that section and the rates and terms of this part.

(c) Licensees relying upon the statutory license set forth in 17 U.S.C. 112 shall comply with the requirements of that section and the rates and terms of this part.

(d) Notwithstanding the schedule of rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services within the scope of 17 U.S.C. 112 and 114 concerning eligible nonsubscription transmissions shall apply in lieu of the rates and terms of this part.

§ 261.2 Definitions.

For purposes of this part, the following definitions shall apply:

Aggregate Tuning Hours mean the total hours of programming that the Licensee has transmitted over the Internet during the relevant period to all end users within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. Likewise, if one listener listened to a service for 10 hours, the service's Aggregate Tuning Hours would equal 10.

Business Establishment Service is a Licensee that is entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that obtains a compulsory license under 17 U.S.C. 112(e) to make ephemeral recordings for the sole purpose of facilitating those exempt transmissions.

Commercial Broadcaster is a Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission to make over-the-air broadcasts, other than a CPB-Affiliated or Non-CPB-Affiliated, Non-Commercial Broadcaster.

Copyright Owner is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

Designated Agent is the agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part from the Receiving

Agent. The Designated Agent shall make further distribution of those royalty payments to Copyright Owners and Performers that have been identified in § 261.4(c).

Ephemeral Recording is a phonorecord created solely for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) or under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Gross proceeds mean all fees and payments, as used in § 261.3(d), including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).

Licensee is: (1) A person or entity that has obtained a compulsory license under 17 U.S.C. 112 or 114 and the implementing regulations therefor to make eligible non-subscription transmissions and ephemeral recordings, or

(2) A person or entity entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) and that has obtained a compulsory license under 17 U.S.C. 112 to make ephemeral recordings.

Listener is a recipient of a transmission of a public performance of a sound recording made by a Licensee or a Business Establishment Service. However, if more than one person is listening to a transmission made to a single machine or device, those persons collectively constitute a single listener.

Non-CPB, Non-Commercial Broadcaster is a Public Broadcasting Entity as defined in 17 U.S.C. 118(g) that is not qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener via a Web Site transmission or retransmission (e.g. the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained license from the copyright owner of such sound recording; and

(3) An incidental performance that both: (i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performer means the respective independent administrators identified in 17 U.S.C. 114(g)(2)(A) and (B) and the parties identified in 17 U.S.C. 114(g)(2)(C).

Receiving Agent is the agent designated by the Librarian of Congress for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to Designated Agents, and that has been identified as such in § 261.4(b). The Receiving Agent may also be a Designated Agent.

Side channel is a channel on the Web Site of a Commercial Broadcaster or a Non-CPB, Non-Commercial Broadcaster, which channel transmits eligible non-subscription transmissions that are not simultaneously transmitted over-the-air by the Licensee.

Webcaster is a Licensee, other than a Commercial Broadcaster, Non-CPB, Non-Commercial Broadcaster or Business Establishment Service, that makes eligible non-subscription transmissions of digital audio programming over the Internet through a Web Site.

Web Site is a site located on the World Wide Web that can be located by an end user through a principal Uniform Resource Locator (a ''URL''), e.g., www.xxxxx.com.

§ 261.3 Royalty fees for public performances of sound recordings and for ephemeral recordings.

(a) For the period October 28, 1998, through December 31, 2002, royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114(d)(2), and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) shall be as follows:

(1) Webcaster and Commercial Broadcaster Performance Royalty. For all Internet transmissions, including simultaneous Internet retransmissions of over-the-air AM or FM radio broadcasts, a Webcaster and a Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(2) Non-CPB, Non-Commercial Broadcaster Performance Royalty.

(i) For simultaneous Internet retransmissions of over-the-air AM or FM broadcasts by the same radio station, a non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.02¢ per performance.

(ii) For other Internet transmissions, including up to two side channels of programming consistent with the mission of the station, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.02¢ per performance.

(iii) For Internet transmissions on other side channels of programming, a Non-CPB, Non-Commercial Broadcaster shall pay a section 114(f) performance royalty of 0.07¢ per performance.

(b) Estimate of Performance. Until December 31, 2002, a Webcaster, Commercial Broadcaster, or Non-CPB, Non-Commercial Broadcaster may estimate its total number of performances if the actual number is not available. Such estimation shall be based on multiplying the total number of Aggregate Tuning Hours by 15 performances per hour (1 performance per hour in the case of transmissions or retransmissions of radio station programming reasonably classified as news, business, talk or sports, and 12 performances per hour in the case of transmissions or retransmissions of all other radio station programming).

(c) Webcaster and Broadcaster Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings to facilitate the Internet transmission of a sound recording, each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster shall pay a section 112(e) royalty equal to 8.8% of their total performance royalty.

(d) Business Establishment Ephemeral Recordings Royalty. For the making of any number of ephemeral recordings in the operation of a service pursuant to the Business Establishment exemption contained in 17 U.S.C. 114(d)(1)(C)(iv), a Business Establishment Service shall pay a section 112(e) ephemeral recording royalty equal to ten percent (10%) of the Licensee's annual gross proceeds derived from the use in such service of the musical programs which are attributable to copyrighted recordings. The attribution of gross proceeds to copyrighted recordings may be made on the basis of:

(1) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program,

(2) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(e) Minimum fee. (1) Each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster licensed to make eligible digital transmissions and/or ephemeral recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall pay a minimum fee of $500 for each calendar year, or part thereof, in which it makes such transmissions or recordings.

(2) Each Business Establishment Service licensed to make ephemeral recordings pursuant to a license under 17 U.S.C. 112(e) shall pay a minimum fee of $10,000 for each calendar year, or part thereof, in which it makes such recordings.

§ 261.4 Terms for making payment of royalty fees and statements of account.

(a) A Licensee shall make the royalty payments due under § 261.3 to the Receiving Agent. If there are more than one Designated Agent representing Copyright Owners or Performers entitled to receive any portion of the royalties paid by the Licensee, the Receiving Agent shall apportion the royalty payments among Designated Agents using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such apportionment shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Receiving Agent and the Designated Agents. Within 30 days of adoption of a methodology for apportioning royalties among Designated Agents, the Receiving Agent shall provide the Register of Copyrights with a detailed description of that methodology.

(b) Until such time as a new designation is made, SoundExchange, an unincorporated division of the Recording Industry Association of America, Inc., is designated as the Receiving Agent to receive statements of account and royalty payments from Licensees. Until such time as a new designation is made, Royalty Logic, Inc. and SoundExchange are designated as Designated Agents to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners.

(c) SoundExchange is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners, except when a Copyright Owner or Performer has notified SoundExchange in writing of an election to receive royalties from a particular Designated Agent. With respect to any royalty payment received by the Receiving Agent from a Licensee, a designation by a Copyright Owner or Performer of a particular Designated Agent must be made no later than thirty days prior to the receipt by the Receiving Agent of that royalty payment.

(d) Commencing September 1, 2002, a Licensee shall make any payments due under § 261.3 to the Receiving Agent by the forty-fifth (45th) day after the end of each month for that month. Concurrently with the delivery of payment to the Receiving Agent, a Licensee shall deliver to each Designated Agent a copy of the statement of account for such payment. A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Receiving Agent after the due date. Late fees shall accrue from the due date until payment is received by the Receiving Agent.

(e) A Licensee shall make any payments due under § 261.3 for transmissions made between October 28, 1998, and August 31, 2002, to the Receiving Agent by October 20, 2002.

(f) A Licensee shall submit a monthly statement of account for accompanying royalty payments on a form prepared by the Receiving Agent after full consultation with all Designated Agents. The form shall be made available to the Licensee by the Receiving Agent. A statement of account shall include only such information as is necessary to calculate the accompanying royalty payment. Additional information beyond that which is sufficient to calculate the royalty payments to be paid shall not be required to be included on the statement of account.

(g) The Receiving Agent shall make payments of the allocable share of any royalty payment received from any Licensee under this section to the Designated Agent(s) as expeditiously as is reasonably possible following receipt of the Licensee's royalty payment and statement of account as well as the Licensee's Report of Use of Sound Recordings under Statutory License for the period to which the royalty payment and statement of account pertain, with such allocation to be made on the basis determined as set forth in paragraph (a) of this section. The Receiving Agent and the Designated Agent shall agree on a reasonable basis on the sharing on a pro-rata basis of any incremental costs directly associated with the allocation method. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and a Designated Agent for each calendar year no later than 180 days following the end of each calendar year.

(h) The Designated Agent shall distribute royalty payments on a reasonable basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances; Provided, however, that Copyright Owners and Performers who have designated a particular Designated Agent may agree to allocate their shares of the royalty payments among themselves on an alternative basis.

(i)(1) A Designated Agent shall provide to the Register of Copyrights:

(i) A detailed description of its methodology for distributing royalty payments to Copyright Owners and Performers who have not agreed to an alternative basis for allocating their share of royalty payments (hereinafter, ''non-members''), and any amendments thereto, within 30 days of adoption and no later than 60 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that the Designated Agent receives from a non-member concerning the distribution of royalty payments, within 30 days of receiving such written complaint; and

(iii) The final disposition by the Designated Agent of any complaint specified by paragraph (i)(1)(ii) of this section, within 60 days of such disposition.

(2) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Agent's methodology for distributing royalty payments to non-members meets the requirements of this section.

(j) A Designated Agent shall distribute such royalty payments directly to the Copyright Owners and Performers, according to the percentages set forth in 17 U.S.C. 114(g)(2), if such Copyright

Owners and Performers provide the Designated Agent with adequate information necessary to identify the correct recipient for such payments. However, Performers and Copyright Owners may jointly agree with a Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties to Performers and Copyright Owners consistent with the percentages in 17 U.S.C. 114(g)(2).

(k) A Designated Agent may deduct from the royalties paid to Copyright Owners and Performers reasonable costs incurred in the collection and distribution of the royalties paid by Licensees under § 261.3, and a reasonable charge for administration.

(l) In the event a Designated Agent and a Receiving Agent cannot agree upon a methodology for apportioning royalties pursuant to paragraph (a) of this section, either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute.

§ 261.5 Confidential information.

(a) For purposes of this part, ''Confidential Information'' shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) Confidential Information shall not include documents or information that at the time of delivery to the Receiving Agent or a Designated Agent are public knowledge. The Receiving Agent or a Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) In no event shall the Receiving Agent or Designated Agent(s) use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that the Designated Agent may report Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any Licensee or group of Licensees cannot directly or indirectly be ascertained or reasonably approximated. All reported aggregated Confidential Information from Licensees within a class of Licensees shall concurrently be made available to all Licensees then in such class. As used in this paragraph, the phrase ''class of Licensees'' means all Licensees paying fees pursuant to § 261.4(a).

(d) Except as provided in paragraph (c) of this section and as required by law, access to Confidential Information shall be limited to, and in the case of paragraphs (d)(3) and (d)(4) of this section shall be provided upon request, subject to resolution of any relevance or burdensomeness concerns and reimbursement of reasonable costs directly incurred in responding to such request, to:

(1) Those employees, agents, consultants and independent contractors of the Receiving Agent or a Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records;

(2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Receiving Agent or a Designated Agent with respect to the verification of a Licensee's statement of account pursuant to § 261.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty payments pursuant to § 261.7;

(3) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. 114(f)(2) and 112(e), under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(4) In connection with *bona fide* royalty disputes or claims by or among Licensees, the Receiving Agent, Copyright Owners, Performers or the Designated Agent(s), under an appropriate confidentiality agreement or protective order, attorneys, consultants and other authorized agents of the parties to the dispute, arbitration panels or the courts.

(e) The Receiving Agent or Designated Agent(s) and any person identified in paragraph (d) of this section shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Receiving Agent or Designated Agent(s) or person.

(f) Books and records of a Licensee, the Receiving Agent and of a Designated Agent relating to the payment, collection, and distribution of royalty payments shall be kept for a period of not less than three (3) years.

§ 261.6 Verification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by the Designated Agent.

(b) *Frequency of verification.* A Designated Agent may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Designated Agent must submit a notice of intent to audit a particular Licensee with the Copyright Office, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the Designated Agent's notice. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Designated Agents, and all Copyright Owners and Performers.

(d) *Acquisition and retention of records.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Designated Agent requesting the verification procedure shall retain the report of the verification for a period of not less than three (3) years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all Designated Agents with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit;

Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Designated Agent requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Licensee shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Licensee and more than $5,000.00.

§ 261.7 Verification of royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification by any Copyright Owner or Performer of royalty payments made by a Designated Agent; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and a Designated Agent have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or a Performer may conduct a single audit of a Designated Agent upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three (3) calendar years, and no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must submit a notice of intent to audit a particular Designated Agent with the Copyright Office, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within thirty (30) days of the filing of the notice. The notification of intent to audit shall be served at the same time on the Designated Agent to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of records.* The Designated Agent making the royalty payment shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three (3) years. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than three (3) years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Designated Agent being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Designated Agent reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of ten percent (10%) or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure; Provided, however, that a Designated Agent shall not have to pay any costs of the verification procedure in excess of the amount of any underpayment unless the underpayment was more than twenty percent (20%) of the amount finally determined to be due from the Designated Agent and more than $5,000.00.

§ 261.8 Unclaimed funds.

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of three (3) years from the date of payment. No claim to such payment shall be valid after the expiration of the three (3) year period. After the expiration of this period, the unclaimed funds of the Designated Agent may first be applied to the costs directly attributable to the administration of the royalty payments due such unidentified Copyright Owners and Performers and shall thereafter be allocated on a pro rata basis among the Designated Agents(s) to be used to offset such Designated Agent(s) other costs of collection and distribution of the royalty fees.

Dated: June 20, 2002.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 02–16730 Filed 7–5–02; 8:45 am]

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Federal Register

Tuesday

May 1, 2007

Part VI

Library of Congress

Copyright Royalty Board

37 CFR Part 380

Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2005–1 CRB DTRA]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges, on behalf of the Copyright Royalty Board of the Library of Congress, are announcing their final determination of the rates and terms for two statutory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings, for the period beginning January 1, 2006, and ending on December 31, 2010.

DATES: *Effective date:* May 1, 2007.

Applicability date: The regulations apply to the license period January 1, 2006 through December 31, 2010.

ADDRESSES: The final determination is also posted on the Copyright Royalty Board Web site at *http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf.*

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. *Telephone:* (202) 707–7658. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Subject of the Proceeding

This is a rate determination proceeding convened under 17 U.S.C. 803(b) *et seq.* and 37 CFR 351 *et seq.*, in accord with the Copyright Royalty Judges' Notice announcing commencement of proceeding, with a request for Petitions to Participate in a proceeding to determine the rates and terms for a digital public performance of sound recordings by means of an eligible nonsubscription transmission or a transmission made by a new subscription service under section 114 of the Copyright Act, as amended by the Digital Millennium Copyright Act (''DMCA''), and for the making of ephemeral copies in furtherance of these digital public performances under section 112, as created by the DMCA, published at 70 FR 7970 (February 16, 2005). The rates and terms set in this proceeding apply to the period of January 1, 2006 through December 31, 2010. 17 U.S.C. 804(b)(3)(A).

B. Parties to the Proceeding

The parties to this proceeding are: (i) Digital Media Association and certain of its member companies that participated in this proceeding, namely: America Online, Inc. (''AOL''), Yahoo!, Inc. (''Yahoo!''), Microsoft, Inc. (''Microsoft''), and Live365, Inc. (''Live365'') (collectively referred to as ''DiMA''); (ii) ''Radio Broadcasters'' (this designation was adopted by the parties): namely, Bonneville International Corp., Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee (''NRBMLC''), Susquehanna Radio Corp.; (iii) SBR Creative Media, Inc. (''SBR'') and the ''Small Commercial Webcasters'' (this designation was adopted by the parties): namely, AccuRadio, LLC, Digitally Imported, Inc., Radioio.com LLC, Discombobulated, LLC, 3WK, LLC, Radio Paradise, Inc.; (iv) National Public Radio, Inc. (''NPR''), Corporation for Public Broadcasting-Qualified Stations (''CPB''), National Religious Broadcasters Noncommercial Music License Committee (''NRBNMLC''), Collegiate Broadcasters, Inc. (''CBI''), Intercollegiate Broadcasting System, Inc., (''IBS''), and Harvard Radio Broadcasting, Inc. (''WHRB''); (v) Royalty Logic, Inc. (''RLI''); and (vi) SoundExchange, Inc. (''SoundExchange'').

DiMA, Radio Broadcasters, Small Commercial Webcasters, SBR, NPR, CPB, NRBNMLC, CBI, IBS and WHRB are sometimes referred to collectively as ''the Services.'' The Services are Internet webcasters or broadcast radio simulcasters that each employ a technology known as streaming, but comprise a range of different business models and music programming. DiMA and certain of its member companies that participated in the proceeding (namely: AOL, Yahoo!, Microsoft and Live365), Radio Broadcasters, SBR and Small Commercial Webcasters are sometimes referred to collectively as ''Commercial Webcasters.'' NPR, CPB, NRBNMLC, CBI, IBS and WHRB are sometimes referred to collectively as ''Noncommercial Webcasters.''

II. The Proceedings

A. Pre-Hearing Proceedings

A notice calling for the filing of Petitions to Participate in this proceeding to set the rates and terms for the period beginning January 1, 2006, and ending on December 31, 2010, was published February 16, 2005. 70 FR 7970. The Petitions were due by March 18, 2005. Forty-two petitions were filed. Following an order to file a Notice of Intention to Submit Written Direct Statements, the participants were reduced to the following twenty eight: SBR; NPR; NPR Member Stations; CPB; CBI; SoundExchange; RLI; IBS; WHRB; Digital Media Association; AOL; Live365; Microsoft; Yahoo!; AccuRadio LLC; Discombobulated LLC; Digitally Imported, Inc.; Radioio.com LLC; Radio Paradise, Inc.; Educational Media Foundation; NRBNMLC; Bonneville International Corp.; Clear Channel Communications, Inc.; CBS Radio, Inc.; NRBMLC; Salem Communications Corp.; Susquehanna Radio Corp.; and Beethoven.com LLC.

Following an unsuccessful negotiation period, the Written Direct Statements were due October 31, 2005. All of the above filed plus the additional following: Mvyradio.com LLC; 3WK; XM Satellite Radio, Inc.; Sirius Satellite, Inc.; Infinity Broadcasting Corp.

B. The Direct Cases

The participants conducted discovery and then began live testimony. By the time testimony began, the participants reduced to the following: SBR; NPR; NPR Member Stations; CPB; CBI; SoundExchange; RLI; IBS; WHRB; Digital Media Association; AOL; Yahoo!; AccuRadio LLC; Discombobulated LLC; Digitally Imported, Inc.; Mvyradio.com LLC; Radioio.com LLC; Radio Paradise, Inc.; 3WK LLC; Educational Media Foundation; NRBNMLC; Bonneville International Corp.; Clear Channel Communications, Inc.; NRBMLC; and Susquehanna Radio Corp.

Testimony was taken from May 1, 2005, through August 7, 2006. SoundExchange presented the testimony of the following 14 witnesses: (1) John Simson, SoundExchange, executive director; (2) Barrie Kessler, SoundExchange, chief operating officer; (3) James Griffin, One House LLC, chief executive officer; (4) Erik Brynjolfsson, MIT Sloan School of Management, professor of management and director of Center for eBusiness at MIT; (5) Michael Pelcovits, MiCRA, economic consultant; (6) Mark Eisenberg, SONY BMG, senior vice president of business and legal affairs; (7) Lawrence Kenswil, Universal eLabs, a division of Universal Music Group, president; (8) Michael Kushner, Atlantic Records Group, business and legal affairs; (9) Stephen Bryan, Warner Music Group, vice president of strategic planning and business development; (10) Harold Bradley, American Federation of Musicians of United States and Canada, vice president; (11) Jonatha Brooke, songwriter and performer, owner of Bad Dog Records; (12) Cathy Fink, songwriter and performer; (13) Bruce Iglauer, Alligator

Records, an independent blues label, founder; and (14) Mark Ghuneim, Wiredset, LLC, chief executive officer.

Royalty Logic, Inc. presented the testimony of Ronald A. Gertz, president.

The Services presented the testimony of the following 24 witnesses: Digital Media Association and its Member Companies: (1) Adam B. Jaffe, Brandeis University, professor in economics; (2) Christine Winston, America Online, executive director of programming strategy and planning; (3) David Porter, Live365, general manager of business development; (4) Jonathan Potter, DiMA, executive director; (5) N. Mark Lam, Live365, chairman and chief executive officer; (6) Robert D. Roback, Yahoo! Music, general manager; (7) J. Donald Fancher, Deloitte and Touche Financial Advisory Services LLP; (8) Jay Frank, Yahoo!, programming and label relations; (9) Fred Silber, Microsoft, business development manager for MSN; (10) Eric Ronning, Ronning Lipset Radio; (11) Jack Isquith, American Online Music, executive director Music Industry Relations; (12) Karyn Ulman, Music Reports, Inc.;

Radio Broadcasters: (13) Dan Halyburton, Susquehanna Radio, research, engineering and programming; (14) Roger Coryell, San Francisco Bonneville Radio Group, director strategic marketing and Internet; (15) Russell Hauth, National Radio Broadcasters Music Licensing Committee, executive director; (16) Brian Parsons, Clear Channel Radio, vice president of technology;

Small Commercial Webcasters: (17) Kurt Hanson, AccuRadio, president and RAIN newsletter, publisher;

National Public Radio: (18) Kenneth Stern, NPR, chief executive officer;

Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.: (19) Frederick J. Kass, Jr., IBS, chief operating officer; (20) Michael Papish, HRBC, treasurer and Media Unbound, president;

Collegiate Broadcasters, Inc.: (21) William Robedee, CBI, past chair and KTRU, Rice University, manager; (22) Joel R. Willer, KXUL, University of Louisiana, Monroe, faculty advisor;

National Religious Broadcasters Noncommercial Music Licensing Committee: (23) Eric Johnson, NRBNMLC, board member and CDR Radio Network, music director; and

SBR Creative Media, Inc.: (24) David Rahn, president.

C. The Rebuttal Cases

The participants filed Written Rebuttal Statements on September 29, 2006. Discovery was then conducted on the rebuttal evidence. Rebuttal testimony was taken from November 6 through November 30, 2006.

SoundExchange presented the testimony of the following nine witnesses: (1) Barrie Kessler, SoundExchange, chief operating officer; (2) James Griffin, One House LLC, chief executive officer; (3) Erik Brynjolfsson, MIT Sloan School of Management, professor of management and director of Center for eBusiness at MIT; (4) Michael Pelcovits, MiCRA, economic consultant; (5) Mark Eisenberg, SONY BMG, senior vice president of business and legal affairs; (6) Thomas Lee, American Federation of Musicians, president; (7) Simon Wheeler, Association of Independent Music, chair of New Media Committee; (8) Charles Ciongoli, Universal Music Group, North American, executive vice president and chief financial officer; and (9) Tom Rowland, Universal Music Enterprises, senior vice president, film and television music;

Royalty Logic, Inc. presented the testimony of the following two witnesses: (1) Ronald A. Gertz, president; and (2) Peter Paterno, entertainment attorney;

The Services presented the testimony of the following 16 witnesses:

Digital Media Association and its Member Companies: (1) Adam B. Jaffe, Brandeis University, professor in economics; (2) Christine Winston, America Online, executive director of programming strategy and planning; (3) N. Mark Lam, Live365, chairman and chief executive officer; (4) Robert D. Roback, Yahoo! Music, general manager; (5) J. Donald Fancher, Deloitte and Touche Financial Advisory Services LLP; (6) Jay Frank, Yahoo!, programming and label relations; (7) Jack Isquith, American Online Music, executive director Music Industry Relations; (8) Roger James Nebel, FTI Consulting;

Radio Broadcasters: (9) Keith Meehan, Radio Music Licensing Committee, executive director; (10) Eugene Levin, Radio Music Licensing Committee, controller; (11) Brian Parsons, Clear Channel Radio, vice president of technology; (12) Adam B. Jaffe, Brandeis University, professor of economics;

National Public Radio: (13) Adam B. Jaffe, Brandeis University, professor of economics;

Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.: (14) Jerome Picard, economics professor (ret.); (15) Michael Papish, HRBC, treasurer; and

National Religious Broadcasters Noncommercial Music Licensing Committee: (16) Eric Johnson, member of board.

At the close of all the evidence, the record was closed. In addition to the written direct statements and written rebuttal statements, the Copyright Royalty Judges heard 48 days of testimony, which filled 13,288 pages of transcript, and 192 exhibits were admitted. The docket contains 475 entries of pleadings, motions and orders.

D. Post-Hearing Submissions and Arguments

After the evidentiary phase of the proceeding, the participants were ordered to file Proposed Findings of Fact and Conclusions of Law on December 12, 2006, and Responses to those proposals on December 15, 2006. The parties were also ordered to submit Stipulated Terms on December 15, 2006, but none have been filed. Closing arguments were heard on December 21, 2006. Then the matter was submitted to the Copyright Royalty Judges for a Determination.[1]

On March 2, 2007, the Copyright Royalty Judges issued the initial Determination of Rates and Terms. Pursuant to 17 U.S.C. 803(c)(2) and 37 CFR Part 353, the parties filed Motions for Rehearing.[2] The Judges requested the parties to respond to the motions filed, in order to know the positions of each party on each of the issues raised in the motions, and ordered the parties to file written arguments in support of each motion. The parties filed responses and written arguments. Having reviewed all motions, written arguments and responses, the Judges denied all the motions for rehearing. Order Denying Motions for Rehearing, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2005–1 CRB DTRA (April 16, 2007). As reviewed in the said Order, none of the grounds in the motions presented the type of exceptional case where the Determination is not supported by the

[1] Hereinafter, references to written direct testimony shall be cited as ''WDT'' preceded by the last name of the witness and followed by the page number. References to written rebuttal testimony shall be cited as ''WRT'' preceded by the last name of the witness and followed by the page number. References to the transcript record shall be cited as ''Tr.'' preceded by the date and followed by the page number and the last name of the witness. References to proposed findings of fact and conclusions of law shall be cited as ''PFF'' or ''PCL,'' respectively, preceded by the name of the party that submitted same and followed by the paragraph number. References to reply proposed findings of fact and conclusions of law shall be cited as ''RFF'' or ''RCL,'' respectively, preceded by the name of the party and followed by the paragraph number.

[2] Motions were filed by DiMA, IBS, WHRB, NPR, Radio Broadcasters, RLI, Small Commercial Webcasters, SoundExchange and CBI.

evidence, is erroneous, is contrary to legal requirements, or justifies the introduction of new evidence. 17 U.S.C. 803(c)(2)(A); 37 CFR 353.1 and 353.2. The motions did not meet the required standards set by statute, by regulation and by case law. Nevertheless, the Judges were persuaded to clarify two issues raised by the parties. This Final Determination includes a transition phase for 2006 and 2007 to use Aggregate Tuning Hours (''ATH'') to estimate usage as permitted under the prior fee regime. This limited use of an ATH calculation option should facilitate a smooth transition to the fee structure adopted in this Final Determination. Next, the regulations are corrected to refer to ''digital audio transmissions'' in place of the phrase ''Internet transmissions.''

III. The Statutory Criteria for Setting Rates and Terms

A. The Statutory Background

1. Music Copyright Law in General

Section 102 of the Copyright Act of 1976 (the ''Copyright Act'') identifies various categories of works that are eligible for copyright protection. 17 U.S.C. 102. These include ''musical works'' and ''sound recordings.'' *Id.* at 102(2) and 102(7). The term ''musical work'' refers to the notes and lyrics of a song, while a ''sound recording'' results from ''the fixation of a series of musical, spoken, or other sounds.'' *Id.* at 101. A song that is sung and recorded will constitute a sound recording by the entity that records the performance, and a musical work by the songwriter. Another performer may record the same song and that performance will result in another sound recording, but the musical work remains with the songwriter. Under these facts, there are two sound recordings and one musical work as a result of the two recordings of the same song. Typically, a record label owns the copyright in a sound recording and a music publisher owns the copyright in a musical work. 5/4/06 Tr. 24:11–27:16 (Simson).

Under the 1976 Copyright Act, a copyright owner receives a bundle of exclusive rights set forth in section 106. 17 U.S.C. 106. Among them is the right to make or authorize the performance to the public of a copyrighted work. The performance right is granted to all categories of copyrighted works with one exception: Sound recordings. Thus, while the owner of a musical work enjoys the performance right, the owner of a sound recording does not.[3] Congress did not begin to address this inequality until the end of the twentieth century.

2. The DPRA

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (''DPRA''), Public Law 104–39, 109 Stat. 336 (1995), which added a new section 106(6) to the Copyright Act. That provision grants copyright owners of sound recordings a limited performance right to make or authorize the performance of their works ''by means of a digital audio transmission.'' 17 U.S.C. 106(6). Often referred to as the ''digital performance right,'' the right was further limited by the creation of a statutory license for certain nonexempt, noninteractive subscription services and preexisting satellite digital audio radio services. 17 U.S.C. 114. The statutory license permits these services, upon compliance with certain statutory conditions, to make those transmissions without obtaining consent from, or having to negotiate license fees with, copyright owners of the sound recordings they perform. *Id.* Congress established procedures to facilitate voluntary negotiation of rates and terms including a provision authorizing copyright owners and services to designate common agents on a nonexclusive basis to negotiate licenses—as well as to pay, to collect, and to distribute royalties— and a provision granting antitrust immunity for such actions. *Id.*

Absent agreement among all the interested parties, the Librarian of Congress was directed to convene a Copyright Arbitration Royalty Panel (''CARP'') to recommend royalty rates and terms. Congress directed the CARP to set a royalty rate for the subscription services' statutory license that achieves the policy objectives in section 801(b)(1) of the Copyright Act. *Id.*

Under the DPRA, copyright owners must allocate one-half of the statutory licensing royalties that they receive from the subscription services to recording artists. Forty-five percent of these royalties must be allocated to featured artists; 2½ percent of the royalties must be distributed by the American Federation of Musicians to non-featured musicians; and 2½ percent of the royalties must be distributed by the American Federation of Television and Radio Artists to non-featured vocalists. 17 U.S.C. 114(g).

[3] Indeed, copyright owners of musical works have enjoyed the performance right since the nineteenth century.

3. The DMCA

The new statutory license for digital audio transmission of sound recordings was expanded in the Digital Millennium Copyright Act of 1998 (''DMCA''), Public Law 105–304, 112 Stat. 2860 (1998). It provided that certain digital transmissions and retransmissions, typically referred to as webcasting, are subject to the section 106(6) digital performance right and that webcasters who transmit/retransmit sound recordings on an interactive basis, as defined in section 114(j), must obtain the consent of, and negotiate fees with, individual owners of those recordings. However, webcasting would be eligible for statutory licensing when done on a *non-interactive* basis. Accordingly, Congress created another statutory license in sections 114(d)(2) & (f)(2) for ''eligible nonsubscription transmissions,'' which include non-interactive transmissions of sound recordings by webcasters. 17 U.S.C. 114(d)(2). To qualify for that license, the webcaster must comply with several conditions in addition to those that the DPRA applied to preexisting subscription and satellite radio services. As with these service royalties, webcaster royalties are allocated on a 50–50 basis to copyright owners and to performers.

Congress adopted the DPRA voluntary negotiation and arbitration procedures for the DMCA webcaster performance license. 17 U.S.C. 114(e), (f). However, it changed the statutory standard for determining rates and terms. The new standard is to determine what ''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).

Congress also recognized that webcasters who avail themselves of the section 114 license may need to make one or more temporary or ''ephemeral'' copies of a sound recording in order to facilitate the transmission of that recording. Accordingly, Congress created a new statutory license in section 112(e) for such copies and extended that license to services that transmit sound recordings to certain business establishments under the section 114(d)(1)(c)(iv) exemption created by the DPRA. Congress retained the DPRA voluntary negotiation and arbitration procedures for the section 112 ephemeral license. 17 U.S.C. 112(e)(2), (3). Congress again applied the willing buyer/willing seller standard applicable to the section 114 webcaster performance license. 17 U.S.C. 112(e)(4). The webcasting and ephemeral statutory licenses created by the DMCA are the subject of this proceeding.

The two DMCA licenses were the subject of one prior proceeding. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings (Final Rule), 67 FR 45240 (July 8, 2002) (codified at 37 CFR part 261) (''Webcaster I''). After a recommendation from a CARP, the Librarian applied the statutory standard to determine rates and terms. Many of the parties in this proceeding participated in that prior proceeding.

4. The Reform Act

Congress enacted a new system to administer copyright royalties with the Copyright Royalty and Distribution Reform Act of 2004 (the ''Reform Act''), Public Law 108–419, 118 Stat. 2341. The Copyright Royalty Judges were established to perform the functions previously served by the Copyright Royalty Tribunal and the Librarian of Congress. They were appointed January 9, 2006, and took over this proceeding.

B. Section 114(f)(2)

1. The Statutory Language

The criteria for setting rates and terms for the section 114 webcaster performance license are enunciated under 17 U.S.C. 114(f)(2)(B), which provides in pertinent part:

> * * * Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties, including—
>
> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. 114(f)(2)(B).

The statute further directs the Judges to set ''a minimum fee for each such type of service'' and grants the Judges discretion to consider the rates and terms for ''comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements'' negotiated under the voluntary negotiation provisions of the statute. *Id.*

2. The Relationship of the Statutory Factors to the ''Willing Buyer/Willing Seller'' Standard

Webcaster I clarified the relationship of the statutory factors to the willing buyer/willing seller standard. The standard requires a determination of the rates that a willing buyer and willing seller would agree upon in the marketplace. In making this determination, the two factors in section 114(f)(2)(B)(i) and (ii) must be considered, but neither factor defines the standard. They do not constitute additional standards, nor should they be used to adjust the rates determined by the willing buyer/willing seller standard. The statutory factors are merely to be considered, along with other relevant factors, to determine the rates under the willing buyer/willing seller standard. Webcaster I; In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, No. 2000–9 CARP DTRA 1 & 2 (''Webcaster I Carp Report'').

3. The Nature of ''The Marketplace''

The parties agree that the directive to set rates and terms that ''would have been negotiated'' in the marketplace between a willing buyer and a willing seller reflects Congressional intent for the Judges to attempt to replicate rates and terms that ''would have been negotiated'' in a hypothetical marketplace. Webcaster I CARP Report at 21. The ''buyers'' in this hypothetical marketplace are the Services (and other similar services) and this marketplace is one in which no statutory license exists. *Id.* See also Noncommercial Educational Broadcasting Compulsory License (Final rule and order), 63 FR 49823, 49835 (September 18, 1998) (''[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect 'fair market value.' ''). The ''sellers'' in this hypothetical marketplace are record companies, and the product being sold consists of a blanket license for the record companies' complete repertoire of sound recordings. Webcaster I, 67 FR 45244 (July 8, 2002).

4. The Appropriate Willing Buyer/Willing Seller Rate

As noted, the statute directs us to ''establish rates and terms that *most clearly* represent the rates and terms that would have been negotiated in the marketplace.'' 17 U.S.C. 114(f)(2)(B) (emphasis added). In the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors. Congress surely understood this when formulating the willing buyer/willing seller standard. Accordingly, the Judges construe the statutory reference to rates that ''most clearly represent the rates * * * that would have been negotiated in the marketplace'' as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree. Webcaster I, 67 FR 45244, 45245 (July 8, 2002); Webcaster I CARP Report at 25, 26.

C. Section 112(e)

The criteria for setting rates and terms for the section 112 ephemeral license are enunciated under 17 U.S.C. 112(e)(4), which provides in pertinent part:

> The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—
>
> (A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
>
> (B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. 112(e)(4). As does section 114, this section further directs the Judges to set ''a minimum fee for each type of service.'' 17 U.S.C. 112(e)(4). Although section 112 does not explicitly grant the Judges discretion to consider the rates and terms for comparable types of services, it does explicitly grant discretion to ''consider the rates and terms under voluntary license agreements'' negotiated under the provisions of the statute. 17 U.S.C. 112(e)(4). Accordingly, while the language of the two sections varies in minor respects, the Judges interpret the criteria for setting rates and terms as

essentially identical. See Webcaster I Order of July 16, 2001, at 5.

IV. Determination of Royalty Rates

A. Application of Section 114 and Section 112

Based on the applicable law and relevant evidence received in this proceeding, the Copyright Royalty Judges must determine rates for two licenses, the section 114 webcaster performance license and the section 112 ephemeral reproduction license. The Copyright Act requires that the Copyright Royalty Judges establish rates for each of these two licenses that most clearly represent those ''that would have been negotiated in the marketplace between a willing buyer and a willing seller'' and directs the Copyright Royalty Judges to set a minimum fee for each license. In the case of both licenses, the Copyright Act requires the Copyright Royalty Judges to take into account evidence presented on such factors as (1) whether the use of the webcasting services may substitute for or promote the sale of phonorecords and (2) whether the copyright owner or the service provider make relatively larger contributions to the service ultimately provided to the consuming public with respect to creativity, technology, capital investment, cost and risk. 17 U.S.C. 114(f)(2)(B) and 17 U.S.C. 112 (e)(4).

Having carefully considered the relevant law and the evidence received in this proceeding, the Copyright Royalty Judges determine that the appropriate section 114 performance license rate is a per performance usage rate for Commercial Webcasters and an annual flat per-station rate for Noncommercial Webcasters for use up to a specified cap coupled with a per performance rate for use above the cap, while the appropriate section 112 reproduction license rate is deemed to be included in the applicable respective section 114 license rates.

The applicable rate structure is the starting point for the Copyright Royalty Judges' determination.

B. The Rate Proposals of the Parties and the Appropriate Royalty Structure for Section 114 Performance Licenses

1. Commercial Webcasters

The contending parties present several alternative rate structures for Commercial Webcasters. In its final revised rate proposal, SoundExchange argues in favor of a monthly fee equal to the greater of: 30% of gross revenues or a performance rate beginning at $.0008 per performance in 2006 and increasing annually to $.0019 by 2010.[4] This fee structure is proposed for nonsubscription services and is modified to add a third alternative in its ''greater of'' formulation of a $1.37 per subscriber minimum for new subscription services.[5] An exception to this ''greater of'' formulation is proposed for so-called ''bundled services'' from which SoundExchange seeks a per performance rate of $.002375 to be adjusted each year by the change in the CPI–U. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 2–12.

By contrast, DiMA on behalf of certain large commercial webcasters, proposes a fee structure under which webcasters could elect a fee equal to either $.00025 per performance or $.0038 per Aggregate Tuning Hour (''ATH'') or 5.5% of revenue directly associated with the streaming service. However, DiMA applies only its per performance usage rate to ''bundled services'' situations where the bundle price to the consumer is not allocated as between the individual component parts of the bundle. DiMA PFF at ¶¶ 35–38.

Smaller commercial webcasters present varying proposals. SBR Creative Media, Inc., a privately owned commercial webcaster, proposes a fee structure under which webcasters can elect a fee equal to either a use metric of $.0033 per Aggregate Tuning Hour (''ATH'') or 4% of gross revenue. SBR Creative Media PFF at ¶ 19. The self-styled Small Commercial Webcasters,[6] in contrast to all the other commercial parties, propose a pure revenue-based metric equal to 5% of gross revenues. Small Commercial Webcasters PCL at ¶ 24.

Radio Broadcasters propose an annual flat fee[7] structure generally related to usage as reflected in the format of the radio station being simulcast over the web. For example, Radio Broadcasters propose that music-formatted stations pay a fee ranging from as little as $500 per annum for small stations in low revenue ranked markets to as much as $8,000 per annum for large stations in high revenue ranked markets, but further propose that news, talk, sports and/or business stations pay $250 per annum irrespective of station size in low revenue ranked markets and $750 per annum irrespective of station size in high revenue ranked markets. Finally, Radio Broadcasters propose that stations with mixed music/non-music formats pay a percentage of the music format fee, depending on the percentage of programming identified as music programming. Radio Broadcasters PFF at ¶¶ 325–338.

In short, among the parties on both sides who have proposed rates covering Commercial Webcasters, only Small Commercial Webcasters propose a fee structure based solely on revenue. However, in making their proposal, this group of five webcasters clearly is unconcerned with the actual structure of the fee, except to the extent that a revenue-based fee structure especially one in which the percent of revenue fee is a single digit number (i.e., 5%)—can protect them against the possibility that their costs would ever exceed their revenues.[8] Their only witness, Kurt Hanson, CEO/President of AccuRadio, LLC, in fact, provided testimony indicating that the Small Commercial Webcasters were, at bottom, concerned with the amount of the fee rather than the structure of the fee. (''Obviously, were there to be a sound recording royalty based on performances that was at an extremely low rate * * * a percentage-of-revenue model might not be required. And just as obviously, a confiscatory percentage-of-revenue rate would not allow these companies [the Small Commercial Webcasters] to survive.'') Hanson, WDT at 4 n.2. Small Commercial Webcasters' focus on the amount of the fee, rather than how it should be structured, is further underlined by the absence of evidence submitted by this group to identify a basis for applying a pure revenue-based structure to them. While, at times, they suggest that their situation as small

[4] The latter $.0019 per performance rate is to be adjusted by the change in the CPI–U from December 2005 to December 2009 (accordingly, if the CPI–U increases by 3% in each of these four twelve-month periods, the resulting per performance rate for 2010 would increase from $.0019 to $.00214).

[5] In addition, SoundExchange proposes an adjustment to its revenue alternative based on time spent listening to music for so-called ''non-music'' services, a per performance rate of $.002375 to be adjusted each year by the change in the CPI–U for ''bundled services'' and a 25% premium for transmissions terminating on wireless devices for nonsubscription services, new subscription services and bundled services.

[6] The Small Commercial Webcasters are AccuRadio, LLC; Digitally Imported, Inc.; Radioio.com, LLC; Discombobulated, LLC; 3WK, LLC and Radio Paradise, Inc.

[7] Radio Broadcasters further propose that the structure increase across the board by 4% annually over the term of the license.

[8] It must be emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, the normal free market processes typically weed out those entities that have poor business models or are inefficient. To allow inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners. Furthermore, it would involve the Copyright Royalty Judges in making a policy decision rather than applying the willing buyer/willing seller standard of the Copyright Act.

commercial webcasters requires this type of structure, there is no evidence in the record about how the Copyright Royalty Judges would delineate between small webcasters and large webcasters.[9] Similarly, while Mr. Hanson asserts that a percentage-of-revenue is necessary because ''this is a nascent industry'' or because small entrepreneurs require such a structure, 8/3/06 Tr. 49:12–22 (Hanson), he offers no evidence to support that assertion or to help define the parameters of the assertion. Furthermore, the only other self-styled small entrepreneur to offer testimony in this proceeding, SBR Creative Media Inc., specifically includes a usage metric in its rate proposal and neither SBR Creative Media, Inc. nor the Small Commercial Webcasters offers any evidence to distinguish between their respective situations.

While each of the remaining contending parties—SoundExchange, DiMA, Radio Broadcasters and SBR Creative Media, Inc.—proposes a fee structure for Commercial Webcasters that contains revenue-based elements as well as either usage elements or a usage alternative, from the evidence of record, the Copyright Royalty Judges conclude that numerous factors weigh in favor of a per-performance usage fee structure for Commercial Webcasters.

First, as aptly stated by Dr. Adam Jaffe, revenue merely serves as ''a proxy'' for what ''we really should be valuing, which is performances.'' Jaffe, WDT Section N, Designated Testimony (Jaffe WDT in Webcaster I at 22). By contrast, a per-performance metric ''is directly tied to the nature of the right being licensed, unlike other bases such as revenue * * * of the licensee.'' *Id.* (Emphasis in original.) The more intensively an individual service is used and consequently the more the rights being licensed are used, the more that service pays and in direct proportion to the usage.[10] Jaffe, WDT Section N, Designated Testimony (Jaffe WDT in Webcaster I at 21–22). As Dr. Jaffe points out, with a usage metric, the resultant ''scaling'' of the royalty paid to the extent of use ''is intuitively appealing and is a common feature'' of intellectual property licenses. Jaffe, WDT at 32. Dr. Jaffe notes that, by contrast, ''Revenue is a less exact proxy for the scale of activity, because the revenue that a licensee derives, even from its music-related activities can be influenced by a variety of factors that have nothing to do with music.'' *Id.* Therefore, Dr. Jaffe cautions that a revenue-based metric should only be used as a proxy for a usage-based metric where the revenue base used for royalty calculation is ''carefully defined to correspond as closely as possible to the intrinsic value of the licensed property.'' *Id.* The Copyright Royalty Judges do not find a sufficient clarity of evidence based on the record in this proceeding to produce a revenue-based metric that can serve as a good proxy for a usage-based metric. Furthermore, there was no persuasive evidence offered by any commercial webcasting/simulcasting party to indicate that a usage-based metric is not readily calculable and, that as a consequence, the Copyright Royalty Judges must resort to some proxy metric in reaching their fee determination.

Second, percentage-of-revenue models present measurement difficulties because identifying the relevant webcaster revenues can be complex, such as where the webcaster offers features unrelated to music. Webcaster I noted this particular difficulty. 67 FR 45249 (July 8, 2002). Mixed format webcasters/simulcasters continue to make up a significant part of the commercial webcasting market and, in a number of cases, generate the more significant portion of their revenues from non-music programming. RBX1; RBX7; RBX20; 7/27/06 Tr. 283:7–285:12 (Hauth). Clearly, questions surrounding the proper allocation of revenues related to music use in such instances present greater complexity than a straightforward use of a usage-based approach.[11]

Third, percentage of revenue metrics ultimately demand a clear definition of revenue so as to properly relate the fee to the value of the rights being provided, and no such clear definition has been proffered by the parties. Indeed, the definition of revenue has been a point of substantial contention between two of the parties in this proceeding. SoundExchange sought an expansive definition of revenue, ostensibly covering revenues from subscription fees, advertisements (of many kinds including advertisements directly and indirectly derived from webcasting), sales of products and commissions from third party sales, software fees and sales of data. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 12–17. But the Copyright Royalty Judges are not persuaded that all the elements of the SoundExchange definition of revenue have been shown, in every instance, to be related to the use of the rights provided to licensees.[12] For example, there is some evidence presented by the Radio Broadcasters that on-air talent, programming director contributions and marketing skills impact the revenues of simulcasting webcasters. Radio Broadcasters PFF at ¶¶ 234, 237, 240. DiMA has proposed a much more restrictive definition of revenue as part of its rate proposal which it seeks to support through the testimony of its witness, Donald Fancher. On the whole, we find little to recommend Mr. Fancher's testimony, but the Copyright Royalty Judges do observe that even Mr. Fancher conceded that, on various points, the DiMA proposed definition was unclear. 6/22/06 Tr. 292:11–295:14; 308:1–309:1; 311:15–312:10; 315:17–317:14 (Fancher). The absence of persuasive evidence of what constitutes an unambiguous definition of revenue that properly relates the fee to the value of the rights being provided militates against reliance on a revenue-based metric.

Fourth, the use of a revenue-based metric gives rise to difficult questions for purposes of auditing and enforcement related to payment for the use of the license. The per-performance approach involves the relatively straightforward application of a rate to reports of use (recordkeeping) data that is already required to be produced by the Services. See 37 CFR part 370. While audit and enforcement issues may arise even with a pure usage metric, the alternative use of a revenue-based metric will give rise to additional, different issues of interpretation and controversy related to how revenues are defined or allocated. See, for example, Radio Broadcasters PFF at ¶ 258 and 7/31/06 Tr. 78:3–11, 79:1–13 (Parsons). In other words, the introduction of multiple payment systems will augment

[9] Indeed, since none of the small commercial webcasters participating in this proceeding provided helpful evidence about what demarcates a ''small'' commercial webcaster from other webcasters at any given point in time, any determination that a revenue-based metric was somehow uniquely applicable to small commercial webcasters would be speculative.

[10] Dr. Erik Brynjolfsson is similarly of the opinion that ''the rates paid by a given company should take into account that different companies use different amounts of music.'' 11/21/06 Tr. 251:2–18 (Brynjolfsson).

[11] This is illustrated in the SoundExchange rate proposal where an additional adjustment is made to the proposed revenue rate where services conform to a definition of ''non-music services'' as measured by the listening time of end users. By contrast, in the same rate proposal no such adjustment needs to be made to the proposed usage rate for the same services. The added information necessary for the adjustment as well as the process of adjustment to the revenue-based metric clearly would raise the transaction costs of implementing a revenue rate structure as compared to the usage-based metric. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 11–12.

[12] Moreover, the mere process of measuring such an expansive array of revenues must necessarily raise transaction costs for the parties.

the transactions costs imposed on the parties.

Fifth, the way that the contending parties, in particular SoundExchange and DiMA, suggest using a revenue-based metric in their rate proposals does not square with the basic notion agreed to by their respective experts (Dr. Brynjolfsson for SoundExchange and Dr. Jaffe for DiMA) that the more the rights being licensed are used, the more payments should increase in direct proportion to usage. See supra at Section IV.B.1. SoundExchange seeks to use the revenue-based metric to insure that it will share in any revenue produced by the Services that is greater than what it would receive based on a usage rate coupled with actual usage. Pelcovits WDT at 28. This could result in a situation where the Services would be forced to share revenues that are not attributable to music use, but rather to other creative or managerial inputs. DiMA, on the other hand, seeks to employ a revenue-based metric to protect against the failure of revenues produced by the Services (particularly as they pursue a shift to advertising-supported business models) to rise to the level necessary to pay for music use based on actual usage. Winston WDT at 10. This could result in a situation in which copyright owners are forced to allow extensive use of their property without being adequately compensated due to factors unrelated to music use such as a dearth of managerial acumen at one or more Services. The similar potentiality that webcasters might generate little revenue and, under a revenue-based metric, produce a situation where copyright owners receive little compensation for the extensive use of their property was a concern that animated the Librarian to approve a per performance metric rather than providing for a revenue-based payment option in Webcaster I. 67 FR 45249 (July 8, 2002).

For all of the above reasons, the Copyright Royalty Judges conclude that evidence in the record weighs in favor of a per-performance usage fee structure for Commercial Webcasters. This does not mean that some revenue-based metric could not be successfully developed as a proxy for the usage-based metric at some time in the future by the parties if the problems noted above were remedied. It does mean that the parties to this proceeding have not overcome these problems in the context of the proposals they have offered in this proceeding.[13]

A further consequence of the Copyright Royalty Judges rejecting the revenue-based metric as a proxy for a usage-based metric is to eliminate the need for a rate structure formulated as a ''greater of'' or ''lesser of'' comparison between per performance metrics and alternative revenue-based metrics.[14] Therefore, the Copyright Royalty Judges determine that a per-performance rate structure will be utilized for eligible nonsubscription transmission services, new subscription services and bundled services and where such services are commercial Services.

2. Noncommercial Webcasters

The Copyright Royalty Judges also find that a revenue-based metric is not a good proxy for a usage-based metric as applied to noncommercial webcasters in the non-interactive webcasting marketplace because, in addition to suffering from the same shortcomings discussed supra at Section IV.B.1. in the context of the Commercial Webcasters,[15] no evidence of negotiated agreements applying a revenue-based metric to Noncommercial Webcasters has been presented by any of the parties.

Only one party in this proceeding, SoundExchange, proposes that Noncommercial Webcasters should be subject to a rate structure incorporating a revenue-based metric as one alternative means of payment. SoundExchange specifically proposes that Noncommercial Webcasters pay according to the same structure and rates applicable to Commercial Webcasters, previously summarized supra at Section IV.B.1.

The Noncommercial Webcasters propose a variety of rates that are (or could be read as) per station flat rates. For example, NPR proposes a flat fee of $80,000 per annum, with successive years after the first year increased by a cost-of-living adjustment as determined by the change in the CPI. NPR proposes that this flat fee cover all NPR (798) and CPB-qualified stations (estimated at 100 or 200). Stern WDT at 13; 6/27/06 Tr. 154:18–155:18 (Stern).

The NRBNMLC proposes that non-commercial, non-NPR music stations pay a flat annual fee consisting of the lesser of (a) $200 per Internet simulcast and up to two associated side channels or (b) $500 per group of up to five Internet simulcasts and up to two Internet-only side channels per simulcast. The NRBNMLC further proposes that for news, talk, business, teaching/talk, or sports stations the aforementioned annual fee alternatives drop to $100 and $250 respectively. Mixed format stations would pay a pro rata share of these annual fees based on the demonstrated music-talk programming breakdown. Finally, NRBNMLC proposes that all five years of such fees covering the 2006–2010 license term be paid in one lump sum at the beginning of the term, except that a broadcaster that stops streaming before the end of the term would be entitled to a pro rata refund.[16] NRBNMLC Fee Proposal August 1, 2006.

IBS' amended rate proposal seeks a $100 annual rate for large college stations and a $25 annual rate for

[13] While both SoundExchange and DiMA have pointed to a number of agreements covering music rights that embody an alternative revenue-based metric, they have not shown: (1) Whether those agreements have overcome these problems or, (2) if so, how those agreements have overcome these problems or, (3) most importantly, how their proposed rate structures embody comparable mechanisms for overcoming these problems. Nor have they demonstrated whether these other agreements have been negotiated with a revenue-based option in the context of comparable circumstances-for example, an agreement negotiated with a revenue-based alternative because of an inability of some services to account for performances would not be comparable to the circumstances at hand because of our recordkeeping requirements at 37 CFR part 370.

[14] In addition, while SoundExchange proposes a third alternative—a per subscription minimum dollar amount—to be applied to new subscription services, the Copyright Royalty Judges do not find the basis for this alternative structure to be supported by persuasive evidence. SoundExchange cannot be proposing this per subscription alternative because of a lack of music usage data from subscription services, because the per subscription alternative itself requires such usage data in order to make a pro rata distribution of the per subscription minimum to the record companies. See Pelcovits WDT at 22. Nor does SoundExchange present persuasive evidence that the availability of this per subscription alternative is necessary because it is easier to administer and thus will reduce transaction costs. Indeed, although SoundExchange makes it an alternative to the per-performance fee in its proposed structure, SoundExchange presents its purpose as equivalent to the function served by the per-performance fee in its proposed fee structure. See Pelcovits WDT at 28–29. Moreover, SoundExchange's own expert economist, Dr. Brynjolfsson, further notes that in cases where webcasters ''monetize'' the value of the sound recording license through subscriptions or advertising revenue, ''counting the number of plays is a good proxy'' for that value. 5/18/06 Tr. 116:9–117:14 (Brynjolfsson). For all these reasons, the Copyright Royalty Judges decline to establish such a duplicative structure.

[15] Indeed, the use of a revenue-based metric in connection with Noncommercial Webcasters may further exacerbate transactions costs where defining of revenue, accounting for revenue and auditing of such accounts involve different concepts for the noncommercial, non-profit entities that populate this marketplace as compared to the accounting concepts and approaches applicable to commercial entities. For example, NPR derives significant amounts of its revenues from several sources not typically found as a source of commercial service revenue, such as underwriting, donations, public funds and the NPR Foundation. NPR PFF at ¶ 18.

[16] NRBNMLC also proposes a decrease in its annual fees ''to match the per station fees of NPR if the NPR station fees are lower than the above-stated fees.'' NRBNMLC Fee Proposal August 1, 2006.

smaller college stations.[17] IBS Clarification of Common Rate Proposal (August 10, 2006).[18] CBI proposed a flat annual fee of $175 for educational stations. CBI Amended Introductory Statement at 6.

For the reasons discussed infra at Section IV.C.2.a., the Copyright Royalty Judges determine that Commercial Webcasters and certain Noncommercial Webcasters represent two different segments of the marketplace. In contrast to the general commercial marketplace, agreements produced by the parties in this proceeding covering noncommercial services typically structured payments as flat fees. See, for example, SERV–D–X 157. Furthermore, no evidence was presented by the parties that could be used in a precise way to convert such flat annual fees into a reliable per-performance metric. Consequently, only a per station metric could be ascertained from such flat fees.

Flat annual fees do not present the complexity, measurement difficulties, accounting and enforcement issues presented by revenue-based alternatives, and, as a result, do not increase transaction costs beyond what might be experienced under a usage-based fee structure. On the other hand, flat fees do permit increasing usage without increasing payment.

However, as noted infra at Section IV.C.2.a, the Copyright Royalty Judges have determined that in order to preserve the distinction between the commercial webcasters and certain noncommercial segments of the marketplace over the period of the license term, a cap on usage must be established for certain noncommercial webcasters.

In short, the Copyright Royalty Judges conclude that, on balance, the most appropriate rate structure for noncommercial services that can be reliably derived from the record of evidence is an annual flat per-station rate structure for use by certain noncommercial webcasters up to a specified cap coupled with a per performance rate for use by noncommercial services that exceed the cap.

C. The Section 114 Royalty Rates and Minimum Fees

1. Commercial Webcasters

a. The ''Willing Buyer/Willing Seller Standard''

As previously noted hereinabove, supra at Section IV.A., the Copyright Act requires that the Copyright Royalty Judges establish rates for the section 114 performance license that ''most clearly'' represent those ''that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' Both the copyright owners and the commercial services agree that the willing buyer/willing seller standard should be applied by the Copyright Royalty Judges in determining the rates for the section 114 license and both the copyright owners and the commercial services agree that those rates should reflect the rates that would prevail in a hypothetical marketplace that was not constrained by a statutory license. Finally, both copyright owners and commercial services agree that the best approach to determining what rates would apply in such a hypothetical marketplace is to look to comparable marketplace agreements as ''benchmarks'' indicative of the prices to which willing buyers and willing sellers in this marketplace would agree. SoundExchange PFF at ¶¶ 215–219; SoundExchange PCL at ¶¶ 4–27; DiMA and Radio Broadcasters JPFF at ¶¶ 75–80; DiMA and Radio Broadcasters JPCL at ¶¶ 28–9; DiMA PFF at ¶¶ 39–45; Radio Broadcasters PFF at ¶¶ 296–301; SBR Creative Media, Inc. PFF at ¶¶ 17; Small Commercial Webcasters PFF at ¶¶ 24–28.

However, the parties, to some extent, appear to disagree about the degree of competition among sellers required by law in the hypothetical marketplace, resulting in different definitions of the sellers in the hypothetical marketplace.[19] SoundExchange accuses the Services of seeking a marketplace characterized by perfect competition. DiMA and the Radio Broadcasters claim that SoundExchange is championing a marketplace characterized by monopoly power on the seller's side. SoundExchange PCL at ¶ 38; DiMA and Radio Broadcasters JPCL at ¶¶ 29, 36. We find that these extreme characterizations miss the mark.

The question of competition is not confined to an examination of the seller's side of the market alone. Rather, it is concerned with whether market prices can be unduly influenced by sellers' power or buyers' power in the market. This issue was addressed in Webcaster I. An effectively competitive market is one in which super-competitive prices or below-market prices cannot be extracted by sellers or buyers, because both bring ''comparable resources, sophistication and market power to the negotiating table.'' 67 FR 45245 (July 8, 2002). In other words, neither sellers nor buyers can be said to be ''willing'' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power.

Furthermore, we find that in the hypothetical marketplace that would exist in the absence of a statutory license constraint, the willing sellers are the record companies. Any cognizable entity smaller than the record companies makes little sense because, in such cases, the larger buyers among the Services would enjoy disproportionate market power resulting in below-market prices. At the same time, if the sellers' side of the market were characterized by so many sellers as to be consistent with perfect competition, the transaction costs to the buyers of the copyrights would likely be prohibitive.

Webcaster I made clear that ''the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies and the product consists of a blanket license for each record company which allows use of that record company's complete repertoire of sound recordings.'' 67 FR 45244 (July 8, 2002) (emphasis added). None of the parties has adduced persuasive evidence that this definition of sellers has been altered in the marketplace as a result of greater or lesser competition between these sellers since Webcaster I was issued. For example, no party provided any empirical evidence on the elasticity of the demand curve facing these firms in the market or, more importantly, whether it has changed since Webcaster I. Similarly, no party produced persuasive evidence that market share had changed substantially among the record companies in the hypothetical marketplace since Webcaster I.[20]

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[17] The IBS rates herein summarized were to be applicable only to noncommercial educational stations not covered by the annual lump sum payment proposed by NPR and CPB.

[18] IBS' original proposal consisted of a flat fee of $500 per year for music stations and $250 per year for non-music stations, with additional payments in the event that the webcaster exceeded 146,000 aggregate tuning hours in a month. Kass WDT at Ex. A.

[19] For example, at one extreme, if no competition exists on the seller's side of the market (i.e., the seller is a monopolist), then the degree of competition observed describes the number of sellers in the marketplace (i.e., there is a single seller in the marketplace).

[20] Dr. Jaffe presents some testimony implying anti-competitive market share differences and the potentially collusive use of ''most-favored-nations'' clauses in the interactive music service marketplace. See Jaffe WRT at 6–16. However, the Copyright Royalty Judges do not find Dr. Jaffe's testimony persuasive even with respect to this

Continued

As articulated in the Copyright Act, the ''willing buyer/willing seller standard'' encompasses consideration of economic, competitive and programming information presented by the parties, including (1) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords and (2) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. Because we adopt a benchmark approach to determining the rates, we agree with Webcaster I that such considerations ''would have already been factored into the negotiated price'' in the benchmark agreements. 67 FR 45244 (July 8, 2002). Therefore, such considerations have been reviewed by the Copyright Royalty Judges in our determination of the most appropriate benchmark from which to set rates. We have further reviewed the evidence bearing on these considerations to determine if the benchmark agreements require any further adjustment based on any evidence of differences between the benchmark market and the target hypothetical market. See infra at Section IV.C.1.c.

b. Benchmarks For Setting Market Rates

Notwithstanding their general agreement that a benchmark approach is the best way to setting rates in this hypothetical marketplace, the parties disagree about what constitutes the appropriate benchmark indicative of the prices to which willing buyers and willing sellers in this marketplace would agree. SoundExchange maintains that the most appropriate benchmark agreements, as analyzed by its expert economist, Dr. Michael Pelcovits, are those found in the market for interactive webcasting covering the digital performance of sound recordings. SoundExchange PFF at ¶ 216. On the other hand, DiMA, Radio Broadcasters and Small Commercial Webcasters argue that the most appropriate benchmarks are agreements between the performing rights organizations (especially, ASCAP and BMI) and webcasters covering the digital public performance of musical works. DiMA PFF at ¶¶ 39–45; Radio Broadcasters PFF at ¶ 297; Small Commercial Webcasters PFF at ¶¶ 24–26. SBR Creative Media, Inc. claims analog over-the-air broadcast music radio as its benchmark, with reference to musical composition royalties paid by such broadcasters to the performing rights organizations (''PROs''). SBR Creative Media, Inc. Rahn WDT at 11.

We find, based on the available evidence before us, that the most appropriate benchmark agreements are those reviewed by Dr. Pelcovits in the market for interactive webcasting covering the digital performance of sound recordings.

i. The Interactive Webcasting Market Benchmark

The interactive webcasting market is a benchmark with characteristics reasonably similar to non-interactive webcasting, particularly after Dr. Pelcovits' final adjustment for the difference in interactivity. Both markets have similar buyers and sellers and a similar set of rights to be licensed (a blanket license in sound recordings). Both markets are input markets and demand for these inputs is driven by or derived from the ultimate consumer markets in which these inputs are put to use. In these ultimate consumer markets, music is delivered to consumers in a similar fashion, except that, as the names suggest, in the interactive case the choice of music that is delivered is usually influenced by the ultimate consumer, while in the non-interactive case the consumer usually plays a more passive role. Pelcovits WDT at 5–15. But this difference is accounted for in Dr. Pelcovits' analysis. In order to make the benchmark interactive market more comparable to the non-interactive market, Dr. Pelcovits adjusts the benchmark by the added value associated with the interactivity characteristic. Pelcovits WDT at 37–41. In short, the Copyright Royalty Judges find the Pelcovits benchmark to be of the comparable type that the Copyright Act invites us to consider. 17 U.S.C. 114(f)(2)(B) (''In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).'').

ii. SoundExchange's Proposed Corroborative Evidence

SoundExchange offers additional relevant evidence from the marketplace for other types of digital music services to corroborate Dr. Pelcovits' analysis by showing that, for many types of music services, a substantial portion of revenue is paid to sound recording copyright owners above the current statutory rate, just as it would be under the rate proposal that Dr. Pelcovits' analysis seeks to support. See, for example, summary chart of Universal Music Group agreements covering various digital music marketplaces at SoundExchange PFF at ¶ 338. We find these additional voluntary agreements covering such digital services as clip licenses, permanent audio downloads, etc. of some general corroborative value. These data show that, in many cases, the price paid by buyers for the rights to utilize a sound recording in various ways is as much as or higher than the rate proposed by Dr. Pelcovits as a result of his benchmark analysis.[21] This shows that the prevailing rates in these other markets do not appear to undermine his analysis—some indication of general reasonableness.

At the same time, SoundExchange offered further purportedly corroborative testimony by its economic expert, Dr. Brynjolfsson, which seeks to support its rate proposal based on an analysis of costs and revenues related to webcasting and of the ''surplus'' that would be generated over the course of the license period. Dr. Brynjolfsson testified that one approach to determining the price a seller would obtain in the market is to measure the ''surplus'' that would be generated when the seller's input is added to the buyer's service and sold to the public, and then to divide that ''surplus'' between the buyer and the seller. In order to make the division, it is necessary to determine the revenue that would be generated by the retail sale of the service and the service provider's other costs of providing the service (i.e., costs other than expenditures on the input sought to be valued). This requires certain information about the buyer, the seller and the marketplace to determine how the ''surplus'' would be divided. We find that the Brynjolfsson analysis relies on unsupported assumptions about market behavior and how negotiations take place in obtaining his results. For example, Dr. Brynjolfsson makes a questionable assumption that conditions in the real world justify the use of a 75% licensor to 25% licensee ratio in bargaining power in his models for this market. 5/18/2006 Tr. 120:1–124–3 (Brynjolfsson). No evidence from this market was provided to support this assumption. A different assumption of equal bargaining power would yield a different estimate of the proposed royalty rate. Similarly, other assumptions such as a 20% annual growth rate in the sell-out rates for

different marketplace. See infra at Section IV.C.1.b.iii..

[21] Although, little effort is made in the presentation of this corroborative data to reconcile differences that may exist between these markets and adjust for such differences.

banner ads and a 10% annual growth rate in the sell-out rate for in-stream advertising are not solidly supported. DiMA and Radio Broadcasters JPFF at ¶¶ 206, 208. Different assumptions for these numbers would clearly provide different bottom-line rate determinations in Dr. Brynjolfsson's models. Then too, Dr. Brynjolfsson inputs data into his models in a less than rigorous fashion. For example, he relies on Accustream data as a source for certain cost data without examining the methodology used by Accustream in compiling the data. 5/18/2006 Tr. 141:1–6 (Brynjolfsson). Dr. Brynjolfsson also uses such data to project future growth rates even though the source, Accustream, does not appear to discuss its methodology for collecting their data in the written report that supplies the data. SERV–D–X 37. Thus, if there is error in the original data stemming from the way it is collected, that error is compounded by applying growth rates to an erroneous base. Dr. Brynjolfsson also appears to have double-counted or miscounted certain types of revenue. DiMA and Radio Broadcasters JPFF at ¶¶ 215, 216. In short, questionable assumptions coupled with concerns over the reliability of the data used in the Brynjolfsson models cause us to regard the ultimate findings of these models as effectively undeterminable. For those reasons, the Copyright Royalty Judges find that the Brynjolfsson models do not provide additional corroboration of SoundExchange's benchmark analysis and the rates proposed.[22]

iii. Services' Objections to Pelcovits' Interactive Webcasting Market Benchmark Analysis Are Not Persuasive

The Services' objections to the Pelcovits benchmark analysis are not supported by persuasive evidence. Their major objections are reflected in Dr. Jaffe's written rebuttal testimony and boil down to two: (1) The claim that this benchmark market is not adequately competitive and (2) certain alleged methodological flaws in the Pelcovits approach. Jaffe WRT at 4–24.

As we have indicated hereinabove, supra at Section IV.C.1.a., the law does not require a perfectly competitive target market if that is the thrust of Dr. Jaffe's objections; therefore, neither does it require a perfectly competitive benchmark market because that would not be comparable to circumstances in the target market. Indeed, Webcaster I emphasizes that buyers and sellers participate in a ''competitive'' market for purposes of the law when they have comparable resources and market power.[23] 67 FR 45245 (July 8, 2002).

On the other hand, if the thrust of Dr. Jaffe's concerns are that the benchmark market is not sufficiently competitive to be similar to the competitive circumstances that prevail in the target hypothetical market, we find that the evidence does not support such a view. On the contrary, the evidence establishes that the benchmark market is sufficiently similar to the target hypothetical market to merit comparison. There are multiple sellers and buyers in each market—indeed many are the same buyers and sellers. Pelcovits WDT at 12–13. In other words, the weight of the evidence supports the Pelcovits benchmark analysis.

Dr. Jaffe's claim that buyers in the market for interactive webcasting face a different seller than the record companies because they need the portfolios of the four major record companies in order to provide a service to consumers is largely unsubstantiated.[24] Dr. Jaffe himself concedes the possibility for competition among the record companies for market share in the interactive market. SoundExchange PFF at ¶¶ 304–305.

At the same time, Dr. Jaffe's contention that the interactive webcasting benchmark market is highly concentrated on the seller's side is not supported by any evidence of a super-competitive impact on prices in the benchmark market. Further undermining his contention is Dr. Jaffe's own admission that market concentration on one side of the market (i.e., among sellers) need not necessarily result in an outcome that looks markedly different from a competitive outcome so long as the buyers in the same market have comparable market power. SoundExchange PFF at ¶ 196.

Nor does Dr. Jaffe provide any persuasive evidence to support a collusion allegation among the sellers in the interactive webcasting benchmark market. SoundExchange PFF at ¶ 312. And he fails to substantiate his claim that the presence of so-called most favored nations (''MFN'') clauses in certain agreements in the interactive webcasting market is suggestive of anti-competitive behavior. MFN clauses are not automatically indicative of tacit collusion—they may simply reflect the need for price flexibility in the face of uncertainty in long-term contracts.[25]

In short, Dr. Jaffe's concerns that the benchmark market is not sufficiently competitive to be similar to the competitive circumstances that prevail in the target hypothetical market amount to little more than the theoretical speculations of an academic offering a quick outline of possible criticisms without carefully considering the applicable facts or alternative explanations. We find that the available evidence does not support such a view.

Apart from his concerns about the competitive comparability of the interactive webcasting market benchmark to the hypothetical target market, Dr. Jaffe also raises methodological criticisms of the projected rate results obtained by Dr. Pelcovits from the latter's use of interactive webcasting as a benchmark. While raising interesting potential issues, Dr. Jaffe's critique fails in its search for persuasive evidence. For example, Dr. Jaffe complains that the interactivity adjustment made by Dr. Pelcovits is based on incorrect and internally inconsistent assumptions—i.e., the assumption that ''elasticity at market equilibrium is the same for interactive services and non-interactive services.'' Jaffe WRT at 17. First, it should be noted that even if Dr. Jaffe's complaint were supported by the record, it would not eliminate the interactive webcasting market as an appropriate benchmark. As Dr. Pelcovits correctly notes, ''if demand elasticity were to differ significantly between the two markets, it could increase the copyright fee or decrease it.'' Pelcovits WRT at 36 n.14. But we are not faced with that difficulty here because the available evidence tends to support Dr. Pelcovits' assumption that demand elasticities were likely to be very close in the relevant range of the demand curves. SoundExchange RFF at ¶¶ 117–118; Pelcovits WRT at 25–27.

[22] We do not intend to imply that all of the evidence offered by Dr. Brynjolfsson through his testimony is without value; rather, we simply find that his two formal models taken as a whole suffer from significant defects for the purposes at hand.

[23] In other words, a ''competitive'' price could be deemed to have been set in a marketplace where sellers and buyers had roughly equal bargaining power, because the resulting price would be much closer to the perfectly competitive price than to a price determined in circumstances where the sellers exercised pure monopoly power or the buyers exercised pure monopsony power. That is, counterveiling power has the effect of yielding a more competitive result than does the absence of such counterveiling power.

[24] Additionally, there was testimony that directly contradicts any suggested generalization that the repertoires of all four majors are necessary as a prerequisite prior to undertaking the operation of a consumer music service in the various digital music service markets. For example, Mr. Roback testified that Yahoo! was able to operate its custom radio channels without Universal Music for two years, even though Universal may account for nearly one-third of the market in terms of repertoire. 11/9/06 Tr. 17:13–21 (Roback).

[25] At the same time, it should be noted that Dr. Pelcovits did review the MFN clauses in the agreements in question and concluded they were not anti-competitive or collusive. 5/15/06 Tr. 207:5–16 (Pelcovits).

Dr. Jaffe also contends that Dr. Pelcovits improperly extrapolates fees for non-subscription or ad-supported services from a model based entirely on subscription services because subscription services only account for a small percentage of non-interactive services. Jaffe WRT at 22–24. He says, without empirical support, that this small fraction is not representative of all non-interactive listeners. Jaffe WRT at 22–24. The implication is that ad-supported services are the predominant business model now for non-interactive webcasting and that ad-supported services would necessarily pay less than subscription services to use the same music in their non-interactive services because their advertising revenues have not yet grown to the point where ad-supported services are more lucrative on a per-listener hour basis. However, this criticism, besides providing no information on the degree of substitution by consumers between the subscription and non-subscription options, fails to take into account any improvement in ad-supported revenues over the term of this licensing period. SoundExchange PFF at ¶¶ 320–321, 323–324. Therefore, to the extent that ad-supported revenues may not yet have equalized subscription revenues on a per-listener hour basis but are expected to grow over the term of this applicable license, SoundExchange's proposed phase-in of the per-performance rates to the level indicated by the benchmark analysis represents a wholly reasonable approach to dealing with this potential issue.

Finally, Dr. Jaffe contends that one or more of the key data items in Dr. Pelcovits' rate analysis must be incorrect because their strict application would produce a negative royalty rate. Jaffe WRT at 20–22. But this criticism ignores the profits earned by interactive services, or, alternatively, assumes without basis that the same dollar amount of profit should be earned by services in the non-interactive market.[26] Jaffe WRT at 20–21; SoundExchange RFF at ¶¶ 122–123. We find no merit in this flawed critique.

In sum, the Services' objections to the Pelcovits benchmark analysis are not persuasive. This does not mean that Dr. Pelcovits' analysis and presentation is without any warts. For example, Dr. Pelcovits failed to fully account in his written statement for the reasoning behind his choice of variables and the functional form used in his hedonic model to isolate the value of interactivity to consumers of online music services. But for the fact that he subsequently provided most of that information orally in response to questions from the Copyright Royalty Judges, 5/16/2006 Tr. 267:16–276:14 (Pelcovits), such an omission may have led to more serious questions about this aspect of his model. And a more comprehensive study of the relative price elasticities of demand in the interactive and non-interactive webcasting markets would have been a welcome addition to the available evidence on this point, even though the available evidence weighed in Dr. Pelcovits' favor. On the other hand, the Copyright Royalty Judges find that these critiques are not sufficient to undermine the basic thrust and conclusions of the Pelcovits benchmark analysis. Moreover, as noted supra at Section IV.C.1.b.ii., his analysis benefits from some general corroborative evidence.

iv. A Flawed Musical Works Benchmark Offered by Dr. Jaffe

We have also considered and rejected Dr. Jaffe's offer of agreements from the musical works marketplace as a benchmark. This benchmark analysis appears to be little more than a hasty attempt to revive and rehabilitate some similar arguments that failed to prevail in Webcaster I.

The Copyright Royalty Judges find that the benchmark analysis offered by Dr. Jaffe is fatally flawed for several reasons. First, Dr. Jaffe's benchmark analysis is based on a marketplace in which, while the buyers may be the same as in the target hypothetical marketplace, the sellers are different and they are selling different rights. Therefore, contrary to Dr. Jaffe's expectations that the prices paid for the rights in each respective market dealing with similar rights should be the same, substantial empirical evidence shows that sound recording rights are paid multiple times the amounts paid for musical works rights in the markets for ring tones, digital downloads, music videos and clip samples. Pelcovits WRT at 4; Eisenberg WRT at 7–14.

Second, the Copyright Royalty Judges find that Dr. Jaffe's equivalence argument also fails because of his reliance on the assumption of "sunk costs" as a justification. This assumption must be rejected on both theoretical and empirical grounds. Dr. Jaffe claims that, while the sellers in his benchmark market are not the same, they come to the negotiation from a similar position because in both his proposed benchmark market and in the hypothetical target market, the costs of producing the underlying intellectual property are "sunk." Jaffe WDT at 23. According to Dr. Jaffe, this means "there is no incremental cost imposed on either the musical work or sound recording by virtue of making the underlying intellectual property available for digital performance." [27] Jaffe WDT at 24. As a matter of theory, Dr. Jaffe's proposed benchmark analysis ignores the long-established pattern of investment in the recording industry. Thus, not only are there some initial sunk investments, but there is a requirement of repeated substantial outlays year after year or, in other words, the repeated "sinking" of funds. If sellers are faced with the prospect of not recovering such sunk costs, then the incentive to produce such sound recordings is diminished. And the record is replete with evidence of a substantially greater investment of this type in sound recordings as compared to musical works. SoundExchange PFF at ¶¶ 449–461. Furthermore, recording companies will necessarily make future investment decisions based on their best estimates of the revenue sources available to them in the future from all sources including revenue streams derived from the non-interactive webcasting of sound recordings.[28] SoundExchange PFF at ¶ 478; Brynjolfsson WRT at 6–8. Thus, to suggest that they ignore such costs in their approach to pricing makes little sense. It would be tantamount to suggesting that services such as Yahoo! or AOL or Microsoft would never consider the cost of their research and development programs when pricing their products.[29] In short, we decline to accept Dr. Jaffe's "sunk costs" justification for his proposed benchmark.

[26] Dr. Pelcovits also noted that a negative royalty rate would be unlikely to occur in a dynamically adjusting market. Pelcovits WRT at 30.

[27] Curiously, at this point in his analysis Dr. Jaffe appears to back away from his insistence on a "competitive" market because to maintain that position would lead to a logically inconsistent result in his benchmark analysis. Since, in a perfectly competitive market situation, price at equilibrium is equal to marginal cost, then, logically, the price for the rights in question could be no higher than zero. Therefore, Dr. Jaffe opts for a necessarily different undefined market structure by saying that here, even though the price should be zero, the resulting royalty would be some greater amount apparently determined by the relative bargaining power of the buyers and sellers. Jaffe WDT at 26. If this benchmark market results in a price that is higher than what is expected under perfectly competitive conditions, then clearly the sellers must be exercising some degree of market power.

[28] In other words, this is not just a static process concerned with recouping past investment costs, but a dynamic economic process concerned with obtaining greater resources for future creative efforts.

[29] Indeed, even Dr. Jaffe concedes that the costs of sound recordings not yet created are not sunk. 6/28/06 Tr. 99:7–101–7 (Jaffe).

Third, there is ample empirical evidence in the record from other marketplaces to controvert Dr. Jaffe's premise that the market for sound recordings and the market for musical works are necessarily equivalent. SoundExchange PFF at ¶¶ 483–495.

For all these reasons, the Copyright Royalty Judges find that Dr. Jaffe's proffered benchmark is not useful to our determination of an appropriate benchmark from which to derive applicable rates. We, therefore, adhere to the Pelcovits benchmark analysis as a superior tool for that purpose.

v. Other Proposed Benchmarks Rejected

One other benchmark was proposed in this proceeding by a commercial party. SBR Creative Media, Inc. claims analog over-the-air broadcast music radio as its benchmark, with reference to musical composition royalties paid by such broadcasters to the performing rights organizations. SBR Creative Media, Inc. Rahn WDT at 11. We find that this is virtually the same benchmark as that proposed by Dr. Jaffe on behalf of the Services and rejected in Webcaster I. 67 FR 45246–7 (July 8, 2002). SBR does nothing to remedy the deficiencies from which this proposed benchmark was shown to suffer in Webcaster I. Furthermore, this proposed benchmark suffers from the same deficiencies we find fatal with respect to Dr. Jaffe's proposed benchmark discussed supra at Section IV.C.1.b.iv. For all these reasons, the Copyright Royalty Judges find that the SBR Creative Media, Inc. proffered benchmark is not useful to our determination of an appropriate benchmark from which to derive applicable rates and, therefore, adhere to the Pelcovits benchmark analysis as a superior tool for that purpose.

c. Conclusion: The Interactive Webcasting Market Benchmark Provides the Best Benchmark for Setting Commercial Rates Without Further Adjustment for Either Substitution or Promotion Factors or the Relative Contributions Made by the Copyright Owners and Webcasting Services in Bringing the Copyrighted Works and the Services to the Public

As discussed supra at Section IV.C.1.a., the ''willing buyer/willing seller standard'' in the Copyright Act encompasses consideration of economic, competitive and programming information presented by the parties, including (1) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords and (2) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. Because we adopt a benchmark approach to determining the rates, we agree with Webcaster I that such considerations ''would have already been factored into the negotiated price'' in the benchmark agreements. 67 FR 45244 (July 8, 2002). Therefore, such considerations have been reviewed by the Copyright Royalty Judges in our determination of the most appropriate benchmark from which to set rates. Nevertheless, we have also further reviewed the evidence bearing on these considerations to determine if the benchmark agreements require any further adjustment based on any evidence of differences between the benchmark market and the target hypothetical market.

We find that no further adjustment is necessary to the Pelcovits benchmark analysis to account for any of these considerations. Dr. Pelcovits explicitly examined the promotion and substitution issues and ultimately found no empirical evidence to suggest a net substitution/promotion difference between the interactive and the non-interactive marketplaces. Pelcovits WRT at 17–27. Because only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence of such a difference obviates the need for such further adjustment. Furthermore, even if the absolute levels of promotion/substitution in the non-interactive market alone were somehow relevant, as the Services appear to suggest, we find that the Services presented no acceptable empirical basis for quantifying promotion/substitution for purposes of adjusting rates in that market.[30]

Similarly, the parties' evidence with respect to the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public does not persuade us that any further adjustment needs to be made to the Pelcovits benchmark to account for quantifiable differences related to these factors. We find that such factors are implicitly accounted for in the rates that result from negotiations between the parties in the benchmark marketplace. Moreover, because only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence of such a difference obviates the need for such further adjustment.

Finally, the Radio Broadcasters seek to differentiate their simulcasting operations from the operations of other commercial webcasters and, thereby, obtain a different, lower royalty rate. The record before us fails to persuade us that these simulcasters operate in a submarket separate from and non-competitive with other commercial webcasters. Indeed, there is substantial evidence to the contrary in the record indicating that commercial webcasters such as those represented by DiMA in this proceeding and simulcasters such as those represented by Radio Broadcasters in this proceeding regard each other as competitors in the marketplace. SoundExchange PFF at ¶¶ 1107–1110. Therefore, the Copyright Royalty Judges do not find a basis for setting a different, lower rate for these simulcasters as compared to other commercial webcasters. Webcaster I, at 67 FR 45255, 45272 (July 8, 2002), reached a similar conclusion in finding no basis for treating these simulcasters any differently with respect to the per performance commercial rate, and we find no facts to persuade us of a change in circumstance since then.

d. Rates and Minimum Fees Applicable to Commercial Webcasters

i. Determination of Per Play Rates for Commercial Webcasters

Because we find that the interactive webcasting market is a benchmark with characteristics reasonably similar to non-interactive webcasting, particularly after Dr. Pelcovits' final adjustment for the difference in interactivity, the Copyright Royalty Judges find that this benchmark supports the explicit annual usage rates[31] proposed by

[30] For example, the Radio Broadcasters strenuously assert that over-the-air-radio is promotional and therefore that simulcasting must be promotional. But they present no persuasive evidence that would be useful for quantifying the magnitude of this asserted effect either for over-the-air-radio or for non-interactive webcasting and deriving a method for translating such magnitudes into a rate adjustment. Indeed, the quality of evidence presented by the Services on this issue consisted largely of assertions, recollections of conversations clearly evidencing common ''puffing'' in a business context, or anecdotes recounting subjective opinions. On a similar record, Webcaster I found no basis for a downward adjustment of the simulcast rate to account for the promotional value associated with over-the-air broadcasts because the net impact was indeterminate. 67 FR 45255 (July 8, 2002).

[31] For the reasons indicated supra at Section IV.B.1, only usage rates are determined.

SoundExchange. Therefore, we find that the per play rate applicable to each year of the license for Commercial Webcasters [32] is as follows: a per play rate of $.0008 for 2006, a per play rate of $.0011 for 2007, a per play rate of $.0014 for 2008, a per play rate of $.0018 for 2009 and a per play rate of $.0019 for 2010.[33]

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

Note: See footnote 33

We find no basis for making further adjustments to this usage rate to reflect inflation [34] or bundling.[35]

We are persuaded by the evidence in the record to apply these usage rates without any further adjustment for wireless transmission to all Commercial Webcasters. While SoundExchange's proposed rates included a 25% premium for ''wireless services,'' the Copyright Royalty Judges find no persuasive basis in the record for such a so-called ''mobility premium.'' The proposed wireless premium was not grounded on the Pelcovits benchmark analysis that underlies SoundExchange's primary rate proposal. Indeed, Dr. Pelcovits specifically declined to do so because of the absence of any data on mobile interactive services. Pelcovits WDT at 60–61. The alternative data offered by Dr. Pelcovits on this issue is not persuasive. Most of the relatively limited data he offers fails to address salient differences between the markets and products represented by that data and the non-interactive webcasting market and its product offerings. In addition, SoundExchange fails to provide any persuasive evidence that a music service delivered to a tethered laptop computer via the Internet is valued differently in the marketplace than the same music service delivered to a laptop computer via the Internet over private or public wireless Internet networks using Wireless Fidelity (''WiFi'') technology. SoundExchange's proposal to exempt wireless transmissions over ''personal, short range residential networks'' from its proposed wireless premium also underlines its own recognition of the absence of a difference. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 7. Therefore, on the record before us, we do not find a sufficient basis to support a proposed premium for the wireless transmission of non-interactive webcasts.[36]

ii. Determination of Minimum Fee for Commercial Webcasters

Under 17 U.S.C. 114(f)(2)(B), the Copyright Royalty Judges are directed to set a minimum fee for each type of service. SoundExchange points out that the Webcaster I CARP noted that one purpose of the minimum fee was to ''protect against a situation in which a licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties'' and another purpose was ''to capture the intrinsic value of the licensee's access to the full blanket license, irrespective of whether the service actually transmits any performances.'' SoundExchange PFF at ¶ 1349. We find no evidence in the record that establishes an amount for such an ''intrinsic value'' and, therefore, focus on the administrative cost issue. Here again, we are provided with little evidence of the administrative cost per licensee,[37] especially for a webcaster who may be generating few royalties. The benchmark marketplace agreements generally provide for substantial advance annual minimum fees that are non-refundable, but recoupable against future royalties. As compared to these amounts, SoundExchange's proposal of an annual non-refundable, but recoupable $500 minimum per channel or station payable in advance is a substantially smaller amount. SoundExchange Revised Rate Proposal (filed September 29, 2006). Even though its proposed minimum fee is low, SoundExchange must anticipate that it will cover its administrative costs even in the absence of royalties. Therefore, we find SoundExchange's minimum annual fee proposal is reasonable and

[32] Commercial Webcasters include such licensees who are eligible nonsubscription transmission services or new subscription services, irrespective of whether they transmit music in large part or in small part.

[33] The Judges recognize that a smooth transition from the prior fee regime to the new fee structure adopted by the Judges hereinabove may be aided by permitting the limited use of an ATH calculation option. Such a transition option enhances the ability of some Services to effectuate speedy payments and, in so doing, improves the ability of copyright owners to more quickly obtain monies due. In short, such a transition measure is reasonably calculated to facilitate a smooth, speedy transition to the new fee structure adopted hereinabove by the Judges. Therefore, the usage fee structure established in this Final Determination will continue use of an ATH option for timely payment of fees due for the years 2006 and 2007. See table near footnote 33 reference.

The following Aggregate Tuning Hours (ATH) usage rate calculation options will be available for the transition period of 2006 and 2007: Note: [See table for footnote 33 above] where ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

[34] We do not find that the benchmark supports an additional Consumer Price Index adjustment to the usage rate in 2010. No evidence has been submitted by SoundExchange to support this additional adjustment by what is, at this point in time, an indeterminate amount.

[35] We find that a usage rate is more directly reflective of the rights being licensed than other alternative rate metrics. See supra at Section IV.B. Moreover, the evidence presented fails to persuade us that receiving a music service as part of a bundle of services necessarily results in a higher valuation of that music service by the consumer than if it had been delivered as a non-bundled service. For example, SoundExchange's claim for an uplifted rate for bundled services is supported by only one custom radio agreement addressing bundled services and that agreement is specifically identified by its expert, Dr. Pelcovits, as part of a class of agreements that are ''not a good benchmark.'' Pelcovits WRT at 35 n.43. Therefore, we find no sufficient basis upon which to determine a different usage rate for bundled services as compared to non-bundled services.

[36] We are also troubled by SoundExchange's proposal to apply the wireless premium even in cases where the service cannot ''distinguish between transmissions to wireless devices and fixed line devices.'' This proposal is not supported by any evidence that a presumption of ''wireless'' transmission ought to apply. To the contrary, SoundExchange's own witness, James Griffin admits that, at least in some cases, webcasters simply may not be able to distinguish between transmissions to wireless devices and fixed line devices. Griffin WDT at 32.

[37] At the same time, there is evidence that the royalty collection and distribution operations performed by SoundExchange consist of substantial work, such as processing payments and reports of use, matching information received from licensees with information on copyright owners and performers, undertaking related research and quality assurance work, allocating and distributing royalties and resolving errors or disputes. See Kessler WDT at 3–16.

applicable to Commercial Webcasters.[38] Moreover, since this flat dollar minimum fee is not adjusted over the term of the license to reflect the impact of inflation, this minimum fee is likely to have a declining financial impact on the costs of the Services over the term of the license. Therefore, we determine that a minimum fee of an annual non-refundable, but recoupable $500 minimum per channel or station [39] payable in advance is reasonable over the term of this license.

2. Noncommercial Webcasters

a. The Willing Buyer/Willing Seller Standard Revisited

As previously noted hereinabove, supra at Section IV.A., the Copyright Act requires that the Copyright Royalty Judges establish rates for the section 114 performance license that ''most clearly'' represent those ''that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' Both copyright owners and noncommercial services agree that the best approach to determining what rates would apply in such a hypothetical marketplace is to look to comparable marketplace agreements as ''benchmarks'' indicative of the prices to which willing buyers and willing sellers in this marketplace would agree. However, the copyright owners and the noncommercial services disagree on an appropriate benchmark.

The copyright owners insist there is no basis to apply a benchmark other than that used in the commercial market; and consequently, they maintain that the rates supported by the interactive benchmark analysis apply with equal force to Commercial and Noncommercial Webcasters. SoundExchange's Revised Rate Proposal (filed September 29, 2006). The Noncommercial Webcasters, on the other hand, maintain that they are distinguishable from commercial services and, as such, require a different, lower rate. In effect, they claim to be different buyers and, hence, a different benchmark should be consulted. Joint Noncommercial PFF [40] at ¶ 10; Joint Proposed Findings of IBS and WHRB at 9–15. The Noncommercial Webcasters propose lower rates, described supra at Section IV.B.2., based on several alternative benchmarks-(1) the musical works rates applicable to over-the-air broadcasting pursuant to section 118 of the Copyright Act and (2) rates loosely related to the 2001 NPR–SoundExchange agreement which covered streaming from 1998 to 2004 (SERV–D–X 157). Joint Noncommercial PFF at ¶ 35; NRBNMLC PFF at ¶ 52.

Based on the available evidence, we find that, up to a point, certain ''noncommercial'' webcasters may constitute a distinct segment of the non-interactive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for Commercial Webcasters. A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve. An example of a segmented market is a market for electricity with different prices for commercial users and residential users. In other words, price differentiation or price discrimination is a feature of such markets. The multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. By definition, if the commodity in question derives its demand from its ultimate use, then the marketplace can remain segmented only if buyers are unable to transfer the commodity easily among ultimate uses. Put another way, each type of ultimate use must be different.[41]

Certainly, there is a significant history of Noncommercial Webcasters such as NPR and the copyright owners reaching agreement on rates that were substantially lower than the applicable commercial rates over the corresponding period. See, for example, the 2001 NPR–SoundExchange agreement which covered streaming from 1998 to 2004 (SERV–D–X 157). And, even though SoundExchange offers no formal proposal exempting any Noncommercial Webcasters from its proposed commercial rates, its own economic expert suggests a continuation of differentiated rates where the service offered by such Noncommercial Webcasters does not appear to pose any threat of making serious inroads into the business of those services paying the commercial rate. Brynjolfsson WRT at 42. Dr. Brynjolfsson suggests a cap on listeners beyond which Noncommercial Webcasters would no longer enjoy the lower rate in order to reduce ''the chance that small noncommercial stations will cannibalize the webcasting market more generally'' and thereby adversely affect the value of the digital performance right in sound recordings. *Id.* SoundExchange does not disavow Dr. Brynjolfsson's testimony on this point, even citing it in its proposed findings of fact. In short, SoundExchange can itself envision circumstances under which a continuation of some regime of differentiated prices would continue.

The Copyright Royalty Judges also can envision such circumstances. But, as a matter of pure economic rationale based on the willing buyer/willing seller standard, those circumstances undoubtedly must include safeguards to assure that, as the submarket for noncommercial webcasters that can be distinguished from commercial webcasters evolves, it does not simply converge or overlap with the submarket

[38] Webcaster I found a $500 minimum annual fee per licensee to be reasonable in light of the CARP's reasoning that the RIAA would not have negotiated a minimum fee that failed to cover at least its administrative costs. 67 FR 45262–3 (July 8, 2002). In the agreement to push forward rates and terms in 2003, commercial webcasters and SoundExchange agreed that minimum annual fees would equal $2500, or $500 per channel or station, but in no event less than $500 per licensee. 37 CFR 262.3(d)(2). Again, it is reasonable to anticipate that SoundExchange would not have negotiated a minimum fee that failed to cover at least its administrative costs.

[39] This $500 minimum fee is applicable to each individual station and each individual channel, including each individual ''side channel'' maintained by broadcasters. ''Side channels'' are channels on the website of a broadcaster that transmit eligible transmissions that are not simultaneously transmitted over-the-air by the broadcaster. Thus, a broadcaster who transmits one simulcast over the Internet and also transmits an eligible transmission over one side channel is subject to a minimum fee of $500 for each respective transmission, for a total in this example of $1,000. In other words, the minimum fee is separately applicable to each side channel. We find no basis in the record for distinguishing between side channels and other stations or channels with respect to a minimum fee that reflects the costs of license administration. We have found, hereinabove, that SoundExchange's proposal of a $500 minimum fee for such administration is clearly reasonable. Further, such administration costs will align more clearly with per station or per channel reports of use where such reports of use are submitted in satisfaction of recordkeeping requirements.

[40] The ''Joint Noncommercial Proposed Findings of Fact and Conclusions of Law'' were submitted by National Public Radio, Corporation For Public Broadcasting-Qualified Stations, the National Religious Broadcasters Noncommercial Music License Committee (''NRBNMLC''), and Collegiate Broadcasters, Inc.

[41] See for example, Burkett, John P., Microeconomics: Optimization, Experiments and Behavior, (Oxford University Press, 2006) at 162 for an introductory microeconomic description of price discrimination. Typically, the submarket characterized by lesser price elasticity will exhibit a higher price. All the economists who testified in this proceeding for both the Services and the copyright owners generally agreed with this description. See, for example, 5/16/06 Tr. 222:19–223:5 (Pelcovits); 11/21/06 Tr. 14:20–15:11 (Brynjolfsson); 11/8/06 Tr. 63:4–64:8 (Jaffe); Picard WRT at 2–7, 11/13/06 Tr. 191:5–196:1 (Picard). For an introductory discussion of price discrimination in copyright markets, see Congressional Budget Office, Copyright Issues in Digital Media, August 2004 at 23–24 or Landes, William M. and Richard A. Posner, the Economic Structure of Intellectual Property Law, (Cambridge, MA: The Belnap Press of the Harvard University Press, 2003) at 374–78, 389–90.

for commercial webcasters and their indistinguishable noncommercial counterparts.

The Copyright Royalty Judges have reached this view after a careful consideration of the characteristics that help to delineate the noncommercial submarket, juxtaposed against evidence in the record that those characteristics may be changing for at least some members of the submarket. For example, the noncommercial broadcasters cite a myriad of characteristics that they claim set them apart from commercial broadcasters. Noncommercial licensees are non-profit organizations. Johnson WDT at ¶ 5; Papish WDT at ¶¶ 4, 12; Robedee WDT at ¶ 2; 6/27/06 Tr. 63:1–21 (Stern); 8/7/06 Tr. 13:11–17, 21:10–12 (Kass). The noncommercial webcasters' mission is to provide educational, cultural, religious and social programming not generally available on commercial venues. See, for example, Stern WDT at 4 and 8/1/06 Tr. 21:11–22:1 (Johnson). Noncommercial webcasters have different sources of funding than ad-supported commercial webcasters-such as listener donations, corporate underwriting or sponsorships, and university funds. Joint Noncommercial PFF at ¶ 20. The implication is that noncommercial webcasters do not compete with commercial webcasters. But as webcasting has developed, some of these traits have become blurred. Public and collegiate radio stations no longer necessarily face a limited geographic audience, but rather their music programming is geographically unbounded so that such stations may compete with commercial webcasters even ''worldwide.'' SoundExchange PFF at ¶¶ 1105, 1185. Some college radio stations use the Live365 service to stream their simulcasts, making them just another consumer choice available on Live365 together with numerous commercial stations. SoundExchange PFF at ¶ 1186. Commercial Webcasters view Noncommercial Webcasters as competition for an audience interested in listening to music. SoundExchange PFF at ¶ 1116. And some Noncommercial Webcasters, such as NPR, may view Commercial Webcasters as their competition for audience as well. SoundExchange PFF at ¶ 1170. Some noncommercial stations have adopted programming previously found on commercial stations for use on noncommercial side channels or expanding the use of side channels as music outlets. SoundExchange PFF at ¶¶ 1117, 1123. Music programming found on noncommercial stations competes with similar music programming found on commercial stations. SoundExchange PFF at ¶ 1122, SoundExchange RFF at ¶ 284. Sponsorships appear to monetize webcasting in a fashion similar to advertising. SoundExchange PFF at ¶¶ 1130, 1134, 1166. Some noncommercial stations use the functional equivalent of marketing materials that emphasize the size, income and demographics of their audience in much the same manner that commercial stations make their advertising sales pitches. SoundExchange PFF at ¶¶ 1135, 1142. In other words, as webcasting has evolved, some convergence between some noncommercial webcasters and commercial webcasters can be observed ultimately resulting in competition for audience. Brynjolfsson WRT at 40–41. To the extent such competition occurs, market segmentation breaks down, obviating the need for a separate lower royalty rate.

b. Proposed Benchmarks and Other Relevant Evidence

The copyright owners take the position that the same benchmark applies to the noncommercial and the commercial services in the marketplace. Consequently, they maintain that the rates supported by the interactive benchmark analysis discussed supra at Section IV.C.1.b.i. apply with equal force to Commercial and Noncommercial Webcasters. Because we have found that, up to a point, ''noncommercial'' webcasters, may constitute a segment of the non-interactive webcasting market that in a willing buyer-willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for Commercial Webcasters, we necessarily find that the benchmark proposed by the copyright owners is applicable to only some Noncommercial Webcasters (i.e., those that cannot be clearly distinguished from their commercial counterparts). In other words, the copyright owners' benchmark does not apply to those Noncommercial Webcasters that can be said to constitute a distinct submarket in the non-interactive marketplace. The interactive market benchmark analysis is based on agreements in which all of the services are Commercial Webcasters. There are no agreements that form part of that analysis that would adequately gauge what a Noncommercial Webcaster in a distinctly different submarket would be willing to pay as a willing buyer for the rights at issue in this proceeding.

The Noncommercial Webcasters offer several alternative benchmarks applicable to all noncommercial Services without distinction as well: (1) The musical works rates applicable to over-the-air broadcasting pursuant to section 118 of the Copyright Act and (2) rates loosely related to the 2001 NPR–SoundExchange agreement which covered streaming from 1998 to 2004 (SERV–D–X 157). We find neither of these approaches adequately deals with the segmented marketplace.

First, the Noncommercial Webcasters would apply the rates determined using their benchmarks to all noncommercial Services, irrespective of whether they were part of a submarket in the marketplace for non-interactive webcasting that was distinctly different from commercial non-interactive webcasting.

Second, even within a distinctly different submarket, the benchmarks proposed by the Noncommercial Webcasters suffer from serious flaws. For example, the musical works benchmark proposed by the Services is based on a very different marketplace characterized by different sellers who are selling different rights. Then too, as previously discussed, there is ample evidence in the record from other relevant marketplaces to controvert the underlying premise of this proposed benchmark that the market for sound recordings and the market for musical works are necessarily equivalent. SoundExchange PFF at ¶¶ 483–495. Similarly, the 2001 NPR–SoundExchange agreement covering streaming from 1998 to 2004 does not provide clear evidence of a per station rate that could be viewed as a proxy for one that a willing buyer and a willing seller would negotiate today—it provided for a lump sum amount to cover the entire 74-month term of the contract with no amount specified for different years, and there is nothing in the contract or the record to indicate the parties' expectations as to levels of streaming or the proper attribution of payments for any given year or how additional stations beyond the 410 covered by the agreement were to be handled. Moreover, the transformation of this proposed benchmark by the offering service, the NRBNMLC, into proposed rates adds further problems. In NRBNMLC PFF at ¶ 57, the entire lump sum payable under the 2001 NPR–SoundExchange agreement is divided by 798 stations to arrive at an estimated annual fee of less than $60 per station. But, as previously noted, the agreement in question covered only about half as many stations (410) and dividing the stated lump sum by 410 stations over the stated 74-month term of the agreement would yield a per station rate twice the amount calculated by NRBNMLC. Furthermore, NRBNMLC's calculation does not add any adjustment for the time value of money in the latter years of the contract[42] nor add any adjustment to account for the erosion in the purchasing power of the dollar since 2004.[43] Finally, none of the final rate proposals[44] of the Noncommercial Webcasters would cover the minimum annual fee determined for Commercial Webcasters.

In short, we find neither SoundExchange's proposals based on its benchmark nor the Noncommercial Webcasters' proposals based on their suggested benchmarks adequate to provide a basis for determining the rates to be applicable to that part of the noncommercial market for non-interactive webcasting that can be identified as a distinct submarket from the commercial market. However, we observe that certainly the bare minimum that such services should have to pay is the administrative cost of administering the license. There is no evidence in the record to suggest that the submarket in which a Noncommercial Webcaster may reside would yield a different administrative cost for SoundExchange as compared to the administrative costs associated with Commercial Webcasters and SoundExchange, notably, makes no distinction between webcasters with respect to the $500 minimum fee. Webcaster I affirmed the notion that all webcasters—all Noncommercial Webcasters as well as all Commercial Webcasters—should pay the same minimum fee for the same license. 67 FR 45259 (July 8, 2002). We also find no basis in the record for distinguishing between Commercial Webcasters and Noncommercial Webcasters with respect to the administrative cost of administering the license.[45] Therefore, we determine that a minimum fee of an annual non-refundable, but recoupable $500 minimum per channel or station[46] payable in advance is reasonable over the term of this license.

Because this minimum fee of $500 is meant to cover administrative costs, it does not address actual usage. Therefore, it would be reasonable to add at least the bare minimum suggested by the Services' proposals as payment for usage to the $500 minimum fee for administration. However, based on the available evidence, we find that past practice has been to treat the minimum fee as recoupable against usage charges. Therefore, we have no basis upon which to add a usage element that is not recoupable to the minimum fee for this distinctive submarket of noncommercial webcasters. Moreover, we note that this minimum fee corresponds to the $500 original fee proposal of IBS and, therefore, demonstrates that, at least for some webcasters in the relevant submarket, the $500 amount represented a ceiling beyond which they would not be willing buyers. Kass WDT at Exhibit A.

We turn next to the derivation of a cap to delineate the boundaries of the submarket for which the effective $500 flat fee rate will apply.

c. Cap To Delineate Submarket and Rates and Minimum Fees Applicable to the Various Noncommercial Webcasters

Because there is evidence in the record that some Noncommercial Webcasters typically have a listenership of less than 20 simultaneous listeners—see, for example 8/2/06 Tr. 137 (Robedee) and 8/2/06 Tr. 243 (Willer)—Dr. Brynjolfsson suggests a cap of 20 simultaneous listeners (or about 14,600 ATH[47] per month) as the boundary for the noncommercial webcasting submarket to be subject to a lower rate.[48] At this level of operation, such a small Noncommercial Webcaster could not be viewed as a serious competitor for commercial enterprises in the webcasting marketplace. We find Dr. Brynjolfsson's suggested line of demarcation too limiting. Size here is only a proxy that aims to capture the characteristics that delineate the noncommercial submarket. See our consideration of these characteristics supra at Section IV.C.2. And, there is evidence in the record that some larger Noncommercial Webcasters, such as the typical NPR station extant in 2004, may also be distinguished from Commercial Webcasters. Indeed, the evidence of convergence in the record appears to apply more clearly to the stations at the larger end of the range of NPR station size. See, for example, SoundExchange PFF at ¶ 1122, SoundExchange RFF at ¶ 284.

The 2001 NPR-SoundExchange agreement covered the typical NPR webcasting station at a rate substantially less than the rate that applied to Commercial Webcasters as of 2004. Based on the available evidence, the typical NPR station in 2004, then, would not have been treated as the functional equivalent of a commercial station. This is significant because the latest available data on what might constitute a typical NPR streaming station consists of a survey of NPR stations undertaken in 2004. See SoundExchange Trial Ex. 67 (NPR Digital Music Rights Station Survey, 2004). According to that survey, the NPR stations averaged 218 simultaneous streaming listeners per station (or the equivalent of 159,140 ATH per month). This average (218) or a lesser number of listeners was exhibited by 80% of all of the NPR stations engaged in streaming that responded to the survey—in short, it encompassed the experience of all but a handful of NPR stations positioned at the extreme high end of the listenership

[42] Receiving the 2003 and 2004 fees well in advance of the year earned is more valuable to the recipient because it can be invested and earn interest that would not be available if paid when actually due.

[43] Purchasing power loss is complicated by the lack of attribution of amounts to particular years in the contract. Thus, the amount calculated by the NRBNMLC may be, at best, an average for the period. Therefore, a higher amount than that average would be the proper target for adjustment for the erosion in purchasing power since 2004.

[44] CBI's final proposed fees ranged from $25 to $175 per station; the NRBNMLC's proposed fees ranged up to $200 per simulcast but with up to two associated channels subsumed within that amount. NPR's proposed fees were $80,000 to cover at least 798 NPR stations (and an undetermined number of CPB stations) or approximately $100 per station.

[45] Moreover, even in the musical works benchmark market proposed by some Services such as the NRBNMLC, the minimal amount that a webcaster paid to cover the combined works administered by the three PROs was $636 for college stations in 2006 and $1135 for other public broadcasting entities—that is more than the minimum rate for a single station determined for the section 114 license hereinabove. For a similar analogy, see Webcaster I, 67 FR 45259 (July 8, 2002).

[46] This $500 minimum fee is applicable to each individual station and each individual channel, including each individual ''side channel'' maintained by broadcasters. ''Side channels'' are channels on the website of a broadcaster that transmit eligible transmissions that are not simultaneously transmitted over-the-air by the broadcaster. Thus, a broadcaster who transmits one simulcast over the Internet and also transmits an eligible transmission over one side channel is subject to a minimum fee of $500 for each respective transmission, for a total in this example of $1,000. In other words, the minimum fee is separately applicable to each side channel. We find no basis in the record for distinguishing between side channels and other stations or channels with respect to a minimum fee that reflects the costs of license administration. We have found, hereinabove, that SoundExchange's proposal of a $500 minimum fee for such administration is clearly reasonable. Further, such administration costs will align more clearly with per station or per channel reports of use where such reports of use are submitted in satisfaction of recordkeeping requirements.

[47] Aggregate Tuning Hours or ATH refers to the total hours of programming transmitted to all listeners during the relevant time period. Thus, one hour of programming transmitted to 20 simultaneous listeners would produce 20 aggregate tuning hours or 20 ATH. The number of ATH in a month could be calculated by multiplying the average number of simultaneous listeners by the average potential listening hours in a month or 730 (i.e., 365 days in a year multiplied by 24 hours in a day then divided by 12 months). Applying this calculation to an average of 20 simultaneous listeners yields 14,600 ATH per month.

[48] In contrast, the original IBS proposal had a cap of 146,000 ATH below which an annual per station rate of $500 would apply. Kass WDT at Exhibit A.

distribution.[49] See SoundExchange Trial Ex. 67 (NPR Digital Music Rights Station Survey, 2004) at CRB–NPR000036, CRB–NPR000054–57. Therefore, we find that a cap structured to include the typical NPR experience that was viewed by the parties as not being subject to commercial rates, results in a cap of 159,140 ATH per month.

Again, we stress that this cap is only a proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters in order to delineate a distinct noncommercial submarket in which willing buyers and willing sellers would have a meeting of the minds that would result in a lower rate than the rate applicable to the general commercial webcasting market.[50] Mere size alone, without evidence of the other characteristics that define membership in the noncommercial submarket discussed supra at Section IV.C.2.a., does not make a webcaster eligible for this lower rate. Members of this noncommercial submarket, by definition, are not serious competitors with Commercial Webcasters.[51]

A careful review of the record also does not persuade us to make any further adjustment to the lower $500 per station rate described hereinabove to account for such considerations as (1) the promotional or substitution effects on CD sales of webcasting by members of the noncommercial submarket or (2) the relative contributions made by copyright owners and webcasting services with respect to creativity, technology, capital investment, cost and risk. There is no showing of a quantitative effect of these considerations that is not already embraced within the lower rate we have set. Furthermore, inasmuch as that lower rate is also encompassed by the minimum fee necessary to support administration of the license, no showing has been made by any Noncommercial Webcaster that such administrative costs are somehow overborne by such considerations. Similarly, with respect to the higher rate (i.e., the Commercial Webcaster rate) applicable to Noncommercial Webcasters above the monthly 159,140 ATH cap, we find that no further adjustment is required for the same reasons that we found no such adjustment necessary for Commercial Webcasters subject to the commercial rate we set. See supra at Section IV.C.1.c.

In summary, first, we determine that the minimum fee applicable to Noncommercial Webcasters is an annual non-refundable, but recoupable[52] $500 minimum per channel or station payable in advance. In other words, we find no basis for distinguishing between Commercial Webcasters and Noncommercial Webcasters with respect to the minimum fee. See supra at Section IV.C.2.b and Section IV.C.2.c. Second, the following rates apply to Noncommercial Webcasters:[53] (1) an annual per station or per channel rate of $500 for stations or channels will constitute full payment for digital audio transmissions totaling not more than 159,140 ATH per month and (2) if in any month a Noncommercial Webcaster makes digital audio transmissions in excess of 159,140 ATH per month, then the Noncommercial Webcaster will pay additional usage fees[54] for digital audio transmissions of sound recordings in excess of the cap as follows: a per play rate of $.0008 for 2006, a per play rate of $.0011 for 2007, a per play rate of $.0014 for 2008, a per play rate of $.0018 for 2009 and a per play rate of $.0019 for 2010.[55] As indicated supra at Section IV.C.d.1., we find no basis for making further adjustments to the usage rates to reflect inflation or bundling.

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

Note: See footnote 55

D. The Section 112 Royalty Rates and Minimum Fees

1. Background

Section 112(e) of the Copyright Act directs the Copyright Royalty Judges to establish rates and terms for the making of ephemeral copies of digital recordings to enable or facilitate the transmission of those recordings under the statutory license in section 114. As is the case with the section 114 license, we are tasked with setting rates and terms that ''most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller,'' as well as establish ''a minimum fee for each type

[49] The reason the average (218) or a lesser number encompassed so many stations is that several very large stations at the upper end of the distribution influenced the average. This is statistically apparent from a comparison of the average (218) with the median number of simultaneous listeners (50).

[50] The Services also advance various public policy considerations which they maintain militate in favor of lower rates. However, the Copyright Act is clear that we are required to apply a willing buyer/willing seller standard in determining rates for all types of participants in the marketplace. We decline to deviate from this standard. We further decline to usurp the authority of Congress to consider potential public policy concerns and, if it chooses, to establish special nonmarket rates for certain noncommercial services.

[51] On the other hand, a Commercial Webcaster with an audience of less than 219 simultaneous listeners is, nothwithstanding its size, a direct competitor to other Commercial Webcasters.

[52] In effect, payment of the $500 minimum administrative fee by Noncommercial Webcasters whose monthly ATH is below the cap will satisfy the full royalty obligations of such webcasters because it fully encompasses the per station usage fee. 37 CFR 380.3(b). Therefore, as a practical matter, recoupment does not come into play for such webcasters.

[53] Noncommercial Webcasters include such licensees who are eligible nonsubscription transmission services or new subscription services, irrespective of whether they transmit music in large part or in small part.

[54] Subject to the credit attributable to any unused balance of the annual minimum fee pursuant to 37 CFR 380.3(b).

[55] The Judges recognize that a smooth transition from the prior fee regime to the new fee structure adopted by the Judges hereinabove may be aided by permitting the limited use of an ATH calculation option. Such a transition option enhances the ability of some Services to effectuate speedy payments and, in so doing, improves the ability of copyright owners to more quickly obtain monies due. In short, such a transition measure is reasonably calculated to facilitate a smooth, speedy transition to the new fee structure adopted hereinabove by the Judges. Therefore, the usage fee structure established in this Final Determination will continue use of an ATH option for timely payment of fees due for the years 2006 and 2007. Note: [See table near footnote 55 reference.]

The following Aggregate Tuning Hours (ATH) usage rate calculation options will be available for the transition period of 2006 and 2007: where ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

of service offered by transmitting organizations.'' 17 U.S.C. 112(e)(4). The types of ''economic, competitive, and programming information'' that we are to examine is the same for the section 112 license as it is for the section 114 license. *Id.*

Webcaster I set the royalty fee for the section 112 license at 8.8% of the total royalty fee by a Service under the section 114 license. 67 FR 45240, 45262 (July 8, 2002). This fee, as a separate charge, was not part of the 2003 ''push forward'' of the Webcaster I rates negotiated by SoundExchange and the Services. Rather, the parties agreed to incorporate the fee for section 112 within the rates for section 114 (which increased by a modest $0.000062 per performance over the Webcaster I rates), but the regulations adopting their agreement provided that of the total section 112/114 fee, 8.8% was ''deemed'' to comprise the charge for ephemeral recordings. 37 CFR 262.3(c).

2. Proposals of the Parties

SoundExchange proposes to carry forward the combination of section 112 and 114 rates from the prior license period, including the ''deeming'' of 8.8% of the total fee owed by Services as constituting the section 112 charge. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 4. DiMA agrees with this proposal. DiMA RFF at ¶ 115. Radio Broadcasters and the NRBMLC also believe that the fee for the section 112 license should be combined with that for section 114, but oppose the attribution of an 8.8% value for the section 112 license. They argue that the effect is to hide an independent value for the section 112 license within the overall fee even though SoundExchange failed, in their view, to provide any evidence to justify the 8.8% value. Radio Broadcasters ''take no position as to the percentage of the overall royalty that is to be designated as the portion attributable to the making of ephemeral copies,'' but submit that ephemeral copies have no economic value separate from the value of the performances they effectuate. Radio Broadcasters PFF at ¶ 319. The NRBMLC also contends that ephemeral copies have no independent economic value, citing the Copyright Office's 2001 DMCA Section 104 Report in support. NRBMLC PFF at ¶¶ 60, 62.

None of the other parties offer specific proposals as to section 112 rates. SBR Creative Media, Inc. combines section 112 with section 114 in its request for a single fee, while CBI asserts that its stations have no need of the section 112 license. SBR PFF at ¶ 14; CBI PFF at ¶ 19.

3. The Record Evidence

While the record in Webcaster I regarding the section 112 license was thin,[56] it is slimmer still in this proceeding. SoundExchange proffers that because copyright owners and performers agreed to include the section 112 charge within the section 114 fee in the 2003 negotiation provided that there was a recognition that section 112 constituted 8.8% of the total value, this is ''strong evidence'' of what copyright owners and performers believe to be the value of the section 112 license. SoundExchange PFF at ¶ 1370. But see SoundExchange PFF at ¶ 1371 (conceding that ''[t]here has been little evidence adduced on the value of ephemeral copies * * *''). SoundExchange further contends that two marketplace agreements—the WMG-Next Radio agreement for a custom radio service and the SONY BMG-MusicMatch custom radio agreement—support its assertion that 8.8% is within the zone of reasonableness. Both of these agreements provide that 10% of the overall fees for streaming are attributable to the making of ephemeral copies. SoundExchange Ex. 002 DR; SoundExchange Ex. 004 DR.

Radio Broadcasters and the NRBMLC counter that none of SoundExchange's witnesses discussed proposed rates or values for ephemeral recordings in written or oral testimony. Instead, they point to testimony of Adam Jaffe offered in Webcaster I that ephemeral copies have no independent economic value from the value of the public performances that they effectuate, Jaffe 2001 WDT at ¶ 82; Jaffe 2001 WRT at 81; 2001 Tr. 6556:10–13 (Jaffe), and offer the Copyright Office's 2001 DMCA Section 104 Report in support of Dr. Jaffe's view.

4. Conclusion

Of the thousands of pages of testimony and exhibits submitted by the parties in this proceeding, less than twenty of the pages are devoted to any discussion of the section 112 license and ephemeral copies. It is therefore evident that the parties consider the section 112 license to be of little value at this point in time, which may explain why SoundExchange is content to roll whatever value the license may have into the rates for the section 114 license. Nevertheless, SoundExchange asks the Copyright Royalty Judges to bless its proposal that whatever the royalty fee for the section 114 may be, 8.8% of that fee constitutes the value of the section 112 license. We decline to accept SoundExchange's invitation for two reasons.

First, the section 112 license requires us to determine the rate or rates that would have been negotiated between a willing buyer and a willing seller. SoundExchange's valuation of 8.8% is not a rate. Services will not be paying 8.8% more in total royalty fees because of this valuation, nor will they be subtracting 8.8% from their charge if they choose not to avail themselves of the section 112 license. Rather, the 8.8% valuation is nothing more than an effort to preserve a litigation position for future negotiations that the section 112 license has some independent value, as it did in Webcaster I. It is understandable why DiMA would not find the 8.8% figure objectionable since it does not represent any additional charges to its members in this proceeding.

Second, the paucity of the record prevents us from determining that 8.8% of the section 114 royalties is either the value of or the rate for the section 112 license. SoundExchange's assertion that its 8.8% proposal is ''strong evidence'' of copyright owners' and performers' belief as to the appropriate rate applicable to section 112 is bootstrapping. SoundExchange did not present any persuasive testimony or evidence from copyright owners or performers on this point. We also do not find the WMG-Next Radio and the SONY BMG-MusicMatch agreements to be supportive of an 8.8% rate for ephemeral copies, which SoundExchange asserts are evidence of marketplace negotiations and establish a ''zone of reasonableness'' for section 112 rates in the 10% range. These agreements are for custom radio, which SoundExchange has long avowed is not DMCA compliant, and both have expired. SoundExchange Ex. 002 DR at 10 (WMG-Next Radio Solutions webcasting agreement); SoundExchange Ex. 004 DR at 14 (SONY BMG-MusicMatch Internet radio agreement). More importantly, the 10% figure in both is not a rate but is, like SoundExchange's proposal, a proclamation as to how much of the total fees paid by Next Radio and MusicMatch are attributable to the making of ephemeral copies. Since the 10% figure does not represent any actual monies to be paid by Next Radio or MusicMatch, it can hardly be argued that those agreements are marketplace evidence of negotiated royalty rates for the section 112 license.

[56] See Webcaster I CARP Report at 99–103 (speculating as to the reasons why the parties themselves seemed to attach little importance to the section 112 license).

We are left with a record that demonstrates that, since the expiration of section 112 rates set in Webcaster I, copyright owners and performers are unable to secure separate fees for the section 112 license. The license is merely an add-on to the securing of the performance right granted by the section 114 license. SoundExchange's proposal to include the section 112 license within the rates and minimum fees set for the section 114 license reflects this reality and we accept it. In so doing we decline, for the reasons stated above, to ascribe any particular percentage of the section 114 royalty as representative of the value of the section 112 license.[57]

V. Terms for Royalty Payments Under the Section 112 and 114 Statutory Licenses

A. The Statutory Standard

Sections 112(e)(3) and 114(f)(2)(A) of the Copyright Act, 17 U.S.C., require the Copyright Royalty Judges to adopt royalty payment terms for the section 112 and 114 statutory licenses.[58] It is established that the standard for setting terms of payment is what the record reflects would have been agreed to by willing buyers and willing sellers in the marketplace. Webcaster I, 67 FR 45240, 45266 (July 8, 2002). It is not established, however, whether the terms adopted must, or should, be administratively feasible or efficient.

In Webcaster I the parties agreed to a set of terms and, with the exception of a few disputed terms, presented them to the CARP for acceptance. In adopting the parties' proposed terms, the CARP declined to make a determination as to whether they were feasible or efficient and deferred to the judgment of the Librarian of Congress. Webcaster I CARP Report at 129. The Librarian declined to address the issue as well and evaluated the agreed-upon terms according to the ''arbitrary or contrary to law'' standard that the Librarian applied to the other aspects of the CARP's decision. The Librarian did, however, state that he was ''skeptical of the proposition that terms negotiated by parties in the context of a CARP proceeding are necessarily evidence of terms that a willing buyer and a willing seller would have negotiated in the marketplace,'' and noted that he would not have adopted all of the negotiated terms if his ''task were to determine the most reasonable terms governing payment of royalties.'' 67 FR 45266 (July 8, 2002). The question therefore remains as to whether the Judges should consider matters of feasability and administrative efficiency in adopting payment terms. We conclude the answer is yes, for two reasons.

First, it is an axiom of the copyright laws that statutory licenses are designed to achieve efficiencies that the marketplace cannot. See, H.R. Rep. No. 94–1476, at 89 (1976). Typically, statutory licenses reduce transaction costs associated with licensing large volumes of copyrighted works from multiple rights holders. They guarantee access to the use of prescribed categories of works to those who satisfy the eligibility requirements of a license, while providing a return to the owners of the works subject to the license. Statutory licenses are about administrative efficiency. For example, they increase the speed and ease with which copyrighted works may be used. Adopting a set of terms whose operation is not practical, or creates additional unjustified costs and/or inefficiencies, is inconsistent with the precepts of statutory licensing, and we must avoid such circumstances.

Second, we observe that rational willing buyers and sellers themselves will, in their agreements with one another, select terms that are practical, efficient, and avoid excessive costs. Consequently, we have considered the terms presented in agreements offered by the parties to this proceeding, assessed their applicability to the blanket license structure of the statutory licenses, and adopted those terms that will facilitate an efficient collection, distribution and administration of the statutory royalties.

B. Collection of Royalties

1. Background

Unlike the statutory licenses set forth in sections 111, 119, and chapter 10 of the Copyright Act where royalty payments are submitted directly to a government collecting body (the Licensing Division of the Copyright Office), the section 112 and 114 licenses contain no such provision. Read literally, the licenses appear to require that licensees pay royalties directly to each copyright owner and performer. Recognizing the costs and inefficiencies of such an approach, the parties to the first section 112/114 proceeding negotiated a payment scheme whereby all services paid their royalties to a single ''Receiving Agent'': SoundExchange, Inc. See 37 CFR 262.4. SoundExchange was, at that time, an unincorporated division of the Recording Industry Association of America.[59] SoundExchange was then tasked with the responsibility of distributing royalties to those identified in the regulations as ''Designated Agents.'' By agreement of the parties, both SoundExchange and Royalty Logic, Inc. were identified as ''Designated Agents.'' The Librarian in Webcaster I reluctantly adopted this payment scheme. 67 FR 45267 n.45 (July 8, 2002).

The royalty collection and distribution scheme adopted in Webcaster I ended with the expiration of the 1998–2002 licensing period. In negotiations for rates and terms for the 2003–2004 licensing period, the parties retained the Receiving Agent/Designated Agent structure but did not recognize Royalty Logic as a Designated Agent.[60] Royalty Logic objected to the parties' agreement and requested the Librarian to convene a CARP on the issue of royalty collection and payment. However, prior to the convening of the CARP, it withdrew from the proceeding. RLI PFF at ¶ 46. Royalty Logic now requests that the Copyright Royalty Judges recognize it in the regulations as both a Designated Agent and a Receiving Agent for the 2006–2010 license period.

2. Royalty Logic

Royalty Logic, acting as an authorized agent for certain copyright owners and performers,[61] is a for-profit subsidiary of Music Reports, Inc. 6/14/06 Tr. 44:21–45:22, 50:20–51:1 (Gertz).[62] Royalty Logic presented the direct testimony of Ronald Gertz, its founder, and the rebuttal testimony of Mr. Gertz and Peter Paterno, Esquire, who represents the recording artists Metallica and Dr. Dre. RLI PFF ¶ 72.[63]

[57] We are mindful that section 112(e)(4) prescribes inclusion of a minimum fee for each type of service offered by transmitting organizations. Because we are determining that the section 112 fee is included within the section 114 license fee, we are, likewise, based upon the record evidence, doing the same for the section 112 minimum fee.

[58] Consistent with Webcaster I, we are adopting terms for the collection, distribution and administration of royalty payments.

[59] SoundExchange is now an independent entity. SoundExchange PFF at ¶ 72.

[60] By the terms of the Copyright Royalty and Distribution Reform Act of 2004, the rates and terms adopted for the 2003–2004 licensing period were extended through the end of 2005. See Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, section 6(b)(3) (transition provisions), 118 Stat. 2341, 2370 (2004).

[61] Despite an invitation from the Copyright Royalty Judges to do so, Royalty Logic was unable to identify all the copyright owners and performers constituting the ''RLI Affiliates.'' The list appears to include Lester Chambers, North Star Media, Sigala Records, ABKCO Music & Records, Inc., the Everest Record Group, Metallica and Peter, Paul and Mary.

[62] MRI is a for-profit company whose principal business is to assist broadcasters in the licensing of musical works used in their programming. 11/15/06 Tr. 103:7–20 (Gertz).

[63] Royalty Logic also presented written direct testimony of Lester Chambers, a recording artist. Mr. Chambers, however, did not appear at trial and his testimony therefore was not considered.

Royalty Logic contends that it is necessary for the Copyright Royalty Judges to formally recognize it as a ''Designated Agent''—complete with direct accounting, reporting, payment and auditing rights vis-a-vis the Services—in the payment regulations to be adopted in this proceeding so that it may compete with SoundExchange as a royalty collection and distribution agent. The claimed need for competition is the central feature of Royalty Logic's presentation. According to Royalty Logic, Designated Agents can compete with one another on multiple levels, including: (1) The royalty rates to be charged; (2) interpretations of the statute; (3) distribution policies; and (4) costs. 6/14/06, Tr. 101:5–105:5; 124:14–127:20; 314:22–315:19 (Gertz). Royalty Logic advocates a payment scheme whereby a proportionate share of the royalties owed by each Service under the section 112 and 114 licenses would be allocated to each Designated Agent; i.e., it and SoundExchange. Both Designated Agents would be entitled to direct receipt of statements of account, royalty fees and the reports of use of sound recordings required by 37 CFR part 370. For the initial payment period, Royalty Logic proposes that it receive five percent of each Service's royalties, which subsequently would be adjusted either upwards or downwards depending upon the number of performances belonging to Royalty Logic's affiliates that were made by the Service. The identity and ownership of performances (and ephemeral reproductions, if any) would be determined through examination of each Service's report of use of sound recordings. Thereafter, royalty payments to Royalty Logic and SoundExchange would be based solely upon performances of the works of each organization's members, as determined by the reports of use from the prior payment period. Any disputes between the Designated Agents concerning royalty allocations would be resolved by the Copyright Royalty Judges. RLI PFF at ¶ 117(g).

3. SoundExchange

SoundExchange is a non-profit performing rights organization that represents thousands of record labels and artists who have specifically authorized SoundExchange to collect royalties on their behalf. Kessler WDT at 3. SoundExchange presented the direct testimony of John Simson, Barrie Kessler, Harold Ray Bradley, and Cathy Finks on the matter of royalty collection and distribution, as well as the rebuttal testimony of Thomas Lee.

SoundExchange submits that it would be inefficient for the Copyright Royalty Judges to select more than one agent to receive and distribute royalties. SoundExchange PFF at ¶ 46. It argues that it should be the sole collection and distribution agent because it is proven and well-run and is the most qualified and dedicated to the interests of copyright owners and performers. SoundExchange PFF at ¶¶ 1558–67. It contends that Royalty Logic is unsuitable to serve as an agent because it is owned by Music Reports, Inc., a company that represents licensees of musical works, and such connection creates a conflict of interest. SoundExchange PFF at ¶¶ 50, 51.

4. Receiving Agents and Designated Agents

At the outset, the Copyright Royalty Judges must address a fundamental misperception of Royalty Logic, and to a somewhat lesser extent SoundExchange, regarding Receiving Agents and Designated Agents. As noted above, Receiving Agents and Designated Agents and the terms governing their operation were established by agreement by the parties in Webcaster I and were adopted, reluctantly, by the Librarian of Congress. 67 FR 45240, 45266 (July 8, 2002); See also, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services (Final rule), 68 FR 39837, 39839 n.2 (July 3, 2003) (stating that in Webcaster I the Librarian ''expressed skepticism about the benefit of the two-tier structure involving a Receiving Agent and more than one Designated Agent, which adds expense and administrative burdens to a process the purpose of which is to make prompt, efficient, and fair payments of royalties to copyright owners and performers with a minimum of expense.'') The entire Receiving Agent/Designated Agent structure is a legal fiction with no basis or grounding in the statute,[64] and we are under no obligation to preserve it, if we determine that there are sound reasons for adopting a different royalty collection and distribution system.

In evaluating the Receiving Agent/Designated Agent system, we share in the Librarian's skepticism that it is an effective and efficient means of collecting and distributing royalties. The system was pressed in negotiations by the Services in Webcaster I as a means of enabling Royalty Logic to enter the business of collecting and distributing section 112 and 114 royalties even though Royalty Logic did not represent at the time a single copyright owner or performer entitled to those royalties. 68 FR 39839 (July 3, 2003). While Royalty Logic's participation may have presented the Services with a potential future benefit, it is difficult to determine what, if any, benefit was derived by copyright owners and performers. Royalty Logic responds that the benefit to copyright owners and performers is the fruits of competition between it and SoundExchange, yet there is no evidence in the record that demonstrates that any copyright owners or performers sought or claimed such a supposed benefit. If anything, the record reflects that copyright owners and performers prefer SoundExchange as the sole collection and distribution entity. SoundExchange Ex. 239 RP, 240 RP; Lee WRT at 4; Bradley WRT at 20; Fink WDT at 14.

We are also troubled by Royalty Logic's contention throughout this proceeding that an agent must be formally recognized by the Copyright Royalty Judges as a Designated Agent before it can have any involvement in the royalty distribution process. This position has no support in the statute. Sections 112(e) and 114(e) state that it is copyright owners and performers who may designate common agents for the receipt of royalties. As the Librarian observed in the 2003 section 112 and 114 preexisting subscription service proceeding:

> In fact, it is not clear that RLI needs to participate in a CARP proceeding or be named in a negotiated settlement in order to act as a designated agent for purposes of collecting royalty fees on behalf of copyright owners and performers who are entitled to receive funds collected pursuant to the section 112 and section 114 licenses. Section 112(e)(2) and section 114(e) of the Copyright Act both expressly provide that a copyright owner of a sound recording may designate common agents to negotiate, agree to, pay, or receive royalty payments. Under these provisions, it is plausible that a copyright owner or performer could designate any agent of his or her choosing (including RLI)—whether or not that agent had been formally designated in the CARP proceeding—to receive royalties from the licensing of digital transmissions and, by doing so, limit the costs of such agents to those specified in section 114(g)(4), as amended by the Small Webcaster Settlement Act of 2002.

68 FR 39840 n.4 (July 3, 2003).

Given our reservations about the Receiving Agent/Designated Agent

[64] Section 114(f)(5)(A) does reference the term ''receiving agent.'' However, that section of the law, which was created by the Small Webcaster Settlement Act of 2002, Public Law 107–321, 116 Stat. 2780 (2002), is no longer in force. Furthermore, ''receiving agent'' was defined by reference to § 261.2 of title 37 of the Code of Federal Regulations which are the very same rules adopted in Webcaster I.

scheme, and the fact that none of the parties have presented any supporting evidence as to why it must or should continue, the Judges decline to adopt it in this proceeding. Rather, we are adopting a system that effectively and efficiently collects royalties from Services and distributes them to copyright owners, performers, and the agents that they may designate.

5. The Royalty Collective

a. The Need for a Single Collective [65]

As noted above, a literal reading of the section 112 and 114 licenses suggests that the Services pay directly each and every copyright owner and performer for the use of their respective works. No one in this proceeding, however, has suggested this arrangement, nor do any of the statutory licenses in the Copyright Act function in that fashion. Direct payments would add enormous transaction costs to the Services as they would be forced to locate and make arrangements with all copyright owners and performers for the thousands and thousands of sound recordings they perform, thereby eliminating much, if not all, of the efficiencies achieved by statutory licensing. Consequently, the royalty payment and collection system that we adopt must promote administrative efficiency and economy and reduce transaction costs wherever possible. This stated purpose is wholly consistent with the willing buyer/willing seller standard.

In adopting an economically and administratively efficient royalty collection and distribution method, Royalty Logic proposes that we look to the marketplace for performance rights for musical works, which is dominated by three principal rights organizations: ASCAP, BMI and SESAC. These organizations operate on behalf of and are paid for by their members. Royalty Logic contends that competition among the performing rights organizations reduces the administration costs for collecting and distributing royalties in that market and is therefore more efficient than a single Collective such as SoundExchange. We reject application of the performing rights organization model to this proceeding for several reasons. First, the performing rights organizations do not operate exclusively within the confines of a statutory license. The majority of these organizations' activity is direct licensing with users of musical works.[66] While Royalty Logic's argument that multiple Collectives promote competition on pricing may make some sense in the direct licensing context where rates and terms are set through private agreement, it does not make sense where the rates and terms are governed by statutory licenses.

Second, performing rights organizations are member societies that license only the works of their members. The statutory licenses are blanket licenses that cover the works of all copyright owners and performers. Forcing owners and performers to choose membership in one or more Collectives when their works have already been licensed does not seem to serve a purpose and creates a significant practical difficulty in resolving how unaffiliated copyright owners and performers should receive their royalty distributions.

Third, while Royalty Logic vehemently argues that competition between it and SoundExchange will reduce the overall administrative costs in the royalty collection and distribution process and therefore result in greater returns for copyright owners and performers, it never presented evidence demonstrating the likelihood of such an outcome.[67] Further, Royalty Logic did not present any evidence showing that its administration costs on a per copyright owner or performer basis will be less than SoundExchange's, merely suggesting that they might be. 6/14/06 Tr. 51:9–14 (Gertz); 11/15/06 Tr. 140:18–21 (Gertz).

In sum, we find that selection of a single Collective represents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses. Transaction costs to the users of such a license are minimized when they can make payment to a single Collective, as opposed to allocating their payments among several. And there is no credible evidence that demonstrates copyright owners and performers suffer increased costs from a system with a single Collective. We now turn to the issue of which of the two parties in this proceeding, Royalty Logic or SoundExchange, will best fulfill the role of the Collective for section 112 and 114 royalties.

b. SoundExchange vs. Royalty Logic

SoundExchange, a non-profit corporation under 26 U.S.C. 501(c)(6), has operated as the royalty collection and distribution entity since the beginning of the statutory licenses involved in this proceeding, and collects and distributes the royalties paid by preexisting subscription and satellite digital audio services under the statutory license created by the Digital Performance Right in Sound Recordings Act of 1995, Public Law 104–39, 109 Stat. 336 (1995). Kessler WDT at 2. SoundExchange is controlled by an 18-member Board of Directors comprised of equal numbers of representatives of copyright owners and performers. Copyright owners are represented by board members associated with the major record companies (five), independent labels (two), the Recording Industry Association of America (one), and the American Association of Independent Music (one). Performers are represented by one representative each from the American Federation of Television and Radio Artists; the American Federation of Musicians; and seven at-large artist seats. Simson WDT at 33. Though it is a non-member organization, SoundExchange is authorized by over 12,000 performers, 3,000 record labels and 800 record companies to collect royalties on their behalf. SoundExchange PFF at ¶ 75. SoundExchange distributes royalties to nearly 15,000 copyright owner and performer accounts and, as of September 20, 2005, has processed over 650 million sound recording performances. Kessler WDT at 12, 16. It is the only organization that directly receives reports of use from the Services under the licenses in this proceeding. 37 CFR 370.3(d)(4).

SoundExchange presented Thomas Lee, President of the American Federation of Musicians, who testified that the structure of SoundExchange's Board provides the necessary checks and balances to ensure that performer interests are well represented. Lee WRT at 4–5. Several performer organizations—the American Federation of Television and Radio Artists, the Music Manager's Forum, and the Recording Artists' Coalition—wrote to Mr. Lee to express their preference and support for SoundExchange in these proceedings. SoundExchange Exs. 239 RP, 240 RP, 241 RP; Lee WRT at 4. Recording artists Harold Ray Bradley and Cathy Fink testified as to their preference for SoundExchange as the sole collective for section 112 and 114

[65] A "Collective" is defined in our rules as an organization that is designated by the Copyright Royalty Judges under section 114 to both collect and distribute royalties. 37 CFR 370.5(b)(1).

[66] The performing rights organizations do collect royalties on behalf of their members for several of the statutory licenses in the Copyright Act. Participation in royalty collection and distribution under these licenses, however, was after they had established their direct licensing businesses.

[67] The small amount of testimony adduced on this point suggests that SoundExchange's administrative costs are lower than those of ASCAP and BMI. Kessler WDT at 16; 6/6/06 Tr. 190:1–4 (Kessler).

royalties. Bradley WRT at 20; Fink WDT at 14.

Royalty Logic, a for-profit corporation, operated as a ''Designated Agent'' under the Webcaster I decision. Gertz WDT at 5–6; RLI PFF at ¶ 36. Royalty Logic was created and is currently managed by the principals of Music Reports, Inc. Music Reports is in the business of allocating royalty payments from television stations to performing rights societies for musical works performed by those stations. Royalty Logic recently received a significant investment from Abry Partners and may be reorganizing as a result. 11/15/06 Tr. 130:16–131:5 (Gertz). As described in footnote 61, supra, the precise number and identity of copyright owners and performers currently represented by Royalty Logic is unclear. Royalty Logic did not present any copyright owner or performer witnesses [68] in support of its request to be a royalty collection and distribution entity under the section 112 and 114 licenses. It did, however, present the testimony of Peter Paterno, a lawyer representing clients in the music publishing and recording business. Mr. Paterno testified that one of his clients, the rock group Metallica, is affiliated with Royalty Logic and that he has proposed affiliation to three or four other clients. 11/15/06 Tr. 157:10–18; 181:4–22 (Paterno). Royalty Logic also presented as an exhibit a royalty rate agreement between it and DiMA for performances under the statutory licenses, asserting that the agreement demonstrated at least one willing seller's preference for Royalty Logic. RLI PFF at ¶ 61.

After considering the presentations of both parties, the Copyright Royalty Judges conclude that SoundExchange is the superior organization to serve as the Collective for the 2006–2010 royalty period. SoundExchange has a proven track record in collecting and processing section 112 and 114 royalties, having done so since the inception of the statutory licenses. Its operational practices appear efficient and fair, and the Judges were not presented with credible evidence of significant failures or deficiencies.[69] Moreover, we are persuaded that the structure and composition of SoundExchange's Board of Directors—with equal representation for copyright owners and performers—provides a greater balance of competing interests than that of Royalty Logic, which is controlled by one person, Mr. Gertz. This was confirmed by the weight of performer testimony on this point which demonstrated a decided preference for the services of SoundExchange over those of Royalty Logic. As the direct beneficiaries of the royalties collected under the statutory licenses, the copyright owner and performer testimony on this point is particularly persuasive.

This testimony is not outweighed by the Royalty Logic/DiMA royalty rate agreement offered by Royalty Logic as evidence of the Services' preference for Royalty Logic. It is difficult to envision any interest that the Services can have in the administration and distribution of royalties, which are the essential functions of the Collective. The Services' views on this subject are not reflected in the agreement. More importantly, the value of the agreement itself is illusory. Signed only by DiMA, a trade organization, it does not bind any Service to its terms; and, to date, no Services have signed on to the agreement. 11/15/06 Tr. 108:7–15 (Gertz).

The Copyright Royalty Judges also have serious reservations about the bona fides of Royalty Logic to act as the Collective under the statutory licenses. Royalty Logic ''is a for profit organization whose acknowledged goal is to make a profit,'' 67 FR 45267 (July 8, 2002), and Mr. Gertz candidly offered that his reasons for seeking entrance into the royalty collection and distribution business was ''to make money.'' 11/15/06 Tr. 89:7–10 (Gertz). In addition, Mr. Gertz stated that Royalty Logic may decide to pay some copyright owners and/or performers more than others. 11/15/06 Tr. 79:22–80:10 (Gertz). These statements raise a concern as to whether Royalty Logic will act in the best interest of all copyright owners and performers covered by the statutory licenses. The concern is elevated by the fact that Royalty Logic's participation in Webcaster I was championed by the Services and is favored more in this proceeding by the Services than by copyright owners and performers.[70] As noted above, the Services should have little if any interest in the activities of the Collective to whom they pay their royalties (especially where they are relieved of the burden of paying more than one Collective) unless they have reason to believe that Royalty Logic may offer them reduced royalty fees in negotiations for future license periods. Mr. Gertz's business with MRI, which licenses the performance right for musical works on behalf of copyright users rather than owners and performers, suggests this outcome. [71]

Likewise, we have no basis in the record to expect that Royalty Logic will deduct lower administration fees, and therefore return greater royalties to copyright owners and performers, than SoundExchange. We were not presented with any comparison of Royalty Logic's and SoundExchange's administration fees, only an argument that competition between Collectives potentially could reduce the overall administration fees. Given that we are selecting only a single Collective, the potential effects of competition on administration fees to be charged to copyright owners and users is not relevant.

In sum, the Copyright Royalty Judges determine that SoundExchange will best serve the interests of all copyright owners and performers whose works are subject to the statutory licenses and, therefore, shall be the Collective for the 2006–2010 royalty period.

C. Terms

Having resolved the matter of who shall serve as the Collective for the 2006–2010 licensing period, the Copyright Royalty Judges now turn to other terms necessary to effectuate payment and distribution. Other than the few disputed terms, adoption of all the terms necessary for payment and distribution presents a decidedly unfortunate challenge, as is discussed below.

1. Webcaster I

In Webcaster I, the parties to the proceeding presented the CARP with a comprehensive, negotiated settlement of nearly all the payment, administration and distribution terms for the section 112 and 114 licenses. These terms included governing provisions for submission of payments and statements of account, confidentiality requirements, audit and verification of statements of account and royalty distributions, and unclaimed royalty

[68] See, supra, n.63.

[69] Mr. Gertz and Mr. Paterno did testify as to their awareness of some performers' dissatisfaction with SoundExchange—primarily due to its former ties to the Recording Industry Association of America, Inc.—but the statements were not corroborated by any copyright owner or performer testimony.

[70] The Copyright Royalty Judges find the testimony of Mr. Paterno an unpersuasive substitute for the views and preferences of copyright owners and performers. Only one of Mr. Paterno's clients, Metallica, has affiliated with Royalty Logic, and he admitted that he has not pressed his other clients to affiliate. 11/15/06 Tr. 157:10–18 (Paterno). Rather, Mr. Paterno stated that he would advocate that clients affiliate with the collective that offered the most money, but he has seemingly made no inquiries on this matter, preferring instead to ''see how things play out.'' Id. at 157:22–158:10.

[71] Our impression on this point is bolstered by the royalty agreement negotiated by Royalty Logic with DiMA, which adopts a rate (to be adjusted to our determination in this proceeding) far below any of the rates proposed by SoundExchange and is almost identical to the proposal of those commercial Services in this proceeding.

funds. The CARP was only called upon to resolve two relatively minor disputes regarding terms: whether to include four definitional provisions related to broadcast radio, and what to do with royalties for copyright owners who did not designate either SoundExchange or Royalty Logic to serve as their agent. Applying the willing buyer/willing seller standard, the CARP adopted wholesale the negotiated terms as being the best evidence of marketplace negotiations, chose not to adopt the disputed definitional provisions, and determined that willing buyers and willing sellers would choose SoundExchange for copyright owners who failed to choose a Designated Agent. Webcaster I CARP Report at 128–134.

The Librarian made significant alterations to the CARP's determination regarding terms. While he accepted the CARP's rejection of the broadcaster definitional terms and the determination that SoundExchange should serve as agent for unaffiliated copyright owners, he rejected a negotiated term limiting agents' liability for improper distributions and a negotiated term allowing agents to deduct litigation and licensing costs from collected royalty fees. 67 FR 45268–9 (July 8, 2002). He also modified a negotiated definition of ''gross proceeds'' and created two new definitional provisions: one for ''Ephemeral Recordings'' and another for ''Listener.'' Further, he extended the right to select a Designated Agent to performers in addition to copyright owners, granted performers the right to audit their Designated Agent, and ''clarified'' the negotiated terms for allocating royalty payments among Designated Agents and for allocation of royalties among parties entitled to receive such royalties. 67 FR 45270–1 (July 8, 2002).

2. Negotiated Terms

As noted previously, there was no CARP proceeding for the 2003–2004 licensing period. The parties settled their differences and offered the Librarian a negotiated agreement for rates and terms. The proposed agreement included the Webcaster I terms with some modifications. After offering the proposed agreement for public comment, the Librarian adopted it. See, Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule), 69 FR 5693 (February 6, 2004). Codified in part 262 of the Copyright Office's regulations, the effective date of these rates and terms was extended by the Copyright Royalty and Distribution Reform Act of 2004 until December 31, 2005, the last day prior to the beginning of the rates and terms established by this proceeding. 37 CFR part 262; Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, section 6(b)(3) (transition provisions), 118 Stat. 2341, 2370 (2004).

3. This Proceeding

The parties' approach to rates and terms was decidedly different in this proceeding than in Webcaster I. Even though the Copyright Royalty and Distribution Reform Act of 2004 eliminated the CARP system and thereby removed the Librarian and the Copyright Office from further involvement in royalty adjustment proceedings,[72] the parties apparently operated under the assumption that the terms contained in part 262 would remain in place for the 2006–2010 period plus the recommended amendments the Copyright Royalty Judges adopted. The existence of this assumption is confirmed in Part III of the written direct testimony of Barrie Kessler entitled ''Modifications Needed to License Terms,'' where Ms. Kessler only addresses those terms that she believed required amendment. The Services also refer to the regulations in part 262 as the ''current'' regulations. See, *e.g.* DiMA and Radio Broadcasters JPFF at ¶ 300.

In examining part 262, the Copyright Royalty Judges observe that these are the regulations of the ''Copyright Office, Library of Congress.'' The Copyright Royalty Judges do not have authority to amend, alter, or otherwise affect these regulations. There is no provision in the Copyright Royalty and Distribution Reform Act of 2004 that carries forward the regulations contained in part 262 or makes them applicable to the Copyright Royalty Judges.[73] Part 262 is therefore not a part of this proceeding.

Other than testimony and argument devoted to amendment of certain provisions contained in part 262, no other evidence was presented regarding terms for payment and distribution. The Copyright Royalty Judges anticipated that the parties would follow their approach from Webcaster I and present negotiated terms prior to the close of the record. When nothing was forthcoming, the Copyright Royalty Judges issued an order directing parties to file agreed-upon terms no later than the deadline for the submission of their reply findings of fact and conclusions of law. Amendment to Amended Trial Order, Docket No. 2005–1 CRB DTRA (November 28, 2006). When nothing again was filed, the Copyright Royalty Judges questioned counsel at closing arguments who stated that because of the press of time in drafting and filing proposed findings and reply findings, they were unable to discuss or negotiate any terms. Still nothing has been filed.

The failure to submit negotiated terms, coupled with the absence of further testimony, places the Copyright Royalty Judges in a difficult situation. While there is sufficient record testimony to resolve the disputed terms, see infra, the only evidence for the ''missing terms'' is the assumption of the parties that the provisions of part 262, plus our resolution of disputed terms, would constitute the terms for payment and distribution for the 2006–2010 statutory period. The parties' assumption is certainly thin evidence on which to proceed. Nevertheless, there are sufficient grounds to resolve the difficulty of the missing terms.

First, we observe that in Webcaster I the Librarian made several wholesale changes to the parties' negotiated terms even though the parties did not propose such changes. The Librarian created definitions for ''Ephemeral Recordings'' and ''Listener'' because, in his view, their absence from the regulations would lead to confusion. 67 FR 45269–70 (July 8, 2002). He extended the right of choosing a Designated Agent to performers as well as copyright owners and permitted them to audit Designated Agents because he could ''conceive of no reason why Performers should not be given the same choice'' as copyright owners. 67 FR 45271 (July 8, 2002). It is clear that the Librarian took these actions so that the regulations governing terms would be clearer, more efficient and fairer to the parties affected. In other words, the Librarian endeavored to make the operation of the statutory licenses as smooth, efficient, and fair as possible. This approach was both necessary and proper and we adopt it here. It is wholly consistent with our conclusion, discussed in Section V.A., supra, that it is our obligation to adopt royalty payment and distribution terms that are practical and efficient. Failure to so act would produce statutory licenses that are operationally chaotic and otherwise unusable, thereby frustrating the Congressional intention underlying their establishment.

Second, while an assumption that part 262 would apply to the new license period is not necessarily the best

[72] The exception is the limited role of the Register of Copyrights on questions of law. See 17 U.S.C. 802(f)(1)(A)(ii), 802(f)(2)(B)(i), and 802(f)(1)(D).

[73] In contrast, 17 U.S.C. 803(b)(6)(B) made the procedural rules of the CARP applicable to the Copyright Royalty Judges until 120 days after appointment of the Copyright Royalty Judges or interim Copyright Royalty Judges who were required to adopt new regulations.

evidence of the required terms, it nevertheless demonstrates the parties' intention to be bound by that provision (including, of course, their proposed changes). They certainly had ample opportunity to disavow this intention and did not do so. Rejection of the provisions contained in part 262 would, in addition to disrupting the operation of the statutory licenses, frustrate the demonstrated intention of the parties.

Consequently, the Copyright Royalty Judges are adopting the undisputed provisions of part 262 as the baseline for terms for the 2006–2010 licensing period, subject to the additions and changes adopted in this decision. Parties to future royalty rate proceedings are strongly urged to attach a greater importance to the adoption of terms and to create a more comprehensive and thorough record.

4. Disputed Terms

a. Late Payment Fees

SoundExchange requests that the Copyright Royalty Judges establish a fee for late payments of statutory royalties equal to 2.5% of the total royalty owed by the Service for that period. The 2.5% late fee represents a substantial increase from the 0.75% late fee adopted in Webcaster I.

SoundExchange argues that the increase is necessary. Barrie Kessler stated that many Services are late with their royalty payments and opined that a nominal late fee (0.75%) coupled with the high cost of bringing an infringement action for failure to pay royalties actually encourages late payments. Kessler WDT at 27–28; 6/8/06 Tr. 261:1–6 (Kessler). Ms. Kessler also requested that the late fee be doubled every five days beginning 20 days after SoundExchange sends a Service notification of late payment. Kessler WDT at 28.

In support of its request for the 2.5% late fee, SoundExchange offers several marketplace agreements between record companies and services containing, on average, a late payment fee of 1.5% per month, with a high of 2.0%. SoundExchange Ex. 012 DR (UMG-MusicNet subscription services agreement); SoundExchange Ex. 014 DR (UMG-Muze clip license agreement); SoundExchange Ex. 017 DR (UMG-Real Networks subscription agreement); SoundExchange Ex. 021 DR (SONY BMG-Muze clip license agreement); SoundExchange Ex. 002 DR (WMG-Next Radio Solutions webcasting agreement); SoundExchange Ex. 004 DR (SONY BMG-MusicMatch Internet radio agreement).

Radio Broadcasters and DiMA counter that a 0.75% late fee (9% per annum) is generous and is greater than the current cost of borrowing. DiMA and Radio Broadcasters JPFF at ¶ 286. They cite the testimony of Eugene Levin of Entercom Broadcasting who, while conceding that Entercom has agreements with a number of suppliers (including ASCAP, BMI and SESAC) that provide for late fees ranging from 12% to 18% per year, testified that late fees are often waived so as to promote a positive business atmosphere and maintain good relations. Levin WRT at 4–5; 11/14/06 Tr. 38:2–9, 41:5–12 (Levin). Radio Broadcasters cite Entercom's agreements with SESAC and Liquid Compass as evidence that late fees can be discretionary. Radio Broadcasters RFF at ¶¶ 137–138.

The Copyright Royalty Judges determine that the record evidence does not support continuation of a 0.75% per month late fee. Although Mr. Levin advocated that number, he did not provide a single agreement that his company had for music service that contained such a rate, nor did he state that he was aware of any agreements containing such a rate. To the contrary, Entercom's agreements with ASCAP, BMI and SESAC all provide for late fees ranging from 12% to 18% per annum. 11/14/06 Tr. 38:2–9, 41:5–12 (Levin). The agreements cited by SoundExchange also fall within this range.

We are not persuaded that contracting parties' ability to waive late fees requires rejection of a higher late fee. Contract provisions granting discretion to waive late fees were present in some of Entercom's agreements but were noticeably absent from the record company/music service agreements cited by SoundExchange. Mr. Levin was not aware of industry practices with respect to waiver. Moreover, his testimony that waiver promotes good business relationships with contractees is unavailing in the context of statutory licensing. While waiving a late fee can promote good feelings in a private agreement and thereby avoid termination of future goods and services by the offending party, it has no bearing for a statutory license where copyright owners and performers cannot, short of an infringement determination by a federal court, terminate access to their works under the license.

After reviewing the record, the Copyright Royalty Judges find that the record company/music service agreements provided by SoundExchange are the best evidence as to the appropriate late fee. While these are not agreements for DMCA-compliant webcasting,[74] there is no reason to believe that a term governing late payment, which is unrelated to the specific royalty rates of the agreements, would be any different in a DMCA-compliant agreement. The agreements establish a range of 1.5% to 2%, with the majority of the agreements containing the 1.5% figure. We adopt the 1.5% figure.[75] In doing so, we reject SoundExchange's request for a doubling of the late fee every five days when a royalty payment is later than 20 days because such a provision does not appear in any of the agreements, and SoundExchange has failed to demonstrate the need for such an extraordinary measure.

b. Statements of Account

i. Late Fee for Statements of Account

Webcaster I and part 262 of the Copyright Office's rules adopted a late fee for royalty payments but not for late statements of account. Ms. Kessler testified that it is not uncommon for SoundExchange to receive late and incomplete statements of account from Services. 6/6/06 Tr. 137:12–138:20 (Kessler). She urged the Copyright Royalty Judges to adopt a penalty fee for late and/or incomplete statements calculated as if the Service had failed to pay royalties when required. Kessler WDT at 29–30. Mr. Levin testified that it was inappropriate to assess a late fee when a Service did not submit a timely statement of account and particularly unfair where the statement contained good faith errors or omissions. Levin WRT at ¶¶ 16,19; 11/14/06, Tr. 44:18–45:11 (Levin).

The Copyright Royalty Judges determine that timely submission of a statement of account is critical to the quick and efficient distribution of royalties. The statement of account identifies the time period to which the royalty payment applies, enables SoundExchange to determine what music service is being paid for and whether the filer has attributed the correct royalty fee to the service or services it is paying for. Although Mr.

[74] We acknowledge that the status of whether "custom radio" services are DMCA-compliant remains unresolved, but resolution of this issue is not necessary to our determination.

[75] We note that Ms. Kessler testified that a 1.5% late fee, which is the late fee for the section 114 license applicable to preexisting subscription services, still does not discourage late payments. Ms. Kessler did not supply, other than her opinion, evidence to demonstrate that 2.5% is the magic number that will end, or virtually end, future late payments. Further, the Services demonstrated on cross-examination of Ms. Kessler that the frequency of late payments of the Services in this proceeding has not been so rampant as to warrant a much higher late fee. DiMA and Radio Broadcasters JPFF at ¶ 292.

Levin viewed the timely submission of statements of account as burdensome, we note that the regulations implementing the satellite, cable and digital audio recording devices or media (DART) statutory licenses require the simultaneous submission of royalty payments and statements of account. See 37 CFR 201.11 (satellite); 37 CFR 201.17 (cable); 37 CFR 201.28 (DART). Failure to timely submit a statement of account with the royalty payment requires payment of a late fee under those licenses. We do not see any unique burdens or circumstances for Services operating under the section 112 and 114 licenses that require a different outcome. Consequently, we adopt the 1.5% per month late fee for statements of account.

With respect to the completeness of the statement of account, the burden is upon the Service to provide as complete and error-free a statement as possible. All of the information needed to complete the statement—which is neither complex nor lengthy, see SoundExchange Ex. 212 DP—is in the possession of the Service. Inconsequential good-faith omissions or errors should not warrant imposition of the late fee.

ii. Confidentiality

There is considerable disagreement as to whether the information contained in statements of account is confidential and should be viewed by the Collective (SoundExchange) alone and not by copyright owners and performers. DiMA and Radio Broadcasters assert that a confidentiality requirement is necessary and is what willing buyers and sellers would agree to in a competitive market. DiMA and Radio Broadcasters JPFF at ¶¶ 297, 299. They cite to the confidentiality provisions of five agreements—SoundExchange Ex. 003 DR sec. 10(b) (WMG-MusicNet subscription services agreement); SoundExchange Ex. 004 DR sec. 10.01 (SONY BMG-MusicMatch Internet radio agreement); SoundExchange Ex. 006 DR sec. 8.1 (EMI standard wholesale agreement for streaming/conditional download licenses); SoundExchange Ex. 017 DR sec. 5(b) (UMG-Real Networks subscription agreement); SoundExchange Ex. 014 DR sec. 6 (WMG-Muze clip license agreement)—in support of this assertion. Further, Mr. Levin testified that the information concerning a Service's total royalty payments, listening minutes and aggregate tuning hours is not the kind of information that Services share with their competitors. 11/14/06 Tr. 47:14–48:7 (Levin).

SoundExchange counters that precluding copyright owners and performers from access to the information contained in the statements of account not only impedes the operation of its Board of Directors (which is comprised of owners and performers) but is a denial of the fundamental information necessary for enforcement of the statutory licenses. Kessler WDT at 33. Copyright owners and performers only see statement of account information from prior statutory license periods in the aggregate [76] and cannot make informed decisions to identify and act against Services that, in their view, are not satisfying their statutory requirements. *Id.* at 31. SoundExchange also views the evidence of marketplace activity differently from DiMA and Radio Broadcasters, citing two marketplace agreements between record companies and digital music services that require the reporting of revenues and number of performances so that the copyright owners can verify the calculation of the royalty fee owed under the agreement. SoundExchange Ex. 002 DR (WMG-Next Radio Solutions webcasting license agreement); SoundExchange Ex. 018 DR (UMG-Music Video Net video agreement). Radio Broadcasters counter that even these two agreements have a general confidentiality provision that prevents disclosure to the public of confidential business information. Radio Broadcasters RFF at ¶ 127.

The Copyright Royalty Judges are troubled by continuing the confidentiality restrictions adopted in Webcaster I and part 262 of the Copyright Office's regulations. Because they were the product of negotiations, there was no finding that the types of information contained in the statements of account were indeed ''confidential''; i.e., that their disclosure would harm the business interests of the reporting Services. Mr. Levin, the only witness offered by the Services on this point, did not articulate how the information contained in the statements can or could injure the competitiveness of a Service, or otherwise negatively affect its operation. 11/14/06 Tr. 96:11–104:11 (Levin). Further, he conceded that a competitor's subscription to Arbitron, a broadcasting rating and information service, would provide much of the same information contained in the statements. 11/14/06 Tr. 85:20–87:13, 97:13–99:14 (Levin). The Copyright Royalty Judges come to the conclusion that while Services may want the information contained in statements of account to remain confidential, they have not demonstrated how disclosure of that information is, or is likely to be, harmful.

Even more troubling is how the denial of information to copyright owners and performers impacts their substantive rights under the section 112 and 114 licenses. Without the information contained in a statement of account, a copyright owner and/or performer cannot begin to make an informed judgment as to whether a Service is complying with its statutory obligations and making the correct payments. Permitting the disclosure of the information contained in statements of account only to the Collective does not alter this concern and grants the Collective an inordinate amount of control as the only party knowledgeable of the compliance of each of the Services. No support can be found in the statute for an arrangement that effectively imbues only the Collective, or any other agent, with the information necessary to pursue an infringement action. In sum, copyright owners and performers should not be excluded from obtaining the information contained in a statement of account of a Service that performed his or her work.[77]

Review of the licensing agreements cited by Radio Broadcasters does not counsel a different result. The confidentiality provisions in these agreements generally prohibit disclosure of ''business'' information to those not party to the agreement, i.e., the public at-large. They do not deny the licensor—the copyright owner—access to this information. And several of the cited agreements permit the licensor to share obtained business information with others, including advisors, financial officers, bankers, and contractors with a need to know. SoundExchange Ex. 004 DR sec. 10.01(a) (SONY BMG-MusicMatch Internet radio agreement); SoundExchange Ex. 002 DR sec. 9.01(a) (WMG-NextRadio Solutions webcasting license agreement). In the statutory licensing setting, copyright owners and performers are the licensors of their works to the Services and certainly need to know the information concerning the Services' payments. Providing the information only to SoundExchange, as the Services request, is not consistent with these agreements.

What is consistent with these agreements, however, is a prohibition of disclosure of statement of account information to the general public, and we are adopting that restriction.

[76] See 37 CFR 262.5(c).

[77] This conclusion again is supported by the satellite, cable and DART licenses which permit copyright owners full and complete access to the statements of account of the users of those licenses.

Therefore, access to statements of account is limited to copyright owners and performers, and their agents and representatives identified in the regulations, whose works were used by a Service under the section 112 and 114 licenses. Copyright owners, performers, and the Collective are directed in the regulations to implement the necessary procedures to guard against access to and dissemination of statement of account information to unauthorized parties.

c. Audit and Verification of Payments

SoundExchange requests four ''clarifications'' to the part 262 regulations regarding verification of royalty payments made by the Services: (1) That the Services should be required to maintain their books and records for the three prior calendar years (January to December) and the entirety of those three years may be audited; (2) persons other than Certified Public Accountants (''CPAs'') should be allowed to serve as auditors and need only be independent from the Service they are auditing; (3) individual copyright owners and performers, in addition to the Collective, should be permitted to audit Services; and (4) the threshold for allocating the costs of an audit should be reduced from a 10% underpayment to a 5% underpayment, or if the Service underpays by $5,000 or more. SoundExchange PFF ¶¶ at 1314, 1342. With the exception of the first request, the Copyright Royalty Judges decline to accept SoundExchange's proposals.

By eliminating the requirements that an auditor be a CPA and independent from SoundExchange, SoundExchange is seeking to transform the prior verification process into what it calls ''technical audits.'' SoundExchange PFF at ¶¶ 1327, 1328. Technical audits would, in SoundExchange's view, reduce its costs by allowing in-house technical experts to conduct the audits rather than outside CPAs, who might lack the technical capability for the data processing and analysis and may be more expensive than in-house personnel. 6/6/06 Tr. 269:16–273:4 (Kessler). The Copyright Royalty Judges have reviewed the record company/music service agreements submitted by the parties and note that some agreements permit technical audits. SoundExchange Ex. 002 DR sec. 5.02 (WMG-NextRadio Solutions webcasting license agreement); SoundExchange Ex. 003 DR sec. 4(b) (WMG-MusicNet subscription services agreement). Others, however, require the auditors to be CPAs, (SoundExchange Ex. 001 DR sec. 4.01 (WMG-All Media Guide clip license agreement), SoundExchange Ex. 014 DR sec. 3.7 (WMG-Muze clip license agreement)), and that the auditor be independent of both the licensor and licensee. SoundExchange Ex. 001 DR sec. 4.01 (WMG-All Media Guide clip license agreement); SoundExchange Ex. 004 DR sec. 6.05 (SONY BMG-MusicMatch Internet radio agreement); SoundExchange Ex. 007 DR sec. 8(b) (EMI—MusicNet nonportable subscription services agreement). While technical audits by in-house personnel might be cheaper for the Collective, we conclude that it is more important, in the interest of establishing a high level of credibility in the results of the audit, that the auditor be independent of both parties. 11/14/06 Tr. 9:8–11:11 (Levin). Likewise, we find that requiring the auditor to be certified further raises confidence levels in the audit. CPAs have experience in the field of accounting, are familiar with the accepted standards and practices for auditing, and are governed by standards of conduct. If technical skills are required to process the data of a Service, the auditor can request assistance. In sum, the Copyright Royalty Judges are requiring that the auditor be certified and independent of both SoundExchange and the Service being audited.

The Copyright Royalty Judges are not persuaded that all copyright owners and performers should have the right to audit a Service. It is one thing for a Service that enters into a private agreement with a copyright owner to allow the owner to conduct an audit. Kenswil WDT at 10–11; Eisenberg WDT at 13. It is an altogether different matter to grant the right of audit to copyright owners and performers under a statutory licensing scheme where there is no privity of contract and the potential for a significant magnitude of audits. We agree with the Services that subjecting them to that kind of extensive auditing process could seriously impair their business operations. Levin WRT at ¶ 30.

Likewise, we are not persuaded that the underpayment threshold for shifting the cost of an audit should be reduced from an underpayment of 10% to one of 5% of the royalty fee due, or $5,000, whichever is less. Ms. Kessler stated that the 10% figure was too high and encourages the Services to deliberately underpay their royalties up to 9%, but she did not offer any direct evidence of this occurring. Furthermore, the 10% figure is consistent with several of the record company/music service agreements. SoundExchange Ex. 003 DR sec. 6(f) (WMG-MusicNet subscription services agreement); SoundExchange Ex. 004 DR sec. 6.06 (SONY BMG-MusicMatch Internet radio agreement); SoundExchange 010 DR sec. 5(c) (EMI-Muze clip license agreement).

Finally, the Copyright Royalty Judges agree with SoundExchange that the Services should retain their books and records for the three calendar years prior to the current year. Services need to know with precision how long they must retain their books and records as well as the time period that is potentially subject to an audit.

d. Other Matters

i. Recordkeeping

Subsequent to the conclusion of the hearings on the direct statements, the Copyright Royalty Judges issued an Interim Final Rule in Docket No. RM 2005–2, the docket establishing notice and recordkeeping requirements for certain digital audio services using the section 112 and 114 licenses. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License (Interim final rule), 71 FR 59010 (October 6, 2006). The Interim Final Rule prescribed the format and delivery requirements for reports of use of sound recordings, thereby completing the interim recordkeeping rulemaking process begun several years ago by the Copyright Office. Several of the parties in this proceeding, uncertain as to whether such recordkeeping issues would be addressed in this docket and noting the statutory language that permits the Copyright Royalty Judges to modify their existing recordkeeping rules, 17 U.S.C. 803(c)(3), submitted testimony on the matter. Although we ruled that recordkeeping matters would be addressed through notice and comment rulemaking and not in this proceeding, we did not strike the testimony. Instead, such testimony was allowed to remain in the record as evidence, if any, of the relative costs to the Services and the Collective associated with recordkeeping. Order Denying Radio Broadcasters' Motion for Clarification, Motion to Strike SoundExchange Exhibits 414–418 DP and Motion to Set Expedited Briefing Schedule, Docket No. 2005–1 CRB DTRA (September 8, 2006).

The costs of recordkeeping to both sides did not influence our determination of royalty rates in this proceeding, nor are we choosing to amend our existing recordkeeping regulations. See 37 CFR part 370. The testimony presented by the Services as to the costs associated with recordkeeping was vague and unsubstantiated and went little beyond the assertion that there are some costs associated with recordkeeping. Clearly, any recordkeeping, no matter how modest, involves some costs. Nevertheless, the statute does require reporting. 17 U.S.C. 112(e)(4), 114(f)(4)(A). And despite the fact that most of the requirements for creating a report of use have been public since 2002, see Notice and Recordkeeping for Use of Sound Recordings Under Statutory Licenses (Notice requesting written proposals and announcement of status conference), 67 FR 59573 (September 23, 2002), the Services failed to quantify either the magnitude of the actual overall costs or the average costs to individual Services. In any event, because our recordkeeping regulations are interim and not final, there is ample opportunity to again address the Services' costs in a future rulemaking. The ability to influence and adjust the costs of recordkeeping is far more direct in that context than this rate determination proceeding and is more properly handled there.

Likewise, there was no persuasive testimony compelling an adjustment of the current recordkeeping regulations. SoundExchange presses for census reporting, but the record is incomplete as to effectiveness of the current periodic reporting requirement. Once again, the Copyright Royalty Judges conclude that this matter is more appropriate for a future recordkeeping rulemaking.

ii. Royalty Distribution

Having eschewed the Receiving Agent/Designated Agent model of the prior regulations in favor of a single Collective, we are adopting streamlined royalty distribution procedures. SoundExchange has the responsibility of collecting the royalties from the Services and distributing them to all eligible copyright owners and performers, including any agents designated by copyright owners and/or performers for their receipt. Deduction of costs by SoundExchange is governed by the statute, 17 U.S.C. 114(g)(3), and therefore we have no authority to address any resulting inequalities.

With respect to the distribution methodology, the Copyright Royalty Judges are retaining the requirement that all performances be valued equally by the Collective. SoundExchange is already familiar with and applies this requirement. 6/6/06 Tr. 171:2–172:10 (Kessler). Copyright owners and/or performers are certainly free to agree to subsequent distribution methodologies once they have received their distribution from the Collective.

VI. Determination and Order

Having fully considered the record, the Copyright Royalty Judges make the above Findings of Fact based on the record. Relying upon these Findings of Fact, the Copyright Royalty Judges unanimously adopt every portion of this Final Determination of the Rates and Terms of the Statutory Licenses for the digital audio transmission of sound recordings, pursuant to 17 U.S.C. 114, and for the making of ephemeral phonorecords, pursuant to 17 U.S.C. 112(e). The Copyright Royalty Judges exercise their authority under 17 U.S.C. 803(c), and transmit this Final Determination to the Librarian of Congress for publication in the **Federal Register**, pursuant to 17 U.S.C. 803(c)(6).

So Ordered.

James Scott Sledge,
Chief Copyright Royalty Judge.

William J. Roberts,
Copyright Royalty Judge.

Stanley C. Wisniewski,
Copyright Royalty Judge.

Dated: April 23, 2007.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulation

■ For the reasons set forth in the preamble, Chapter III of Title 37 of the Code of Federal Regulations is amended by adding new Subchapter E to read as follows:

Subchapter E—Rates and Terms for Statutory Licenses

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Sec.

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

§ 380.1 General.

(a) *Scope.* This part 380 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2006, through December 31, 2010.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 shall comply with the requirements of those sections, the rates and terms of this part, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this part to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) *Aggregate Tuning Hours* (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all Listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous Listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one Listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

(b) *Broadcaster* is a type of Commercial Webcaster or Noncommercial Webcaster that owns and operates a terrestial AM or FM radio station that is licensed by the Federal Communications Commission.

(c) *Collective* is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2006–2010 license period, the Collective is SoundExchange, Inc.

(d) *Commercial Webcaster* is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

(e) *Copyright Owners* are sound recording copyright owners who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

(f) *Ephemeral Recording* is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C.112(e).

(g) *Licensee* is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)), or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

(h) *Noncommercial Webcaster* is a Licensee that makes eligible digital audio transmissions and:

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

(i) *Performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(j) *Performers* means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(k) *Qualified Auditor* is a Certified Public Accountant.

(l) *Side Channel* is a channel on the website of a broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the broadcaster.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112 are as follows:

(1) *Commercial Webcasters:* (i) The per-performance fee for 2006–2010: For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Commercial Webcaster will pay a performance royalty of: $.0008 per performance for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010. The royalty payable under 17 U.S.C. 112 for any reproduction of a phonorecord made by a Commercial Webcaster during this license period and used solely by the Commercial Webcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments.

(ii) Optional transitional Aggregate Tuning Hour fee for 2006–2007: The following Aggregate Tuning Hours (ATH) usage rate calculation options, in lieu of the per-performance fee, are available for the transition period of 2006 and 2007:

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

(iii) ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

(2) *Noncommercial Webcasters:* (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of $500 in 2006, 2007, 2008, 2009 and 2010.

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Noncommercial Webcaster will pay a performance royalty of: $.0008 per performance for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010.

(iii) The following Aggregate Tuning Hours (ATH) usage rate calculation options, in lieu of the per-performance fee, are available for the transition period of 2006 and 2007:

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

(iv) ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

(v) The royalty payable under 17 U.S.C. 112 for any reproduction of a phonorecord made by a Noncommercial Webcaster during this license period and used solely by the Noncommercial Webcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments.

(b) *Minimum fee.* Each Commercial Webcaster and Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the license period during which they are Licensees pursuant to licenses under 17 U.S.C. 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters and Noncommercial Webcasters and is also payable for each individual Side Channel maintained by Broadcasters who are Licensees. The minimum fee payable under 17 U.S.C. 112 is deemed to be included within the minimum fee payable under 17 U.S.C. 114. Upon payment of the minimum fee, the Licensee will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 by the 45th day after the end of each month for that month, except that payments due under § 380.3 for the period beginning January 1, 2006, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that:

(1) Payment due under § 380.3(b) for 2006 and 2007 shall be due 45 days after the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms.

(2) Payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment is received by the Collective.

(f) *Statements of account.* Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

> I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.3 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Licensee, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.5 Confidential information.

(a) *Definition.* For purposes of this part, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Dated: April 23, 2007.

James Scott Sledge,

Chief Copyright Royalty Judge.

[FR Doc. E7–8128 Filed 4–30–07; 8:45 am]

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Copyright Royalty Board

37 CFR Part 380

Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2009–1 CRB Webcasting III]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges are announcing their final determination of the rates and terms for two statutory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings, for the period beginning January 1, 2011, and ending on December 31, 2015.

DATES: *Effective Date:* March 9, 2011.

Applicability Dates: These rates and terms are applicable to the period January 1, 2011, through December 31, 2015.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707–7658. E-mail: *crb@loc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Subject of the Proceeding

This is a rate determination proceeding convened under 17 U.S.C. 803(b) *et seq.* and 37 CFR part 351 *et seq.,* in accord with the Copyright Royalty Judges' Notice announcing commencement of proceeding, with a request for Petitions to Participate in a proceeding to determine the rates and terms for the digital public performance of sound recordings by means of an eligible nonsubscription transmission or a transmission made by a new subscription service under section 114 of the Copyright Act, as amended by the Digital Millennium Copyright Act ("DMCA"), and for the making of ephemeral copies in furtherance of these digital public performances under section 112, as created by the DMCA, published at 74 FR 318 (January 5, 2009). The rates and terms set in this proceeding apply to the period of January 1, 2011 through December 31, 2015. 17 U.S.C. 804(b)(3)(A).

B. Statutory Background

A lengthy review of the history of the sound recordings compulsory license is contained in the Final Determination for Rates and Terms in Docket No. 2005–1 CRB DTRA, 72 FR 24084 (May 1, 2007) ("*Webcaster II*").[1] This history was summarized by the United States Court of Appeals for the District of Columbia Circuit in *Intercollegiate Broadcast System, Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 753–54 (DC Cir. 2009), as follows:

[Since the nineteenth century, the Copyright Act protected the performance right of "musical works" (the notes and lyrics of a song), but not the "sound recording." Writers were protected but not performers.]

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act. Pub. L. No. 104–39, granting the owners of sound recordings an exclusive right in performance "by means of a digital transmission." 17 U.S.C. § 106(6); *see Beethoven.com LLC* v. *Librarian of Cong.,* 394 F.3d 939, 942 (D.C. Cir. 2005). The Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, "created a statutory license in performances by webcast," to serve Internet broadcasters and to provide a means of paying copyright owners. *Beethoven.com,* 394 F.3d at 942; *see* 17 U.S.C. § 114(d)(2), (f)(2). To govern the broadcast of sound recordings, Congress also created a licensing scheme for so-called "ephemeral" recordings, "the temporary copies necessary to facilitate the transmission of sound recordings during internet broadcasting." *Beethoven.com,* 394 F.3d at 942–43; *see* 17 U.S.C. § 112(e)(4).

Congress has delegated authority to set rates for these rights and licenses under several statutory schemes. The most recent, passed in 2005 [sic], directed the Librarian of Congress to appoint three Copyright Royalty Judges who serve staggered, six-year terms. *See* 17 U.S.C. § 801, *et seq.* These Judges conduct complex, adversarial proceedings, described in 17 U.S.C. § 803 and 37 CFR § 351, *et seq.,* and ultimately set "reasonable rates and terms" for royalty payments from digital performances. 17 U.S.C. § 114(f). * * * Rates should "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." *Id.* [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.* Specifically, they must consider whether "the service may substitute for or may promote the sales of phonorecords" or otherwise affect the "copyright owner's other streams of revenue." *Id.* § 114(f)(2)(B)(i). The Judges must also consider "the relative roles of the copyright owner and the transmitting entity" with respect to "relative creative contribution, technological contribution, capital investment, cost, and risk." *Id.* § 114 (f)(2)(B)(ii). Finally, "[i]n establishing such rates and terms," the Judges "may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A)." *Id.* § 114(f)(2)(B).

Intercollegiate Broadcast System, Inc. v. *Copyright Royalty Board,* 574 F.3d 748, 753–54 (DC Cir. 2009).

Forty petitions to participate were filed in response to the January 5, 2009, notice of commencement of the proceeding. The great majority of the petitioners were webcasters. During the subsequent period of voluntary negotiations, settlements were reached among many of the parties. In addition to the negotiation phase required in this proceeding, 17 U.S.C. 803(b)(3), Congress enacted the Webcaster Settlement Acts of 2008 and 2009, which expanded the opportunities to resolve the issues in this proceeding, as well as the issues in *Webcaster II.* This legislation further impacted *Webcasting III* by permitting the settling parties to determine if the settlements could be considered as evidence before the Copyright Royalty Judges ("Judges").[2] Eight settlements were resolved under the Webcaster Settlement Acts. 74 FR 9293 (March 3, 2009) (three agreements); 74 FR 34796 (July 17, 2009) (one agreement); 74 FR 40614 (August 12, 2009) (four agreements). The rates and terms under these settlements were the basis of approximately 95 percent of webcasting royalties paid to SoundExchange in 2008 and 2009. SX PFF at ¶¶ 50, 51.[3] Evidence was presented in this proceeding by SoundExchange, Inc. ("SX"), representing the owners, and three webcasters, College Broadcasters, Inc. ("CBI"), Live365, Inc. ("Live365"), and Intercollegiate Broadcasting System,

[1] The two prior webcasting proceedings often have been referred to informally as "Webcaster I" and "Webcaster II," respectively, as opposed to the formal caption "DTRA" (which stands for "Digital Transmissions Rate Adjustment"). In the current proceeding, we use the caption "Webcasting III" and intend to caption future webcasting proceedings using the term "Webcasting" followed by the appropriate Roman numeral.

[2] In the pleadings filed and during the testimony, Live365 attempted to introduce evidence about agreements that contained provisions that they were not to be considered as precedential under the Webcaster Settlement Acts. Following the clear language of the statute that these agreements were not "admissible as evidence or otherwise taken into account," 17 U.S.C. 114(f)(5)(C), these attempts were rejected. *See, e.g.,* 4/19/10 Tr. at 210:9–10 (sustaining objection to Live365's motion to enter into evidence the "Pure Play Agreement").

[3] References to the proposed findings of fact and conclusions of law shall be cited as "PFF" or "PCL," respectively, and reply findings and conclusions of law shall be cited as "RFF" or "RCL," respectively, preceded by the name of the party that submitted same and followed by the paragraph number. Similarly, references to the written direct testimony shall be cited as "WDT" preceded by the last name of the witness and followed by the page number. Likewise, references to the written rebuttal testimony shall be cited as "WRT" preceded by the last name of the witness followed by the page number. References to the transcript shall be cited as "Tr." preceded by the date and followed by the page number and the name of the witness.

Inc. ("IBS").[4] CBI only presented evidence to support adoption of its settlement with SoundExchange for noncommercial educational webcasters. SoundExchange and Live365 presented evidence related to commercial webcasters. The webcasting royalties paid by Live365 to SoundExchange for 2008 and 2009 were less than 3 percent of total webcasting royalties paid to SoundExchange. SX PFF at ¶ 53. SoundExchange presented evidence related to noncommercial webcasters, and IBS presented evidence for small noncommercial webcasters. Written statements, discovery and testimony for both direct case and rebuttal case were filed on these issues.

On December 14, 2010, the Judges issued their Initial Determination of Rates and Terms. Pursuant to 17 U.S.C. 803(c)(2)(B) and 37 CFR 353.4, motions for rehearing were due to be filed no later than December 29, 2010. No motions were received.

II. Commercial Webcasters

A. Commercial Webcasters Encompassed by the National Association of Broadcasters-SoundExchange Agreement

On June 1, 2009, the National Association of Broadcasters ("NAB") and SoundExchange filed a settlement of all issues between them in the proceeding, including the proposed rates and terms. This was one of the Webcaster Settlement Act agreements, published by the Copyright Office in the **Federal Register**, and was filed in this proceeding, pursuant to 17 U.S.C. 801(b)(7)(A), to be adopted as rates and terms for some services of commercial broadcasters for the period 2011 through 2015. It applies to statutory webcasting activities of commercial terrestrial broadcasters, including digital simulcasts of analog broadcasts and separate digital programming. The settlement includes per performance royalty rates, a minimum fee and reporting requirements that are more comprehensive than those in the current regulations. Section 801(b)(7)(A) allows for the adoption of rates and terms negotiated by "some or all of the participants in a proceeding at any time during the proceeding" provided they are submitted to the Copyright Royalty Judges for approval. This section provides that in such event:

> (i) The Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates; and
>
> (ii) The Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i) objects to the agreement and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

17 U.S.C. 801(b)(7)(A).

The Judges published the settlement (with minor modifications) in the **Federal Register** on April 1, 2010, and provided an opportunity to comment and object by April 22, 2010. 75 FR 16377 (April 1, 2010). No comments or objections were submitted, so the provisions of 17 U.S.C. 801(b)(7)(A)(ii) do not apply. Absent objection from a party that would be bound by the proposed rates and terms and that would be willing to participate in further proceedings, the Copyright Royalty Judges adopt the rates and terms in the settlement for certain digital transmissions of commercial broadcasters for the period of 2011–2015. 17 U.S.C. 801(b)(7)(A). *Cf. Review of the Copyright Royalty Judges Determination, Docket No. 2009–1,* 74 FR 4537, 4540 (January 26, 2009) (review of settlement adoption).

B. All Other Commercial Webcasters

1. Stipulation Concerning the Section 112 Minimum Fee and Royalty Rate and Stipulation Concerning the Section 114 Minimum Fee

In between the direct and rebuttal phases, SoundExchange and Live365 presented two settlements of issues for all remaining commercial webcasters not encompassed by the NAB-SoundExchange agreement: (1) The minimum fee and royalty rates for the section 112 license and (2) the minimum fee for the section 114 license. These two settlements were included in one stipulation. The terms of the settlement are the same as the agreement reached and included as a final rule in *Webcaster II,* following remand. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule),* 75 FR 6097 (February 8, 2010). The minimum fee for commercial webcasters is an annual, nonrefundable fee of $500 for each individual channel and each individual station (including any side channel), subject to an annual cap of $50,000. The royalty rate for the section 112 license is bundled with the fee for the section 114 license. There is one additional term in the stipulation that was not included in *Webcaster II.* The royalty rate for the section 112 license is attributed to be 5% of the bundled royalties. There was no objection to the stipulation. There was evidence presented to support the minimum fee for commercial webcasters and the bundled royalty rates. SX PFF at ¶¶ 459–468, 472. No evidence disputed it. These provisions are supported by the parties and the evidence. The Judges accept and adopt these two stipulations as settling these issues.

2. Rate Proposals for the Section 114 License for Commercial Webcasters

The contending parties propose vastly different rate amounts for the use of the section 114 license for commercial webcasters. In its second revised rate proposal, SoundExchange argues in favor of a performance rate beginning at $.0021 per performance in 2011 and increasing annually by .0002 to a level of $.0029 by 2015. SX PFF at ¶ 118.

Live365 also proposes a per performance fee structure. By contrast, under the Live365 proposal, commercial webcasters would pay $.0009 per performance throughout the period 2011–2015. Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.3(a)(1).[5]

Notwithstanding the gulf between the SoundExchange and Live365 proposed royalty amounts, there is no difference between the parties with respect to the basic *structure* of their proposed compensation schemes. Both SoundExchange and Live365 propose that per performance rates (typically stated as a fraction of a penny) be applicable in the case of the section 114 license. Furthermore, the per performance usage structure was adopted in *Webcaster II. Webcaster II,* 72 FR 24090 (May 1, 2007). It remains the best structure for the reasons stated therein. *Id.* at 24089–90. Therefore, the only issues we are left to decide are the applicable amount of the webcaster royalty rate and whether any discount to that rate should be made on those occasions when certain types of webcasters are aggregated.

The starting point for our determination is the applicable amount of the section 114 performance rate.

[4] After filing Written Direct Statements, RealNetworks, Inc. withdrew from the proceedings, and Royalty Logic, LLC, did not participate further.

[5] In addition, Live365 seeks a 20% discount applicable to this commercial webcasting per performance rate for certain "qualified webcast aggregation services." This proposal is discussed *infra* at Section II.B.5.

3. The Parties' Disparate Approaches To Rate Setting for the Section 114 License for Commercial Webcasters

Both Live365 and SoundExchange agree that the willing buyer/willing seller standard should be applied by the Copyright Royalty Judges in determining the rates for the section 114 license. Both recognize that those rates should reflect the rates that would prevail in a hypothetical marketplace that was not constrained by a compulsory license.

However, in contrast to the positions of the copyright owners and commercial services in *Webcaster II,* in the instant case SoundExchange and Live365 do not agree that the best approach to determining rates is to look to comparable marketplace agreements as "benchmarks" indicative of the prices to which willing buyers and willing sellers would agree in the hypothetical marketplace. On the one hand, Live365 primarily seeks to support its rate proposal by means of a modeling analysis that aims to determine the amount of any residue that may remain for compensating the sound recording input a commercial webcaster uses, after reducing webcaster revenues by an amount equal to the cost of all other inputs utilized by the webcaster in providing its service and also by an assumed amount of webcaster profits. By contrast, SoundExchange puts forward a benchmark approach in support of its rate proposal, similar to the primary argument it made in *Webcaster II* and an approach adopted by the Judges therein.

a. The Live365 Approach

Live365 relies primarily on a modeling analysis provided by Dr. Mark Fratrik that seeks to identify the rate that commercial webcasters "would have been willing to pay in a negotiated settlement between a willing buyer and a willing seller." Fratrik Corrected and Amended WDT at 5. We find that Dr. Fratrik presumes behavioral constraints not found in the statutory standard and, that even if we were to ignore the distortions created by such added constraints, his analysis suffers from so many other unwarranted explicit assumptions and data defects as to make his analysis untenable.

i. Dr. Fratrik's Model and the Hypothetical Market

The terms "willing buyer" and "willing seller" in the statutory standard simply refer to buyers and sellers who are unconstrained in their marketplace dealings. In other words, the buyers and sellers operate in a free market unconstrained by government regulation or interference. (*See, for example, Noncommercial Educational Broadcasting Compulsory License (Final rule and order),* 63 FR 49823, 49834 (September 18, 1998). ("[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice to license, could truly reflect 'fair market value.' "). Moreover, neither the buyers nor the sellers exercise such monopoly power as to establish them as price-makers and, thus, make negotiations between the parties superfluous. *Webcaster II,* 72 FR 24091 (May 1, 2007). ("In other words, neither sellers nor buyers can be said to be 'willing' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power.")

Dr. Fratrik and Live365 either misperceive the plain meaning of the terms of the statute or deliberately seek to expand the meaning of a "willing buyer" as articulated in the willing buyer-willing seller standard that governs this proceeding. For them, a "willing buyer" is viewed through the lens of an additional policy consideration nowhere articulated in the statute—i.e., that a buyer can only be considered "willing" if that buyer is able to obtain the sound recording input at a price that allows the buyer to earn at least a 20 percent operating profit margin from the use of that input. Thus, in Dr. Fratrik's analysis, a "representative" *single* buyer is deemed to be constrained in its behavior from participating in the input market for sound recordings unless its operating profit margin expectations in the output market for webcasting services are guaranteed at a level consistent with an *industry-wide* average profit margin for a purportedly comparable industry such as terrestrial radio. Fratrik Corrected and Amended WDT at 21–22.

Nothing in the statute supports reading such a behavioral constraint into the hypothetical marketplace to be derived by the Judges in this proceeding. Indeed, a similar argument that economic viability based on the sufficiency of revenue streams to cover costs determines any individual buyer's "willingness" to pay for an input raised by Live365 in *Webcaster I,* was rejected in that proceeding. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings (Final rule and order)* ("*Webcaster I*"), 67 FR 45240, 45254 (July 8, 2002) ("Thus, the Panel had no obligation to consider the financial health of any particular service when it proposed the rates.").

Dr. Fratrik's notion of a representative entity adds an operating condition that distinguishes his conceptual formulation from that of a statistically average firm in an industry. His representative firm must reach one specified minimum profit margin and, therefore, can only be satisfied with a royalty rate sufficient to allow it to reach that profit margin. Any lower assumed profit margin would, ceterus paribus, necessarily result in a lower recommended royalty rate. Thus, Dr. Fratrik effectively assumes that his representative firm will never have a reason to operate at less than a particular operating profit margin (*i.e.,* 20%).

But there is no a priori reason to believe that a representative webcaster would not accept a lesser profit margin, so long as it earns a profit and/or finds no risk-adjusted rate of return that could be earned by an alternative investment. Indeed, basic microeconomic analysis recognizes that, in the short-run, it is in the interest of a firm to continue to produce *even at an operating loss,* so long as its variable costs are covered and some contribution can be made toward fixed costs—otherwise, the loss incurred by the firm will be even greater (*i.e.,* full fixed costs if no production takes place).[6] In short, Dr. Fratrik's assumption of a 20% profit margin totally ignores the possibility of webcasters with a whole range of potential acceptable operating profit margins—whether lesser or greater—that would be dependent on such things as varying capital investment costs among webcasters, changing market conditions in output markets, and the applicable time horizon.[7]

Still another difficulty with Dr. Fratrik's conceptual framework is that his single "representative" buyer is treated as tantamount to an industry. But no single firm is typically the equivalent of an industry on the demand side of the market, although there is the obvious exception where a single monopsonistic buyer constitutes the entire demand side of the market for a particular input. While Dr. Fratrik does not make the claim that his representative commercial webcaster is a monopsonist, his analysis effectively produces that result.

[6] See, for example, Varian, Hal, *Intermediate Microeconomics: A Modern Approach,* (W.W. Norton & Company, 2009) at 350, 401. Mansfield, Edwin and Yohe, Gary Wynn, *Microeconomics: Theory and Applications,* (W.W. Norton & Company, 2004) at 296, 407; see also 7/28/10 Tr. at 54:2–14 (Salinger).

[7] In the long-run, all short-run fixed costs become variable.

For example, Dr. Fratrik explains that he chose to wed a 20% operating profit margin assumption to his cost and revenue estimates to "derive a resulting value for the copyrighted work." Fratrik Corrected and Amended WDT at 15, 23. In other words, Dr. Fratrik and Live365 effectively claim that *no* buyer would ever be a "willing buyer" unless the price of only the one input here analyzed (i.e., the royalty rate for sound recordings) is low enough to provide *all* buyers with sufficient revenue after the royalty payment to cover all other input costs and yield an operating profit margin of 20%. It is a claim that, rather than resulting from any careful analysis of the market demand and supply schedules, blithely ignores such analysis in favor of a single price point wholly determined by a single actor on the demand side of the market without any reference to the supply side of the market.[8]

In other words, Dr. Fratrik's single "representative" buyer's business model is to be treated as if it is the *only* webcasting production model in the whole webcasting industry. Instead of a *market* demand curve, Dr. Fratrik puts forward the implicit assumption that the amount of sound recording performances demanded must be whatever his representative *firm* deems best for its particular technological and organizational structure. But no one *firm's* demand curve is equivalent to the *market's* demand curve, unless that firm is a monopsonist. Rather, as we have noted in *Webcaster II* and the CARP noted in *Webcaster I* before us, in the hypothetical marketplace we attempt to replicate, there would be significant variations, among *both* buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors. *Webcaster II,* 72 FR 24087 (May 1, 2007); *In the Matter of Rate Setting for the Digital Performance of Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Panel to the Librarian of Congress,* Docket No. 2000–9 CARP DTRA 1&2 ("*Webcaster I CARP Report*") at 24.

Finally, even assuming the absence of the additional errors catalogued below, Dr. Fratrik's analysis, which focuses on *past* operating income statements to determine a royalty rate for all commercial webcasters in the future, fails to establish any behavioral information that would help to delineate the hypothetical marketplace we must replicate. Instead, Dr. Fratrik's analysis is largely mechanical and leads to an unsupported conclusion that *past* revenues and non-royalty costs, coupled with a webcaster operating profit margin not demonstrated to be related to past operating revenue and cost considerations (*see infra* at Section II.B.3.a.ii.), will repeatedly recur at the same levels in each year over the five-year period of the license going forward. Having tightly constrained the possibilities of market behavior in this manner, Dr. Fratrik's model then automatically produces an unchanging residue and, hence, an unchanging royalty rate for the whole period.[9] This is a dubious result that flows from the unwarranted assumption of what amounts to a behavioral straitjacket.

Moreover, even if Dr. Fratrik's problematic behavioral constraints and implicit assumptions somehow could be ignored, his analysis suffers from so many other unwarranted explicit assumptions and data defects as to make it untenable.

ii. The Specific Elements of Dr. Fratrik's Model

Dr. Fratrik's assumptions regarding webcasting industry costs, revenues and profit margins are seriously flawed when viewed individually. Moreover, these flaws are compounded by merging revenue, costs and profit margin information gathered from disparate data sources into a single "economic model." [10]

Dr. Fratrik begins by assuming that "Live365's cost structure will serve as a good conservative proxy for the *industry* as it is a mature operator." Fratrik Corrected and Amended WDT at 16 (emphasis added). This assumption is not supported by the record of evidence in this proceeding which points to a wide variety of existing webcasting services and business models. SX PFF at ¶ 323. It defies credulity to claim, as does Live365, that all these disparate business models may be experiencing essentially the same unit costs. Indeed, Dr. Fratrik makes this assertion while recognizing that, unlike for many other participants in the market, at least two separate lines of business can be distinguished for Live365 (broadcasting services and webcasting) and, further, that Live365 acts as an aggregator with respect to webcasting. Dr. Fratrik offers no example of a comparable analogous participant in the industry who is structured in this manner. Furthermore, when he attempts to adjust Live365's costs to reflect only webcasting operations, he fails to adequately do so and he ignores the synergistic nature of Live365's various lines of business. SX PFF at ¶¶ 355, 357, 358. Finally, even though he argues for an additional aggregator discount to be applied to Live365's webcasting royalty rates based on monitoring and reporting savings purportedly provided to the collective (i.e., SoundExchange), he nowhere appears to adjust Live365's webcasting cost estimates to account for any resulting differences in costs that Live365 may incur as compared to other webcasters who are not aggregators. He makes no such adjustment despite the fact that it is the typical webcaster's unit costs he is seeking to model rather than the typical aggregator's unit costs. While any additional reporting and monitoring costs incurred by aggregators [11] may be offset by fees charged to the aggregated webcasters or by the reduced costs of programming that Live365 would otherwise have to undertake in order to make comparable channel offerings as a multi-channel broadcaster, such salient differences between the typical webcaster's unit costs and the typical aggregator's unit costs are not addressed by Dr. Fratrik's analysis. For all these reasons, the unit cost estimation for webcasting which Dr. Fratrik offers is seriously flawed.

On the revenue side of his analysis, Dr. Fratrik assumes that: (1) Webcaster revenue comes from advertising revenue and subscription revenue; (2) "publicly available industry reports from AccuStream and ZenithOptimedia serve as the lower and upper bounds, respectively, on advertising revenue measurements for the past period;" and (3) Live365's subscription revenue per listening hour can be utilized as a proxy for gauging subscription revenues in the webcasting industry. Fratrik Corrected and Amended WDT at 16–17, 24–25.

[8] Dr. Fratrik implies that because the record companies supplying the sound recordings will incur something near zero incremental costs, the supply side of the market may be largely ignored. 4/27/10 Tr. at 1131:12–1133:19 (Fratrik). But Dr. Fratrik offers no empirical support for his assertion as to actual incremental costs. We have clearly rejected a similar contention put forward in *Webcaster II* on both empirical and theoretical grounds. *Webcaster II,* 72 FR 24094 (May 1, 2007).

[9] In addition to the flat royalty rate growth recommended by Dr. Fratrik over the 2011–2015 term, his recommended royalty rate of $0.0009 per performance would return the statutory rate to near its 2006 statutory level.

[10] Dr. Fratrik uses the term "economic model" to broadly describe his analysis. It is more closely akin to a type of *pro forma* income statement that attempts to demonstrate the expected effect of varying royalty rates on a firm's financial viability. In other words, it is an accounting model that, relying on historical cost and revenue data for all but royalty costs, endeavors to demonstrate the anticipated results of alternative royalty rates on projected net revenues.

[11] For example, Dr. Fratrik notes that, in connection with its aggregation services, "Live365 has spent a considerable amount of time and investment establishing its software systems to accurately measure and document listening for each copyrighted work that is streamed." Fratrik Corrected and Amended WDT at 38 n.62.

Live365's rate proposal in this proceeding (i.e., $.0009 per performance throughout the period 2011–2015), however, is apparently based only on Dr. Fratrik's analysis of revenues using the ZenithOptimedia data. Indeed, use of the Accustream revenue data alternative produces the anomalous result that copyright owners would have to pay webcasters each time the owners' sound recordings were performed, no matter how low a profit margin Dr. Fratrik assumed for webcasters in his analysis. Fratrik Corrected and Amended WDT at 26, Table 4; 4/27/10 Tr. at 1157:1–1158:6 (Fratrik).

Undaunted by this anomalous result, Dr. Fratrik simply repeats his analysis, substituting, *in part,* the ZenithOptimedia advertising revenue data for the Accustream advertising revenue data and, in concert with a 20% assumed profit margin, obtains the $.0009 per performance royalty rate that has been proposed by Live365 to be applied without change throughout the period 2011–2015. Yet Dr. Fratrik's alternative ZenithOptimedia-based analysis does not completely divorce itself from the Accustream data; instead, because ZenithOptimedia did not provide the Aggregate Tuning Hours ("ATH") numbers associated with its total advertising revenue estimate, Dr. Fratrik fell back on the Accustream data for a total ATH number and calculated advertising revenue per ATH by dividing the ZenithOptimedia revenue data by the Accustream ATH data. In short, Dr. Fratrik combines advertising revenue data based on two separate data sources without making a determination that the data was capable of being combined in this manner.

Moreover, even Dr. Fratrik admitted that the ZenithOptimedia and Accustream advertising revenue estimates are "challenging" or difficult to produce because a vast number of webcasters do not report their revenues publicly. 4/27/10 Tr. at 1220:1–20 (Fratrik). Thus, these databases have clear limitations and the uncritical manner in which Dr. Fratrik mixes and matches data from these two separate advertising revenue databases and then further combines subscription revenue data from a third separate source (*i.e.,* the Live365 subscription revenue data) plainly suggests a less than rigorous approach to his analysis.

Finally, with respect to revenues, Dr. Fratrik's analysis reports, but neither takes into account nor provides an adequate explanation for, the growth in the ZenithOptimedia advertising revenues forecast from his 2008 base through 2011 (i.e., growth from $200 million to $291 million). Fratrik Corrected and Amended WDT, Ex. 8 at 187. It may be argued that growth in the *level* of revenues does not necessarily translate into growth in *unit* revenues. However, we find that it is difficult to accept Dr. Fratrik's unsupported assertion that he expects little improvement in such revenues on a unit basis (*see* Fratrik Corrected and Amended WDT at 5). Dr. Fratrik fails to provide any adequate empirical support for the implied assumption necessary to reach this conclusion—an assumption that the growth in performances will take place at precisely the pace necessary to assure that the anticipated growth in revenues over the relevant period will not alter the unit revenue ratio. Moreover, without such an implied assumption, it is difficult to avoid the conclusion that Dr. Fratrik's constant royalty rate should have been adjusted each year based on the implications of growing revenues for his own model. Yet, he offers no such adjusted royalty rate. At the very least, these changing advertising revenue totals call into question the reliability of the unchanging royalty rate derived by Dr. Fratrik from the lowest of the revenue totals available from the same data source (i.e., $200 million instead of $291 million).

Dr. Fratrik's assumption of a 20% operating margin for webcasters in his analysis is not solidly supported. That operating profit margin is not put forward as either a historical profit margin or a forecasted profit margin for webcasters, but rather as a profit margin derived from the over-the-air broadcasting industry. SX PFF at ¶¶ 328, 330. The record of evidence in this proceeding does not support the notion that profit margins for webcasters are likely to be similar to the more capital intensive terrestrial radio industry. SX PFF at ¶¶ 332–5. Furthermore, we find that Dr. Fratrik failed to establish a solid basis for concluding that the *minimum* operating profit margin for his representative webcaster was comparable to the *average* firm experience from firms that operate on a different platform (over-the-air radio).

Live365 argues in its proposed reply findings at ¶ 327 that Dr. Fratrik's 20% profit margin assumption is further corroborated by the recording industry's own expert testimony in *Webcaster I* (offered by Dr. Thomas Nagle, Chairman, Strategic Pricing Group, Inc.) which purportedly "recommended that webcasters should be able to achieve margins between 13.2% and 21.8%." However, although the Nagle exhibit referred to by Live365 was appended to Dr. Salinger's written rebuttal testimony, the exhibit was only mentioned briefly in a footnote to the Salinger testimony and then only to make a different argument. Dr. Salinger, in fact, made no specific reference to any of the varying operating profit-margin figures utilized in that 2001 Recording Industry Association of America ("RIAA") study. In other words, it can hardly be said that the figures in question were offered as "corroborative" evidence to support Dr. Fratrik's assumptions. Moreover, the point of this 2001 study appears to have been to recommend a royalty rate based on the operating profit margins necessary to generate an *assumed* range of rates of return on investment for webcasters. In fact, the Nagle study utilized an operating profit margin in the range of 8.43% to 17.05% in order to "arrive at the appropriate range for the statutory license royalty fee." *See* Salinger WRT, Exhibit 3 at 16 and Appendix 3 at 1. Dr. Fratrik's 20% assumption for webcaster operating profit margins lies substantially outside this range. Moreover, the CARP rejected Dr. Nagle's analysis as corroborating evidence in *Webcaster I.* ["Dr. Nagle's analysis necessarily relies upon a myriad of highly questionable assumptions that appear inconsistent with foreseeable market conditions."] *Webcaster I CARP Report* at 73; ["We conclude that Dr. Nagle's analysis does not support any particular rate level."] *Id.* at 74. We find it provides no corroborative support for Dr. Fratrik's assumed 20% webcaster operating profit margin in this proceeding.

Thus, we find that Dr. Fratrik's "model" is based upon a series of assumptions and analogies that, taken individually, add such a degree of uncertainty or inexactitude to the resulting model as to make it unsatisfactory for the purpose of portraying the likely outcome of negotiations between willing buyers and willing sellers in the market for sound recording inputs that are used in webcasting services. Indeed, Dr. Fratrik's model does not even adequately address some of the modest considerations for a modeling approach laid out by Live365's rebuttal expert, Dr. Salinger. SX PFF at ¶ 307. Questionable assumptions, reservations about the methodological appropriateness of mixing disparate data sources, and concerns over the resulting reliability of the data used in the Fratrik model lead us to find that this theoretical construct suffers serious deficiencies that do not lend themselves to remediation.

iii. Other Factors Put forward for Consideration

Live365 offers several other arguments to buttress its request for a royalty rate that would effectively return the statutory rates to near their 2006 statutory level.

First, Dr. Fratrik maintains that "[a]s industry projections for more robust growth in the Internet radio advertising market have clearly not materialized over the past few years," his valuation model must give rise to the conclusion that a "reduction in royalty rates from the prescribed rates covering 2006–2010" is warranted. Fratrik Corrected and Amended WDT at 31. In so doing, he incorrectly attributes the annual increase in rates established in *Webcaster II* to projections of growth primarily provided by Dr. Erik Brynjolffson and Mr. James Griffin in that proceeding. Fratrik Corrected and Amended WDT at 12–14. Similarly, Live365 argues that "[g]iven that the lofty expectations from the *Webcasting II* proceeding have not been fulfilled, it follows that the rates for the next five years should be set lower than the rates determined by the CRB [Judges] in *Webcasting II.*" *See* Live365 PFF at ¶ 38. But, quite to the contrary, the Judges' determination in *Webcaster II* did not rely on those particular predictions in setting rates. Indeed, the Judges expressly rejected Dr. Brynjolfsson's modeling attempt and specifically cited the flaws in his effort "to project future growth rates" as a basis for not relying on them. *Webcaster II,* 72 FR 24093. Moreover, the evidence in the record on industry growth over the 2006–2010 period which shows *increased* advertising revenues, *increased* performances, and *increased* listening does not support a rate *reduction.* It more likely would support at least some modest rate increase. *See* SX PFF at ¶¶ 390–395, 398–401. While some Live365 data may show a flattening or decline for a particular pair of years, the overall trend of that same data does not show a decrease. For example, data presented by Live365 shows a year-to-year decline in listenership from 2006 to 2007, but this is followed by substantial increases in 2008 and 2009 and maintenance of 2009 levels in 2010. Overall, the trend in such listenership recorded since 2000 has been decidedly upward, even though the growth has occurred unevenly from year to year. *See* Smallens Corrected WRT at 7, Table 1.

Second, Live365 also contends that a downward adjustment of the current royalty rate is appropriate based on (1) The promotional value of statutory webcasting relative to its non-substitutional effect on other sales of music, including the promotional value to copyright owners stemming from the wide array of music and artists played on statutory webcasting services; (2) the relative creative contributions, technical contributions, investments, costs and risks made or borne by commercial webcasters compared to copyright owners; and (3) the relative disparate impact of certain competitive factors on webcasters as compared to copyright owners. After careful consideration, we find that the evidence submitted by Live365 on each of these claims is weak at best and, most certainly, too weak to establish the basis for a decrease in webcaster royalty rates. SX PFF at ¶¶ 415, 419–21, 426, 431, 446–9; SX RFF at ¶¶ 176, 179–180. Then too, Live365 does not present an acceptable empirical basis for quantifying the individual asserted effects of these various factors and/or for deriving a method for translating such magnitudes into a rate adjustment. Moreover, to the extent that Live365 claims that the Fratrik valuation model makes such a quantifiable translation, we need not further address these issues separate from our examination of that model which we have found seriously flawed and an inadequate representation of the market.

b. The SoundExchange Benchmark Approach

i. The Interactive Webcasting Market Benchmark

As in *Webcaster II,* SoundExchange maintains that one set of benchmark agreements with clear relevance for this proceeding as shown by an analysis prepared by its expert economist, Dr. Michael Pelcovits, consists of those agreements found in the market for interactive webcasting covering the digital performance of sound recordings. That is because the interactive webcasting market has characteristics reasonably similar to non-interactive webcasting, particularly after Dr. Pelcovits' final adjustment for the difference in interactivity.

Both markets have similar buyers and sellers and a similar set of rights to be licensed (a blanket license in sound recordings). Both markets are input markets and demand for these inputs is driven by or derived from the ultimate consumer markets in which these inputs are put to use. In these ultimate consumer markets, music is delivered to consumers in a similar fashion, except that in the interactive case the choice of music that is delivered is usually influenced by the ultimate consumer, while in the non-interactive case the consumer usually plays a more passive role. This difference is accounted for in the Pelcovits analysis. In order to make the benchmark interactive market more comparable to the non-interactive market, Dr. Pelcovits adjusts the benchmark by the added value associated with the interactivity characteristic. Pelcovits Amended and Corrected WDT at 23. This results in a rate of $0.0036 per play for a statutory non-interactive webcaster as a possible outcome in the target market. Pelcovits Amended and Corrected WDT at 4, 33.

The Judges find the interactive webcasting benchmark to be of the comparable type that the Copyright Act invites us to consider. 17 U.S.C. 114(f)(2)(B). ("In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).") Nevertheless, as we indicated in *Webcaster II,* this particular Pelcovits benchmark analysis is not without warts. *Webcaster II,* 72 FR 24094 (May 1, 2007).

In *Webcaster II* we recognized the potential implications of a benchmark analysis that focuses on only subscription services as does the interactive benchmark presented by Dr. Pelcovits. That is, ad-supported non-interactive services might pay less than subscription-based interactive services to use the same music if their advertising revenues failed to evolve to the point where ad-supported non-interactive services were just as lucrative as subscription-based interactive services on a per-listener hour basis. In that proceeding the Judges indicated that to the extent that ad-supported revenues did not come to match subscription revenues on a per-listener hour basis during the 2006–2010 term and, absent clear information on the substitutability of the subscription and non-subscription options among consumers, any resulting shortfall related to ad-supported webcasting revenues would likely be adequately mitigated by a phase-in of the per performance rates to the level indicated by the benchmark analysis, such that the benchmark recommended rate for 2006 would not become effective until the last year of the term. *Webcaster II,* 72 FR 24094 (May 1, 2007).

Here, unlike the absence of data supporting this critique which we noted in *Webcaster II,* Dr. Salinger provides some empirical data to support the position that a benchmark which reflects a weighted average of revenues obtained from *subscribers and non-subscribers* may result in a lower estimated royalty rate than Dr. Pelcovits' benchmark which focuses on only subscription rates. Salinger WRT at 10–11. Therefore, we are not persuaded that Dr. Pelcovits' benchmark estimates are sufficiently reflective of the hypothetical target market as to support the immediate implementation of a royalty rate equivalent to the $0.0036 outcome estimated by Dr. Pelcovits. Some further downward adjustment to his recommendation to adequately address the subscription/non-subscription revenue level differences may well be in order, although the magnitude of such an adjustment is not clear.

While Dr. Salinger shows that there is likely some "upward bias" introduced into the Pelcovits analysis through its focus on only subscription-based services in the benchmark market, the amount of such upward bias is not persuasively determined. Non-interactive webcasters in the market like Live365 often provide both subscription and non-subscription offerings. 7/28/10 Tr. at 40:10–15 (Salinger). Therefore, subscription-based revenues clearly must be considered. Moreover, the data used by Dr. Salinger to support his criticism, as Dr. Salinger admits, is not without its shortcomings. 7/28/10 Tr. at 98:2–104:6 (Salinger). Similarly, Dr. Fratrik admitted that the ZenithOptimedia and Accustream advertising revenue estimates are "challenging" or difficult to produce because a vast number of webcasters do not report their revenues publicly. 4/27/10 Tr. at 1220:1–20 (Fratrik). There is also the difficulty of segmenting intermingled revenues from webcasting business models that may often directly and/or indirectly depend on both subscription and nonsubscription lines of business, as well as potentially on other sources of revenue. 7/28/10 Tr. at 40:10–15, 92:1–19 (Salinger); Ordover WRT at 10–11. Nevertheless, Dr. Salinger's critique is sufficiently supported to raise legitimate concerns about the potential for upward bias in the Pelcovits estimates. It is only the magnitude of the potential upward bias that is not clearly quantified. What is clear from the record of evidence in this proceeding is that $0.0036 can be no more than the upper bounds of the range of possible rates reasonably applicable to the target market and that the most likely prevailing rate in that market is currently lower than $0.0036.

Dr. Salinger also criticizes the Pelcovits interactive webcasting benchmark analysis for: (1) Relying only on contracts with the four major record companies to the exclusion of the independent record labels; (2) ignoring the downward trend in the effective play rates paid by interactive services by utilizing the average rate in his calculations; and (3) inappropriately constructing the hedonic regression model that is used as one alternative measure of interactivity in the analysis. Salinger WRT at 15–21.

The first of these criticisms fails for lack of persuasive evidence in the record that the use of independent record contracts would have made a material difference. SX RFF at ¶¶ 101–103.

Although the second and third criticisms have some merit, the Judges find that these criticisms indicate that the Pelcovits interactive webcasting benchmark may overstate the likely prevailing market rate in the target market without necessarily rendering the Pelcovits analysis fatally flawed. With respect to the second criticism, Dr. Salinger acknowledged that this concern could be addressed by multiplying the recommended rate by 0.8737.[12] SX PFF at ¶ 209. Such an adjustment, of course, would reduce the recommended rate. SoundExchange offers no evidence that such an adjustment is unwarranted and even appears to endorse such an approach by performing this exact calculation with respect to the $0.0036 rate and reducing it to $0.0031. *See* SX PFF at ¶ 210. But SoundExchange's calculation was applied to the highest possible outcome Dr. Pelcovits lists for his benchmark analysis (*i.e.,* $0.0036), when in fact, Dr. Pelcovits indicates that his rate after substitution adjustment would result in a "range of *recommended* rates" with a "simple average of $0.0033." Thus, it appears that this $0.0033 average also requires adjustment to meet Dr. Salinger's criticism (*e.g.,* to approximately $0.0029). This is not a trivial consideration in light of the fact that in *Webcaster II,* it was Dr. Pelcovits' recommended rates *after the substitution adjustment* that formed the basis for SoundExchange's rate proposal and that formed the basis for the determination by the Judges of a royalty rate to be achieved by the end of the term in 2010 (i.e., a per play rate of $0.19). *See Webcaster II,* 72 FR 24096 (May 1, 2007). In any event, the validity of this criticism of the Pelcovits approach regarding the effective per play rate clearly erodes the weight to be accorded to the $0.0036 figure.

Dr. Salinger also criticizes the Pelcovits hedonic regression analysis that formed the basis for one of the alternative measures of interactivity in the interactive webcasting benchmark approach. Dr. Salinger expressed concerns about the use of certain fixed effects variables (alternatively described as dummy variables) in the specification of the regression model and about the broad confidence interval surrounding the estimated interactivity coefficient in the hedonic regression. Salinger WRT at 20; 21 n.31 and Exhibit 6; 7/28/10 Tr. at 66:4–69:22 (Salinger). These criticisms have some merit, especially in light of Dr. Pelcovits' admitted lack of familiarity with some of the relevant economic literature, including recent literature cautioning against the indiscriminant use of dummy variables in certain hedonic estimations. 4/20/10 Tr. at 373:18–376:15 (Pelcovits). SoundExchange, in response to this criticism, claims that any problem associated with the hedonic regression is negated by Dr. Pelcovits' use of other methods that result in rates almost identical to the $0.0036 average. *See, for example,* SX RFF at ¶ 107. However, this does not wholly obviate the impact of any resulting overstatement. The rate associated with the hedonic regression is the highest of the three values that are used to calculate the $0.0036 average. Removing the rate associated with the hedonic regression from the average would, in this case, reduce the average. Thus, this criticism of the Pelcovits approach additionally erodes the weight that the Judges accord to the $0.0036 figure.

In short, the potential for upward bias or actual demonstrated upward bias in the Pelcovits estimates persuade us that $0.0036 can be no more than the upper bounds of the range of possible rates reasonably applicable to the target market and that the most likely prevailing rate at the present time in that market is significantly lower than $0.0036.

ii. The National Association of Broadcasters and SiriusXM Agreements

In addition to the interactive webcasting benchmark, Dr. Pelcovits offers a second benchmark based on the average of rates established for the 2011–2015 term in precedential Webcaster Settlement Act Agreements ("WSA agreements") between SoundExchange and the National Association of Broadcasters and between SoundExchange and SiriusXM ("SiriusXM agreement" or "Commercial

[12] The 0.8737 multiplier represents the value of a ratio where the numerator consists of the effective per play rate for 2009 (*i.e.,* 0.01917) and the denominator consists of the average effective play rate over the three years in question (*i.e.,* 0.02194).

Webcasters agreement"). Pelcovits Amended and Corrected WDT at 22.

While these precedential WSA agreements certainly pertain to rates to be paid by non-interactive webcasters in the commercial webcasting market at issue in this proceeding, the buyers' and sellers' circumstances are not comparable to those that would prevail in the absence of the Webcaster Settlement Act. Rather than a single seller, the sellers in the hypothetical market we are to consider consist of multiple record companies. *Webcaster II,* 72 FR 24087, 24091 (May 1, 2007); *Webcaster I,* 67 FR 45244 (July 8, 2002). Thus, in *Webcaster II* we found that the fact that there were multiple buyers and multiple sellers in the benchmark market as well as in the target market supported a benchmark analysis. *Webcaster II,* 72 FR 24093 (May 1, 2007). While the applicable law does not require a perfectly competitive benchmark market, the market must be at least "competitive" in the sense that buyers and sellers have comparable resources and market power. *Webcaster II,* 72 FR 24093 (May 1, 2007); *Webcaster I,* 67 FR 45245 (July 8, 2002). This would be generally consistent with free market principles. Yet, the buyers' and sellers' circumstances underlying the WSA agreements were not comparable to market conditions that would prevail in the absence of the WSA. That legislation permitted a single seller representative to enter into negotiations with buyers in the market with respect to rates that would be permitted to supplant the statutory rates previously established in the 2006–2010 period, as well as with respect to rates applicable to the 2011–2015 period. Even Dr. Pelcovits admits that "[e]ach of these contracts, of course, was negotiated in the shadow of the regulatory scheme and against the background of statutory rates previously set by this Court. To that extent, they may or may not represent the same outcome that would result in a pure market negotiation with no regulatory overtones." Pelcovits Amended and Corrected WDT at 15. Therefore, we find that these precedential WSA agreements, which may be fairly characterized as single-seller agreements reached under atypical marketplace conditions, cannot satisfy the comparability requirements for an appropriate benchmark.

However, we further find that, because the NAB-SoundExchange and SiriusXM-SoundExchange agreements clearly govern the rates for a substantial number of commercial webcasters over the relevant 2011–2015 period (Pelcovits Amended and Corrected WDT at 15) and the commercial webcasters covered by these agreements are competitors with the other commercial webcasters who comprise the remainder of the non-interactive webcasting services (Salinger WRT at 24; Smallens Corrected WRT at 21), these agreements are a useful gauge of the weight to be assigned to the rates suggested by the interactive webcasting benchmark discussed *supra* at Section II.B.3.b.i. Moreover, nothing in the Webcaster Settlement Act constrains us from using these agreements for that purpose. *See* 17 U.S.C. 114(f)(5)(C).

The NAB-SoundExchange and SiriusXM agreements provide for royalty rates on a per performance basis. For the five-year period beginning 2011, the NAB-SoundExchange agreement sets the following rates: $0.0017 for 2011, $0.0020 for 2012, $0.0022 for 2013, $0.0023 for 2014 and $0.0025 for 2015. For the same period, the SiriusXM agreement sets the following rates: $0.0018 for 2011, $0.0020 for 2012, $0.0021 for 2013, $0.0022 for 2014 and $0.0024 for 2015. Pelcovits Amended and Corrected WDT at 15. Two characteristics of these rates are noteworthy. First, the 2011 rate is slightly less than the current 2010 statutory rate of $0.0019 and the rates in the precedential WSA agreements covering the years 2009 and 2010 were somewhat lower than the corresponding statutory rate for those years. Pelcovits Amended and Corrected WDT at 15. Second, the rates in the NAB-SoundExchange and SiriusXM agreements over their entire term are substantially lower than the range of annual rate possibilities suggested for implementation pursuant to the proposed interactive benchmark ($0.0036) or the interactive benchmark after Dr. Pelcovits' substitution adjustment ($0.0033) or the interactive benchmark adjusted to give a more likely reading of the impact of downward trend in the effective play rates paid by interactive services ($0.0031).

Thus, we find that these negotiated rates indicate that the interactive benchmark may likely overstate the prevailing market rate in the target market even when subjected to Dr. Pelcovits' substitution adjustment or Dr. Salinger's adjustment to mitigate the impact of downward trend in the effective play rates paid by interactive services. As a consequence, we further find that the interactive benchmark, even when subjected to these alternative adjustments, provides for rates near the upper bounds of the range of possible rates reasonably applicable to the target market, when the most likely prevailing rate in that market appears to be lower than the interactive benchmark rates. In other words, the NAB-SoundExchange and SiriusXM agreements lend weight to the need for a further downward adjustment in the benchmark rate to reflect a prevailing rate in the target market closer to the current statutory rate.

Dr. Fratrik contends that the royalty rates in the NAB-SoundExchange agreement must overvalue the input in question, because the NAB received a particularly valuable concession with respect to the waiver of performance complement rules as part of the rate agreement. *See* Fratrik Corrected and Amended WDT at 43–44. ["Consequently, these terrestrial broadcasters, already with the programming established to webcast, *should* be willing to pay more than other webcasters in order to relieve themselves of these provisions." (emphasis added)]. This claim of a one-sided benefit to broadcasters is not adequately supported in the record. The testimony of Dr. Pelcovits, Dr. Ordover and Mr. McCrady indicates that the waivers had value to *both* the NAB and to the record companies. Pelcovits Amended and Corrected WDT at 20 n.21; Ordover WRT at 5, 18; McCrady WDT at 5–6. There is no clear evidence in the record to support either the notion that the limited performance complement waiver in the NAB-SoundExchange agreement was a largely one-sided benefit accruing only to the broadcasters or that broadcasters *did,* in fact, pay more than other webcasters to obtain these provisions.

Dr. Fratrik also contends that terrestrial broadcasters were willing to pay more because they have fewer other costs to cover than pure webcasters. But Dr. Fratrik offers less than persuasive evidence of major cost differences between pure webcasters and broadcasters who engage in webcasting generally or between pure webcasters and the more limiting case of those broadcasters who exclusively simulcast. Dr. Fratrik appears to center his analysis on the latter case. Of course, focusing on this latter comparison simplifies from the reality of the market by assuming that all the webcasting performed by broadcasters consists of simulcasting when, in fact, the NAB-SoundExchange agreement provides for other types of webcasting (*e.g.,* through side channels). *See* SX Ex. 102–DP at Article 1.1(d), 4.2. In addition to that analytical shortcoming, Dr. Fratrik's analysis suffers from other unsupported conclusions. Dr. Fratrik's cost-based contention appears to largely rest on the notion that simulcasters, unlike other commercial webcasters, have no additional programming costs as those costs have already been paid in connection with their over-the-air operations. *See* Fratrik Corrected and Amended WDT at 41. But no specific empirical data in the record unambiguously supports this asserted relative difference. For example, Dr. Fratrik's conclusion ignores the wide range of business models utilized by commercial webcasters, including that of Live365, a webcaster that is apparently paid to put on programming designed by its clients as opposed to incurring a cost for originating such programming itself. Floater Corrected WDT at 4–8; 4/27/10 Tr. at 1274:5–16; 1301:1–4 (Fratrik).

Several other theories are offered by the contending parties to suggest that the precedential WSA agreements are either higher or lower than the likely prevailing rate in the target market.

For example, the possibility is raised that since the rates in the NAB-SoundExchange agreement were negotiated collectively on behalf of the record companies by SoundExchange, the rates might reflect some additional bargaining power exercised by SoundExchange as a single seller, relative to the bargaining power that would have otherwise been exercised by the individual record companies, leading to higher than free market-determined royalty rates. *See* Ordover WRT at 22, Salinger WRT at 27. While, at first blush, this contention appears to be consistent with economic theory, the facts surrounding the SoundExchange-NAB negotiation and the rates resulting from the negotiation cast serious doubt on the operation of normal economic theory in this case.

These negotiations took place in the context of the WSA legislation specifically providing for SoundExchange to engage in such negotiations as a collective in order to reach agreements that would exempt webcasters from the 2006–2010 statutory rates, as well as allow for 2011–2015 negotiated rates in lieu of any statutory rates that might be determined by the Judges for that term of the applicable license pursuant to a statutory proceeding. 17 U.S.C. 114(f)(5)(A). That is, the rates were to be negotiated in response to a specifically legislated, post-determination, second-chance opportunity afforded the parties to voluntarily reshape applicable webcasting rates. Thus, the rates could be said to have been negotiated both in the shadow of a specific regulatory scheme, as well as against the background of previously set statutory rates, which influenced the outcomes available to the parties and, in particular, constrained the exercise of monopoly power. Failing to reach an agreement for the 2011–2015 period, the buyers could still avail themselves of the statutory rate-setting procedure. That is, the buyers retained their rights to reject a settlement with SoundExchange and resort to the statutory rate-setting procedure for the 2011–2015 term of the license. Pelcovits Amended and Corrected WDT at 17; Ordover WRT at 23; Salinger WRT at 27. In other words, the buyers in this case maintained some leverage that otherwise would be absent if they faced a monopolist seller without any such recourse.

Additionally, here, the NAB, which negotiated on behalf of broadcasters, effectively served as a single buyer and, thus, may be said to have exercised countervailing market power relative to SoundExchange. Ordover WRT at 23. At the same time, the SoundExchange-SiriusXM agreement certainly offers the example of a non-NAB webcasting buyer for whom negotiations produced rates very similar to the NAB-SoundExchange agreement, indicating that the NAB-SoundExchange agreement, on its face, did not result in the price discrimination sometimes associated with monopoly power.

In short, the NAB-SoundExchange negotiated royalty rates do not appear to have been pushed *above* what might prevail in a multi-seller market as a result of SoundExchange's legislatively permitted role as a single seller in these negotiations because, under the circumstances, it was unlikely to have the ability to exercise the equivalent of the unchecked bargaining power of an unregulated monopolist.

On the other hand, Dr. Ordover's attempt to cast the NAB-SoundExchange agreement as producing royalty rates *below* what might prevail in a free market is also not supported by the record of evidence in this proceeding. Dr. Ordover suggests that, *if certain circumstances can be assumed to be present,* the NAB-SoundExchange agreement may represent a situation where SoundExchange, acting as a single seller, nevertheless would agree to lower royalty rates as compared to those that would occur in a free market in which individual record companies function as sellers. But Dr. Ordover's analysis is predicated on, among other assumptions, the key notion that the repertoire of all four major labels is necessary for simulcasters to operate a viable streaming service. That is, the sound recordings of record companies must be perceived as complementary inputs rather than as substitutes. Here, there is no evidence in the record which establishes that to be the case for any of the particular broadcasters who have opted into the NAB-SoundExchange agreement, let alone that it is the case generally for all broadcasters.[13] For example, Dr. Ordover offers no evidence that these sound recording inputs are complements based on standard measures such as the cross-elasticity of demand. Moreover, the proffered notion that the NAB-SoundExchange agreement for broadcasters represents lower than average webcasting royalty rates based on some assumed *unique* requirement associated with simulcasting, is not borne out by the agreement itself which provides for *no* distinction between the royalty rate applicable to simulcasting and the royalty rate applicable to broadcasters who engage in other types of webcasting (*e.g.,* side channels). *See* SX Ex. 102–DP at Article 1.1(d), 4.2. Nor is there a substantial difference between the royalty rates applicable to simulcasting in the NAB-SoundExchange agreement and the royalty rates applicable to commercial webcasting in the SiriusXM-SoundExchange agreement. In short, while Dr. Ordover's proposed explanation may be a plausible theory under certain circumstances, here it suffers from a lack of sufficient empirical support to demonstrate the presence of those circumstances.

Finally, Dr. Salinger claims that the rates in both the NAB-SoundExchange and SiriusXM agreements are higher than average webcasting royalty rates in the period 2011–2015 based on a theory that the NAB and SiriusXM structured their agreements with SoundExchange to provide for lower-than-statutory-rates for the years 2009–2010, but above-market rates for the 2011–2015 period, in anticipation that such a restructuring would adversely affect their rivals' costs in the latter period.

Yet, this is also a theory without sufficient facts to support it in the instant case. There is no evidence in the record to suggest any coordination between the NAB and SiriusXM to reach their separate agreements with SoundExchange. Indeed, as NAB broadcasters and SiriusXM are competitors not only with respect to webcasting but also for listeners more generally, it would appear such coordination is unlikely. In addition, for the strategy of raising rivals' costs to work, SoundExchange would have to agree to go along with the NAB and

[13] In *Webcaster II,* a similar assumption that a viable streaming service requires the repertoire of all four major labels was rejected by the Judges. See Webcaster II, 72 FR 24091 (May 1, 2007).

SiriusXM. 7/28/10 Tr. at 132:1–10 (Salinger). There is no evidence in the record to support this additional coordination. A further condition necessary to the success of the strategy is that the NAB and SiriusXM would have to feel assured that a rate setting proceeding would not result in a lower rate than those in their agreements with SoundExchange. There is no evidence in the record to suggest that any protection against a lower statutory rate was embodied in their agreements with SoundExchange. SX PFF at ¶ 270.

Dr. Salinger suggests that one of the possible benefits to SoundExchange from cooperating with a NAB-SiriusXM raising rivals' costs strategy is that copyright owners may "get a rate that's so high but then they get to practice price discrimination by negotiating lower." 7/28/10 Tr. at 133:18–22 (Salinger). However, as Dr. Fratrik acknowledged, in order to price discriminate the seller must "be able to segment out customers." 4/27/10 Tr. at 1249:8–13 (Fratrik). No such market segmentation is supported by the record of evidence in this proceeding. On the contrary, simulcasting and other commercial webcasting compete for the same ultimate consumers who may easily substitute one service for the other as their listening choice. SX PFF at ¶¶ 277, 278. In *Webcaster II,* similarly noting that the balance of the evidence in the record did not persuade us that these simulcasters operate in a submarket separate from and noncompetitive with other commercial webcasters, we declined to set a differentiated rate for commercial broadcasters. By contrast, where we did find sufficient evidence in the record that supported a finding that certain noncommercial webcasters constituted a distinct segment of the market, we did set a differentiated rate. *Webcaster II,* 72 FR 24095, 24097 (May 1, 2007). In *Webcaster II* we noted that "[a] segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve" and further, that "[t]he multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand." *Webcaster II,* 72 FR 24097. Price discrimination is a feature of such markets. *Id.* Dr. Salinger offers no persuasive empirical evidence of price discrimination related to different price elasticities of demand associated with distinct classes of buyers in the market.

Dr. Salinger's analysis also fails to address other important features of the "raising rivals' costs" construct. For example, he does not empirically examine whether it would make economic sense for NAB and SiriusXM in terms of profitability, to effectively shift up their respective average cost curves at the original output's average cost. In other words, by agreeing to a higher price for the sound recording input, NAB and SiriusXM may sacrifice some of their profitability, depending on the demand for their output. Dr. Salinger does not empirically address the extent to which that may or may not occur. Nor does he examine how the results of such a profitability analysis might support or undermine the incentives behind the "raising rivals' costs" strategy that he opines was operative in motivating NAB and SiriusXM negotiating behavior. For all these reasons, we do not find Dr. Salinger's "raising rivals' costs" theory persuasive.

However, it cannot be disputed that the 2009 and 2010 rates negotiated in these settlements were lower than the statutory rates otherwise applicable to commercial webcasters. Dr. Pelcovits offers another possible adjustment to mitigate the effects of the lower 2009–2010 rates enjoyed by the NAB and SiriusXM as compared to those commercial webcasters that remained subject to the statutory rate. The rates resulting from Dr. Pelcovits' calculation "would give webcasters that are not part of the WSA settlements the same effective rate over the eight-year period [2009–2015] as the NAB and SiriusXM, assuming they all experience the same level of growth in performances." Pelcovits Amended and Corrected WDT at Appendix II. This calculation results in rates equal to the current statutory rate for the first year of the 2011–2015 term and only somewhat higher thereafter. For the five-year period beginning 2011, these adjusted NAB/SiriusXM agreement rates are as follows: $0.0019 for 2011, $0.0020 for 2012, $0.0020 for 2013, $0.0020 for 2014 and $0.0021 for 2015. Pelcovits Amended and Corrected WDT at Appendix II.

After a careful consideration of the evidence presented on the various suggested sources of potential overvaluation and undervaluation of the market rates by the NAB-SoundExchange and SiriusXM agreements, we find that the rates in these agreements do not appear to seriously overvalue or undervalue input prices likely to prevail in the market. Therefore, because the NAB-SoundExchange and SiriusXM agreements clearly govern the rates for a substantial number of commercial webcasters over the relevant 2011–2015 period and the commercial webcasters covered by these agreements are competitors with the other commercial webcasters who comprise the remainder of the non-interactive webcasting services, we find these agreements are a useful gauge of the weight to be assigned to the rates suggested by the interactive webcasting benchmark. *See supra* at Section II.B.3.b.ii.

Inasmuch as there are only small differences between the 2011, 2012 and 2013 rates in the NAB and SiriusXM agreements and the 2010 statutory rate, we decline to assign a weight to the interactive webcasting benchmark that results in a rate at great variance with the current statutory rate. In other words, the rates in these negotiated agreements serve as a caution to us not to depart radically from past rates where we cannot be confident, based on the quality of the benchmark evidence in the record, that the magnitude of such a departure is fully supported in the target market. Here, the NAB and SirusXM agreements serve as a means of roughly correcting the interactive benchmark for any overvaluation not captured by the variables directly considered in the analysis. As a consequence, we find that the current statutory rate ($0.0019) sets the lower bounds for a range of rates reasonably applicable to the target market and that the most likely prevailing rate in that market is closer to this lower boundary than to the upper boundary identified hereinabove.

4. The Section 114 Commercial Webcaster Rates Determined by the Judges

As previously indicated, *supra* at Section II.B.3.b.i., the Judges find the interactive webcasting benchmark to be of the comparable type that the Copyright Act invites us to consider. It is a benchmark with characteristics reasonably similar to non-interactive webcasting, particularly after some adjustment to account for the differences attributable to interactivity. *Id.* However, we cannot find sufficient evidence in the record to support an increase that *fully* implements the rates proposed on the basis of the interactive benchmark. Rather, we find that a rate of $0.0036, derived from the interactive market and adjusted for interactivity differences, can be no more than the upper bounds of a range of possible rates reasonably applicable to the target market. That is because: (1) There is likely some "upward bias" introduced into the interactive benchmark analysis through its focus on only subscription-based services in the benchmark market (*see supra* at Section II.B.3.b.i.) and (2) there is some merit to Dr. Salinger's identification of some additional sources of upward bias in the Pelcovits interactive benchmark analysis. *Id.*

Two measures available to test the magnitude of such upward bias are the NAB-SoundExchange and SiriusXM–SoundExchange agreements. That is, we find that these agreements are a useful gauge of the weights to be assigned to the rates suggested by the interactive webcasting benchmark, because the NAB-SoundExchange and SiriusXM–SoundExchange agreements clearly govern the rates for a substantial number of commercial webcasters over the relevant 2011–2015 period and the commercial webcasters covered by these agreements are competitors with the other commercial webcasters who comprise the remainder of the non-interactive webcasting services (*see supra* at Section II.B.3.b.ii.). These negotiated rates indicate that the interactive benchmark may likely overstate the prevailing market rate in the target market even when subjected to Dr. Pelcovits' substitution adjustment or Dr. Salinger's adjustment to mitigate the impact of downward trend in the effective play rates paid by interactive services. *Id.* Indeed, the NAB-SoundExchange and SiriusXM agreements lend weight to the need for a further downward adjustment in the benchmark rate to reflect a prevailing rate in the target market closer to the current statutory rate. *Id.* In this way, the NAB-SoundExchange and SirusXM agreements serve as a means of roughly correcting the interactive benchmark for any overvaluation not captured by the variables directly considered in the analysis. Therefore, inasmuch as there appears to be only a small difference between the 2011 rate in the NAB-SoundExchange and SiriusXM agreements and the 2010 statutory rate, we find that the current statutory rate ($0.0019) sets the lower bounds for a range of rates reasonably applicable to the target market and that the most likely prevailing rate in that market is closer to this lower boundary than to the interactive benchmark rates recommended by Dr. Pelcovits.

In other words, while we accept the interactive benchmark as suggesting an increase in royalty rates for non-interactive webcasting over or by the end of the period 2011–2015, we find that the weight of the evidence does not allow us to accept the full amount of the increases suggested by either the unadjusted or the various adjusted versions of the interactive benchmark. Rather having identified the $0.0036 rate as the upper boundary for a zone of reasonableness for potential marketplace benchmarks and the $0.0019 rate as the lower boundary for a zone of reasonableness for potential marketplace benchmarks, we find that the most likely prevailing rate in the target market is closer to the lower boundary than to the upper boundary of this zone of reasonableness (*see supra* at Section II.B.3.b.ii.).

However, the most likely prevailing rate at the present time is also likely to shift upward over the 2011–2015 term. We recognize that the interactive benchmark derived in this proceeding after adjusting for interactivity and accounting for substitution (i.e., $0.0033) itself indicates an increase when compared to a similarly adjusted interactive benchmark derived in *Webcaster II* (i.e., $0.0019). *See supra* at Section II.B.3.b.i.; *Webcaster II,* 72 FR 24094, 24096. Similarly, the NAB-SoundExchange and SiriusXM-SoundExchange agreements exhibit an increase in rates over the 2011–2015 term for competing webcasters. *See supra* at Section II.B.3.b.ii. Moreover, we also find that the evidence in the record on industry growth in *increased* advertising revenues, *increased* performances, and *increased* listening likely support at least a modest increase over the 2011–2015 term. *See supra* at Section II.B.3.a.iii. However, we recognize that while the trend in industry growth, as captured by some measures such as listenership, has been decidedly upward, that growth has occurred unevenly from year to year, with two-year plateaus succeeded by large jumps in growth. *Id.*

Our findings suggest three criteria for an appropriate rate based on the marketplace evidence we have been presented. These criteria are: (1) A rate structure that reflects our finding that the most likely prevailing rate in the target market is closer to the lower boundary than to the upper boundary of the zone of reasonableness for potential marketplace benchmarks; (2) a rate structure that accommodates some modest growth in rates over the term of the license period; and (3) a rate structure that provides for longer periods of stable rates during the term of the license period. We find that the following rate structure for commercial webcasters, based on our downward adjustment of the interactive benchmark, meets these three criteria: For the five-year period beginning 2011, the per play rate applicable to each year of the license for Commercial Webcasters is: $0.0019 for 2011, $0.0021 for 2012, $0.0021 for 2013, $0.0023 for 2014 and $0.0023 for 2015.

The willing buyer/willing seller standard in the Copyright Act encompasses consideration of economic, competitive and programming information presented by the parties, including (1) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and (2) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. Because we adopt an adjusted benchmark approach to determining the rates, we agree with *Webcaster II* and *Webcaster I* that such considerations would have already been factored into the negotiated price in the benchmark agreements. 72 FR 24095 (May 1, 2007); 67 FR 45244 (July 8, 2002). Therefore, such considerations have been reviewed by the Copyright Royalty Judges in our determination of the most appropriate benchmark from which to set rates. Similar considerations would have been factored into the negotiated price of the NAB-SoundExchange and SiriusXM-SoundExchange agreements which we utilized to roughly gauge the further downward adjustment necessary to assure that the interactive benchmark rates reasonably reflected likely rates in the target market.

Nevertheless, we have also further separately reviewed the evidence bearing on these considerations. We find that no further upward or downward adjustment is indicated. We have previously noted that the evidence submitted by Live365 on each of these considerations is too weak to establish a basis for a decrease in webcaster royalty rates from the current statutory rate (*see supra* at Section II.B.3.a.iii.). Nor does Live365 present an acceptable empirical basis for quantifying the individual asserted effects of these various factors and/or for deriving a method for translating such magnitudes into a rate adjustment. *Id.* Similarly, to the extent that SoundExchange treats each of these factors separate from its proffered benchmark analysis, it also does not present an acceptable empirical basis for quantifying the individual asserted effects of these various factors and/or for deriving a method for translating such magnitudes into a rate adjustment. Moreover, SoundExchange explicitly relies on Dr. Pelcovits' interactive services benchmark analysis to encompass these considerations. SX RCL at ¶ 20. Therefore, our further consideration of these factors leads us to find no need for any further adjustment to the rates determined hereinabove.

5. The Proposed Aggregator Discount to the Section 114 Commercial Webcaster Rates

Live365 seeks a further 20% discount applicable to the commercial webcasting per performance rate for certain "qualified webcast aggregation services" who operate a network of at least 100 independently operated "aggregated webcasters" that individually "stream less than 100,000 ATH per month of royalty-bearing performances." Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2 and § 380.3(a)(2). This "discount" proposal may be more properly understood as a proposed term rather than an additional rate proposal. It is conditional; that is, it is applicable only to the extent that certain defined conditions are met (*e.g.,* minimum number of 100 aggregated webcasters and each individual aggregated webcaster streaming less than 100,000 ATH per month). It proposes to establish a mechanism whereby a group of commercial webcasters under certain qualifying conditions may utilize a "webcast aggregation service" to aggregate their monitoring and reporting functions. Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2(m). Monitoring and reporting are compliance-related functions that are currently required of all individual webcaster licensees.

We find no persuasive evidence in the record to support the imposition of an aggregator discount that would apply to the statutory rate for commercial webcasters. Live365 submitted testimony from Dr. Fratrik and Mr. Floater to support this request. The testimony of the latter witness does not, in any meaningful way, address the purported rationale behind this request—namely, that an administrative benefit accrues to the collective which, by implication, reduces transactions costs. Rather Mr. Floater's testimony speaks largely about the asserted benefits of using an aggregation service that flow to "individual webcasters" who make use of the service and to copyright owners of having multiple webcaster stations assembled on a single platform. ["* * * a streaming architecture that can aggregate tens of thousands of individual webcasters * * * Live365's broadcast tools and services enable broadcasters to economically and efficiently stream their programming * * * Live365's aggregation helps broadcasters contain their costs * * * Live365 allows small webcasters to broadcast content * * * while generating increased performances, sales, royalties and promotional benefits for a wide range of artists and copyright holders."] Floater Corrected WDT at 11–14. These asserted benefits to individual webcasters and copyright owners, which are not quantified sufficiently to ascertain their value, are benefits that are largely indistinguishable from those that might be asserted by any multi-channel webcaster. Nor do these benefits address the issues at heart of the proposal; that is, whether an *aggregator* like Live365 provides any administrative benefit that could be shown to reduce transactions costs, whether any administrative benefit provided by the aggregator can be measured and translated into a discount applicable to the commercial webcasting royalty rate, and whether the full amount of the purported administrative benefit should properly flow to the aggregator, to the individual webcasters so aggregated, to the copyright owners or to some combination thereof.[14] We do not find Mr. Floater's testimony helpful in resolving any of these issues.

Live365 also submitted testimony from Dr. Fratrik to support its request for an aggregator discount that attempts, in part, to address the administrative savings issue. Dr. Fratrik opines that aggregators are entitled to this discount because they "collect and compile all of the necessary documentation of the actual copyrighted works that are streamed and the number of total listening levels for each of these copyrighted works" and because "aggregators make royalty payments to the appropriate parties." Fratrik Corrected and Amended WDT at 38. But again these functions are part of the same sort of compliance activities for which any multi-channel webcaster would necessarily be responsible on behalf of the multiplicity of channels it offered. They do not appear to be unique to an "aggregator." Indeed, when questioned about his description of the aggregator discount, Dr. Fratrik offered no practical distinction between an "aggregator" and any commercial webcaster or simulcaster who offered 100 or more channels. 4/27/10 Tr. at 1265:9–1266:22; 1267:7–1270:15 (Fratrik). We find that Dr. Fratrik's claim of administrative cost savings provided by aggregators describes a benefit that is largely indistinguishable from those that might be asserted by any multi-channel webcaster. Therefore, inasmuch as multi-channel webcasters already receive a benefit under current regulations[15] (37 CFR 380.3(b)(1)) by way of a $50,000 cap on the minimum fee for services with 100 or more stations or channels, the proposed additional discount for indistinguishable administrative services provided by an "aggregator" is unwarrantedly cumulative. SX PFF at ¶ 597.

Furthermore, Dr. Fratrik admitted that the choice of 100 channels or stations as the threshold for triggering the proposed aggregator discount was not supported by any examination of administrative costs to see what relative administrative cost savings specifically demarcated the boundaries of the discount's applicability. 4/27/10 Tr. at 1270:12–1271:3 (Fratrik). In other words, Dr. Fratrik establishes no cost savings basis in the record for a distinction between the administrative cost savings that might accrue from aggregating 100 stations as compared to 50 or 300 stations where each such station meets the additional condition of accounting for streaming of less than 100,000 ATH per month.

At the same time, Dr. Fratrik reaches his estimated 20% discount rate through the offer of a kind of benchmark analysis that uses purported aggregator discounts provided to Live365 in its agreements with the Performance Rights Organizations ("PROs") pertaining to musical works royalties. But Dr. Fratrik indicated in his testimony that the Live365–BMI agreement he utilized to support this benchmark does not provide a discount to Live365 for aggregating webcasters. Instead, the agreement apparently provides a discount more directly to very small webcasters that utilize Live365 for certain administrative functions related to compliance. 4/27/10 Tr. 1261:18–1262:19 (Fratrik). That is *not* comparable to the proposal before us which calls for the aggregator to receive the full benefits of any discount.

In any case, even if Live365 were to receive the full benefits of any aggregator discount in the BMI agreement, such PRO agreements do not constitute a benchmark that inspires sufficient confidence to be useful. Dr. Fratrik asserts that Live365 provides centralized administration for the

[14] For example, it is obvious that if the *full* amount of any purported administrative savings were to flow to the aggregator, then no benefit accrues to anyone else. In such a formulation, the aggregator proposal would seem to reduce to a mere stalking horse for obtaining a less than competitive market rate that advantages Live365 as compared to other commercial webcasters and simulcasters.

[15] Under the May 14, 2010 Stipulation executed by SoundExchange and Live365, the $50,000 cap on minimum fees was also agreed to by the parties for the 2011–2015 term. *See supra* at Section II.B.1.

benefit of the PROs, including centralized collection, reporting and compliance. But he offers no evidence to suggest that the types and level of centralized administrative services provided to the PROs are comparable to the administrative services to be provided by the aggregator to SoundExchange. In *Webcaster II,* we found that another benchmark offered in that proceeding based on the musical works market was flawed because the sellers in that market are different and they are selling different rights. 72 FR 24094 (May 1, 2007). Yet, in the instant proceeding, Dr. Fratrik fails to show that these different sellers and different rights give rise to comparably valued "centralized" administrative services provided by a third party in the target sound recordings market. Nor does Dr. Fratrik address the issue of whether any adjustments to the data from the benchmark musical works market are required that could make it more comparable to the target sound recordings market.

In short, we find that Live365 makes no sufficient showing that an aggregator discount can be justified in general, or adequately measured in particular, on the basis of the evidence in the record.

To the extent that Live365's proposed aggregator discount is viewed strictly as a rate proposal rather than a term, Live365 also fails to delineate a basis for a different royalty rate applicable to a distinct submarket of the larger commercial webcasting market. *Webcasting II* determined that a key factor in differentiating between classes of webcasters for rate purposes is whether the webcasters operate in a distinct market segment or submarket that does not directly compete with the remainder of all webcasters. *Webcaster II,* 72 FR 24095, 24097 (May 1, 2007); *see also supra* at Section II.B.3.b.ii. Live365 as the aggregator does not appear to meet this standard. The record clearly establishes that Live365 competes directly with other commercial webcasters. SX PFF at ¶ 280. And, of course, whether considered as a proposed rate for a new category of commercial webcasters or, as noted hereinabove as a proposed term, we are not persuaded by the record of evidence in this proceeding of a particular market value provided by an aggregator in terms of reduced transactions costs that can, or should, be translated into a discount applicable to the commercial webcasting royalty rate.

In addition, some aspects of the Live365 proposal appear likely to engender confusion. For example, Live365 proposes definitions for a "webcast aggregation service," "aggregated webcasters," "commercial webcaster," and "licensee." Taken together, these definitions fail to explicitly delineate that Live365 intends the webcast aggregation service to serve as the licensee in its proposed arrangement and that the webcasters whose programming is transmitted are not the licensees. The proposed regulations, by contrast, identify webcasters specifically as licensees and, therefore, suggest that any commercial webcaster, whether aggregated or unaggregated, remains responsible for payment of the applicable statutory license fee. *See* Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2(b), § 380.2(e), § 380.2(h), § 380.2(o); 9/30/10 Tr. at 622:14–22, 669:18–677:12 (Closing Arguments, Oxenford). Such confusion has practical consequences. Given that the aggregator, as the licensee, is not obligated to provide a list of webcasters for whom it purports to pay SoundExchange and the aggregator, as licensee, may not voluntarily provide such a list to SoundExchange, it may result in more time-consuming administrative effort for SoundExchange to determine whether a particular webcaster is subject to or properly complying with the statutory licenses. This burden was pointed out by Mr. Funn in the context of SoundExchange's specific experience with Live365. Funn WRT at 2; 8/2/10 Tr. at 445:13–446:2 (Funn).

For all the above reasons, we decline to adopt Live365's proposal for a 20% aggregator discount, applicable under certain conditions to the commercial webcasting royalty rate.

III. Noncommercial Webcasters

Having determined the rates for commercial webcasters, the Judges now turn to the noncommercial category. As previously mentioned, certain services argued in *Webcaster II* that they were distinguishable from commercial webcasters and, as a result, deserved a lower royalty rate. We observed:

> Based on the available evidence, we find that, up to a point, certain "noncommercial" webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for Commercial Webcasters. A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve. An example of a segmented market is a market for electricity with different prices for commercial users and residential users. In other words, price differentiation or price discrimination is a feature of such markets. The multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. By definition, if the commodity in question derives its demand from its ultimate use, then the marketplace can remain segmented only if buyers are unable to transfer the commodity easily among ultimate uses. Put another way, each type of ultimate use must be different.

Webcaster II, 72 FR 24097 (footnote omitted). We found that the evidence supported a submarket for noncommercial webcasting, but included safeguards to assure that the submarket did not converge or overlap with the submarket for commercial webcasting. A cap of 159,140 ATH per month marked the boundary between noncommercial and commercial webcasting, and we adopted a $500 per station or channel rate which included the annual, non-refundable, but recoupable, $500 minimum fee payable in advance.[16]

In this proceeding, certain participants have once again asked us for adoption of lower rates for noncommercial webcasting. Greater refinements to the category are also sought; namely, separate rates for distinct "types" of services (all still under the general rubric of noncommercial). SoundExchange and CBI have submitted an agreement, pursuant to 17 U.S.C. 801(b)(7)(A), for rates and terms for a type of service that they identify as "noncommercial educational webcasters." SX PFF at ¶ 65; CBI PFF at ¶ 5. IBS urges us to recognize and set rates for two types of services: small noncommercial webcasters, defined as those whose ATH does not exceed 15,914 per month, and very small noncommercial webcasters, defined as those whose ATH does not exceed 6,365 per month. IBS PFF (Reformatted) at ¶ 26. We address these requests beginning with the SoundExchange-CBI agreement.

A. Noncommercial Educational Webcasters

On August 13, 2009, slightly more than eight months into the cycle of this proceeding, SoundExchange and CBI submitted a joint motion to adopt a partial settlement "for certain internet transmissions by college radio stations and other noncommercial educational webcasters." *Joint Motion to Adopt*

[16] The United States Court of Appeals for the District of Columbia Circuit remanded the $500 minimum fee for lack of evidence. *Intercollegiate Broadcast System, Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 767 (DC Cir. 2009). After taking evidence, we adopted a $500 minimum fee. Digital *Performance Right in Sound Recordings and Ephemeral Recordings (Remand order*), 75 FR 56873, 56784 (September 17, 2010).

Partial Settlement at 1. The settlement was achieved under authorization granted by the Webcaster Settlement Act of 2009, Public Law 111–36, discussed *supra* at Section I.B., and was published by the Copyright Office in the **Federal Register**. *See* 74 FR 40616 (August 12, 2009). By virtue of that publication, the SoundExchange-CBI agreement is now "available, as an option, to any * * * noncommercial webcaster meeting the eligibility conditions of such agreement." 17 U.S.C. 114(f)(5)(B). In submitting the agreement to the Judges, SoundExchange and CBI urged us to likewise publish it in the **Federal Register** and adopt it, under 17 U.S.C. 801(b)(7)(A), as *the* rates and terms applicable to noncommercial educational webcasters for the period 2011 through 2015.[17]

On April 1, 2010, the Judges did publish the SoundExchange/CBI agreement under the authority of section 801(b)(7)(A). 75 FR 16377. With respect to rates, the agreement proposes an annual, nonrefundable minimum fee of $500 for each station or individual channel, including each of its individual side channels. *Id.* at 16384 (April 1, 2010). For those noncommercial educational webcasters whose monthly ATH exceed 159,140, additional fees are paid on a per-performance basis. There is also an optional $100 proxy fee that may be paid by noncommercial educational webcasters in lieu of submitting reports of use of sound recordings. The agreement also contains a number of terms of payment.

Our consideration of the SoundExchange-CBI agreement, as is the case with the NAB-SoundExchange agreement is governed by 17 U.S.C. 801(b)(7)(A). The Judges received 24 comments, from managers and representatives of terrestrial radio stations, favoring adoption of the SoundExchange-CBI agreement. Many of these comments asserted that the rate structure was compatible with their budget restraints, *see,* e.g., Comment of Bill Keith for WSDP Radio, Plymouth-Canton Community Schools ("The monetary amount was reasonable and most college or high school stations can live with the amounts charged for webcasting"), and several expressed satisfaction with the $100 proxy fee in lieu of reports of use. *See, e.g.,* Comments of Christopher Thuringer for WRFL, University of Kentucky; Comments of David Black, General Manager, WSUM–FM. We received one comment objecting to the settlement from IBS.[18] We held a hearing on the motion on May 5, 2010.

During the course of the hearing, it became clear that IBS' arguments centered upon the proposed annual $500 minimum fee for stations with less than 159,140 ATH. Most significantly, IBS contended that if the Judges adopted the proposed minimum fee for noncommercial educational webcasters, it would be precluded from presenting its own minimum fee proposal and, effectively, its participation in this proceeding would be ended. 5/5/10 Tr. at 51:22–52:2 ("I think Mr. DeSanctis' [counsel for SoundExchange] last remarks indicate that this is an attempt to freeze IBS out of statutory rights to a decision from the Board on the record.") (Hearing on Joint Motion to Adopt Partial Settlement). After conclusion of the hearing, the Judges did not render a decision on the adoption of the settlement, preferring instead to let IBS present its case in the main and consider the matter after all testimony had been presented.

It is now evident that IBS' contention of a "freeze out" was erroneous from the start, for IBS never proposed any rates and terms for noncommercial *educational* webcasters. Rather, as noted above, IBS requested rates and terms only for certain noncommercial webcasters (defined by it as "small" and "very small"). The Judges pressed counsel for IBS at closing argument as to whether he still objected to adoption of the SoundExchange-CBI agreement as the basis for establishing rates and terms for noncommercial educational webcasters. After some dissembling, he concluded that he did to the extent that adoption of the agreement might influence or prejudice his rate proposal.[19] We find that his response does not support a proper objection raised under section 801(b)(7)(A)(ii) which would require us to consider the reasonableness of the SoundExchange/CBI agreement. *Cf.* 37 CFR 351.10 (admissible evidence must be relevant); FRE 401. Even if we were to conclude otherwise, IBS has not presented any credible testimony that the agreement is unreasonable. Twenty-four noncommercial broadcasters that purportedly will operate their webcasting services under the agreement find it to be reasonable and affordable. IBS has not provided documented testimony to the contrary, despite an invitation to do so. 5/5/10 Tr. at 81:7–82:10 (Hearing on Joint Motion to Adopt Partial Settlement). Instead, it has relied upon the bald assertions of its counsel and its witnesses, arguing that some unidentified and unspecified number of its members cannot afford the fees contained in the agreement and will be driven from the webcasting business.

[17] At the hearing to consider the SoundExchange/CBI motion, there was significant discussion as to whether SoundExchange and CBI were asking the Judges to adopt the agreement as an option for noncommercial educational webcasters or whether the agreement would be binding on all noncommercial educational webcasters. *See* 5/5/10 Tr. at 5:8–51:11 (Hearing on Joint Motion To Adopt Partial Settlement). The confusion was created by the last two sentences of proposed § 380.20(b) to the Judges' rules, 37 CFR, which provided:

However, if a Noncommercial Educational Webcaster is also eligible for any other rates and terms for its Eligible Transmissions during the period January 1, 2011, through December 31, 2015, it may by written notice to the Collective in a form to be provided by the Collective, elect to be subject to such other rates and terms rather than the rates and terms specified in this subpart. If a single educational institution has more than one station making Eligible Transmissions, each such station may determine individually whether it elects to be subject to this subpart.

Digital Performance Right in Sound Recordings and Ephemeral Recordings (Proposed rule), 75 FR 16377, 16383 (April 1, 2010). After deliberations, counsel for SoundExchange conceded that such language was confusing and unnecessary, since the purpose of the motion was to set the rates and terms for all services that met the definition of a noncommercial educational webcaster, and could be removed. 5/5/10 Tr. at 46:14–47:16, 50:12–51:11 (Hearing on Joint Motion To Adopt Partial Settlement). In adopting The SoundExchange/CBI agreement today, we are accepting SoundExchange's offer and are not adopting this language.

[18] IBS has asserted several times throughout the course of this proceeding that it represents more college and high school radio stations than CBI. *See, e.g.* 5/5/10 Tr. at 80:16–81:3 (Hearing on Joint Motion to Adopt Partial Settlement). However, it has never provided any evidence to demonstrate this is true. In fact, IBS has never revealed to the Judges how many members it has, let alone their identities.

[19] [THE JUDGES]: You're not proposing a rate for noncommercial educational webcasters. Only CBI and SoundExchange are.

MR. MALONE: Right.

[THE JUDGES]: So why are you objecting to the adoption of that if you have a—two separate categories that you want adopted?

MR. MALONE: Well, the judges can certainly say that—I mean, there's nothing incompatible with them. The—

[THE JUDGES]: But I'm asking you why are you still objecting to the adoption of a $500 minimum fee for noncommercial educational webcasters when you have proposed new fees for two new types of services and have not proposed a fee for something called a noncommercial educational webcaster?

MR. MALONE: Well, our—

[THE JUDGES]: Where is your dog in that fight? I don't see it.

MR. MALONE: All right. The dog in that fight is—and, again, excluding indirect effects that I understand to be the context of your question.

We have no objection to the terms that are there as long as they don't apply to our small stations.

[THE JUDGES]: So you're just objecting to it on the theory that you just hope that what's ever in there doesn't somehow get applied to your case, even though you're asking for two completely different services?

MR. MALONE: That's essentially correct, Your Honor.

9/30/10 Tr. at 660:13—661:22 (IBS Closing Argument).

Without proper evidence, we could not find the agreement unreasonable, were we inclined to do so.

Finding neither a proper nor a credible objection to the SoundExchange-CBI agreement, nor other grounds requiring rejection, we adopt the agreement (*see supra* n.17) as the basis for rates and terms for noncommercial educational webcasters for the period 2011–2015. *See supra* Section II.A.

B. All Other Noncommercial Webcasters

1. Rate Proposals for the Section 114 License for Noncommercial Webcasters

The Judges' adoption of the SoundExchange-CBI agreement under section 801(b)(7)(A) does not resolve the matter of rates for the broader category of noncommercial webcasters that we recognized in *Webcaster II.* SoundExchange urges adoption of the same rates for noncommercial webcasters as noncommercial educational webcasters. IBS agrees, but proposes that we recognize two new types of services: small and very small noncommercial webcasters. We address these proposals separately.

For noncommercial webcasters operating under the sections 112 and 114 licenses, SoundExchange proposes a royalty of $500 per station or channel per year, subject to the 159,140 ATH limit. The base royalty would be paid in the form of a $500 per station or channel annual minimum fee, with no cap. If a station or channel exceeds the ATH limit, then the noncommercial webcaster would pay at the commercial usage rates for any overage. SX PFF at ¶¶ 489, 471. In support of its proposal, SoundExchange points to the fact that 363 noncommercial webcasters paid royalties in 2009 similar to its current proposal, with 305 of those webcasters paying only the $500 minimum fee. *Id.* at ¶ 493. This, in its view, demonstrates noncommercial webcasters' ability and willingness to pay the requested fees.

SoundExchange also submits that the reasonableness of the $500 minimum fee is confirmed by the testimony of Barrie Kessler, its chief operating officer. While SoundExchange does not track its administrative costs on a service-by-service basis, Ms. Kessler presented a "reasonableness check" by estimating its administrative cost per service and per channel. First, she divided SoundExchange's total expenses for 2008 by the number of licensees, and then divided that number by the average number of stations or channels per licensee (seven). The result was an approximate average administrative cost of $825 per station or channel. Kessler Corrected WDT at 25.

Finally, SoundExchange offers its agreement with CBI, discussed above, as support for its rate proposal. The fees are the same, along with the 159,140 ATH limitation and no cap on the minimum fee. The agreement, along with the 24 comments received in favor of it, "is strong evidence of the rates and terms that noncommercial webcasters are willing to pay." SX PFF at ¶ 501.

IBS agrees with SoundExchange's proposal for noncommercial webcasters, but asks the Judges to recognize two additional types of noncommercial services that it identifies as "small" and "very small." Its arrival at this request has followed a decidedly convoluted path throughout this proceeding, metamorphosing from the written direct statements through the closing argument. Section 351.4(a)(3) of the Judges' rules, which governs the content of written direct statements, provides that in a rate proceeding, "each party must state its requested rate." IBS did not do this in plain fashion, instead including its request within the body of testimony of one of its three witnesses. Frederick J. Kass, Jr., the "treasurer, director of operation (chief operating officer), and a director of" IBS stated that: "IBS Members should only pay for their direct use of the statutory license by the IBS Member. There should be no minimum fee greater than that which would reasonably approximate the annual direct use of the statutory license, not to exceed $25.00 annually." Kass WDT at 1, 9. However, Mr. Kass attached as an exhibit to his statement a joint petition to adopt an agreement negotiated between the RIAA, IBS, and the Harvard Radio Broadcasting, Co. that was submitted to the Copyright Office on August 26, 2004.[20] That agreement provided for a minimum annual fee of $500 for noncommercial educational webcasters, except that the fee was $250 for any noncommercial educational webcaster that affiliated with an educational institution with fewer than 10,000 enrolled students or where substantially all of the programming transmitted was classified as news, talk, sports or business programming. Kass WDT, Exhibit A at 5. Despite the inclusion of this exhibit, Mr. Kass expressly disavowed endorsement of its rates in the hearing on his written direct statement. Instead, he asserted that "the appropriate rates are what most people were paying in the marketplace for the direct use of the statutory license," without stating what that fee or amount should be. 4/22/10 Tr. at 779:22–780:2 (Kass). When the Judges questioned Mr. Kass as to exactly what was his rate proposal, he responded that IBS members should pay only for their actual use of sound recordings and that the fee should be 50 cents per continuous listener per year to a station or channel,[21] not to exceed $25 per year. *Id.* at 781:3–792:12 (Kass). He then later characterized the $25 as a "flat fee" and concluded his testimony on this point that each IBS station should pay an annual $25 flat fee. *Id.* at 791:17–792:12 (Kass).

After the close of the direct case hearings and before the submission of written rebuttal cases, IBS filed a "Restatement of IBS' Rate Proposal." This proposal identified two new types of services: a "small noncommercial webcaster," described as a service with total performances of digitally recorded music less than 15,914 ATH per month or the equivalent; and a "very small noncommercial webcaster," described as a service with total performances of less than 6,365 ATH per month or the equivalent. For small noncommercial webcasters, IBS proposed a flat annual fee of $50, and for very small noncommercial webcasters a flat annual fee of $20. No mention was made of the broader category of noncommercial webcaster. On July 29, 2010, after the submission of written rebuttal cases, IBS filed an "Amplification of IBS' Restated Rate Proposal." This filing was far more than an amplification, because for the first time it proposed an annual minimum fee of $500 for noncommercial webcasters per station or channel, along with annual minimum fees of $50 and $20 for small noncommercial webcasters and very small noncommercial webcasters, respectively. IBS also expressly endorsed SoundExchange's per performance rate proposal for the sections 114 and 112 licenses.[22] And, as an alternative to this rate structure, IBS proposed paying an annual lump sum of $10,000 to SoundExchange to cover all performances by IBS members that are not covered by a negotiated agreement.

[20] The joint petition was submitted to the Copyright Office as a settlement of rates and terms for the sections 112 and 114 licenses for the period 2005 and 2006. It was not acted upon by the Office.

[21] This fee is very roughly derived from an agreement negotiated between the RIAA and the Corporation for Public Broadcasting under the Small Webcaster Settlement Act of 2002, which was submitted by IBS in the *Webcaster II* proceeding.

[22] IBS does not define "noncommercial webcaster," but the proposal suggests that it is a webcaster with no more than 159,140 ATH per month per station or channel, but no less than 15,915 ATH. The endorsement of the SoundExchange per performance proposal would then apply to the overage of 159,140 ATH. 9/30/10 Tr. at 651:11–652:21 (IBS Closing Argument).

IBS added that "[i]f the amount of IBS members participating exceeds $10,000.00 there will be a true up within 15 days of the end of the year." Amplification of IBS' Restated Rate Proposal at 3 (July 29, 2010).[23]

During the hearings on the written rebuttal cases, SoundExchange objected to the testimony of Mr. Kass, IBS' only rebuttal witness, on the grounds that he did not verify his testimony as required by § 350.4(d) of the Judges' rules, and did not appear to know what was in his testimony.[24] The Judges granted the motion and his testimony was not admitted.[25] IBS sought reconsideration of the decision, which was denied. *Order Denying IBS' Motion For Reconsideration of the Rulings Excluding Its Rebuttal Case,* Docket No. 2009–1 CRB Webcasting III (August 18, 2010). Even if his testimony had been admitted, it did not contain support for IBS' new rate proposals, nor could it given that such testimony would be outside the scope of the rebuttal proceedings.

IBS changed its proposed rates one final time with the filing of its proposed findings of fact and conclusions of law. It withdrew its proposal of a $10,000 annual lump sum payment, and proposed regulatory language that permitted SoundExchange to accept unspecified collective payments on behalf of small and very small noncommercial webcasters.[26]

2. The Section 114 Noncommercial Webcaster Rates Determined by the Judges

The statutory standards that apply to the Judges' determination of section 114 rates for commercial webcasters apply with equal force to our consideration of rates for noncommercial webcasters. IBS requests that we distinguish between two different types of noncommercial webcasters—small and very small—within the broader category, thereby invoking the provision of section 114(f)(2)(B) that requires that rates (and terms)

> shall distinguish among different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.

17 U.S.C. 114(f)(2)(B). IBS asks that we make such a distinction for small and very small noncommercial webcasters despite the fact that it has not presented one iota of evidence regarding the relative quantities of music used by these services,[27] nor the nature of their use of sound recordings covered by the license.[28] Likewise, it has completely failed to present any evidence that would enable the Judges to determine the degree to which these proposed services promoted or substituted for the purchase of phonorecords by consumers. IBS has done nothing more than create two arbitrary subcategories of noncommercial webcaster, separated by unsupported amounts of monthly aggregated tuning hours, in an effort to obtain lower royalty rates for its members. IBS has failed to satisfy the statutory burden of presenting evidence to enable the Judges to determine if distinctions within the noncommercial webcaster category are required or warranted, and there is nothing in the record of this proceeding that requires the Judges under section 114(f)(2)(B) to establish separate terms and rates for types of services other than noncommercial webcasters.

IBS' failure on this point is endemic to its failure to the even greater task at hand: The rates that would be negotiated in the marketplace between a willing buyer and willing seller. IBS' constantly changing rate proposals were not fashioned with this standard in mind (let alone the evidence to support it), but rather appeared to spring from some undefined meaning of "fairness," or more likely the impressions of Mr. Kass as to what his members would like to pay for statutory royalties. Indeed, even with respect to Mr. Kass' somewhat consistent mantra, that IBS members should not pay for any more than the music that they used, there was no proffer of evidence to demonstrate the nature or volume of that use, by what stations, or under what circumstances. The aridity of the record necessitates the rejection of IBS' proposal.

There is no dispute between SoundExchange and IBS that noncommercial webcasting is a distinct segment of the noninteractive webcasting market for which a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for commercial webcasters. SX PFF at ¶¶ 489–90; IBS PFF at ¶¶ 4, 26. There is also no dispute that the boundary of that submarket is marked by 159,140 ATH per month per station or channel and that any noncommercial webcaster exceeding this limitation should pay the commercial rates adopted in this proceeding for the overage. SX PFF at ¶ 489; IBS PFF at ¶ 26. There is a dispute as to the annual $500 minimum, recoupable fee (*i.e.,* the flat fee rate) proposed by SoundExchange and adopted by the Judges in the *Webcaster II* proceeding. *See* 75 FR 56873 (September 17, 2010) (Remand order). IBS contends that many of its members cannot afford the fee and will cease webcasting activities, but it did not provide any financial records, data or other information, beyond bare allegations of its counsel and Mr. Kass, to support its claim. To the contrary, financial data obtained from IBS' witness John E. Murphy, General Manager of WHUS, licensed to the University of Connecticut, revealed that in 2009 WHUS generated total revenues of $527,364.21 and had a profit of $87,041.55. 4/21/10 Tr. at 583:1–586:12 (Murphy).[29] Mr. Murphy was the only witness to present radio station financial data. Even Mr. Kass' statement that the average operating budget of IBS members is $9,000, though wholly unsupported by documentation, does not demonstrate a lack of ability to pay.[30] Three hundred and five noncommercial webcasters paid SoundExchange the $500 minimum fee in 2009 pursuant to the decision in *Webcaster II,* with an additional 58

[23] IBS does not explain what is meant by IBS members exceeding $10,000 in participation. However, the pleading does offer a number of annual statutory performances covered by the $50 annual minimum fees for small noncommercial webcasters (2,291,616) and very small noncommercial webcasters (916,646). Presumably, IBS is offering to pay additional unspecified amounts for those members that exceed that number of performances in a given year.

[24] Section 350.4(d) provides that "[t]he testimony of each witness shall be accompanied by an affidavit or a declaration made pursuant to 28 U.S.C. 1746 supporting the testimony."

[25] It was apparent after *voir dire* of the witness that not only did he not comply with the verification rule in filing his written rebuttal statement, but that he was not familiar with substantial portions of his testimony, which had been drafted by IBS' counsel. 7/29/10 Tr. at 292:1–296:15 (Kass).

[26] To further roil the waters, IBS attached to its proposed findings its Amplification of IBS' Restated Rate Proposal which does contain the $10,000 lump sum payment language.

[27] IBS distinguishes between the services based upon the number of ATH, but ATH is not a measurement of the quantity of use of sound recordings covered by the section 114 license. It is only a time measurement of reception of a transmission.

[28] Counsel for IBS conceded at closing argument that the record was devoid of evidence on this statutory requirement. 9/30/10 Tr. at 647:12–651:5 (IBS Closing Argument).

[29] It was revealed that WHUS did not pay *any* statutory license fees in 2009 nor did it file required reports of use. 4/21/10 Tr. at 579:21–582:3, 594:5–600:2 (Murphy).

[30] Interestingly, IBS members pay an annual $125 membership fee to IBS, and pay $85 per person, or $480 per station, to attend IBS' annual conference in New York City, plus the cost of hotel rooms. 4/21/10 Tr. at 593:12–594:3 (Murphy).

services paying more for exceeding the ATH cap or streaming more than one station or channel. 75 FR 56874 (September 17, 2010) (Remand order). Twenty-four noncommercial educational stations endorsed the SoundExchange-CBI agreement which contains the same flat $500 fee. *See supra* at Section III.A. In sum, we reject IBS' contention that the $500 fee is not affordable and cannot represent what a willing buyer would pay in the hypothetical marketplace.

Having rejected *in toto* the contentions and claims of IBS,[31] we are persuaded that the presentation of SoundExchange best represents the rates that would be paid in the willing buyer/willing seller hypothetical marketplace for noncommercial webcasting. The annual minimum fee of $500 per station or channel functions as the royalty payable for usage of sound recordings up to 159,140 ATH per month. This flat fee is the same that we adopted in *Webcaster II* and, as discussed above, is demonstrably affordable to noncommercial webcasters. We find that the SoundExchange-CBI agreement, which contains the very same fee and rate structure, and the 24 comments supporting it are corroborative evidence that our determination satisfies the statutory standard. As a minimum fee, and mindful of the Court of Appeals' admonition regarding evidence of administrative costs administering the licenses, *Intercollegiate Broadcast System, Inc.* v. *Copyright Royalty Bd.,* 574 F.3d at 761 (DC Cir. 2009), we are persuaded that the testimony of Ms. Kessler as to estimates of average administrative costs per licensee shows that a $500 minimum fee for noncommercial webcasters is more than reasonable. SX PFF at ¶ 484; *see also* 75 FR 56874 (September 17, 2010) (Remand order).

3. The Section 112 Noncommercial Webcaster Rates Determined by the Judges

Although there is not a stipulation as to the rates for the section 112 license for noncommercial webcasters as there is for commercial webcasters, *supra* at Section II.B.1, there is no disagreement between SoundExchange and IBS. SoundExchange proposes the same bundled rate approach for both the section 112 and 114 rights, five percent of which is allocated as the section 112 royalty for making ephemeral copies, and IBS endorses the proposal. SX PFF at ¶¶ 671; IBS PFF at ¶ 24. The testimony offered by SoundExchange supports this proposal and we adopt it. SX PFF at ¶¶ 672–688.

IV. Terms

The standard for setting terms of payment is what the record reflects would have been agreed to by willing buyers and willing sellers in the marketplace. *Webcaster II,* 72 FR 24102 (May 1, 2007); *see also Webcaster I,* 67 FR 45266 (July 8, 2002). In *Webcaster II,* we further established that we are obligated to "adopt royalty payment and distribution terms that are practical and efficient." *Webcaster II,* 72 FR 24102 (May 1, 2007). The parties each submitted proposals of the terms that they believe satisfy both of these requirements.[32] SoundExchange based its proposal generally on the current terms as adopted in *Webcaster II* and the proceeding setting the sections 112 and 114 rates and terms for preexisting satellite digital audio radio services, with certain revisions, and proposed conforming editorial changes to the webcasting terms in light of changes made in that proceeding. SX PFF at ¶ 549. Live365 proposed changes to the definitions of two terms in § 380.2 of the current webcasting regulations.[33] Live365 PFF at ¶¶ 382–87; Live365 PCL at ¶¶ 77–79. IBS proposed terms for noncommercial webcasters. IBS PFF at ¶ 26.

SoundExchange and Live365 also stipulated to certain terms. *See Stipulation of SoundExchange, Inc. and Live365, Inc. Regarding Certain Proposed Terms,* Docket No. 2009–1 CRB Webcasting III (September 10, 2010) ("*Joint Stipulation*").

When adopting royalty terms, we also strive, where possible, to maintain consistency across the licenses set forth in sections 112 and 114 in order to maximize efficiency in and minimize the overall costs associated with the administration of the license. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services (Final rule and order),* 73 FR 4080, 4098 (January 28, 2008) ("*SDARS*"). However, this goal is not overriding. We will vary terms across the licenses where a party can demonstrate the need for and the benefits of such variance. *Id.*

A. Collective

SoundExchange requests to be named the sole collective for the collection and distribution of royalties paid by commercial and noncommercial webcasters under the sections 112 and 114 licenses for the period 2011–2015. SX PFF at ¶ 602; Second Revised Rates and Terms of SoundExchange, Inc., Docket No. 2009–1 CRB Webcasting III, at Proposed Regulations § 380.4(b) (July 23, 2010). Live365 takes no position regarding SoundExchange's request, Live365 RFF at ¶ 602, and IBS does not appear to object, given its rate proposal refers to SoundExchange as the collective. *See* Amplification of IBS' Restated Rate Proposal, Docket No. 2009–1 CRB Webcasting III, at 2 (July 29, 2010).

We have determined previously that designation of a single Collective "presents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses." *Webcaster II,* 72 FR 24104 (May 1, 2007); *see also SDARS,* 73 FR 4099 (January 24, 2008). No party has submitted evidence that would compel us to alter that determination here. Indeed, no party requested the designation of multiple collectives, and SoundExchange was the only party requesting to be selected as a collective.[34]

[31] In its proposed findings, and for the first time in this proceeding, IBS contends that "Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type of service in accord with the general public policy favoring small businesses," and that as a consequence the Judges are required under the Regulatory Flexibility Act, 5 U.S.C. 601(6), to determine whether the $500 fee unnecessarily burdens IBS' members. IBS PFF (Reformatted) at ¶¶ 10–13. There is no support in the text or legislative history of the Copyright Act for the proposition that section 114(f)(2) favors small businesses, and, indeed, IBS does not supply any. To the contrary, section 114(f)(2)(B) is very clear as to our task in this proceeding: To fashion rates (and terms) that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." IBS has also failed to support its contention that the Judges must conduct a Regulatory Flexibility Act assessment of impact of the $500 fee on IBS' members in particular. IBS has not supplied the Judges with any evidence to adduce whether its members are "small entities" within the meaning of 5 U.S.C. 601—IBS has not supplied us with any documentary evidence of its membership, even their names—nor has it demonstrated that the Regulatory Flexibility Act applies to rate proceedings before the Judges. *See* 5 U.S.C. 601(2) (exempting from the definition of a rule of a government agency "a rule of particular applicability relating to rates"); *c.f. American Moving and Storage Assoc.* v. *DOD,* 91 F.Supp.2d 132, 136 (D.D.C. 2000) (exception for "a rule of particular applicability relating to rates" is explicit and broad). In any event, the Judges did consider the circumstances of noncommercial webcasters, discussed above, in establishing the $500 fee.

[32] CBI's proposal consisted of the terms contained in the agreement with SoundExchange submitted for adoption by the Judges. Since we are adopting that agreement, see supra at Section III.A., CBI's proposal will not be discussed here.

[33] Live365's request for an aggregator discount initially was proposed as a term. However, as discussed *supra* at Section II.B.5., the aggregator discount was handled in the section on proposed rates and thus will not be discussed here. *See also,* 9/30/10 Tr. at 615:5–22 (Live365 Closing Argument).

[34] As noted *supra* at n.4, RLI filed a written direct statement but did not present oral testimony;

SoundExchange (and its predecessor) has served as the Collective for the collection, processing and distribution of royalty payments made under the sections 112 and 114 statutory licenses since their inception thereby accumulating a wealth of knowledge and expertise in administering these licenses. *See* Kessler Corrected WDT at 4. Moreover, SoundExchange's designation as the sole Collective is supported by artists and copyright owners. *See* Roberts Hedgpeth WDT at 1–2; McCrady WDT at 19. This coupled with the absence of any opposition or record evidence to suggest that SoundExchange should not serve in that capacity here leads us to designate SoundExchange as the Collective for the 2011–2015 license period.

B. Stipulated Terms and Technical and Conforming Changes

On September 10, 2010, SoundExchange and Live365 submitted a stipulation regarding certain proposed terms in the Proposed Regulations appearing as an attachment to Second Revised Proposed Rates and Terms of SoundExchange, Inc. filed July 23, 2010. In several instances, they have stipulated that current provisions of the webcasting terms will remain unchanged. For example, SoundExchange and Live365 agree that the current definitions of the following terms in § 380.2 shall remain unchanged: "Commercial Webcaster," "Copyright Owners," "Ephemeral Recording," "Noncommercial Webcaster," "Performers," and "Qualified Auditor." *Joint Stipulation,* Exhibit A at 2–4 (September 10, 2010). Similarly, the current provisions of § 380.5 will remain unchanged. *Id.* at 9–11.

In other instances, stipulated terms consist of eliminating provisions which were solely applicable to the 2006–2010 license period (*see,* e.g., § 380.4(d)) and reflecting changes necessitated by the adoption of the NAB-SoundExchange and SoundExchange-CBI agreements (*see,* e.g., § 380.2 definition of "Licensee"). *Id.* at 3, 8.

We find that the stipulated terms constitute for the most part technical and non-controversial changes that will add to the clarity of the regulations adopted today. Therefore, we are adopting the terms stipulated to by SoundExchange and Live365.

For these same reasons, we are adopting the technical and conforming changes proposed by SoundExchange, and not opposed by any party, in Section IV of their Second Revised Rates and Terms, filed July 23, 2010.

We now turn to those contested terms proposed for Commercial Webcasters.

C. Contested Terms for Commercial Webcasters

1. Terms Proposed by Live365

Live365 proposes changes to the definitions of two terms in § 380.2, namely, "performance" and "aggregate tuning hours." [35] Live365 PFF at ¶ 387 and PCL at ¶ 79. Specifically, Live365 proposes to modify the definition of "performance" to "exclude any performances of sound recording that are not more than thirty (30) consecutive seconds." Live365 PFF at ¶ 387. According to Live365, this proposed modification conforms the definition of "performance" in § 380.2 to that of a "performance" or "play" as defined in the four interactive service agreements reviewed by Dr. Pelcovits. *Id.* Live365 also contends that past precedent has excluded partial performances from "royalty-bearing" performances, citing to the Librarian's adoption of a settlement agreement among SoundExchange, AFTRA, the American Federation of Musicians of the United States and Canada, and Digital Media Association which excluded from payment performances that suffered technical interruptions or the closing down of a media player or channel switching. Live365 PCL at ¶ 78, citing *Digital Performance Right In Sound Recordings And Ephemeral Recordings, Docket Nos. 2002–1 CARP DTRA3 & 2001–2 CARP DTNSRA,* 74 FR 27506, 27509 (May 20, 2003).

Similarly, Live365 seeks to revise the current definition of "aggregate tuning hours" to exclude programming that does not contain sound recordings such as talk, sports, and advertising not containing sound recordings. Live365 PCL at ¶ 79. Live365 justifies its request by asserting that "programming without sound recordings should not be subject to consideration in regulations dealing with a royalty to be paid for the use of sound recordings." *Id.*

SoundExchange vehemently opposes adoption of either proposed modification. First, SoundExchange contends that these proposed modifications constitute new terms, not a revision to an existing proposal, in violation of § 351.4(b)(3) which allows for revision of a rate proposal at any time up to and including submission of proposed findings of fact.[36] SX RFF at ¶ 223. Next, SoundExchange asserts that Live365's citation to the four interactive service agreements without more does not provide sufficient record support for either the need for or benefit of this request. *Id.* at ¶¶ 226–228. With regard to the request to redefine "aggregate tuning hours," SoundExchange argues that Live365 fails to point to anything in the record explaining, much less supporting, the need for such proposal. *Id.* at ¶¶ 231–232. Finally, SoundExchange points to Live365's failure to consider the potential effect of its definition of "performance" on the per-performance rate as yet another reason not to accept Live365's proposal. *Id.* at ¶ 230. Were Live365's definition adopted, SoundExchange contends that an upward adjustment would be needed to the per-performance rate since neither Drs. Pelcovits nor Fratrik excluded performances of less than 30 seconds in the calculation of their respective per-performance rates.[37] *Id.*

The Judges decline to adopt either of Live365's proposed definitions. Live365 has provided insufficient record support for either of its proposals. This is especially true with regard to its proposed definition of "aggregate tuning hours." It appears for the first time in Live365's proposed conclusions of law without any citation to the record or any substantive explanation as to why such a change is needed or what benefits would result from its adoption. All Live365 has provided is the unsupported assertions of counsel. Thus, Live365 has not met its burden regarding adoption of this term. *See SDARS,* 73 FR 4101 (January 28, 2008) (refusal to adopt bare proposals unsupported by record evidence).

Likewise, Live365 has not met its burden with respect to adoption of its proffered definition of "performance." Neither the mere citation to the four interactive service agreements in the record here without more nor a reference to a settlement agreement adopted by the Librarian in a CARP proceeding demonstrates that a willing buyer and a willing seller would agree to such a term in the non-interactive market. Live365 simply states that its

therefore, their written direct statement was not considered. In any event, RLI did not seek designation as a Collective.

[35] In the proposed regulations attached to its proposed findings of fact, Live365 included an additional term: A proposed deadline for the completion and issuance of a report regarding an audit to verify royalty payments. *See* Attachment to Live365's Proposed Findings of Fact and Conclusions of Law, § 380.6(g). Since this proposal was not discussed in its proposed findings of fact and Live365 presented no evidence to support the need for such a term, we decline to adopt it.

[36] We need not address the validity of this argument since we decline to adopt this term on other grounds.

[37] According to SoundExchange, the upward adjustment would result from a reduction in the number of plays in the calculation of a per-performance rate. SX RFF at ¶ 230.

requested definition conforms to the definitions of "performance" and "play" in the agreements reviewed by Dr. Pelcovits with no discussion of or cited support for why such conformance is needed or beneficial or even appropriate here.

Live365's reference to adoption by the Librarian of the settlement agreement in a prior CARP proceeding is unpersuasive. As with its proposal regarding aggregate tuning hours, this justification is offered for the first time in Live365's proposed conclusions of law. Thus, like its proposed definition for aggregate tuning hours, the proffered justification amounts to nothing more than an unsupported argument of counsel.

More importantly, as SoundExchange correctly observes, since neither Dr. Pelcovits nor Dr. Fratrik excluded performances from the calculation of their respective per-performance rates, there would be fewer plays in such calculations, thereby necessitating an upward adjustment to the per-performance rates. Live365 never acknowledges this effect much less addresses how to make the adjustment. *See* SX RFF at ¶ 230. The lack of supportive evidence presented by Live365 when combined with the potential problematic effect on the per-performance rates requires rejection of this term.

2. Terms Proposed by SoundExchange

SoundExchange proposes several terms. We note at the outset that several of SoundExchange's proposed terms are contained in some or all of the WSA agreements, including the NAB–SoundExchange and SoundExchange-CBI agreements adopted herein. Parties are free to agree to whatever terms they choose. When such agreement is submitted to the Judges for adoption, we are obligated to adopt said agreement in the absence of objections after publication in the **Federal Register**. 17 U.S.C. 801(b)(7)(A); *see supra* at Section II.A. However, when parties litigate over the adoption of a term, even one that is contained in an adopted agreement, the requesting party must meet its burden with respect to the standards set forth *supra.*

Evaluating SoundExchange's proposals in this light, we find that SoundExchange has not met its burden.

a. Server Log Retention

SoundExchange urges the Judges to clarify that server logs are among the records to be retained for three years pursuant to § 380.4(h) and to be made available during an audit conducted pursuant to § 380.6. *See* Second Revised Rates and Terms of SoundExchange, Inc., Section III.A., Proposed Regulations, § 380.4(h) (July 23, 2010); Kessler Corrected WDT at 27. Although SoundExchange believes that retention of these records is required under the current regulations, it requests an amendment to include server logs since oftentimes such logs are not retained. SX PFF at ¶¶ 556–57; Kessler Corrected WDT at 27. SoundExchange asserts that "[t]he evidence indicates marketplace acceptance of such a term," citing to the SoundExchange-CBI agreement which contains an equivalent term. SX PFF at ¶ 555.

In its opposition to this term, Live365 notes that neither the NAB-SoundExchange agreement nor the Commercial Webcasters agreement contains this term nor do any of the interactive service agreements submitted in this proceeding. Live365 RFF at ¶ 555. Live365 further argues that SoundExchange failed to establish how the benefits to SoundExchange of this term outweigh the burden on licensees to comply. *Id.* at ¶ 557.

Section 380.4(h), which governs the retention of records, requires licensees to retain "books and records" relating to royalty payments. The language does not include server logs and SoundExchange's assumption that it does is incorrect. The question remains, however, whether server logs should be included, and the Judges answer in the negative because the record evidence does not support such a finding. None of the interactive agreements in evidence here contain such specificity. Live365 Exs. 17 and 18; McCrady WDT, Exs. 104–DR & 106–DR. Rather, the agreements require licensees only to retain records relating to their obligations under the agreement and in terms no more specific than in the current regulation. *See,* e.g., Live365 Exs. 17 at ¶ 7(h) and Ex. 18 at ¶ 7(h); McCrady WDT, Exs. 104–DR at ¶ 6(j) and 106–DR at ¶ 4(h). Since these agreements were negotiated in a setting free from the constraints of the regulatory scheme, they provide the best evidence of the agreement of a willing buyer and a willing seller in this respect.

We disagree with SoundExchange's assertion that inclusion of this term in the SoundExchange-CBI WSA agreement constitutes "marketplace acceptance." As discussed *supra* and as acknowledged by SoundExchange, such agreements were reached under atypical marketplace conditions, since their negotiations were overshadowed by the possibility of a regulatory proceeding. *See supra* at Section II.B.3.b.ii.; *see also* 9/30/10 Tr. at 547:20–548:5 (SoundExchange Closing Argument). Furthermore, while the SoundExchange-CBI agreement contains the term, the NAB–SoundExchange and Commercial Webcasters agreements do not despite the assertion of Ms. Kessler that server logs contain data that is "critical for verifying that licensees have made the proper payments." Kessler Corrected WDT at 27; *see also* 4/20/10 Tr. at 455:15–17 (Kessler). If such data is "critical," it is difficult to understand why server logs were not included in the NAB–SoundExchange and Commercial Webcasters agreements, particularly where these agreement were negotiated by SoundExchange and cover "webcasters representing a substantial part of [the webcasting] market." 9/30/10 Tr. at 508:3–4 (SoundExchange Closing Argument); *see supra* at Section II.B.3.b.ii.

Finally, retention of server logs for a three-year period may present significant issues to webcasters regarding storage and costs. No evidence was adduced by SoundExchange as to these important considerations, and the Judges are hesitant to adopt a term without such data. In sum, SoundExchange's request for retention of server logs appears to be more of a want than a need, and we decline to amend § 380.4(h) of our rules.

b. Standardized Forms for Statements of Account

SoundExchange proposes to require licensees to submit statements of account on a standardized form prescribed by SoundExchange in order to simplify licensees' calculations of the royalties owed and to facilitate SoundExchange's ability to efficiently collect information from licensees. SX PFF at ¶¶ 572, 575. SoundExchange currently provides a template statement of account on its Web site. *Id.* at ¶ 574. SoundExchange notes that noncommercial educational webcasters are required pursuant to their WSA agreement to use a form supplied by SoundExchange. McCrady WDT, Ex. 103–DP at section 4.4.1.

Live365 opposes adoption of this term on the grounds that it is addressed more appropriately in a notice and recordkeeping proceeding. Live365 RFF at ¶ 574.

We are not persuaded that a need for mandatory use of a standardized statement of account exists at this time nor do we find support in the record for adoption of this term. As Mr. Funn testified, the majority of webcasters currently use the template form made available on SoundExchange's Web site. Funn WRT at 2; 8/2/10 Tr. at 492:2–3 (Funn) ("much more than half" of webcasters currently use template). Mr. Funn provided no information quantifying the additional work for SoundExchange to process a statement of account for the few webcasters who choose not to use the template. The only example given in this regard focused on Live365 and its submission of an altered form using incorrect rates, which is irrelevant to SoundExchange's request. *See* Funn WDT at 3–4; 8/2/10 Tr. at 465:19–22 (Funn).

Our skepticism regarding the need to require use of a standardized form also stems from the fact that neither the NAB–SoundExchange WSA agreement nor the Commercial Webcasters WSA agreement contains this term. McCrady WDT, Exs. 101–DP and 102–DP. Moreover, although the SoundExchange-CBI WSA agreement requires use of a SoundExchange-supplied form, *see* McCrady WDT, Ex. 103–DP at section 4.4.1, such language was not included in the SoundExchange-CBI agreement submitted to the Judges and adopted herein. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings (Proposed rule),* 75 FR 16377, 16385 (§ 380.23(f)) (April 1, 2010).

Given the already widespread use of SoundExchange's template form, the lack of quantification in the record of the time savings to SoundExchange by having a standardized form, and SoundExchange's failure to include this term in the NAB-SoundExchange and Commercial Webcasters WSA agreements or the SoundExchange-CBI agreement submitted to the Judges, we find that the record before us does not support the adoption of this term.

c. Electronic Signature on Statement of Account

SoundExchange seeks to eliminate the requirement in the current § 380.4(f)(3) of a handwritten signature on the statement of account. SX PFF at ¶ 576. According to SoundExchange, allowing electronic signatures would make it easier for licensees to submit their statements of account. *Id., citing* Funn WRT at 3 n.1. SoundExchange further asserts that "none [of the WSA agreements in evidence] requires that statements of account bear a handwritten signature." SX PFF at ¶ 577.

Live365 does not oppose this request as its own proposed regulations eliminate the requirement for a handwritten signature on the statement of account. *See* Attachment to PFF, Proposed Regulations, § 380.4(f)(3).

The Judges determine that the record evidence does not support adoption of this term. The WSA agreements, as submitted as exhibits to Mr. McCrady's written direct testimony do, despite SoundExchange's assertions to the contrary, require a handwritten signature on a statement of account. SoundExchange is correct that each agreement requires statements of account to be provided each month, although neither agreement sets forth the specific information to be included. *See* McCrady WDT, Ex. 101–DP at section 4.6 (NAB), Ex. 102–DP at section 4.5 (Commercial Webcasters), and Ex. 103–DP at section 4.4.1 (CBI). However, SoundExchange ignores the provision in each agreement which states "[t]o the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 CFR Parts 370 and 380, shall apply to activities subject to these Rates and Terms." *See* McCrady WDT, Ex. 101–DP at section 6.1 (NAB), Ex. 102–DP at section 5.1 (Commercial Webcasters) and Ex. 103–DP at section 6.1 (CBI). Current § 380.4(f)(3) requires a handwritten signature; such requirement is not inconsistent with the agreements' general requirement to simply submit statements of account. Our interpretation is confirmed by the fact that the NAB-SoundExchange and SoundExchange-CBI WSA agreements submitted to the Judges for adoption here each retained the requirement for a handwritten signature. *See Proposed rule,* 75 FR 16380 (§ 380.13(f)(3)), 16385 (§ 380.23(f)(4)) (April 1, 2010). Since we are adopting those provisions as proposed on April 1, 2010, to accept SoundExchange's proposal here would create an inconsistency in terms that does not exist currently.

d. Identification of Licensees and Late Fee for Reports of Use

SoundExchange requests that the Judges harmonize identification of licensees among the notice of intent to use the sections 112 and 114 licenses, the statements of account and the reports of use, and to impose a late fee for reports of use. These two requests differ from the rest of their requests in that these are notice and recordkeeping terms.[38] [39] *See* Kessler Corrected WDT at 20–23, 27–28. This is not the first time we have been asked to adopt terms regarding notice and recordkeeping in this context. *Webcaster II,* 72 FR 24109 (May 1, 2007); *SDARS,* 73 FR 4101 (January 28, 2008). While the Copyright Act grants us the authority to adopt such terms here (said terms would supersede those set forth in 37 CFR Part 370), such authority is discretionary. 17 U.S.C. 803(c)(3). To date, we have declined to exercise this discretion. *Webcaster II,* 72 FR at 24109–10 (May 1, 2007); *SDARS,* 73 FR at 4101 (January 28, 2008).

Our prior refusals stemmed from our findings that the issues presented, such as census reporting, were more appropriately addressed in the context of a rulemaking proceeding and that "no persuasive testimony compelling an adjustment of the current recordkeeping regulations" was presented in either instance. *SDARS,* 73 FR 4101 (January 28, 2008), *citing Webcaster II,* 72 FR 24110 (May 1, 2007). In light of the record before us, we decline to adopt SoundExchange's proposals regarding the harmonization of licensee identification and the imposition of a late fee for reports of use because the evidence does not compel us to amend the current recordkeeping regulations here; rather, these issues are more appropriately addressed in a future rulemaking proceeding, for the reasons discussed below.

i. Identification of Licensees

SoundExchange asserts that harmonization of the identification of licensees can be accomplished by (1) requiring licensees to identify themselves on their statements of account and reports of use "in exactly the same way [they are] identified on the corresponding notice of use * * * and that they cover the same scope of activity (e.g., the same channels or stations)," SX PFF at ¶ 568, Kessler Corrected WDT at 28; (2) making the regulations clear that the "Licensee" is "the *entity* identified on the notice of use, statement of account, and report of use and that each Licensee must submit its own notice of use, statement of account, and report of use," *id.* (emphasis in original); and (3) requiring licensees to use an account number issued by SoundExchange. *Id.* at ¶ 571. In support of these requests, Ms. Kessler testified that these proposals would allow SoundExchange to more quickly and efficiently match the requisite

[38] SoundExchange requested these same, or similar, changes in a rulemaking concluded last year where we imposed census reporting for all services except those broadcasters paying no more than the minimum fee. See Comments of SoundExchange, Docket No. RM 2008–7, at 20–23 (January 29, 2009). Such requests were outside the scope of that rulemaking, which was to improve the reporting regulations in light of technological developments since promulgation of the interim regulation, and were deferred for consideration in a future rulemaking. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License (Final rule),* 74 FR 52418, 52422–23 (October 13, 2009).

[39] Ms. Kessler acknowledges, at least with respect to the late fees for reports of use, that such proposals could be implemented in either the notice and recordkeeping regulations or in the license terms. Kessler Corrected WDT at 28.

notice of use, statement of account and report of use to the correct licensee. Kessler Corrected WDT at 29; 4/20/10 Tr. at 461:2–8 (Kessler). She also claims that such requirements would impose "little or no evident cost" to licensees, and licensees' accounting and reporting efforts would be simplified by use of an account number. Kessler Corrected WDT at 29. SoundExchange also points out that these proposals are included in the NAB–SoundExchange and SoundExchange-CBI agreements.[40] SX PFF at ¶ 569.

While Live365 does not dispute SoundExchange's proposed findings of fact on this issue, it did not stipulate to the language provided by SoundExchange.

These claims are not sufficiently supported in the record. For instance, there is nothing in the record that supports Ms. Kessler's assertion regarding the potential costs, or lack thereof, to licensees in complying with such a requirement. Without input from licensees regarding such information, we are reluctant to adopt such a proposal. Similarly, there is insufficient evidence to support mandating the use of an account number. None of the WSA agreements in evidence contain such a provision. McCrady WDT, Exs. 101–DP (NAB), 102–DP (Commercial Webcasters) and 103–DP (CBI). All that exists is Ms. Kessler's assertion that use of an account number may simplify a licensee's accounting and reporting. Kessler Corrected WDT at 29. Moreover, while the SoundExchange-CBI agreement as adopted herein requires that statements of account list the licensee's name as it appears on the notice of use, *see* § 380.23(f)(1), it does not impose that requirement with regard to reports of use. *Compare* McCrady Ex. 103–DP, section 5.2.2 *with* § 380.23(g). Thus, even if we adopted SoundExchange's proposal, there would still be an inconsistency within the webcasting regulations. We are, therefore, not persuaded that such a proposal should be adopted here; rather, this issue is more appropriately addressed in a future rulemaking proceeding.

ii. Late Fee for Reports of Use

SoundExchange seeks the imposition of the same late fee of 1.5% for reports of use as currently exists for late payments and statements of account. *See* 37 CFR 380.4(c). In support of its request, SoundExchange proffered the testimony of Ms. Kessler. She testified that currently there is widespread noncompliance with reporting requirements, either failure to file a report of use at all or provision of late and/or "grossly inadequate" reports. Kessler Corrected WDT at 28. Given that a report of use is "a critical element in the fair and efficient distribution of the royalties," 4/20/10 Tr. at 458:21–22 (Kessler), such noncompliance significantly hampers SoundExchange's ability to timely distribute the royalties. Kessler Corrected WDT at 28. Ms. Kessler further noted "that late fees in other areas does [sic] help with our compliance situation." 4/20/10 Tr. at 458:19–20 (Kessler). SoundExchange also points to the inclusion of a late fee for untimely reports of use in the NAB–SoundExchange and SoundExchange-CBI WSA agreements as further support for its request. SX PFF at ¶ 564.

Live365 questions SoundExchange's characterization of a payment as being useless without a report of use given that both the NAB–SoundExchange and CBI–SoundExchange agreements contain reporting waivers. Live365 RCL at ¶ 20.

We are not persuaded by the record before us that there is a need to adopt a late fee for reports of use in this context. The record evidence does not show that a willing buyer and a willing seller would agree to a late fee with respect to reporting, as none of the interactive agreements in evidence contain such a term. Live365 Exs. 17, 18; McCrady WDT, Exs.104–DR and 106–DR. Although the NAB–SoundExchange and SoundExchange-CBI WSA agreements do contain the late fee, they were negotiated under the shadow of a regulatory proceeding, and we note that this late fee was not included in the Commercial Webcasters WSA agreement negotiated by SoundExchange.

D. Contested Terms for Noncommercial Webcasters

IBS has proposed two terms. The first is an exemption from the recordkeeping reporting requirements for the small and very small noncommercial webcaster subcategories it proposed in its rate request. As discussed, *supra,* the Judges declined to recognize the proffered subcategories, thus making IBS' request for recordkeeping reporting exemptions moot. The second term proposed by IBS is an express authorization that SoundExchange "may elect to accept collective payments on behalf of small and very small noncommercial webcasters." IBS PFF at ¶ 26. This request is also moot.[41]

V. Determination and Order

Having fully considered the record, the Copyright Royalty Judges make the above Findings of Fact based on the record. Relying on these Findings of Fact, the Copyright Royalty Judges unanimously adopt this Final Determination of Rates and Terms for the statutory licenses for the digital audio transmission of sound recordings, pursuant to 17 U.S.C. 114, and for the making of ephemeral phonorecords, pursuant to 17 U.S.C. 112(e), for the license period 2011–2015.

So ordered.

Dated: January 5, 2011.

James Scott Sledge,

Chief U.S. Copyright Royalty Judge.

William J. Roberts, Jr.,

U.S. Copyright Royalty Judge.

Stanley C. Wisniewski,

U.S. Copyright Royalty Judge.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges revise part 380 of title 37 of the Code of Federal Regulations to read as follows:

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Subpart A—Commercial Webcasters and Noncommercial Webcasters

Subpart B—Broadcasters

[40] We note that neither agreement mandates the use of an account number.

[41] Even if the request were not moot, it seems unnecessary. SoundExchange is authorized, by virtue of its recognition as the collective under the sections 112 and 114 licenses, to accept payments on behalf of copyright owners, from one or more users of the licenses.

Subpart C—Noncommercial Educational Webcasters

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

Subpart A—Commercial Webcasters and Noncommercial Webcasters

§ 380.1 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees as set forth in this subpart in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

Broadcaster is a type of Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Commercial Webcaster is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114, and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter, or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions, but that is not—

(1) A Broadcaster as defined in § 380.11; or

(2) A Noncommercial Educational Webcaster as defined in § 380.21.

Noncommercial Webcaster is a Licensee that makes eligible digital audio transmissions and

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Side Channel is a channel on the Web site of a Broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the Broadcaster.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) are as follows:

(1) *Commercial Webcasters:* For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or

FM radio broadcasts, and related Ephemeral Recordings, a Commercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(2) *Noncommercial Webcasters:* (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of $500 in 2011, 2012, 2013, 2014, and 2015.

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(b) *Minimum fee*—(1) *Commercial Webcasters.* Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011–2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial Webcasters, provided that a Commercial Webcaster shall not be required to pay more than $50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). For each such Commercial Webcaster, the annual minimum fee described in this paragraph (b)(1) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(2) *Noncommercial Webcasters.* Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011–2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Noncommercial Webcasters. For each such Noncommercial Webcaster, the annual minimum fee described in this paragraph (b)(2) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(c) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 on a monthly basis on or before the 45th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the related statement of account are received by the Collective.

(f) *Statements of account.* Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 380.8.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.5 Confidential Information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart B—Broadcasters

§ 380.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Broadcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours means the total hours of programming that the Broadcaster has transmitted during the relevant period to all listeners within the United States from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.

Broadcaster means an entity that:

(1) Has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcaster Webcasts mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.

Broadcast Retransmissions mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an Internet-only side channel.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Small Broadcaster is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.12(c)) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria:

(1) During the prior year it made Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; and

(2) During the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; provided that, one time during the period 2011–2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding paragraph (1) of the definition of "Small Broadcaster" if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

§ 380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in § 380.13(g)(3), be payable on a per-performance basis, as follows:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(b) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting as set forth in § 380.3.

(c) *Minimum fee.* Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2011–2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For the purpose of this subpart, each individual stream (*e.g.,* HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the "Proxy Fee") to the Collective for the reporting waiver discussed in § 380.13(g)(2).

§ 380.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Broadcaster shall make the royalty payments due under § 380.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Broadcasters due under § 380.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments and reporting.* Broadcasters must make monthly payments where required by § 380.12, and provide statements of account and reports of use, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Broadcaster shall make any minimum payment due under § 380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) *Late fees.* A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Broadcasters in General.* (1) Broadcasters other than electing Small Broadcasters covered by paragraph (g)(2) of this section shall submit reports of use on a per-performance basis in compliance with the regulations set forth in part 370 of this chapter, except that the following provisions shall apply notwithstanding the provisions of such part 370 of this chapter from time to time in effect:

(i) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in paragraph (g)(3) of this section.

(ii) Broadcasters shall submit reports of use to the Collective on a monthly basis.

(iii) As provided in paragraph (d) of this section, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(iv) Except as provided in paragraph (g)(3) of this section, Broadcasters shall submit reports of use to the Collective on a census reporting basis (*i.e.,* reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(v) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis;

(vi) Broadcasters shall transmit each report of use in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the report covers a single station only, the call letters of the station.

(vii) Broadcasters shall submit reports of use with headers, as presently described in § 370.4(e)(7) of this chapter.

(viii) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations. Small Broadcasters that have made an election pursuant to paragraph (h) of this section for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to paragraph (g)(1) of this section may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if

(i) Census reporting is not reasonably practical for the programming during those hours, and

(ii) If the total number of hours on a single report of use, provided pursuant to paragraph (g)(1) of this section, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

(A) 2011: 16%;

(B) 2012: 14%;

(C) 2013: 12%;

(D) 2014: 10%;

(E) 2015: 8%.

(iii) To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to this paragraph (g)(3), the Broadcaster shall

(A) Report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour;

(B) Pay royalties (or recoup minimum fees) at the per-performance rates provided in § 380.12 on the basis of paragraph (g)(3)(iii)(A) of this section;

(C) Include Aggregate Tuning Hours in reports of use; and

(D) Include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) *Election of Small Broadcaster Status.* To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.11 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Broadcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in § 370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Broadcaster, such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(j) *Retention of records.* Books and records of a Broadcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.14 Confidential Information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Broadcaster's statement of account pursuant to § 380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Broadcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Broadcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Broadcaster, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Broadcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart C—Noncommercial Educational Webcasters

§ 380.20 General.

(a) *Scope.* This subpart establishes rates and terms, including requirements for royalty payments, recordkeeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Noncommercial Educational Webcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmissions within the scope of such agreements.

§ 380.21 Definitions.

For purposes of this subpart, the following definitions shall apply:

ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Noncommercial Educational Webcaster means Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; and

(4) Is not a "public broadcasting entity" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Noncommercial Educational Webcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings, including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

§ 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Minimum fee.* Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of $500 (the "Minimum Fee") for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (*e.g.,* HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a $100 annual fee (the "Proxy Fee") to the Collective.

(b) *Additional usage fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees ("Usage Fees") for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(6) For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided in paragraphs (b)(1) through (5) of this section based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per-channel or -station basis.

(c) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs (a) and (b)(1) through (5) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.3.

§ 380.23 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.22 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Noncommercial Educational Webcasters due under § 380.22 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc., should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by the Collective, that the Noncommercial Educational Webcaster.

(1) Qualifies as a Noncommercial Educational Webcaster for the relevant year; and

(2) Did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) *Usage fees.* In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) *Late fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with the applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.22 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;

(2) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this subpart;

(3) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution;

(5) The printed or typewritten name of the person signing the statement of account;

(6) The date of signature;

(7) The title or official position held by the person signing the statement of account;

(8) A certification of the capacity of the person signing; and

(9) A statement to the following effect:

I, the undersigned officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Noncommercial Educational Webcasters in general*—(1) *Reporting waiver.* In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of $100 in lieu of providing reports of use for the calendar year pursuant to the regulations at § 370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

(2) *Sample-basis reports.* A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at § 370.4 of this chapter, except that, notwithstanding § 370.4(d)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so.

These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this paragraph (g)(3):

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section. A Noncommercial Educational Webcaster required to report pursuant to this paragraph (g)(3) shall provide reports of use to the Collective quarterly on a census reporting basis (*i.e.,* reports of use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by § 370.4 of this chapter), except that, notwithstanding § 370.4(d)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with this paragraph (g)(3). For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this paragraph (g)(3) for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under this paragraph (g)(3) shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(h) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in § 370.4 of this chapter and this subpart, except that in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to paragraph (g)(1) of this section, the Collective shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) *Server logs.* Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

§ 380.24 Confidential Information.

(a) *Definition.* For purposes of this subpart, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster's statement of account pursuant to § 380.25 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.26;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Noncommercial Educational Webcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.25 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Educational Webcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Noncommercial Educational Webcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Noncommercial Educational Webcaster, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Noncommercial Educational Webcaster to be audited. Any such audit shall be conducted by an independent Qualified Auditor identified in the notice and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Noncommercial Educational Webcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Noncommercial Educational Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Noncommercial Educational Webcaster reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Noncommercial Educational Webcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.26 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.27 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Dated: January 5, 2011.

James Scott Sledge,
Chief U.S. Copyright Royalty Judge.

Approved by:
James H. Billington,
Librarian of Congress.

[FR Doc. 2011–4995 Filed 3–8–11; 8:45 am]

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37 CFR Part 380

Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2009–1 CRB Webcasting III]

Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges announce their final determination of the rates and terms for two statutory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings, for the period beginning on January 1, 2011, and ending on December 31, 2015.

DATES: *Effective Date:* April 25, 2014.

Applicability Dates: These rates and terms are applicable to the period January 1, 2011, through December 31, 2015.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707–7658. Email: *crb@loc.gov*.

SUPPLEMENTARY INFORMATION: On July 6, 2012, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) remanded this matter for determination. The Copyright Royalty Judges (Judges) determine that the royalty rates payable under 17 U.S.C. 114(f) for the public performance by webcasters of digital sound recordings for the period 2011 through 2015 shall be as follows. For commercial webcasters subject to the agreement between the National Association of Broadcasters and SoundExchange, as stipulated in the agreement. For all other commercial webcasters:

Year	Rate per-performance [1]
2011	$0.0019
2012	0.0021
2013	0.0021
2014	0.0023
2015	0.0023

The Judges determine that section 114 public performance rates for noncommercial webcasters shall be as follows. For noncommercial educational webcasters, as agreed by and between College Broadcasters, Inc. and SoundExchange in the agreement approved by the Judges in this proceeding. For other noncommercial webcasters, the rate shall be $500 per station or channel, including side channels, up to a maximum usage of 159,140 Aggregate Tuning Hours [2] (ATH) per month. Commercial usage rates apply to usage in excess of 159,140 hours per month.

All parties in interest in this proceeding agreed that royalties payable for the license granted under 17 U.S.C. 112(e) should be bundled with the section 114 royalties and deemed to be 5% of the bundled remittances. The Judges adopt this agreement for the period 2011 through 2015.

Following are the bases of the Judges' determination.

I. Introduction

A. Subject of the Proceeding

This Determination results from a rate proceeding convened under section 803(b) of the Copyright Act (Act), 17 U.S.C. 803(b). On January 5, 2009, the Copyright Royalty Judges (Judges) announced commencement of the captioned proceeding. *See,* 74 FR 318 (Jan. 5, 2009). The purpose of the proceeding was to determine royalty rates and terms for the public performance of digital sound recordings by eligible nonsubscription transmission services or new subscription services, as defined in section 114 of the Act.[3] This proceeding includes determination of rates and terms relating to the making of ephemeral copies under section 112 of the Act in furtherance of the digital public performances. The rates and terms the Judges determine in this proceeding apply to the period of January 1, 2011, through December 31, 2015. *See* 17 U.S.C. 804(b)(3)(A).

B. Procedural Posture

In response to the Judges' published notice of commencement, forty entities filed Petitions to Participate. The participants followed the statutory procedures for rates and terms determinations, which include a voluntary negotiation period. In addition, Congress provided expanded opportunities for settlement by passing the Webcaster Settlement Acts of 2008 and 2009 (WSA).[4] Most participants negotiated agreements relating to rates and terms prior to the hearing.[5]

When the Judges convened the hearing to determine rates and terms applicable to the non-settling participants, the parties remaining were: SoundExchange, Inc. (SoundExchange),

[1] This rate is applicable from first performance, but subject to recoupment credit for the agreed minimum fee of $500 per year for each station or channel.

[2] ''Aggregate Tuning Hours'' is defined in SoundExchange's rate proposal as using the same definition employed during the 2006–2010 rate period and codified at 37 CFR 380.2 (2010). It is a measure of the duration of all programming transmitted by licensee, less the actual running time of any sound recordings that are licensed directly or which do not require a license under the Act.

[3] Including as amended by the Digital Millennium Copyright Act (DMCA), Public Law 105–304, 112 Stat. 2860, 2887 (Oct. 27, 1998).

[4] Public Law 110–435, 122 Stat. 4974 (Oct. 16, 2008); Public Law 111–36, 123 Stat. 1926 (June 30, 2009). The Webcaster Settlement Acts of 2008 and 2009 authorized webcasters to negotiate rates and terms for the section 112 and 114 licenses to be effective during the then current rate term *in lieu* of the adjudicated rates for that term, and to extend through the rate term at issue in this proceeding. The WSAs also gave parties the option to exclude those negotiated terms from evidence in a proceeding before the Judges notwithstanding the provisions of sections 112(e)(4) and 114(f)(2)(B), which permit the Judges to consider evidence of voluntarily negotiated licenses in determining statutory rates and terms.

[5] The participants reached eight settlements in all, accounting for approximately 95% of the royalties paid to SoundExchange in 2008 and 2009. The Copyright Office published notices of settlements as follows: 74 FR 9293 (Mar. 3, 2009) (three agreements); 74 FR 34796 (July 17, 2009) (one agreement); and 74 FR 40614 (Aug. 12, 2009) (four agreements).

College Broadcasters, Inc. (CBI),[6] the Intercollegiate Broadcasting System, Inc. (IBS), Live365, Inc. (Live365), RealNetworks, Inc., and Royalty Logic, LLC. The Judges heard evidence for seven days in April 2010 in the direct case and three days in July 2010 in the rebuttal case. On May 5, 2010, the Judges heard oral argument relating to the settlement and resulting regulatory language proposed jointly by SoundExchange and CBI. The Judges heard closing arguments of counsel on July 30, 2010.

Following presentation of written and testimonial evidence, legal briefing, and argument of counsel, the Judges published their Final Determination in this matter on March 9, 2011. *See* 76 FR 13026 (Mar. 9, 2011). IBS filed a timely appeal to the United States Court of Appeals for the DC Circuit. IBS asserted on appeal that the $500 minimum fee and the attendant recordkeeping and reporting requirements established for noncommercial webcasters is excessive and burdensome for small college broadcasters. IBS further challenged the Constitutionality of the statutory construct granting the DC Circuit the power not just to affirm, reverse, or remand appeals from the CRB, but also to remediate CRB determinations—an ability IBS challenged as a non-judicial function and unconstitutional under Article III of the Constitution. IBS likewise challenged the constitutionality of the Judges under the Appointments Clause of the United States Constitution. U.S. Const., art. II, sec. 2, cl.2.[7]

SoundExchange and CBI intervened in the appeal. Both intervenors filed briefs in support of the Judges' determination. SoundExchange controverted the constitutional challenges asserted by IBS. CBI sought to assure the validity of its agreement with SoundExchange regardless of the resolution of the constitutional issues.

On July 6, 2012, the DC Circuit ruled that the Judges were acting as principal officers of the United States government in violation of the Appointments Clause of the Constitution. *Intercollegiate Broadcasting Sys., Inc.* v. *Copyright Royalty Board,* 684 F.3d 1332, 1342 (D.C. Cir. 2012), *cert. denied,* 133 S. Ct. 2735 (2013).[8] To cure the violation of the Appointments Clause, the DC Circuit excised that portion of the Act that limited the Librarian's ability to remove Judges. Having determined that the Judges were not validly appointed at the time they issued the challenged determination, the DC Circuit ''vacate[d] and remand[ed] the determination,'' without addressing any substantive issue on appeal, so that a constitutionally appointed panel of Judges could render a new determination. *Id.* at 1334, 1342.

Following the Supreme Court's denial of IBS's petition for a writ of *certiorari,* the Judges requested proposals from the participants on the conduct of proceedings on remand. *Order for Further Briefing* (July 26, 2013). SoundExchange essentially argued for a summary reissuance of the Judges' original determination and CBI argued for summary adoption of its settlement with SoundExchange. IBS urged the Judges to reopen the proceeding to allow additional written and oral testimony and new briefing. IBS argued in the alternative that the Judges permit each participant to submit new briefs.

The substantive issues on appeal were (i) the $500 minimum fee for noncommercial educational webcasters and (ii) terms proposed by IBS relating to ''small'' and ''very small'' noncommercial webcasters. The language of the DC Circuit's remand, however, was not limited to any specific portion of the determination. Rather, the DC Circuit ''vacate[d] and remand[ed] *the determination.'' Id.* at 1342 (emphasis added). The Judges interpret the Court's remand order as directing the Judges to review the entire record and to issue a new determination on all issues included therein, not just the $500 minimum fee that was the subject of the appeal.

The Judges have considered both the language of the remand order and proposals from the participants regarding remand procedure. While the DC Circuit's remand instructions compel the Judges to consider anew all issues in the original determination, the Judges decline to reopen the proceeding and accept additional evidence or argument. Each party had ample opportunity to present its case.[9] The Judges have concluded that this matter shall be determined based upon a *de novo* review of the substantial record that the parties developed during the proceeding leading to the first determination.

Upon completion of their *de novo* review of the existing record, the Judges issued their initial *Determination After Remand for Royalty Rates and Terms for 2011–2015,* Docket No. 2009–1 CRB Webcasting III (Jan. 9, 2014) (*Initial Determination*). Pursuant to 17 U.S.C. 803(c)(2) and 37 CFR Part 353, IBS filed a motion for rehearing. After reviewing the motion, the Judges denied the motion for rehearing. *Order Denying Motion for Rehearing,* Docket No. 2009–1 CRB Webcasting III (Feb. 4, 2014). As explained in the February 4, 2014 Order, the Judges determined that IBS had failed to show that any part of the *Initial Determination* was erroneous, *i.e.,* IBS's arguments did not satisfy the ''exceptional case'' standard necessary to warrant a rehearing. More particularly, the motion failed to establish: (1) An intervening change in controlling law, (2) the availability of new evidence, or (3) a need to correct a clear error or prevent manifest injustice. *Id.*

C. Statutory Background

Transmission of a sound recording constitutes a public performance of that work. Owners of copyright in sound recordings are not accorded an exclusive, general public performance right with regard to those recordings. *See* 17 U.S.C. 106(4). Owners of copyright in ''musical works,'' [10] have an exclusive right of public performance of those works; owners of copyright in ''sound recordings'' [11] do not. As a

[6] In August 2009, under the auspices of the WSA of 2009, CBI and SoundExchange reached a settlement between them (CBI/SoundExchange Agreement) covering rates and terms for certain college broadcasters and noncommercial educational webcasters. The Copyright Office published notice of this settlement on August 12, 2009. *See* 74 FR 40616 (Aug. 12, 2009). CBI and SoundExchange then filed a joint motion for approval of their settlement and adoption of its terms as the applicable regulations for all noncommercial educational webcasters. The Judges published proposed regulations based upon the CBI/SoundExchange agreed rates and terms. *See* 75 FR 16377 (Apr. 1, 2010). The Judges received multiple comments in favor of the proposed regulations and an objection from IBS. The Judges, therefore, heard oral argument of counsel in May 2010, and published the Final Rule relating to the CBI/SoundExchange Agreement and the NAB/SoundExchange Agreement. *See* 76 FR 13026 (Mar. 9, 2011).

[7] IBS argued that the Judges were principal officers of the United States government and, as such, must be appointed by the President with the advice and consent of the United States Senate. IBS also opined that the Librarian is not an agency head authorized to appoint inferior officers of the government, notwithstanding that the Librarian is appointed by the President and confirmed by the Senate.

[8] To remedy the violation of the Appointments Clause, the Librarian appointed the incumbent panel as at-will employees. The Librarian appointed the current panel of Judges while the IBS appeal was pending; consequently, the panel of Judges making the determination on remand is not the same as the panel that made the first determination.

[9] The Judges' consideration of this issue is discussed in detail in *Notice of Intention to Conduct Paper Proceeding on Remand and Solicitation of Comments from the Parties* (Sept. 17, 2013).

[10] A ''musical work'' is a musical composition, together with any accompanying words, that has been fixed in any tangible medium of expression. *See* 17 U.S.C. 102(a)(2).

[11] '' 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other

Continued

consequence, U.S. copyright law permits many public performances of sound recordings—including radio broadcasts—to take place without the authorization of, or compensation to, sound recording copyright owners (*e.g.,* performers and record labels).

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (DPRA),[12] which created and granted to sound recording copyright owners a new exclusive right to perform a sound recording publicly by means of a digital audio transmission. 17 U.S.C. 106(6). The new right was, however, subject to a number of important limitations, including the grant to subscription digital audio transmission services (including satellite digital audio radio services) of a statutory license that permitted them to use sound recordings without the agreement of the copyright owner. 17 U.S.C. 114(d)(2), (f) (1997) (amended 1998).

Technology proceeded apace and, within a few short years, digital transmissions of sound recordings over the Internet were prevalent and available from both subscription and nonsubscription services. Congress did not specifically contemplate these ''webcaster'' services when it drafted the DPRA. Consequently, Congress expanded the statutory license in section 114 to cover ''eligible nonsubscription transmissions,'' *i.e.,* webcasting, when it enacted the Digital Millennium Copyright Act of 1998, Public. Law 105–304, 112 Stat. 2860 (Oct. 28, 1998),

> To ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and . . . to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services. . . .

H.R. Rep. No. 105–796, at 79–80 (1998).

In addition, in recognition of the fact that webcasters must make temporary copies of sound recordings in order to facilitate the transmission process, Congress created a compulsory licensing scheme for so-called ''ephemeral'' recordings. *See id.* at 89–90. Licensees are limited to no more than one ephemeral recording (unless the terms of the license permit more) for use in the broadcasting or transmission of the copied work. 17 U.S.C. 112(e). The ephemeral recording must be transitory in nature, unless the licensee retains it solely for archival purposes. *See* 17 U.S.C. 112(a).

In the Copyright Royalty and Distribution Reform Act of 2004,[13] Congress created the role of Copyright Royalty Judge and authorized the Judges, *inter alia,* to determine and set rates and terms for the licensing and use of copyrighted works in several contexts, *e.g.,* cable television transmission, satellite radio broadcast, and, the medium relevant to this proceeding, webcasting. Congress retained the prior statutory standards and made them applicable to the Judges for determining rates and terms for both the ephemeral and the public performance licenses. For webcasting rates under either license, the ''Judges shall establish rates and terms 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). The quoted language is substantially identical to the statutory language regarding ephemeral recordings. *See* 17 U.S.C. 112(e)(4).

To ascertain rates that represent this hypothetical market under both statutory sections, the Judges shall consider ''economic, competitive, and programming information presented by the parties. . . .'' *Id.* The Judges are not limited with regard to the evidence they may consider (other than the limitations in the WSAs on the use of agreements reached under those statutes). The Judges' determination relating to both licenses should also account for whether the use at issue might substitute for, promote, or otherwise affect the copyright owners' stream of revenues. The Judges must also consider, again for both licenses, the relative contributions of the owners and licensees in making the licensed work available to the public. *Id.* Except as directed by the WSAs, the Judges may consider rates and terms negotiated in voluntary licensing agreements for comparable transmission services. *Id.*

D. The Record

SoundExchange, Live365, IBS, and CBI presented evidence in this proceeding.[14] CBI only presented evidence to support adoption of its settlement with SoundExchange for noncommercial educational webcasting. SoundExchange and Live365 presented evidence relating to commercial webcasters. SoundExchange presented evidence relating to noncommercial webcasting; IBS presented evidence for small noncommercial webcasters. The Judges received written and live testimony from 15 witnesses[15] and admitted 60 documentary exhibits into evidence.

The record on which the Judges base this determination after remand is the existing record, including written and oral legal argument of counsel, and transcripts of the entire determination proceeding.[16]

II. Rates Under the Section 112 Ephemeral License

Between the direct and rebuttal phases of this proceeding, SoundExchange and Live365 presented settlements of (i) the minimum fee and royalty rates for the section 112 license and (ii) the minimum fee for the section 114 license applicable to the commercial webcasters not encompassed by the NAB/SoundExchange Agreement. These two settlements were included in one stipulation. The terms of the settlement are the same as the agreement reached and included as a final rule following the prior webcasting rate determination, following remand. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule),* 75 FR 6097 (Feb. 8, 2010).

The minimum fee for commercial webcasters is an annual, nonrefundable fee of $500 for each individual channel and each individual station (including any side channel), subject to an annual cap of $50,000. The royalty rate for the section 112 license is bundled with the fee for the section 114 license. There is one additional term in the stipulation that was not included in the prior determination. The royalty rate for the section 112 license is deemed to be 5% of the bundled royalties. No party objected to the stipulation. SoundExchange presented unopposed evidence to support the minimum fee for commercial webcasters and the bundled royalty rates. *See* SoundExchange Proposed Findings of Fact (SX PFF) at ¶¶ 459–468, 472. These agreed provisions are supported by the parties and the evidence.

There is no disagreement between SoundExchange and IBS as to the rates for the section 112 license for noncommercial webcasters. As it did for commercial webcasters, SoundExchange

sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.'' 17 U.S.C. 101.

[12] Public Law 104–39, 109 Stat. 336 (Nov. 1, 1995).

[13] Public Law 108–419, 118 Stat. 2341 (Nov. 30, 2004).

[14] After filing Written Direct Statements, RealNetworks, Inc. withdrew from the proceedings, and Royalty Logic, LLC, did not participate further.

[15] The Judges also considered designated written testimony.

[16] The original panel of judges heard approximately ten days of testimony and legal argument in aggregate, resulting in approximately 2,600 pages of transcripts.

proposed a bundled rate approach for both the section 112 and section 114 rights, allocating 5% of the entire bundled royalty as the section 112 royalty. SX PFF at ¶ 671. IBS endorsed the proposal. *Amplification of IBS' Restated Rate Proposal,* at 2. The testimony offered by SoundExchange supported this proposal and the Judges adopt it. *See, e.g.,* Ford WDT at 9–12, 14–15; 4/20/10 Tr. at 434 (Ford); 4/22/10 Tr. at 729–31 (McCrady); *Post-Hearing Responses to Judges' Questions by Michael D. Pelcovits,* at 5 (May 21, 2010).

The issues remaining for the Judges' determination are (i) rates and terms for commercial webcasters' section 114 licenses and (ii) the rates and terms—specifically, the minimum fee—for noncommercial webcasters' section 114 licenses.

III. Rate Structure Under the Section 114 Performance License

The Copyright Act clearly establishes the willing buyer/willing seller standard for the royalty rates at issue in this proceeding. *See* 17 U.S.C. 114(f)(2)(B). To establish the *level* of such rates, the Judges must first determine the *structure* of those rates, *i.e.,* the metric or metrics that willing buyers and sellers likely would have negotiated in the marketplace.

SoundExchange and Live365 proposed that royalties for the section 114 license be computed pursuant to a per-performance usage structure. SoundExchange acknowledged, however, that ''[t]he metrics by which most services pay'' are the ''percentage-of-revenue'' metric or the ''per-subscriber'' metric—both of which are not fixed rates,'' but rather are rates that increase the monetary payment ''as subscribers and revenue increase.'' SX Reply PFF ¶ 74. However, neither SoundExchange nor Live365 proposed an alternative to the per-performance rate structure.

SoundExchange's industry witness noted the ubiquity of rate structures based on revenues or subscribership. More particularly, W. Tucker McCrady, Associate Counsel, Digital Legal Affairs at Warner Music Group acknowledged that ''[i]n the U.S., WMG does not have a single agreement with an audio streaming service where the payment amount is based solely on a per-play rate, as is the case with the statutory license.'' *See* McCrady WDT at 10. As Mr. McCrady further explained, the per-play royalty fee is typically combined with a percentage-of-revenue royalty fee, so that a per-play floor is seen as sort of a minimum protection for the value of the music,'' whereas, beyond that minimum, ''a *revenue share* . . . allows us to share in the upside . . . .'' 4/22/10 Tr. at 658 (McCrady) (emphasis added).

Live365 introduced as an exhibit in this proceeding the prior written direct testimony of Dr. Pelcovits in the previous webcasting proceeding, *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final rule and order,* 72 FR 24084, 24090 (May 1, 2007), *aff'd in relevant part sub nom. Intercollegiate Broad. Sys.* v. *Copyright Royalty Bd.,* 574 F.3d 748 (D.C. Cir. 2009)(*Web II*), in which he testified:

- Through the percentage-of-revenue, the record companies ensure that they will receive a share of royalties in the benchmark interactive market that *properly compensates* them for their valuable copyrighted material,
- The business justification for the percentage-of-revenue structure is so compelling *it should be adopted as the rate structure for the statutory license,*
- Removing the percentage-of-revenue element would unravel the complex set of factors that affected the negotiations, and undoubtedly would change the underlying rates, and
- There is a good argument that the percentage-of-revenue rate applied in the interactive market should simply be adopted for the noninteractive market.

Live365 Tr. Ex. 5, at 28–30.

The parties to the instant proceeding declined to propose rates based explicitly upon the revenues of webcasters, apparently because they had concluded that the Judges would reject revenue-based rates.[17] The parties thus submitted no evidence as to any alternative rate structure premised explicitly on the percentage-of-revenue realized by webcasters.

Given the limitations of the record developed by the parties, the Judges defer to the parties' decision to eschew advocacy for such percentage-of-revenue based fees in this proceeding. 17 U.S.C. 114(f)(2)(B) (''In determining . . . rates and terms the Copyright Royalty Judges shall base their decision on . . . information presented by the parties . . . .''). Accordingly, the Judges consider the relative merits of the competing per-performance rates proposed by the two contending parties.

The Judges recognize, however, that as 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. Mindful of that fact, the Judges wish to emphasize that by deferring to the present parties' decision to propose only a per-performance rate structure, the Judges do not *per se* reject future consideration of rate structures predicated upon other measurements, such as a percentage of revenue realized by webcasters.[18]

IV. Rates for Commercial Webcasters

A. The National Association of Broadcasters/SoundExchange Agreement

Section 801(b)(7)(A) of the Act allows for the adoption of rates and terms negotiated by ''some or all of the participants in a proceeding at any time during the proceeding,'' provided they are submitted to the Copyright Royalty Judges for approval. The Judges must adopt the settlement after affording all interested parties an opportunity to comment, unless a participant in the proceeding objects to it and the Judges determine that the settlement does not provide a reasonable basis for setting rates and terms.

On June 1, 2009, the National Association of Broadcasters (NAB) and SoundExchange filed a settlement of all issues between them in this proceeding, including proposed rates and terms (NAB/SoundExchange Agreement). Their settlement was one of several WSA agreements that the Copyright

[17] For example, SoundExchange expressly noted that in *Web II* both the webcasters and SoundExchange ''proposed rate structures that included revenue-based elements and usage-based elements [but t]he Judges . . . concluded that a per-performance usage fee structure was more appropriate for commercial webcasters, and rejected revenue-based proposals.'' SX PFF ¶ 36 (*quoting Web II,* 72 FR at 24089). Likewise, Dr. Pelcovits indicated that his choice of a rate structure was constrained by the fact that the Judges in *Web II* had ''rejected alternatives such as fees calculated as a percentage of the buyer's revenue. . . .'' Pelcovits WDT at 6. The Judges note, however, that the rejection of percentage-of-revenue rate structures in *Web II* was based on the evidentiary record in that proceeding and that *Web II* explicitly did not establish a *per se* rejection of such rate structures. *Web II,* 72 FR at 24090 (''[The] evidence in the record weighs in favor of a per-performance usage fee structure. . . .This does not mean that some revenue-based metric could not be successfully developed. . . .'').

[18] Of course, the Judges' adoption of any rate structure in a future proceeding would depend upon the evidence and arguments the participants present, including arguments addressing concerns raised by the Judges in earlier proceedings. *See, e.g., Web II,* 72 FR at 24089–90. The Judges' possible future consideration of a percentage-of-revenue rate structure in a section 114(f)(2)(B) proceeding for noninteractive webcasting does not suggest that such a structure or the resulting rates should necessarily be related in any manner to the structure or level of rates set (pursuant to section 801(b)(1) for preexisting services identified in section 114(f)(2)(B)). *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Final rule and order,* 67 FR 45240, 45244 (July 8, 2002)(*Web I*). Additionally, although rates might be set pursuant to the same structure under both statutory provisions, there is no reason why the level of rates would necessarily be the same.

Office published in the **Federal Register**. NAB and SoundExchange filed their WSA agreement in the instant proceeding and requested that the Judges adopt the agreed rates and terms for some services of commercial broadcasters for the period 2011 through 2015. The settlement applies to statutory webcasting activities of commercial terrestrial broadcasters, including digital simulcasts of analog broadcasts and separate digital programming. The settlement includes per-performance royalty rates, a minimum fee, and reporting requirements.

The Judges published the settlement (with minor modifications [19]) as proposed regulations in the **Federal Register** on April 1, 2010, and provided interested parties an opportunity to comment and object by April 22, 2010. 75 FR 16377 (Apr. 1, 2010) (publishing NAB/SoundExchange and CBI/SoundExchange Agreements). The Judges received no comments or objections; therefore, the provisions of section 801(b)(7)(A)(ii) (permitting the Judges to decline to adopt the settlement as a basis for statutory rates and terms) are inapplicable. In the absence of an objection from a party that would be bound by the proposed rates and terms, the Judges adopt the rates and terms in the settlement for certain digital transmissions of commercial broadcasters for the period of 2011–2015. 17 U.S.C. 801(b)(7)(A).

B. All Other Commercial Webcasters

Only two participants—SoundExchange and Live365—presented evidence relating to public performance royalty rates for commercial webcasters.

SoundExchange proposed that the section 114 royalty rates for noninteractive webcasting be established by applying two categories of benchmarks:

• Agreements between SoundExchange and: (a) The NAB; and (b) Sirius XM Satellite Radio (Sirius XM), both of which established per-performance royalty rates for the same noninteractive webcaster rights that are at issue in this proceeding; and

• Rates established in a different but purportedly analogous market—the market for *interactive* webcasting of digital sound recordings—adjusted to render them probative of the rates for noninteractive webcasting.

Relying on these proposed benchmarks, SoundExchange proposed the following royalty rate schedule:

Year	Rate per-performance
2011	$0.0021
2012	0.0023
2013	0.0025
2014	0.0027
2015	0.0029

SX PFF ¶ 11.

Live365 proposed that commercial webcasters pay $0.0009 per performance throughout the entire period 2011–2015. Live365 PFF ¶ 170. In addition, Live365 sought a 20% discount on its proposed per-performance rate for ''Internet radio aggregators,'' such as itself, to account for the alleged value to copyright owners of their provision of certain specified ''aggregation services.'' Live365 PFF ¶ 193.

Live365's proposed rate is not premised upon any benchmarks. Its economic expert, Dr. Mark Fratrik, stated that he was ''not aware of comparable, voluntary license agreements that would serve as an appropriate benchmark for an industry-wide rate.'' Fratrik Corrected and Amended WDT at 7 [hereinafter, Fratrik WDT].[20]

Rather, Live365 proposed a unique model by which:

• Revenues are estimated for a supposedly ''representative'' webcaster;

• All costs—except for the royalty fees to be determined—are estimated for a ''representative'' webcaster; and

• Royalty fees are established, on a per-performance basis, at a level which assures the ''representative'' webcaster a 20% operating margin, *i.e.,* a 20% profit.

1. The Live365 Rate Proposal

As discussed above, Live365 proposed a single constant rate of $0.0009 for each year of the 2011–2015 rate period. This proposed rate was supported by Dr. Fratrik's written and oral testimony.

With regard to the fundamentals of the hypothetical market, Dr. Fratrik first assumed, correctly, that the ''underlying product'' consisted of ''blanket licenses for each record company which allows use of that record company's complete repertoire of sound recordings.'' Fratrik WDT at 8. Next, he properly assumed that the rates must be those that would be negotiated between a willing buyer and a willing seller. Fratrik WDT at 4.

With regard to the market participants, Dr. Fratrik properly identified the hypothetical ''willing buyers'' to be the webcasting services that operated under the statutory license.'' *Id.* at 8. He also properly identified the ''hypothetical willing sellers'' as the several record companies. *Id.*

To determine the statutory rate, Dr. Fratrik attempted to determine the appropriate license rate based upon an examination of the ''revenue and cost structure of a mature webcaster—in this case, Live365.'' *Id.* at 4.

For assumed revenues, Dr. Fratrik utilized in his model ''publicly available industry data on webcasting revenues.'' *Id.* These revenue figures were not historical data, but rather ''estimates of revenues recognizing the changing marketplace.'' *Id.* at 10. More particularly, Dr. Fratrik relied upon ''[p]ublicly available industry reports from Accustream and ZenithOptimedia [to] serve as lower and upper bounds, respectively, on advertising revenue measurements for the past period.'' *Id.* at 16. Although webcaster revenue came from two sources, subscriptions and advertising, the only data available to Dr. Fratrik, and the only data he used, were advertising revenues. *Id.* at 16–17.

For assumed costs, Dr. Fratrik utilized the ''operating costs'' from Live365. *Id.* at 5. Given the mechanics of his model, the costs he included were ''all of the operating costs *except* for the royalty rates to be paid to the copyright owners.'' *Id.* (emphasis added). The royalty cost is omitted because it is the ''unknown'' that Dr. Fratrik's analysis is designed to determine. Dr. Fratrik chose to utilize the costs incurred by Live365 because, in his opinion, ''Live365 is a representative webcaster with respect to its operating costs . . . and will serve as a good conservative proxy for the industry as it is a mature operator.'' *Id.* at 16.

With regard to the difference between revenues and costs, *i.e.,* profits, Dr. Fratrik assumed that ''a Commercial webcaster is *entitled* to a reasonable profit margin.'' *Id.* at 17 (emphasis added). Accordingly, Dr. Fratrik

[19] Exercising the right granted in the WSAs, SoundExchange and NAB provided in their agreement that, unlike the rates and terms they set for the section 114 licenses, the rates and terms they set for the ephemeral recording license could not be used as evidence and would not serve as precedent in any contested rate determination. The Judges, deeming such language inappropriate to the purposes of the regulations, declined to include it in the published regulations. For the same reason, the Judges declined to accept language in the agreement regarding SoundExchange's acceptance of a broadcaster's election to be a ''Small Broadcaster'' or the broadcaster's reservation of rights. The Judges also declined on the same basis to include some of the language of the CBI agreement.

[20] Throughout this determination, the Judges will employ abbreviations that they have used in past determinations, *e.g.,* ''WDT'' for the last version of the witness's Written Direct Testimony; ''WRT'' for Written Rebuttal Testimony; ''Tr.'' for hearing transcripts; ''PFF'' for Proposed Findings of Fact, *etc.*

attempted to identify a ''fair operating margin (measured as a percentage of revenues)'' for a hypothetical webcaster. *Id.* at 5. Dr. Fratrik's proposal fails to create a royalty rate framework that can satisfy the statutory criteria *viz.,* rates that would have been negotiated in the marketplace between a willing buyer and a willing seller; the Judges cannot adopt it.

a. Dr. Fratrik's Misapplication of a Public Utility-Style Rate-Setting Process in the Present ''Willing Buyer/Willing Seller'' Statutory Context

Dr. Fratrik's methodology mimics the methodology by which government agencies or commissions set rates for public utilities or other regulated natural monopolies. There is no basis in the Act or in economic theory to support the use of this paradigm to establish royalty rates for the licensing of sound recordings by noninteractive webcasters.

A fundamental defect in this reasoning is Dr. Fratrik's requirement that the statutory royalty rate must provide for a fixed ''profit margin'' for webcasters. *See* 4/27/10 Tr. at 1138 (Fratrik) (''I believe the 20 percent rate is what they would strive to get *and have to get.''*) (emphasis added). Dr. Fratrik does not provide any evidentiary support for the assumption that the record companies, *i.e.,* the willing sellers in the hypothetical marketplace, would accept (or be compelled to accept) a royalty rate simply because it allowed buyers to realize a predetermined level of revenue as profits. Further, Dr. Fratrik does not provide any evidentiary support for his assumption that the buyers, *i.e.,* the webcasters, would require a royalty rate low enough to maintain a predetermined 20% profit margin or otherwise be driven out of the marketplace. *See* 4/27/10 Tr. at 1166–67 (Fratrik) (Dr. Fratrik unaware of any webcasters earning 20% operating margin).

Not only does Dr. Fratrik's methodology lack evidentiary support, it has embedded within it a perverse incentive structure. Dr. Fratrik's methodology would cause the royalty rates to be a function not only of the revenues of the webcasters, but also a function of: (i) The other (non-royalty) operating costs incurred by the webcasters; and (ii) the guaranteed profit (20% according to Dr. Fratrik) after inclusion of the (to be determined) royalty costs. This fundamental flaw in Dr. Fratrik's methodology can be demonstrated algebraically as follows:

Dr. Fratrik's requirement of a 20% operating profit for webcasters can be expressed as:

$$\text{TOTAL PROFIT} = \text{TOTAL REVENUE (TR)} - \text{TOTAL COST (TC)} = 0.2(\text{TR})$$

Dr. Fratrik dichotomizes costs into royalty costs (*i.e.,* the unknown to be determined) and all other operating costs, which can be expressed as:

$$\text{TC} = \text{Royalty Costs (rc)} + \text{All Other Operating Costs (oc)}$$

So,

$$\text{TR} - \text{rc} - \text{c} = 0.2(\text{TR})$$

Subtracting 0.2(TR) from both sides of the equation results in the following:

$$0.8(\text{TR}) - \text{rc}—\text{oc} = 0$$

Adding rc to both sides of the equation results in the following:

$$0.8(\text{TR}) - \text{oc} = \text{rc}$$

For presentation purposes, the above equation can be set forth in reverse as:

$$\text{rc} = 0.8(\text{TR}) - \text{oc}$$

This presentation makes plain that in Dr. Fratrik's model the royalty rate would be a function of: (i) The revenues of the webcaster (TR); and (ii) all other webcaster costs (oc). Egregiously, the relationship between the royalty rate and all other costs incurred by the webcaster (oc) would be inverse, *i.e.,* as all other costs (oc) increased, the section 114 royalty rate would decrease.

Thus, a webcaster would have no incentive to minimize or otherwise reduce all other operating costs, because higher operating costs would result in a lower royalty paid to owners/compulsory licensors of sound recordings. Such a result would be perverse: The royalty revenue realized by the owners/licensors would be subject to the cost-minimization successes or failures of the webcasters under a formula by which the latter had no incentive to minimize costs.[21]

As previously noted, Dr. Fratrik's methodology mimics the setting of public utility rates for natural monopolies. In that setting, the ''unknown'' variable is the rate to be charged to the end-user, which, when multiplied by the number of units of the service sold, establishes the revenue received by the seller. What can be ''known'' (*i.e.,* determined via such public utility-style hearings) are: (i) The reasonable costs incurred by the utility; and (ii) the fair rate of return to which the utility is deemed entitled by consideration of appropriate marketplace returns on capital. *See generally* Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 169 (2d ed. 1988).

In the present proceeding, the ''unknown'' is different, but the proposed methodology is similar. What is ''unknown'' is one element of total costs, *i.e.,* the royalty fee. The revenues received by the sale to the end-users (*i.e.,* the provision of the listening experience to consumers) is known (or estimated), whether as a function of advertising revenues, subscriptions, or both. Here, as in classic rate regulation, the percentage to be realized as a rate of return (profit) likewise is known or discovered (as Dr. Fratrik purported to have ''discovered'' the 20% return by his examination of the assertedly analogous terrestrial radio marketplace).

The foregoing analysis crystalizes a fundamental problem in Dr. Fratrik's analysis: Rate-setting proceedings under section 114 of the Act are not the same as public utility rate proceedings. The Act instructs the Judges to use the willing buyer/willing seller construct, assuming no statutory license. The Judges are not to identify the buyers' reasonable other (non-royalty) costs and decide upon a level of return (normal profit) sufficient to attract capital to the buyers.

Moreover, Dr. Fratrik's methodology attempts to graft a public utility style rate—designed to regulate a natural monopoly—onto a rate-setting scheme in which he properly acknowledges the existence of a multitude of buyers, whose costs are critical to his analysis. Public utility-style rate-setting procedures are designed to consider the costs and potential returns to a monopoly seller, not the costs or potential returns of numerous buyers.

Not only does Dr. Fratrik's methodology improperly apply the public utility style rate-setting process, it ignores and thus exacerbates a particularly thorny issue in such rate regulation. Regulators of natural monopolies such as public utilities must ascertain the actual operating costs of the monopolist, and disallow inappropriate costs from entering the ''rate base.'' This undertaking is very difficult. *See generally* Richard Posner, *Economic Analysis of Law* 367 (6th ed. 2003) (''The regulatory agency's success in monitoring the regulated firm's costs will inevitably be uneven.''); Paul Krugman & Robin Wells, *Microeconomics* 374 (2d ed. 2009) (''[R]egulated monopolies . . . tend to exaggerate costs to regulators . . . .'').

Here, Dr. Fratrik relies upon only Live365's particular cost data, rather

[21] If webcasters operating under Dr. Fratrik's methodology did minimize or otherwise reduce all other operating costs, then, in order to prevent an increase in their pre-established profit margin, the royalty rate would need to increase. However, given that the Act requires these rates to be fixed for five years, the webcaster could reduce or minimize all other operating costs and simply pocket the profit, increasing their profit percentage above the level set by the Judges.

than any industry-wide cost data, without providing any evidence that Live365's cost structure is representative of the industry. SX PFF ¶¶ 312–322. Further, there is no breakdown by Dr. Fratrik of those other operating costs incurred by Live365 that would ensure that his *de facto* rate base includes only appropriate categories of costs incurred at minimally efficient levels.

To the extent Live365 is not sufficiently representative of all webcasters (or representative at all of other webcasters), Dr. Fratrik's methodology would yield an inaccurate royalty rate. On a more general level, to the extent the cost structure of any given webcaster is not representative of the industry writ large, Dr. Fratrik's methodology is hopelessly impractical. To utilize rate-of-return style regulation in a competitive industry such as webcasting would require information regarding the cost structures of thousands of buyers of sound recordings.

This defect in Dr. Fratrik's methodology was made plain during his cross-examination. For example, Dr. Fratrik admitted that if other royalties (such as for musical works paid by Live365 to Performing Rights Organizations) were to increase, then, *ceteris paribus,* under his methodology the royalties paid to SoundExchange for sound recordings would decrease. 4/27/10 Tr. at 1127 (Fratrik). This relationship, as Dr. Fratrik also admitted, existed with regard to all costs (other than sound recording performance royalties) incurred by a webcaster. Pursuant to his methodology, for example, a webcaster's staff wages, payments to advertising agencies, and payment to bandwidth suppliers could all depress the sound recording royalty. *Id.* at 1125 (Fratrik). Thus, Dr. Fratrik was compelled during cross-examination to conclude:

Q: Okay. So basically the way you modeled this out, if anybody else who supplies an input to Live [365] raises their price, the result is going to be your suggested royalty rate goes down, right?

A: Assuming all the other factors remain constant.

Id. at 1127–28.

The Judges conclude that two glaring and fatal defects in Dr. Fratrik's methodology are: (i) Its ill-conceived attempt to utilize the public utility style ratemaking construct in this ''willing buyer/willing seller'' context; and (ii) its reliance upon an inverse relationship between the sound recording royalty rate and all other operating costs incurred by webcasters.[22] Thus, while (in the interest of completeness) the following section discusses details of the methodology proposed by Dr. Fratrik, the Judges' rejection of his overall rate structure alone constitutes a sufficient basis to reject Live365's proposed rate.

b. The Specific Elements of Dr. Fratrik's Model and His Proposed Rates

As summarized below, even assuming, *arguendo,* that the Live365 model had been acceptable in theory to the Judges, the inputs in that model—costs, revenues and profit margin—failed to establish a credible ''marketplace'' rate under the ''willing buyer/willing seller'' standard.

(1) Costs

Dr. Fratrik assumed that Live365's cost structure would serve as a good conservative proxy for the industry as it is a mature operator. Fratrik WDT at 16. This assumption is unsupported by the evidence, which revealed an array of existing webcasting services and business models. SX PFF at ¶ 323.

Moreover, it would be unreasonable for the Judges to conclude, as Live365 urged, that these many disparate business models might be experiencing essentially the same unit costs. Indeed, Dr. Fratrik conceded that even Live365 has two separate business lines, ''broadcasting'' services[23] and webcasting and, further, that Live365 also acts as an aggregator with respect to webcasting. Dr. Fratrik offered no example of a comparable participant in the industry that is structured in this manner. Further, Dr. Fratrik failed in his attempt to adjust Live365's costs to isolate only webcasting operations, because he failed to address the *synergistic* nature of Live365's various lines of business. SX PFF at ¶¶ 355, 357, 358.

(2) Revenues

The revenue side of Dr. Fratrik's analysis suffers from infirmities as well. Most importantly, Dr. Fratrik admitted that the advertising revenue estimates (from ZenithOptimedia and Accustream) upon which he relied were ''challenging'' because many webcasters do not report their revenues publicly. 4/27/10 Tr. at 1220 (Fratrik). The limitations of these databases diminished the credibility of the analyses that depended upon them.

That analysis is apparently based only on Dr. Fratrik's analysis of revenues using the data Dr. Fratrik found to constitute his ''upper bound,'' derived from ZenithOptimedia data. In an attempt to avoid the acknowledged problems with these data, Dr. Fratrik attempted to mix and match his several revenue data sources. To further muddy the statistical waters and compromise his analysis, Dr. Fratrik added to the ''upper bound'' and ''lower bound'' of his combined data sets a third separate source—Live365's own subscription revenue data. This further admixture only underscores the lack of rigor and persuasiveness in the Live365 analysis.[24]

(3) Profit Margin

Dr. Fratrik has not provided adequate support for the assumption of a 20% operating margin for webcasters in his analysis. That operating profit margin was not put forward as either a historical profit margin (or a forecasted profit margin) for webcasters. Indeed, Dr. Fratrik conceded that he had no ''evidence that actual webcasters'' would require a 20% operating margin, and that he was not aware of any

[22] The Judges distinguish Dr. Fratrik's methodology from a structure that would be based upon the percentage-of -revenue realized by a webcaster, *without regard to the webcaster's other costs.* If Dr. Fratrik's methodology had simply made the royalty rate a function of webcaster revenue, the methodology would have relied upon a positive (*i.e.,* direct) relationship—as revenues received by webcasters increased, royalty rates would also increase. Such a methodology would constitute a percentage-of-revenue royalty rate, which (as noted *supra)* was rejected on evidentiary bases in *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Final rule and order,* 67 FR 45240 (July 8, 2002)(*Web I*) and *Web II,* yet (as also noted *supra*) was not foreclosed by either of those decisions as a potential *future* basis for determining rates in a section 114 proceeding.

[23] Live365 refers to the services it provides to *webcasters* as ''broadcasting'' services, in an Orwellian (and unsuccessful) attempt to distinguish its principal webcasting business from its ancillary webcasting support services.

[24] Dr. Fratrik's analysis also makes certain assertions regarding future growth—or lack of future growth—in the webcasting industry. The Judges note that predictions by witnesses as to future industry growth are highly speculative—economists are not oracles and ergodicity should not be assumed—past growth (or decline) is not necessarily indicative of future trends. *See generally* John Maynard Keynes, *The General Theory of Employment, Interest and Money* 97 (1936) (''Our knowledge of the factors which will govern the yield of an investment some years hence is usually very slight and often negligible. . . . If we speak frankly, we have to admit that our basis of knowledge for estimating . . . amounts to little and sometimes to nothing . . . *even five years hence.*) (emphasis added). The instant dispute makes the point well because the economy was in recession in all of 2008 and economic activity overall remained depressed throughout 2009, causing a reduction in the revenues received by many businesses throughout the United States and the world. That decline does not necessarily foretell a trend in a particular industry, including the markets for interactive and noninteractive sound recording licenses.

webcaster currently earning a 20% margin. 4/27/10 Tr. at 1166–67 (Fratrik).

Rather, Dr. Fratrik's 20% figure was derived from the profit margins reported by the over-the-air (a/k/a terrestrial) radio broadcasting industry. SX PFF at ¶¶ 328, 330. However, the record of evidence in this proceeding does not support the notion that profit margins for webcasters are likely to be similar to the more capital intensive terrestrial radio industry. SX PFF at ¶¶ 332–335. In fact, Dr. Fratrik admitted that the terrestrial radio industry requires much higher capital costs than webcasting, and that the barriers to entry are higher for terrestrial radio than for webcasting. 4/27/10 Tr. at 1168–72 (Fratrik); *see also* SoundExchange rebuttal testimony of Dr. Janusz Ordover, WRT at 3 (''Dr. Fratrik's selection of a minimum expected margin of 20% is based on margins earned by terrestrial radio broadcasters, who operate in a market with higher fixed capital and other costs and therefore do not provide a useful benchmark from which to determine a reasonable operating margin.'').

In fact, when choosing the 20% figure, Dr. Fratrik did not even look at the returns earned by any other digital business, which are lower than 5%. 4/27/10 Tr. at 1173–74 (Fratrik). Likewise, if Dr. Fratrik had considered the operating margins of record companies, he would have had to reconcile the fact that they too had operating margins of approximately 5% or less. 4/27/10 Tr. at 1175–76 (Fratrik).

c. Live365's Proposed Aggregator Discount

Live365 seeks a further 20% discount applicable to the commercial webcasting per-performance rate for certain ''qualified webcast aggregation services'' that operate a network of at least 100 independently operated ''aggregated webcasters'' that individually ''stream less than 100,000 ATH per month of royalty-bearing performances.'' Rate Proposal For Live365, Inc., Appendix A, Proposed Regulations at § 380.2 and § 380.3(a)(2). This ''discount'' proposal may be more properly understood as a proposed term rather than an additional rate proposal. It is conditional; that is, it is applicable only to the extent that certain defined conditions are met (*e.g.,* minimum number of 100 aggregated webcasters and each individual aggregated webcaster streaming less than 100,000 ATH per month). It proposes to establish a mechanism whereby a group of commercial webcasters under certain qualifying conditions may utilize a ''webcast aggregation service'' to aggregate their monitoring and reporting functions. Rate Proposal for Live365, Inc., Appendix A, Proposed Regulations at § 380.2(m). Monitoring and reporting are compliance-related functions that are currently required of all individual webcaster licensees.

The Judges discern no theory and no evidence that would support an adoption of the so-called ''aggregator discount'' as a separate rate or as a separate term. Live365 submitted the testimony of Mr. Floater in support of the ''aggregator discount.'' He testified that the asserted benefits of an aggregation service flow to the individual webcasters who contract to use that service. As Mr. Floater asserted, the aggregator offers ''a streaming architecture that can aggregate tens of thousands of individual webcasters'' and provides individual webcasters with ''broadcast tools and services [that] contain costs. . . .'' Floater Corrected WDT at 11–14. Dr. Fratrik provided further testimony regarding these aggregation services, noting that they consisted of collecting and compiling ''all of the necessary documentation of the copyrighted works that are streamed and the number of total listening levels for each of these copyrighted works.'' Fratrik WDT at 38.

The Judges construe these ''aggregator services'' as benefits that individual webcasters receive pursuant to their contracts with an aggregator—such as Live365. Apparently, through certain economies of scale or otherwise, Live365 can provide these services at a lower cost per webcaster than the cost each webcaster would incur if it assumed the duties individually. That is a real economic benefit to the individual webcasters. In turn, Live365 can realize a profit from the fees it charges webcasters for these aggregation services, after Live365 incurs the costs of providing the aggregation services. Thus, the webcasters are enriched by the difference between the higher cost of providing these services individually and the contract rate they pay to Live365, and Live365 is enriched by the difference between the fee it charges the individual webcasters and the cost of providing the aggregation services.

Thus, the economic benefits of these aggregation transactions have already been accounted for in the private market through these contracts. Accordingly, the benefits and burdens of the services have already been addressed privately, and it would constitute a double-counting if the Judges were to reduce the rate paid by aggregators and received by the copyright owners.

Live365 contended that the discount is appropriate because copyright owners receive a benefit from the aggregation of these services. However, the copyright owners are not parties to the aggregation contracts between Live365 (or any aggregator) and the webcasters. To the extent there are external benefits arising from those agreements that inure to copyright owners, they are no different than any form of benefits that inure to third parties from the contractual arrangements of other parties. The Judges cannot compel such third parties to incur a cost in exchange for such unsolicited benefits.

This point relates to yet another basis to deny to Live365 a reduced royalty rate in exchange for its provision of aggregation services. Under the Act, royalty payments unambiguously are to be established and paid for ''public performances of sound recordings. . . .'' 17 U.S.C. 114(f)(2)(A). The aggregation services provided by Live365 are not themselves ''public performances of sound recordings,'' but rather are services that are complementary to the provision of ''public performances of sound recordings.'' Live365 is improperly attempting to characterize a distinct complementary service as an essential element of utility bundled into the ''public performance of sound recordings.'' The complementary—as opposed to bundled—nature of the service is underscored by the separate fee received by Live365 from the webcasters who voluntarily choose to utilize that service.

Further, since these aggregation services are not themselves ''public performances of sound recordings,'' the rationale for the statutory license is not triggered. The rationale for the statutory license is to cure the perceived market failure that may arise if multiple webcasters were required to negotiate for individual licenses for a multitude of recordings from the various copyright owners. That rationale does not present itself with respect to the aggregation services—and certainly, Live365 has not presented any evidence to that effect. Alternately stated, if an aggregator desired to internalize the benefit its services provided to the record companies, the aggregator could attempt to enter into voluntary contracts with the record companies. There is no market failure or other issue that would preclude or impede such negotiations and contracts. Of course, since Live365 indicated that copyright owners already receive these benefits as a concomitant to the services provided to the webcasters, there is no incentive for a copyright owner to pay for those benefits. (That is the economic nature of a positive externality.)

In sum, Live365 has asked the Judges to provide aggregators with remuneration from the copyright owners that is both unavailable under the statute and that Live365 was unable to procure in the private marketplace. The Judges decline to do so.

d. Conclusions Regarding the Live365 Proposal Based on Dr. Fratrik's Model

For the foregoing reasons, the Judges decline to utilize Live365's proposed rate structure or rates to set the rates for the 2011–2015 rate period or establish a zone of reasonableness within which to set the rates.

Live365 contends that the rates for the 2011–2015 term should be set at a level below the 2010 rates to reflect certain factors identified in section 114(f)(2)(B)(i) and (ii) of the Act.[25] However, as a general principle, espoused in both *Web II* and *Web I,* and absent evidence to the contrary, these statutory considerations are deemed to have been addressed implicitly within the participant's proposed rate structure. *See Web II,* 72 FR at 24095; *Web I,* 67 FR at 45244. Live365 proffered no evidence to support another conclusion.

In the present case, given the Judges' rejection of the Live365 rate structure and proposed rates, they have no basis to depart from this general principle. Moreover, Live365 provides only a qualitative argument for its proposed downward adjustments, rather than a quantitative basis for a reduction below the 2010 rates. Further, even if qualitative arguments were sufficient in this regard, Live365 has not established such a basis for a decrease in webcaster royalty rates.

2. The SoundExchange Rate Proposal

a. Zone of Reasonableness

SoundExchange sought to demonstrate that its proposed rates were within a zone of reasonableness delineated by its economic expert witness, Dr. Michael Pelcovits. He constructed his zone of reasonableness based upon the following assumptions:

- The rates are intended to be those that would have been negotiated in the marketplace between a willing buyer and a willing seller;
- The rates are intended to replicate those that would have been negotiated in a hypothetical marketplace;
- The hypothetical marketplace is one in which no statutory license exists;
- The buyers in this hypothetical marketplace are the statutory webcasting services;
- The sellers in this hypothetical marketplace are record companies;
- The products sold consist of a blanket license for each record company's complete repertoire of sound recordings;
- A per-performance usage fee structure was adopted, rather than a fee structure based upon a percentage of the buyer's revenue, a per-subscriber fee or a flat fee.[26]

The Judges conclude that these general assumptions by Dr. Pelcovits are appropriate when determining the zone of reasonableness within which the statutory rates may be set.

b. Benchmark Analysis

Dr. Pelcovits utilized a ''benchmark'' approach, *i.e.,* an attempt to establish rates by comparing, and as appropriate adjusting, rates set forth in other agreements that he concluded were sufficiently comparable. Dr. Pelcovits's overall benchmark approach to establishing a rate structure is consistent with both *Web I* and *Web II.* Further, the Act itself authorizes the Judges to utilize a benchmark analysis: ''In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).'' 17 U.S.C. 114(f)(2)(B).

The Judges, therefore, agree that it is appropriate to rely on benchmarks to establish rates in this section 114 proceeding.[27]

Dr. Pelcovits identified the following two categories of benchmarks:

- The then-contemporaneous license fees for statutory webcasting services that had been negotiated in two separate agreements under the WSA between SoundExchange and two groups of broadcasters: terrestrial (over-the-air) broadcasters represented by the NAB and Sirius XM;
- The then-contemporaneous license fees that had been negotiated between buyers and sellers in the market for interactive, on-demand digital audio transmissions.

Pelcovits WDT at 2.

The WSA Agreements relied upon by Dr. Pelcovits are such voluntary agreements. Thus, the Judges may rely upon those agreements as benchmarks, assuming the Judges find them to be sufficiently comparable, perhaps after any appropriate adjustments.

The agreements between buyers and sellers in the interactive market are not expressly identified under the Act as agreements upon which the Judges may rely as benchmarks in a proceeding under section 114. However, nothing in the Act suggests that it would be improper for the Judges to consider those agreements as potential evidentiary benchmarks, or as some other form of probative evidence. In this regard, the Act clearly does not constrain the Judges from considering any economic evidence (apart from non-precedential WSA agreements) that they conclude would be probative of the rate that would be established between willing buyers and willing sellers in the hypothetical marketplace—regardless of whether that evidence relates to a market other than the market for licenses of sound recordings by webcasters.[28]

Thus, the Judges conclude that it was proper for Dr. Pelcovits to use benchmark analyses in attempting to establish the zone of reasonableness for rates in this proceeding.[29]

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[25] These factors are: (i) The promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and (ii) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost, and risk in bringing the copyrighted work and the service to the public.

[26] Dr. Pelcovits did not opine that a percentage-of-revenue-based fee or any other type of fee structure was economically improper. Rather, he indicated that he believed the ''per-performance approach'' constituted ''precedent'' established in *Web II,* and therefore he did ''not attempt to independently examine the merits of different rate structures.'' Pelcovits WDT at 6. As noted *supra,* however, *Web II* did *not* create such a precedent, but rather noted that the parties' failure of proofs regarding a proposed percentage-of-revenue fee structure ''does not mean that some revenue-based metric could not be successfully developed'' for use in a future proceeding under section 114. *Web II,* 72 FR at 24090. Nonetheless, even though he was mistaken in that regard, Dr. Pelcovits relied on that belief as to precedent by declining to consider a percent-of-revenue rate structure, or any other rate structure. Thus, the Judges can consider only his per-performance rate structure, and contrast it with Dr. Fratrik's methodology.

[27] The appropriateness of the benchmark method of analysis was called into question by Live365 through the rebuttal expert economic testimony of Dr. Michael Salinger, who described the benchmark approach as a ''shortcut,'' used ''because it is convenient, not because it is correct.'' Salinger WRT at 12–13.

[28] A wide array of potentially comparable markets can and should be considered by the Judges, including those with comparable economic characteristics. For example, a market in which copies of goods can be reproduced at zero marginal cost may provide relevant economic evidence (even if it is not a market for sound recordings), whereas, for example, a market for ancillary reporting services that benefits buyers and sellers of sound recording licenses (such as Live365's aggregator services discussed *infra*) may be economically quite distinct even though it relates to the same parties and licenses.

[29] Dr. Pelcovits's use of benchmarks in principle, discussed in this section, is a separate issue from the issues of whether the particular benchmarks he applied were appropriate, whether his adjustments to those benchmarks were correct or whether other adjustments may be required.

(1) SoundExchange's First Proposed Benchmark: The WSA Agreements

The first benchmark category relied upon by Dr. Pelcovits is comprised of two multi-year agreements that had recently been entered into between SoundExchange and two entities: (i) The NAB, covering webcasting by over-the-air (terrestrial) radio stations; and (ii) Sirius XM, covering webcasting of the music channels broadcast on satellite radio. Each of these agreements was entered into in 2009 pursuant to the WSA and each established royalty rates for the period 2011 through 2015. Together, these two agreements cover webcasters that paid more than 50% of the webcasting royalties received by SoundExchange in 2008. Pelcovits WDT at 14.

Both the NAB and Sirius XM agreements set royalty rates on a per-performance basis. The rates established by those agreements for the license term under consideration by the Judges are set forth below.

Year	NAB Agreement	Sirius XM Agreement
2011	$0.0017	$0.0018
2012	$0.0020	$0.0020
2013	$0.0022	$0.0021
2014	$0.0023	$0.0022
2015	$0.0025	$0.0024

Id. Dr. Pelcovits found these agreements to be ''useful to understand the bargaining range over which buyers and sellers would negotiate in the hypothetical market for statutory webcasting.'' *Id.* at 15.

The Judges agree for the following reasons:

- The rights being sold were precisely the rights at issue in this proceeding;
- The buyers (with the broadcasters represented as a group by the NAB) share characteristics with the buyers in the hypothetical market at issue in this case, but are not identical in all respects;
- The sellers are the same copyright owners whose copyrights are at issue in this case, albeit represented by SoundExchange;
- The copyrights will be used for statutory webcasting services; and
- The agreements were contemporaneous with the time at which the hearing in this proceeding was conducted.

The Judges find that additional reasons support the use of the WSA Agreements as benchmarks in this proceeding.

First, no later than September 2009, ''404 entities had opted into the NAB Agreement on behalf of several thousand individual stations.'' Kessler WDT at 21. Of those broadcasters, approximately 100 were start-ups, reporting their first instance of webcasting after the execution of the NAB Agreement. Ordover WRT at 18. Thus, the rates contained in the NAB Agreement clearly were acceptable to a large number of webcasters.

Second, in similar fashion, as of September 2009, several commercial webcasters opted into the Sirius XM Agreement. *See* Live365 Trial Ex. 25 at 18. The fact that these webcasters, who did not participate in the negotiations, nonetheless adopted the terms of the agreement is evidence that the negotiated rates and terms were reasonable and acceptable to the webcasters.

Third, it is noteworthy that the webcasters who have entered into the NAB Agreement are almost entirely dependent on advertising rather than subscription revenue. 4/20/10 Tr. at 283 (Pelcovits). This fact tends to address the concern raised by Dr. Michael Salinger, the economic expert testifying on rebuttal for Live365, that Dr. Pelcovits's interactive services benchmark analysis had failed to consider webcasters that were dependent primarily on advertising revenue.

Live365 raised a number of criticisms that it argued diminished the value of these WSA Agreements as benchmarks. The Judges address here each of Live365's questions.

(a) Were the rates in the WSA agreements increased in exchange for the revised lower rates for 2009 and 2010 that were agreed to by the parties to the WSA agreements?

Live365 alleged that the 2011–2015 rates in the WSA agreements are higher than they otherwise would be because SoundExchange acquiesced to a lowering of the already existing 2009 and 2010 statutory rates for the NAB and Sirius XM. Dr. Salinger surmised that SoundExchange must have bargained for some form of *quid pro quo* in the 2011–2015 rate structure in exchange for a reduction in the rates already established for 2009 and 2010. Salinger WRT at ¶¶ 55–56. Live365 presented no evidence of such a bargain, however.

On the other hand, Dr. Pelcovits opined that SoundExchange's reduction of the 2009 and 2010 rates, as permitted under the WSAs, was analogous to a ''signing bonus''—offered to induce the NAB and Sirius XM to settle early. That assertion, too, raised a factual question rather than an issue that required expert economic testimony. SoundExchange likewise did not proffer testimony or any other evidence to identify the benefit that SoundExchange received by reducing the statutory 2009 and 2010 webcasting rates.

Neither Dr. Salinger nor Dr. Pelcovits proffered any empirical evidence to support their respective hypotheses as to the relationship, *vel non,* between the reduction in the 2009–2010 rates and the rates for 2011–2015 in the WSA agreements. Neither did the respective parties proffer testimony from their other witnesses that would shed light upon the negotiating strategies of the parties as they related to this issue.

In the absence of such factual or economic evidence, the Judges cannot reach any conclusion regarding the relationship between the reduction of the 2009 and 2010 webcasting rates and establishment of the voluntary rates for 2011–2015 in the WSA agreements. Accordingly, the reduction in the 2009 and 2010 rates charged by SoundExchange to the NAB and Sirius XM cannot serve to diminish the value of the rates in the WSA Agreements as benchmarks in this proceeding.

(b) Does the grant by the four major record companies to the NAB of a waiver of the ''Sound Recording Performance Complement'' rules diminish the probative value of the NAB agreement as a benchmark?

Live365 asserts that the waiver by the four major record companies [30] of the ''sound recording performance complement'' for the benefit of the NAB in its WSA Agreement undermines the value of those rates as benchmarks. It is correct that, contemporaneous with entering into its WSA Agreement with SoundExchange, the NAB negotiated ''performance complement waivers'' with each of the major record companies. Pelcovits WDT at 20 n.21. These waivers allowed the NAB broadcasters to simulcast their broadcasts on the Internet even though the number of plays by an artist or from an album might exceed the allowable levels under section 114(j)(13) of the Act.[31] Live365, through its economic expert, Dr. Fratrik, opined that the waiver of the ''performance complement'' provided additional value to the NAB broadcasters, a value that must be bundled implicitly into the purported benchmark per-performance rates contained in the NAB/SoundExchange Agreement. Dr. Fratrik opined that if the terrestrial broadcasters

[30] As of the date of this Determination on remand, there are three major record labels, following the merger of EMI and Sony.

[31] In their role as terrestrial broadcasters, the NAB broadcasters were not bound by the ''performance complement,'' but in their role as webcasters they would have been subject to the restriction without the waiver.

covered by the NAB/SoundExchange Agreement had been bound by the ''performance complement,'' they would have been required to modify their webcasts, as opposed to simply simulcasting their terrestrial broadcasts. Fratrik WDT at 43–44.

However, neither Dr. Fratrik nor any other witness provided any empirical evidence to indicate the extent, if any, of any additional value realized by the NAB broadcasters in exchange for the waiver of the performance complement rules. Thus, the Judges are asked, in effect, to unbundle the per-performance rates in the NAB/SoundExchange Agreement, without any evidence as to the value of this ''stick'' within that bundle, *i.e.,* the waiver of the performance complement rules.

SoundExchange disputed the assertion that the waiver of the performance complement rules should reduce the efficacy of the NAB agreement as a benchmark. Even so, Dr. Pelcovits does admit the existence of *some* value in the waiver of the performance complement rules:

> The performance complement waivers are *uniquely valuable to broadcasters,* whose over-the-air programming is not subject to a sound recording copyright and therefore not subject to the performance complement. The waiver allows these broadcasters to re-transmit their terrestrial signal without having to alter the programming that they created primarily for a use not subject to the performance complement.

Pelcovits WDT at 20 n.21 (emphasis added).

Dr. Pelcovits notes though that ''[t]he market value of the waiver appears to be very small, since Sirius XM, with no such waiver, agreed to rates that are virtually identical over the life of the contract.'' *Id.* Dr. Pelcovits is correct. The differences between the per-performance rates in the NAB/SoundExchange Agreement and the Sirius XM/SoundExchange Agreement for the 2011–2015 rate period are illustrated on the following table.

Year	NAB Rate	Sirius XM rate	Difference
2011	$0.0017	$0.0018	−$0.0001
2012	0.0020	0.0020	0.0000
2013	0.0022	0.0021	+0.0001
2014	0.0023	0.0022	+0.0001
2015	0.0025	0.0024	+0.0001

Thus, the average annual difference in the per-performance rates between the two agreements is $0.00004. Accordingly, the Judges conclude that the waiver of the performance complement rule has no discernible impact on the value of the WSA Agreements as benchmarks.

(c) Does it matter if the terrestrial broadcasters covered by the NAB/SoundExchange Agreement were able to pay a higher rate because their webcasting costs are lower than the costs of pure webcasters?

Dr. Fratrik opined that the terrestrial commercial radio broadcasters have a vastly different cost structure than pure play webcasters, which allows them to pay higher royalty rates for sound recordings. Specifically, Dr. Fratrik noted:

- Terrestrial radio broadcasters who simulcast on the web their over-the-air transmissions have already incurred the necessary programming costs.[32]
- Terrestrial commercial radio stations can promote their Web site on their own broadcast stations, reducing their advertising costs.[33]
- Terrestrial radio broadcasters can use the sunk cost of a pre-existing sales force to sell online advertising.
- Terrestrial radio broadcasters have audiences more concentrated in the same geographic area than pure webcasters, thus allowing the former to realize more revenue selling advertising to local advertisers.

Fratrik WDT at 41–42. Consequently, Dr. Fratrik concluded ''terrestrial broadcasters are more willing to pay higher royalty fees for webcasting as they are able to generate greater profits from that industry.'' *Id.* at 42.

Live365 has not quantified or otherwise estimated the monetary value of these differences. Thus, even if this argument had substantive merit, the Judges could not make any specific adjustment of the rates in the NAB/SoundExchange Agreement to reflect these theoretical cost advantages.

More importantly, however, the recitation of these advantages inuring to the benefit of the NAB simulcasters is simply another way of stating that their business models afford them the *synergy* to expand horizontally across the landscape of differentiated sound recording sub-markets by paying a higher per-performance fee than webcasters with a more costly and less synergistic business model.[34] As noted in *Web I,* the Act does not provide for a consideration of ''the financial health of any particular service'' when establishing rates. 67 FR at 45254.

(d) Did the WSA agreements have the design, intent, and effect of raising the input costs of smaller webcasters?

Live365, through Dr. Salinger, opined that the parties to the WSA agreements set rates above market rates for 2011–2015 because they had strategically intended to use those rates as benchmarks, and thereby raise the costs of their rivals, *i.e.,* all other webcasters. Salinger WRT at 23. As Dr. Salinger notes, those parties had the power to influence the impact of those contractual rates, because they could elect—as they ultimately did—to permit these agreements and rates to be made available as potential precedents. *Id.* at 24.

This argument is theoretically plausible, as noted in the articles cited by Dr. Salinger. *Id.* at 24 (*citing* Steven Salop and David Scheffman, *Raising Rivals' Costs,* 73 Am. Econ. Rev. 267–71 (1983); Thomas Krattenmaker and Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 Yale L.J. 209 (1986)). However, Live365 has not provided any empirical or other evidence that would tend to prove the existence of such strategic coordination or conduct in this proceeding.

In the absence of any such evidence, the Judges cannot simply assume a multi-party conspiracy among SoundExchange, the NAB, and Sirius XM to increase the rates charged to the NAB and Sirius XM, in the hope that the Judges would utilize those WSA rates to establish the statutory rates. Although the Judges acknowledge that, generally, explicit or tacit collusion may exist among participants in concentrated industries, that general proposition cannot serve as the basis for an ultimate finding of specific tri-partite collusion, absent an adequate factual record.

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[32] The webcasters on whose behalf NAB negotiated a deal with SoundExchange are predominantly simulcasters, *i.e.,* entities that offer terrestrial broadcasts of their programming and simultaneously transmit that same programming on the Internet. Ordover WRT ¶ 51.

[33] This point seems to confuse economic cost with out-of-pocket cost. If a broadcaster foregoes paid advertising from a third party in order to air an advertisement for its own webcasts, that broadcaster has incurred an opportunity cost equal to the advertising revenue that the third party would have paid.

[34] SoundExchange's rebuttal economic witness, Dr. Janusz Ordover, makes an important point in his critique of Dr. Fratrik's cost differential argument—one that relates to the rate structure analysis undertaken earlier in this Determination. Specifically, Dr. Ordover opines that SoundExchange would not offer pure webcasters a lower rate in light of their higher cost structures unless SoundExchange could ''price discriminate at the level of license.'' Ordover WRT at 15. In this context, Dr. Ordover then identifies the pros and cons of marginal cost pricing, as well as the impact of such price discrimination upon the subscription rates of the ultimate consumers, the returns to licensors, and the shifting of revenues between and among different webcasters. *Id.* at 14–16. These are the types of issues that would need to be addressed and supported by empirical analyses in a proceeding in which a party had proposed a rate premised on a form of price discrimination, such as a percentage-of-revenue based fee.

(e) Were the rates in the WSA agreements inflated to reflect litigation cost savings by the NAB and Sirius XM?

Live365 asserted that the rates in the WSA Agreements are higher than market rates because they reflect the litigation cost saved by the NAB and Sirius XM of foregoing a rate proceeding and its attendant expenses. Live365 PFF ¶¶ 322–326. Further, Live365 asserted that this litigation cost/opportunity cost saving only affected the settling webcasters, not SoundExchange, because the latter would be incurring litigation costs regardless, since other webcasters (such as Live365) remained as contesting parties at the time of settlement. Live365 PFF ¶ 283.

SoundExchange disputed these assertions on several grounds.

First, SoundExchange asserted that the principal reason for the WSA Agreements was that the parties had ''a high degree of confidence that the Judges would establish rates consistent with the willing buyer/willing seller construct . . . .'' SX PFF ¶ 282. Dr. Ordover explained that, consequently ''neither party likely would be willing to incur litigation costs in the event of a disagreement . . . .'' Ordover WRT at 16. This is certainly one explanation to counter Live365's assumption that the NAB and Sirius XM paid a rate premium to avoid litigation costs. The Judges recognize that rational parties will attempt to predict the determination of any tribunal, and that they will tend to settle if their respective predictions are sufficiently proximate.[35]

Second, SoundExchange asserted that it too had an incentive to avoid litigation costs, and that such an incentive offset the potential impact of any similar incentive on the settling webcasters with regard to the rates contained in the WSA Agreements. Ordover WRT at 5, 16–17; 8/2/10 Tr. at 351 (Ordover) (threat of litigation ''works on both sides''). However, Live365 is correct in its claim that SoundExchange still would have been required to participate in a rate proceeding against other contesting webcasters. Nonetheless, SoundExchange did avoid the potential impact of arguments that would have been made by the NAB and Sirius XM that might have resulted in lower rates. Instead, SoundExchange was required ultimately to contest the claims of only one webcaster, Live365.

In any event, neither party presented evidence to the Judges regarding how to quantify the relative opportunity costs saved by SoundExchange and/or the settling webcasters. For all these reasons, the Judges cannot adjust the marketplace rates to reflect any such impact arising out of the litigation costs allegedly avoided by the WSA Agreements.[36]

(f) Are the rates in the WSA agreements reflective of SoundExchange's monopoly power?

Live365 asserted that the rates in the WSA Agreements reflect the monopoly power of the single seller in those two contracts, *i.e.,* SoundExchange. Live365 PFF ¶ 286. As Live365 correctly notes, in the ''hypothetical market'' that the Judges are statutorily required to consider, the hypothetical sellers are the several record companies rather than a single monopolist. *Web II,* 72 FR at 24087, *Web I,* 67 FR at 45244.

Dr. Salinger, Live365's economic rebuttal witness, testified that it is ''a very general principle of economics'' that the presence of a monopolist ''poses a risk of increased prices.'' Salinger WRT at 26. SoundExchange's rebuttal economic witness, Dr. Ordover, concurred, acknowledging that SoundExchange ''may [have] additional bargaining power'' because of its status as the single seller. Ordover WRT at 22.

The power that these two economists acknowledged was the well-understood market power of a (single price) monopolist to set a price at a level higher than would be set in a perfectly competitive market, while also restricting the quantity sold to the level at which marginal revenue equals marginal cost. *See, e.g.,* Krugman & Wells, *supra,* at 367; Edwin Mansfield & Gary Yohoe, *Microeconomics* 364–65 (11th ed. 2004).

It is not at all apparent, however, that the market power of SoundExchange to command a high rate would be appreciably greater (if at all) than the power of the major record companies, who owned approximately 85% of supply (the sound recordings) and therefore comprise an oligopoly. 4/20/10 Tr. at 299 (Pelcovits). As stated by Dr. Pelcovits:

> [N]egotiation of the WSA Agreements by SoundExchange *does not significantly alter the market power equation.* Each record company has a unique catalog of sound recordings that are highly valued (or even necessary inputs) to any webcasting service. The individual record companies, as a consequence, have a degree of market power.

Pelcovits WDT at 17 (emphasis added). Dr. Pelcovits's testimony is consonant with contemporary economic understanding that oligopoly pricing behavior can mimic monopoly pricing decisions.

Economists once believed that oligopoly pricing may have been essentially indeterminate. More modern game theory analyses recognize, however, the strong potential for tacit collusion among long-standing oligopolists (such as the major record companies), after repeated ''tit for tat'' pricing maneuvers, that will cause oligopolistic pricing to approach monopoly pricing:

> [W]hen oligopolists expect to compete with each other over an extended period of time, each individual firm will often conclude that it is in its own best interest to be helpful to the other firms in the industry. So it will restrict its output in a way that raises the profits of the other firms, expecting them to return the favor. . . . [T]hey manage to act as if they had . . . an agreement. When this happens, we say that firms engage in tacit collusion.

Krugman & Wells, *supra,* at 401; *see* Hal Varian, *Intermediate Economics: A Modern Approach* 531 (8th ed. 2010) (''The threat implicit in tit for tat may allow the firms to maintain high prices.''). Such tacit collusion can lead to pricing by oligopolists at the monopoly level. *See, e.g.,* L. Kaplow, *On the Meaning of Horizontal Agreements in Competition Law,* 99 Cal. L. Rev. 683, 811 (2011) (''oligopoly pricing is akin to monopoly pricing.'').

Thus, consistent with Dr. Pelcovits's testimony, *theoretically* there *could* be no important difference between the bargaining power of the four major record companies and SoundExchange. However, as discussed *infra,* the evidence in this proceeding does not

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[35] However, SoundExchange overstates the logic of this point. The mere fact that two adversarial parties reach a settlement premised upon their mutual prediction of the Judges' future determination does not mean that they have correctly predicted (with ''a high degree of confidence'' no less) that the rate the parties settled upon would be the same as the rates the Judges ultimately would have established. It is a sufficient inducement for the parties to settle if they agree on their prediction, not that their prediction be correct. It would be hopelessly circular if the Judges were to put their imprimatur on rates negotiated in a settlement merely on the assumption that the parties were able to predict how the Judges would apply the statutory standards. Such an argument would essentially require the Judges to abdicate their responsibilities and defer to the settling parties, whose self-declared rational expectations as to the Judges' future determination would be deemed both prescient and dispositive.

[36] Two ancillary points were made by the respective parties with regard to the alleged impact of litigation costs: Live365 asserted that the settling webcasters did not have the same capacity to absorb litigation costs as SoundExchange, but there was no evidence that indicated such a disparity existed or, even if it did, how it affected the rates upon which the parties settled. Fratrik WDT at 43; Ordover WRT at 17. SoundExchange argued that the settling parties had additional options beyond settle or litigate—they could either elect not to participate in the rate proceeding or decide not to webcast. SX PFF ¶ 284. Both of those supposed ''options'' seem extreme.

indicate that the rates in the WSA Agreements were so high as to enable SoundExchange to extract monopoly rents from webcasters.[37]

(i) The NAB's Countervailing Market Power

As Dr. Ordover noted, the NAB, which negotiated on behalf of a group of broadcasters, enjoyed a degree of bargaining power on the buyers' side during its negotiations with SoundExchange. Ordover WRT at 23; *see also* 7/28/10 Tr. at 129–30 (Salinger) (acknowledging balance of power in this context). This power arose from the fact that, at the time of the WSA Agreement negotiations, the NAB broadcasters had accounted for over 50% of the royalty payments to SoundExchange in the immediately preceding calendar year. Ordover WRT at 23; Live365 Trial Ex. 25. As Dr. Ordover testified, ''[s]uch added market power on the buyer side tends to mitigate, if not fully offset, additional leverage that SoundExchange might bring to the negotiations.'' Ordover WRT at 23; *Web II,* 72 FR at 24091 (''[T]he question of competition is not confined to an examination of the seller's side of the market alone. Rather, it is concerned with whether market prices can be unduly influenced by sellers' power or buyers' power in the market.'')

(ii) The Availability of a Rate Setting Proceeding

The monopoly power of SoundExchange was compromised by the fact that the NAB or any webcasters negotiating with SoundExchange could have chosen instead to be subject to the rates to be set by the Judges. Ordover WRT at 23. Dr. Ordover explained that ''[a]t some point, buyers such as the NAB members would simply elect to seek rates established by the Judges—which would be free of any potential cartel effects—rather than voluntarily agree to pay above-market rates.'' Ordover WRT at 23; *see* Salinger WRT at 27 (buyers can resort to the court if the collective seeks to charge more than each individual member could charge).

(iii) The Evidence Did Not Demonstrate That the Individual Record Companies Necessarily Would Have Negotiated a Lower Rate Than SoundExchange

As Dr. Ordover explained, the nature of the market indicated that SoundExchange might have been in a position to negotiate rates that were actually lower than the rates the record companies would have negotiated individually. More particularly, the existence, *vel non,* of SoundExchange's power to set higher prices ''depends partially on the assumption one makes about whether a webcaster requires access to the repertoire of all four major record companies in order to operate an economically viable business, or only to a subset.'' Ordover WRT at 23–24.

As Dr. Ordover further explained, if the repertoires of all four major record companies were each required by webcasters (*i.e.,* if the repertoires were necessary complements) and webcasters were required to negotiate with each record company individually, then each record company would have an incentive to charge a monopoly price to maximize its profits without concern for the impact on the market writ large. That is, while these higher prices would constitute profits for the record company receiving them, they would constitute higher monopoly costs (incurred four times—paid by webcasters to each of the four record companies). The webcasters would pass on the higher costs to listeners, thus reducing the quantity of sound recordings made available to end users. Ordover WRT at 25–26.

By contrast, SoundExchange, as a collective, would internalize the impact of the complementary nature of the repertoires on industry revenue and thus seek to maximize that overall revenue. This would result in lower overall rates compared to the situation in which the individual record companies negotiated separately. Ordover WRT at 27.

Of course, this argument would be valid only if the repertoires of the several record companies indeed were complements rather than substitutes. If it was sufficient for webcasters to obtain only the licenses for one (or less than all four) of the major record companies, then separate negotiations with individual record companies (absent collusion, tacit or otherwise) could lead to competitively lower royalty rates.

The parties presented no evidence from which the Judges could conclude that the repertoires of the respective record companies were complements or substitutes, or, perhaps, complementary to some degree and substitutional to some degree.[38] Thus, the Judges cannot conclude that SoundExchange necessarily wielded a level of pricing power sufficient to affect the use of the WSA Agreements as benchmarks.[39]

(g) Conclusion Regarding the WSA Agreements

On balance, the Judges conclude that the arguments made by Live365 as to why the WSA Agreements cannot serve as benchmarks are not persuasive. Therefore, the Judges conclude that the evidence permits these two agreements to serve as benchmarks in this proceeding.

(2) SoundExchange's Second Proposed Benchmark: The Adjusted Interactive Subscription Service Rate

In addition to its WSA Agreements benchmark, SoundExchange relied on Dr. Pelcovits's analysis of another purported benchmark—the market for interactive webcasting of digital

[37] An oligopolistic marketplace rate that did approximate the monopoly rate *could* be inconsistent with the rate standard set forth in 17 U.S.C. 114(f)(2)(B), as that standard has been construed by the D.C. Circuit and the Librarian of Congress. The D.C. Circuit has held that this statutory section does not oblige the Judges to set rates by assuming a market that achieves ''metaphysical perfection and competitiveness.'' *Intercollegiate Broadcast System, Inc.* v. *Copyright Royalty Board,* 574 F.3d 748, 757 (D.C. Cir. 2009). Rather, as the Librarian of Congress held in *Web I,* the ''willing seller/willing buyer'' standard calls for rates that would have been set in a ''*competitive* marketplace.'' 67 FR at 45244–45 (emphasis added). *See also Web II,* 67 FR at 24091–93 (explaining that *Web I* required an ''*effectively* competitive market'' rather than a ''*perfectly* competitive market.'' (emphasis added)). Between the extremes of a market with ''metaphysically perfect competition'' and a monopoly (or collusive oligopoly) market devoid of competition there exists ''[in] the real world . . . a mind-boggling array of different markets,'' Krugman & Wells, *supra,* at 356, all of which possess varying characteristics of a ''competitive marketplace.'' As explained in the text, *infra,* in this proceeding the evidence demonstrates that sufficient competitive factors existed to permit the WSA Agreements to serve as useful benchmarks, and does not demonstrate that the rates in the WSA Agreements approximated monopoly rates.

[38] In *Web II,* the Judges found that there was testimony sufficient to indicate that the several repertoires were substitutes rather than complements. 72 FR at 24093. The contesting parties in this proceeding did not provide the Judges with evidence sufficient to make a factual finding as to this issue.

[39] The Judges reject an additional argument made by SoundExchange that the WSA Agreements could be construed as competitive by comparing the prices negotiated by the major record companies in their agreements with ''custom radio services'' to the lower prices in the WSA Agreements. Pelcovits WDT at 19. The Judges agree with Dr. Salinger's critique that a comparison of rates for ''custom radio services'' and noninteractive webcasters is not an ''apples-to-apples'' comparison, because ''custom radio'' adds additional value in terms of substitutability for the purchase of music and adds a level of control for the listener. Salinger WRT at 26. Further, even Dr. Pelcovits acknowledges that custom radio service involves a ''degree of interactivity . . . and therefore is not necessarily comparable to noninteractive webcasting.'' Pelcovits WDT at 32. Thus, this issue posits at least two potential explanatory variables that could explain why the record companies negotiated higher rates for custom radio than SoundExchange negotiated for noninteractive services in the WSA Agreements: (i) The monopoly or oligopoly character of the seller(s); and (ii) the differentiated nature of the two services. Absent any empirical or other evidence that indicates how each of these explanatory variables relates to the pricing differential, SoundExchange's attempt to rely on the pricing differential as probative of a more competitive rate must fail.

performances of sound recordings. According to Dr. Pelcovits, that interactive market is comparable to the noninteractive market at issue in this proceeding for the following reasons:

- Both markets have similar buyers;
- Both markets have similar sellers;
- Both markets utilize a blanket license in sound recordings;
- Both markets are input markets;
- Both markets have a demand schedule for these inputs that is derived from the demand of ultimate consumers; and
- Both markets deliver the sound recordings via the Internet.

Pelcovits WDT at 3; 4/19/10 Tr. at 126 (Pelcovits).

In the interactive market, the rates for sound recordings are not subject to the statutory license. Rather, in the interactive market, the rates for sound recordings are set through marketplace negotiations between the owners of the sound recordings, as sellers/licensors, and the individual interactive webcasters, as buyers/licensees.

The major difference between the two markets is the role of the ultimate consumer in selecting the sound recordings for listening. In the interactive market (as the adjective connotes), the ultimate consumer essentially decides which sound recordings he or she will receive.[40] By contrast, in the noninteractive market (as the adjective again connotes), the consumer plays a more passive role, and the webcaster offers the consumer music that the webcaster anticipates the listener might enjoy (much like radio). *Compare* 17 U.S.C. 114(j)(6) with 17 U.S.C. 114(j)(7).

Thus, it is necessary to isolate the value of such consumer choice, *i.e.,* the utility of interactivity, and subtract that value from any estimate of the value of sound recordings in the interactive market, in order to make that value more comparable to the value in the noninteractive market.

Dr. Pelcovits attempted to make such an adjustment in his analysis (as well as other adjustments discussed *infra*), which resulted in his proposed per-performance rate of $0.0036 per play for a statutory noninteractive webcaster.

The Judges conclude, as the Judges concluded in *Web II,* that such an adjusted benchmark constitutes the type of benchmark that the Act permits (but does not require) the Judges to consider. However, the fact that this is an appropriate type of benchmark to be considered does not necessarily mean that any particular application of the benchmark will be of assistance in a given proceeding. Rather, the Judges must consider the application of such a benchmark, and decide whether to adopt or reject it *in toto* or whether it is necessary to adjust the proposed benchmark.

As explained *infra,* the Judges have concluded that the interactive benchmark proposed by Dr. Pelcovits on behalf of SoundExchange is of assistance in establishing a zone of reasonableness in this proceeding, but only after making certain significant adjustments to that proposed benchmark.

(a) The Methodology Utilized by Dr. Pelcovits in His Interactive Benchmark Analysis

Dr. Pelcovits opined that ''the interactive, on-demand music services [are] the best benchmark to use for the purpose of setting rates for statutory webcasting services in this proceeding.'' Pelcovits WDT at 23. Dr. Pelcovits testified, ''it is reasonable to predict that the ratio of per-subscriber royalty fees to consumer subscription prices will be essentially the same in both the benchmark and target markets.'' Pelcovits WDT at 23; *see* 4/20/10 Tr. at 277–78 (Pelcovits). The theory upon which Dr. Pelcovits relied to make this prediction was premised on the economic concept of ''derived demand.'' As Dr. Pelcovits testified, ''webcasters demand or have a need for the music performance because that's what their customers demand.'' 4/19/10 Tr. at 132 (Pelcovits); Pelcovits WDT at 23 (''I believe it is reasonable to predict that the ratio of per-subscriber royalty fees to consumer subscription prices will be essentially the same in both the benchmark and target markets.'').

However, in order to use the rates in this interactive benchmark market to develop rates in the target market, Dr. Pelcovits also concluded that he was required to make adjustments ''to account for the differences between the benchmark and target markets.'' Pelcovits WDT at 22; 4/29/10 Tr. at 127 (Pelcovits). Specifically, Dr. Pelcovits adjusted (i) the interactive benchmark rates to take into account the fact that there are more plays per subscriber in the noninteractive market; and (ii) the subscription prices in the interactive market to remove the value of interactivity. Pelcovits WDT at 23.

(i) The Marketplace Agreements Considered by Dr. Pelcovits

Dr. Pelcovits obtained 214 agreements between certain interactive webcasters and the four major record companies, *viz.,* Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI, that spanned the period from approximately 2004 through 2009, with an emphasis on contracts that were created in the most recent three years. Pelcovits WDT, App IV. Under the terms of these agreements, Dr. Pelcovits found that the interactive webcasters generally ''pay royalties on the basis of the greatest of three measures: A per-play rate; a percentage of gross revenue rate; and a per-subscriber fee.'' Pelcovits WDT at 29; 4/29/10 Tr. at 129–30 (Pelcovits).

Dr. Pelcovits had available for consideration, *inter alia,* two types of interactive webcasting models: (i) Subscription on-demand interactive streaming services and (ii) advertising-supported (nonsubscription) on-demand streaming services.[41] SoundExchange explained the difference between these models in the following manner, through the testimony of its industry witness:

- Subscription on-demand interactive streaming.

This type of webcasting allows a paying subscriber to request the exact song he or she wishes to hear. McCrady WDT at 12. In addition, most of these services allow their subscribers to conditionally download requested songs to their personal computer and sometimes to a portable storage device, such as an iPod. *Id.* These downloads remain available for listening at any time by a subscriber, provided that the subscription remains active. *Id.*

- Advertising-supported (nonsubscription) on-demand interactive streaming.

This type of webcasting is the same as subscription on-demand interactive

[40] The ability of the ultimate consumer to choose to listen to specific sound recordings renders that decision analogous to the decision to purchase music digitally or otherwise. Thus, as noted in the legislative history of the Digital Performance Right in Sound Recordings Act, that statute permits the owners of sound recordings to bargain directly with each interactive webcaster over the price of each transmission, in the same manner as if the parties were negotiating the price of a digital download for outright purchase. *See* H.R. Rep. No. 104–274 at 14 (1995) (''Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.'').

[41] Dr. Pelcovits also reviewed agreements between ''custom radio'' services and the four major record companies, agreements that, according to SoundExchange's witnesses, occupy a functional gray area between interactive and noninteractive services. *See* McCrady WDT at 16. Dr. Pelcovits made note of such agreements in his testimony, including a particular reference to the agreement between WMG and one such custom radio service, Slacker Premium. As discussed *infra,* Dr. Pelcovits needed data regarding the number of plays by Slacker Premium to serve as a proxy for the number of plays by noninteractive webcasters, because such data was not available for clearly noninteractive services. Pelcovits WDT at 32.

streaming except the listener does not subscribe and receives *gratis* the songs he or she wishes to hear. The webcaster sells advertising on the site and the listener hears the advertising as well as the specific songs requested. Mr. McCrady described these interactive webcasting services that derive their revenue from advertising alone and not from subscriptions to be ''experimental'' and not yet ''mature.'' 4/22/10 Tr. at 663 (McCrady); McCrady WDT at 15.

Dr. Pelcovits ultimately elected to ignore the advertising-supported (nonsubscription) on-demand interactive streaming in his analysis because, in his opinion, ''it is more straightforward to infer differences in consumer willingness-to-pay (and by extension how much the webcaster would be willing to pay for the license) from observed prices for subscription services.'' Pelcovits WDT at 24.

(ii) Dr. Pelcovits's Calculation of the Per-Play Rate in the Benchmark Interactive Subscription Market

Dr. Pelcovits proceeded to calculate the ''effective per play rate'' paid under the contracts between the benchmark interactive services and the four major record companies. To do so, he obtained data from the major record companies that revealed:

- The revenue reported by the interactive subscription services to the major record companies; and
- The number of unique plays those services reported to the major record companies.

Pelcovits WDT at 30; 4/29/10 Tr. at 128 (Pelcovits). The revenue data that Dr. Pelcovits analyzed represented not merely revenue paid under the per-performance rate structure in the interactive contracts, but rather all revenue, regardless of whether that revenue had been paid pursuant to one of the other structures contained in those contracts. Pelcovits WDT at 30.

As noted at the outset of this determination, given Dr. Pelcovits's assumption that only a per-performance (*i.e.,* per play) royalty rate structure would pass muster with the Judges, he only proposed a per-play royalty rate. Accordingly, Dr. Pelcovits determined an ''effective'' per-play royalty rate by combining the revenue reported and paid pursuant to the percentage-of-revenue structure and the per-play structure for the purposes of his analysis. Pelcovits WDT at 30.

The data reviewed by Dr. Pelcovits also showed that the percentage of plays on the interactive services attributable to the four major record companies was approximately 85%. 4/20/10 Tr. at 299 (Pelcovits). Thus, by considering only the data from the four major record companies, Dr. Pelcovits did not consider 15% of the sellers in his benchmark market.

With regard to the number of plays per subscriber for his benchmark market, Dr. Pelcovits counted ''the total number of unique plays of recorded music owned (or distributed) by the four major record companies reported by the interactive webcasting service(s).'' Pelcovits WDT at 30; 4/19/10 Tr. at 130–31 (Pelcovits). Dr. Pelcovits calculated the average number of monthly plays by these interactive subscription services to be 287.37 per subscriber. Pelcovits WDT at 31. To derive the effective per-play rate in the interactive market, Dr. Pelcovits then divided the total revenue collected by the record companies by 287.37, *i.e.,* the total number of unique plays. This division resulted in an effective per-play rate for the benchmark interactive subscription service market of $0.02194 per play. *Id.*

(iii) Dr. Pelcovits's Adjustments to the $0.02194 Per-Play Rate in the Benchmark Interactive Subscription Market

Dr. Pelcovits believed that it was necessary to make certain adjustments to the interactive benchmark streaming per-play rate before it could be applied to the noninteractive streaming market. In particular, Dr. Pelcovits adjusted for:

- The higher usage intensity (number of plays per month) by subscribers of noninteractive services compared to subscribers of interactive services; and
- The value that consumers place on the greater interactivity offered by the on-demand services compared to statutory services that do not offer that function.

Pelcovits WDT at 3, 31.[42]

(a) The Adjustment for Usage Intensity/Number of Monthly Plays

Dr. Pelcovits's first adjustment sought to account for the fact that there were a greater number of plays by subscribers of noninteractive services than by subscribers on interactive statutory services. Pelcovits WDT at 31; *see* 4/19/10 Tr. at 139–41 (Pelcovits).

While, as noted *supra,* Dr. Pelcovits was able to obtain data regarding the number of interactive plays, he admitted to difficulty in calculating the number of noninteractive plays. As Dr. Pelcovits candidly acknowledged, the noninteractive services ''do not report the number of subscribers in public documents or in data provided to the record companies or SoundExchange.'' Pelcovits WDT at 31.

In light of these difficulties, Dr. Pelcovits turned to data provided to the record companies for the subscription custom radio service Slacker Premium. Pelcovits WDT at 32. Although Slacker Premium is not a noninteractive service, because it allows for a degree of user customization, Dr. Pelcovits claimed that most of the music transmitted through the service is ''pushed to the consumer,'' rather than being truly on-demand. Pelcovits WDT at 32. Therefore, he concluded that the data on plays-per-subscriber for this one service would serve as a good proxy for plays-per-subscriber for statutory subscription services.[43] Pelcovits WDT at 32; 4/19/10 Tr. at 141–42 (Pelcovits). Although the unavailability of data for the number of plays of unambiguously noninteractive services reduces the usefulness of Dr. Pelcovits's proposed benchmark, it does not invalidate his methodology and results.[44]

Using the Slacker Premium data, Dr. Pelcovits determined that the average monthly plays per subscriber for a purely noninteractive service was 563.36. Pelcovits WDT at 32. Dividing the plays per subscriber for interactive services (287.37) by the plays per subscriber for statutory services (563.36) resulted in a per-play adjustment of 0.5101. Pelcovits WDT at 33.

(b) The Interactivity Adjustment

Dr. Pelcovits also made an adjustment to account for the difference in the relative value of a service that is interactive to one that is not. Dr. Pelcovits began his calculation of the interactivity adjustment by comparing the subscription rates for selected benchmark interactive services with the subscription rates for certain audio streaming services that he identified as ''arguably'' noninteractive services. Pelcovits WDT at 24; Live365 Trial Ex. 5 at 31–32.

Inasmuch as that ''value added'' feature (by definition) is not available for the noninteractive services, Dr.

[42] Dr. Pelcovits made a third adjustment in an attempt to account for the substitutional effect of the two types of services on CD and permanent download sales. Pelcovits WDT at 35–36. As explained *infra,* the Judges find that this adjustment is subsumed within his willing seller/willing buyer analysis.

[43] Dr. Pelcovits established his own definition of ''statutory services'' as ''services that offer no interactivity or limited interactivity,'' but he cautioned that he was not making a ''legal judgment'' as to whether his self-defined ''statutory services'' would qualify legally as noninteractive statutory services. Pelcovits WDT at 24–25 and n.22.

[44] Based on other data produced by Live365 during discovery, Dr. Pelcovits testified that he was able to confirm that the number of plays per subscriber that he calculated for Slacker Premium represented a reasonable estimate of the plays per subscriber for the statutory webcasting market. Pelcovits WDT at 32 n.27.

Pelcovits calculated the value of the interactivity feature in order to subtract it from his proposed benchmark service. Dr. Pelcovits calculated the purported value added by interactivity in two ways. 4/19/10 Tr. at 133–34 (Pelcovits); Live365 Trial Ex. 5 at 37–40.

First, Dr. Pelcovits compared the retail subscription prices for the interactive and noninteractive streaming services that he analyzed. Pelcovits WDT at 24; Live365 Trial Ex. 5 at 39–40. More particularly, he supervised the collection of information regarding 41 audio streaming services out of the agreements that SoundExchange had provided to him. Pelcovits WDT at 24; 4/19/10 Tr. at 134–35 (Pelcovits). However, Dr. Pelcovits excluded from his analysis 23 of those 41 services (56% of the total) because they were not subscription services. The remaining 18 services that he included in his analysis were paid subscription services. Pelcovits WDT at 24. Of these 18 subscription services, 11 were in the benchmark interactive market, and 7, according to Dr. Pelcovits, ''arguably qualify as statutory services.'' Pelcovits WDT at 24–25. Dr. Pelcovits found that the average monthly subscription price for the 7 noninteractive services that he defined as ''statutory'' was $4.13. Pelcovits WDT at 25.

With regard to the 11 interactive subscription services, Dr. Pelcovits calculated the average subscription price in two different ways. Pelcovits WDT at 25.

- First, Dr. Pelcovits calculated the average monthly subscription prices for the 11 interactive services—an average of $13.70.
- Second, Dr. Pelcovits re-calculated the average monthly subscription prices of 2 of these 11 interactive services to adjust them downward to reflect additional value these 2 services provided in the form of a fixed monthly number of permanent downloads at no additional cost to the subscriber.[45] This calculation resulted in a lower average monthly subscription price of $13.30.

Pelcovits WDT at 25; 4/19/10 Tr. at 135–36 (Pelcovits).

To make his interactivity adjustment, Dr. Pelcovits then subtracted the average (mean) subscription price of his 7 statutory noninteractive services ($4.13) from the average (mean) subscription price of his 11 benchmark interactive services. Because he calculated two different averages for the 11 benchmark interactive services (one ignoring the bundled free downloads and the other adjusting for the bundled free downloads, as noted *supra*), Dr. Pelcovits performed two different subtractions ($13.70 − $4.13; and $13.30 − $4.13). These calculations resulted in interactivity adjustment factors of:

0.301 (using the unadjusted subscription prices for the interactive services); and

0.311 (using the subscription prices for the interactive services adjusted for the bundled downloads offered by two of the benchmark interactive services).

Pelcovits WDT at 26; 4/19/10 Tr. at 136–37 (Pelcovits).[46]

As an alternative measure of the value of interactivity (to be subtracted from the benchmark value), Dr. Pelcovits performed a hedonic regression. Pelcovits WDT at 26; Live365 Trial Ex. 5 at 38–39. As Dr. Pelcovits accurately summarized, a hedonic regression is a statistical technique that can be applied ''to measure the value of different characteristics of a heterogeneous product.'' Pelcovits WDT at 26. *See also* Salinger WRT at 18 (''Hedonic regression is a statistical analysis of prices that seeks to explain prices as a function of product features.'').

This hedonic regression was used ''to isolate the value of interactivity to consumers of on-line music services'' by measuring ''the value of different characteristics of a heterogeneous product,'' which in this case is subscription audio streaming services. Pelcovits WDT at 26; 4/19/10 Tr. at 137 (Pelcovits). In his hedonic regression, Dr. Pelcovits analyzed a number of variables across the same 18 subscription-streaming services he had considered in his ''mean comparison'' interactivity adjustment, and applied those variables to the subscription price. Pelcovits WDT at 26–27. Among the variables that Dr. Pelcovits included in his hedonic regression were: (i) The presence of interactivity; (ii) the availability of a mobile application for the service; and, (iii) and the ability to conditionally download tracks to a portable device (expressed as ''Tethered Downloads'' in the regression table). Pelcovits WDT at 27; *see also* Live365 Trial Ex. 5 at 39.

Dr. Pelcovits's hedonic regression analysis resulted in an interactivity coefficient indicating that ''interactivity is worth $8.52 per month to the typical subscriber.'' Pelcovits WDT at 28; 4/19/10 Tr. at 137–39 (Pelcovits). Dr. Pelcovits then applied this $8.52 value for interactivity to the $13.30 mean value for the 11 interactive on-demand services he had analyzed (*see supra*). By this comparison, the interactivity feature comprised 64.1% of the entire value of the price paid by consumers for subscriptions to interactive webcasting subscriptions ($8.52/$13.30 = 64.1%). *Id.* Alternatively stated, the value of a noninteractive subscription would create an alternative interactivity adjustment factor of 35.9% (*i.e.,* 100% − 64.1%).

Based on the above techniques, Dr. Pelcovits derived three potential interactivity adjustment factors. Pelcovits WDT at 28. That range is shown in the following table.

Source	Interactivity adjustment
Comparison of Mean Subscription Rates—Unadjusted Subscription Prices	0.301
Comparison of Mean Subscription Rates—Adjusted Subscription Prices	0.311
Regression of Subscription Prices	0.359

Pelcovits WDT at 29.

(iv) Dr. Pelcovits's Derivation of Recommended Rates Based on the Foregoing Adjusted Benchmark Analysis

Dr. Pelcovits then multiplied the unadjusted per-play rate he had calculated in the benchmark market by the two adjustment factors. That is, he multiplied the unadjusted per-play rate by: (i) The per-play adjustment (that had accounted for the greater number of plays in the statutory noninteractive market) and (ii) the interactivity adjustment rate (calculated three different ways—two ''mean'' comparisons and one hedonic regression). Through this multiplication, Dr. Pelcovits derived the following range of recommended statutory per-play license fees:

[45] These ''permanent'' downloads are distinguished from the ''conditional'' downloads referred to by Mr. McCrady and discussed *supra,* because the listener cannot retain the ''conditional'' downloads after his or her subscription has expired. McCrady WDT at 12.

[46] ''Interactivity adjustment factor'' is simply the ratio of the mean noninteractive subscription price ($4.13) to the mean interactive subscription price, as calculated in two different ways ($13.70 or $13.30). Thus, the math is as follows: $4.13/$13.70 = 0.301 and $4.13/$13.30 = 0.311.

Recommended source of interactivity adjustment	Proposed statutory per-play rate (rounded)
Comparison of Mean Subscription Rates—Unadjusted Subscription Prices ($0.02194 × 0.51 × 0.301) (benchmark per play rate) × (# of plays adj.) × (interactivity adj.)	$0.0034
Comparison of Mean Subscription Rates—Adjusted Subscription Prices ($0.02194 × 0.51 × 0.311) (benchmark per play rate) × (# of plays adj.) × (interactivity adj.)	0.0035
Regression of Subscription Prices ($0.02194 × 0.51 × 0.359) (benchmark per play rate) × (# of plays adj.) × (interactivity adj.)	0.0040

Pelcovits WDT at 33; *see* 4/19/10 Tr. at 142–45 (Pelcovits) (explaining step-by-step calculations to derive recommended statutory per-play royalty fee).

Dr. Pelcovits then calculated the simple average of the above three recommended rates—$0.0036 per play (rounded). Pelcovits WDT at 33; 4/19/10 Tr. at 145 (Pelcovits).

(b) Review of Dr. Pelcovits's Interactive Benchmark Analysis

(i) The Overemphasis on Subscription Revenues and the Failure To Account for Advertising Revenues

Dr. Pelcovits's interactive benchmark analysis is of some, albeit limited, assistance in determining the royalty rate in the noninteractive market. His analysis was based upon the subscription revenues of noninteractive webcasters, without accounting for their advertising revenues. In fact, ''the reality of a lot of the services is that they have a mix of subscribers and non-subscribers.'' 7/28/10 Tr. at 55 (Salinger); *see also* 4/20/10 Tr. at 312–13 (Pelcovits) (acknowledging that most listening to noninteractive webcasting is by non-subscribers).

Moreover, as noted *supra,* Dr. Pelcovits possessed data regarding advertising revenue for both the benchmark market and the statutory market, yet he chose not to focus on such data, asserting that it failed to reflect the willingness of consumers to pay for the services.[47] Pelcovits WDT at 24.

The Judges conclude that the interactive benchmark model as developed by Dr. Pelcovits is compromised, and its usefulness reduced, by its failure to take into account the advertising revenue received in both the interactive benchmark market and the statutory noninteractive market.

[47] Dr. Pelcovits's decision to ignore advertising revenues in his analysis implicitly constituted an *a priori* rejection of the noninteractive webcaster business model that seeks revenue primarily through advertising rather than from subscriptions.

(ii) SoundExchange's Failure To Incorporate Independent Label Contract Rates in its Benchmark Analysis

Dr. Pelcovits relied upon the contracts between the major record companies and 18 webcasters in performing his interactive benchmark comparison. However, he completely excluded from his rate analysis the rates charged by the independent record companies in his benchmark interactive market and in the noninteractive market that is the subject of this proceeding. This is an important omission, because, as noted by Live365's rebuttal economic witness, Dr. Michael Salinger, approximately 40% of the music streamed on noninteractive webcasts is owned and licensed by independent labels. Salinger WRT at 15. On the other hand, Dr. Salinger did not provide any empirical support for the conclusion that inclusion of the rates charged by independent labels would have resulted in different rates. SX RFF at ¶¶ 101–103.

Thus, the issue becomes one of allocation of the burden of going forward with evidence on this point. The Judges conclude that since SoundExchange had collected information on 214 agreements between webcasters and record companies, including independents, it was in the best position to go forward with evidence indicating the impact, *vel non,* of the rates charged by the independent labels. By failing to do so, SoundExchange compromised the probative value of its benchmark analysis. Accordingly, the Judges conclude that the absence of any evidence as to the impact of the rates charged by the independent labels, either within the model itself or as an adjustment, diminishes the value of that interactive benchmark analysis.

(iii) SoundExchange's Failure To Adjust for the Downward Trend in Rates in the Interactive Benchmark Market

The effective play rate in the interactive benchmark market calculated by Dr. Pelcovits covered an 18-month period from 2007 through 2009. 4/20/10 Tr. at 309–10 (Pelcovits). Dr. Pelcovits relied upon the average rate in that 18-month period. However, he did not account for the fact that the rate had been declining during this period, from $0.02610 in 2007 down to $0.01917 in 2009. By relying upon the average during the period, $0.02194, and not weighting more heavily in that average the more recent periods, Dr. Pelcovits's model failed to account for the temporal decline of rates during his period of analysis. Salinger WRT at 16–17; Live365 Reb. Ex. 1; 7/28/10 Tr. at 127–28 (Salinger).[48] Thus, the Judges conclude that the interactive benchmark rate analysis is compromised by the failure to adequately weight this downward trend in rates.

However, as Dr. Salinger acknowledged, this concern could have been addressed by multiplying Dr. Pelcovits's recommended $0.0036 rate by the ratio of the low 2009 rate to the average rate over the 18-month period, *i.e.,* by multiplying that rate by .01917/.02194 (or .8737). 7/28/10 Tr. at 128–29 (Salinger). SoundExchange performed this calculation and noted that the rate established by its interactive benchmark analysis decreased to $0.0031, still above its proposed rates for the term of the license. SX PFF ¶ 210.

(iv) The Limited Data Regarding Noninteractive Plays

Dr. Pelcovits candidly admitted that he was unable to obtain data regarding the number of monthly noninteractive plays, because such data was not available. Pelcovits WDT at 31–32. Although he attempted to use a different source as a proxy for such data—the monthly plays by the Slacker Premium service that allegedly had some noninteractive features—the probative value of his analysis was diminished by this lack of sufficient data.

[48] *See* note 24 *supra,* regarding the more serious problem with attempts to predict future industry trends.

(c) Problems With Dr. Pelcovits's Hedonic Regression Used as an Alternative To Measure the Value of Interactivity To Be Subtracted From Interactive Benchmark Value

Dr. Salinger set forth the same valid overarching criticism of Dr. Pelcovits's hedonic regression adjustment as he had asserted with regard to Dr. Pelcovits's adjustment based on the ratios of royalties to mean subscription rates in the two markets. That is, Dr. Salinger opined ''*any* estimate of a reasonable royalty rate . . . suffers from the fundamental flaw that noninteractive Internet radio is primarily an advertising-supported business, not a subscription business.'' Salinger WRT at 18 (emphasis added).

On a more granular level, Dr. Salinger further questioned the results of Dr. Pelcovits's hedonic regression. First, Dr. Salinger disagreed with Dr. Pelcovits's use of ''dummy variables'' (*i.e.,* ''fixed effects variables'') in the hedonic regression. Second, Dr. Salinger questioned the significance of the results given what Dr. Salinger testified was the relatively broad confidence interval bracketing the estimated interactivity coefficient in the hedonic regression. Salinger WRT at 20, 21 n.31 and Exhibit 6; 7/28/10 Tr. at 66–69 (Salinger).

With regard to the first issue, Dr. Salinger noted, and Dr. Pelcovits did not disagree, that dummy variables ''are indicator variables that capture unobserved characteristics whose value does not change over time.'' Salinger WRT at 21; *see also* Pelcovits WDT at 28.

In the present case, Dr. Pelcovits included fixed effects/dummy variables for six separate interactive services—one each offered by Classical Archives, Digitally Imported, Pasito Tunes, and Altnet (formerly Kazaa), respectively, and two offered by iMesh.com. In his Written Direct Testimony, Dr. Pelcovits did not comment upon the impact of these fixed effects/dummy variables. However, he also ran his regression *without* these fixed effects/dummy variables. This alternative regression increased the value of interactivity from $8.52 to $10.55 per subscriber per month. Salinger WRT at 20.

This higher value for the interactivity feature, when *subtracted* from the overall value of an interactive service as computed by Dr. Pelcovits, ''caus[ed] the estimated royalty rate to decline . . . from $0.0036 to $0.0023.'' Salinger WRT at 20 (emphasis added). SoundExchange did not contest the probative value of this criticism, but rather acknowledged: ''Dr. Pelcovits also ran regressions without the fixed effects variables, and those results were produced to Live365.'' SX PFF ¶ 215. The Judges are mindful that this essentially undisputed revised value—$0.0023—is highly proximate to the rates established in the WSA Agreements.[49]

Dr. Salinger's second specific criticism of Dr. Pelcovits's hedonic regression, identified above, concerns the breadth of the confidence interval within which lies Dr. Pelcovits's estimated interactivity coefficient. Specifically, Dr. Pelcovits did not provide any ''confidence interval'' around his result. Salinger WRT at 21–22 and n.31. Dr. Salinger calculated that, at a 95% confidence interval, Dr. Pelcovits's regression results would have a range that would be far less (on the low end of the range) than the rate that Live365 proposed and far higher (on the high end of the range) than the rates that SoundExchange proposed. *Id.*

3. The ''Affordability'' of the Proposed Interactive Benchmark Rates

Live365 asserted that SoundExchange's interactive benchmark rate was too high. Specifically, Live365 asserted that this interactive benchmark rate could not be utilized because numerous webcasters would be unable to afford the $0.0036 rate derived from that analysis. Live365 PFF ¶¶ 216–222. Although Live365 characterizes this alleged unaffordability as a ''reality check,'' it is no such thing. A single price established in any market by its very nature inevitably will restrict some purchasers who are unable or unwilling to pay the market price. (In common parlance, they may be said to have been ''priced out of the market.'') The rate of $0.0036 may be too high for other reasons (and indeed it is), but the fact that any particular number of webcasters might not profit under that rate, or that others would either shut down or never enter the market, is not evidence that the rate deviates from the market rate. The essence of a single market price is that it rations goods and services; by definition, a non-discriminatory price system therefore excludes buyers who cannot or will not pay the market price (and excludes sellers who cannot or will not accept the market price).

[49] Dr. Pelcovits also acknowledged that his hedonic regression did not necessarily isolate product characteristics (such as interactivity in the present proceeding) from supply and demand effects on prices (subscription rates in the present proceeding). 4/20/10 Tr. at 373–76.

4. Judges' Conclusions Regarding the Commercial Webcasters Rates

To summarize the Judges' conclusions as discussed above: [50]

- The Judges will set a per-performance rate, in light of the fact that neither of the contesting parties proposed a percentage-of-revenue based rate or any other rate structure.
- The Judges shall not utilize the Live365 Model to establish either the rate for commercial webcasters or the zone of reasonableness within which an appropriate rate would lie.
- The Judges shall utilize the rates set forth in the WSA Agreements between SoundExchange and the NAB and Sirius XM, respectively, to establish an approximate zone of reasonableness for the statutory rates to be determined in this proceeding.
- The Judges shall utilize the SoundExchange interactive benchmark analysis, adjusted to reflect the undisputed impact of the fixed effects/dummy variables, to establish an approximate zone of reasonableness for the statutory rates to be determined in this proceeding.

The Judges are also mindful of the procedural context of this determination, as summarized at the outset of this decision, *supra.* Rates were set for noninteractive commercial webcasting almost three years ago, on March 9, 2011, for the 2011–2015 rate period. No participant sought a rehearing or appealed those rates to the D.C. Circuit.

Further, after the D.C. Circuit vacated the March 9, 2011, determination and the case was remanded to the Judges, neither Live365 nor SoundExchange requested any new proceeding in connection with any aspect of the prior determination. Indeed, Live365 did not respond to the Judges' request for

[50] In considering the Live365 proposal, the willing buyer/willing seller standard in the Act encompasses consideration of economic, competitive, and programming information presented by the parties, including (i) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and (ii) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. *See* 17 U.S.C. 114(f)(2)(B)(i) and (ii). The adoption of an adjusted benchmark approach to determine the rates leads this panel to agree with *Web II* and *Web I* that such statutory considerations implicitly have been factored into the negotiated prices utilized in the benchmark agreements. *Web II,* 72 FR at 24095; *Web I,* 67 FR at 45244. Therefore, the Judges have implicitly incorporated such considerations in the evaluation of the benchmark proposals submitted by SoundExchange. Accordingly, the Judges conclude that SoundExchange's separate analyses discussing these statutory factors, *see* SoundExchange PFF, Point IX, are subsumed in its willing buyer/willing seller analyses.

suggestions as to how to proceed with the remand, and SoundExchange responded only with regard to the minimum fee issue that had been challenged on appeal by IBS, stating that the prior determination in that regard should be reaffirmed.

Thus, it is clear that the contesting parties had accepted the rates as established in the March 9, 2011, determination. The Judges are reluctant to upset settled expectations by retroactively altering rates that have been established for several years, and that licensees have already paid in some years, provided that those rates fall within the zone of reasonableness that the Judges determine in this proceeding.

The present *de novo* determination is substantively distinct in a number of respects from the prior determination, but the analysis leads to an approximate ''zone of reasonableness'' within which an appropriate rate for commercial webcasters can be established that includes the rates established in the March 9, 2011 determination.

Specifically, the Judges find that the approximate zone of reasonableness for the rates for commercial webcasters for the 2011–2015 rate period is as follows:

Year	Lower bound	Upper bound
2011	$0.0017 (NAB/SX rate)	$0.0023 (lowest adjusted interactive rate).
2012	$0.0020 (NAB/SX; Sirius XM/SX rate)	$0.0023 (lowest adjusted interactive rate).
2013	$0.0021 (Sirius XM/SX rate)	$0.0023 (lowest adjusted interactive rate).
2014	$0.0022 (Sirius SM/SX rate)	$0.0023 (lowest adjusted interactive; NAB/SX rate).
2015	$0.0023 (lowest adjusted interactive rate)	$0.0025 (NAB/SX rate).

The Judges recognize that the rates set previously for the 2011–2015 term fall within this zone of reasonableness,[51] and hereby adopt them.

Accordingly, with regard to the license for commercial webcasters, the Judges set the following per-play rates for the five-year period that began in 2011:

Year	Rate
2011	$0.0019
2012	$0.0021
2013	$0.0021
2014	$0.0023
2015	$0.0023

V. Rates For Noncommercial Webcasters

A. Noncommercial Educational Webcasters

On August 13, 2009, SoundExchange and CBI submitted a joint motion under 17 U.S.C. 801(b)(7)(A) regarding a partial settlement ''for certain internet transmissions by college radio stations and other noncommercial educational webcasters'' (CBI/SoundExchange Agreement). The parties sought to make the agreed rates and terms applicable to noncommercial educational webcasters for the period 2011 through 2015.[52] *Joint Motion to Adopt Partial Settlement,* at 1 (Aug. 13, 2009). CBI and SoundExchange reached the CBI/SoundExchange Agreement under authorization granted by the 2009 WSA. The Copyright Office published the terms of the settlement in the **Federal Register**. *See* 74 FR 40616 (Aug. 12, 2009). By virtue of that publication, the CBI/SoundExchange Agreement is ''available, as an option, to any . . . noncommercial webcaster meeting the eligibility conditions of such agreement.'' 17 U.S.C. 114(f)(5)(B).

On April 1, 2010, the Judges published the CBI/SoundExchange Agreement, with minor changes,[53] under the authority of section 801(b)(7)(A) of the Act. *See* 75 FR 16377 (Apr. 1, 2010) (including CBI/SoundExchange Agreement and NAB/SoundExchange Agreement). With respect to rates, the Agreement imposes an annual, nonrefundable minimum fee of $500 for each station or individual channel, including each of its individual side channels. *Id.* at 16384. Under the Agreement, those noncommercial educational webcasters whose monthly ATH exceed 159,140, pay additional fees on a per-performance basis. The CBI/SoundExchange Agreement also provides for an optional $100 proxy fee that noncommercial educational webcasters may pay in lieu of submitting reports of use of sound recordings. The agreement also contains a number of payment terms.

Section 801(b)(7)(A) of the Act provides that, after providing notice and opportunity for affected parties to comment, the Judges shall adopt a settlement agreement among some or all of the participants in a proceeding as a basis for statutory rates and terms, unless a participant in the proceeding objects and the Judges find that the agreement does not provide a reasonable basis for setting rates and terms. The Judges received 24 comments from terrestrial radio stations favoring adoption of the CBI/SoundExchange Agreement.[54] IBS opposed adoption of the CBI/SoundExchange Agreement. The Judges held a hearing on those objections on May 5, 2010.[55]

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[51] However, the zone of reasonableness in this determination is significantly tighter than the zone established in the vacated determination. Specifically, the zone in the vacated determination was bracketed by a low per-play rate of $0.0019 and a high rate of $0.0036. 76 FR at 13036.

[52] The proposed regulatory language in the CBI/SoundExchange agreement originally included the following sentences in 37 CFR 380.20(b) that created confusion as to whether SoundExchange and CBI were asking the Judges to adopt the agreement as an option for noncommercial educational webcasters or whether the agreement would be binding on all noncommercial educational webcasters:

However, if a Noncommercial Educational Webcaster is also eligible for any other rates and terms for its Eligible Transmissions during the period January 1, 2011, through December 31, 2015, it may by written notice to the Collective in a form to be provided by the Collective, elect to be subject to such other rates and terms rather than the rates and terms specified in this subpart. If a single educational institution has more than one station making Eligible Transmissions, each such station may determine individually whether it elects to be subject to this subpart.

Digital Performance Right in Sound Recordings and Ephemeral Recordings, Proposed rule, 75 FR 16377, 16383 (Apr. 1, 2010); *see* 5/5/10 Tr. at 5–51 (Hearing on Joint Motion to Adopt Partial Settlement).

With the concurrence of SoundExchange's counsel, *see* 5/5/10 Tr. at 46–47, 50–51 (Hearing on Joint Motion to Adopt Partial Settlement), the Judges find the language confusing and unnecessary and decline to adopt it.

[53] The Judges modified a reference to earlier regulations to bring it up to date. Deeming it inappropriate to the purpose of CRB regulations, the Judges declined to adopt language regarding compliance or noncompliance with the Agreement and reservation of rights. *See* note 52 *supra,* and accompanying text.

[54] Many of these comments asserted that the rate structure was compatible with their stations' respective budget constraints, *see, e.g., Comment of Bill Keith for WSDP Radio, Plymouth-Canton Community Schools* (Apr. 20, 2010) (''The monetary amount was reasonable and most college or high school stations can live with the amounts charged for webcasting''), and several expressed satisfaction with the $100 proxy fee in lieu of reports of use. *See, e.g., Comments of Christopher Thuringer for WRFL, University of Kentucky* (Apr. 20, 2010); *Comments of David Black, General Manager, WSUM–FM* (Apr. 19, 2010).

[55] The Judges deferred a decision whether to adopt the settlement until IBS had an opportunity to present its witness testimony as part of its direct and rebuttal cases.

The rationale for the IBS objection to adoption of the settlement described in the CBI/SoundExchange Agreement has remained elusive throughout the proceeding. In its initial comments, IBS expressed its concern that adoption of the agreement would create an ''impression'' that the Judges had ''prejudged the outcome of the adjudicatory hearing,'' notwithstanding IBS's acknowledgement that ''the proposed rates and terms . . . are non-exclusive, *i.e.,* [the Agreement] provides for other parties' agreeing with SX to different rates and terms.'' *Comments of IBS* (Apr. 22, 2010).

During the May 5, 2010, hearing, IBS argued that by moving for adoption of their settlement agreement, CBI and SoundExchange were ''attempt[ing] to freeze IBS out of statutory rights to a decision from the Board on the record.'' 5/5/10 Tr. at 52 (Hearing on Joint Motion to Adopt Partial Settlement). IBS also raised for the first time specific exceptions to the $500 minimum fee and $100 proxy fee that are part of the CBI/SoundExchange Agreement. *Id.* at 62–64.

In closing argument, IBS reiterated its objection to adoption of the CBI/SoundExchange Agreement. When pressed by the Judges to articulate specific objections, IBS counsel stated that IBS objected to the agreement to the extent it applied to IBS's smaller members.[56] By this, the Judges understand counsel to be expressing concern that adoption of the agreement would prevent IBS from pursuing its rate proposal (for ''small'' and ''very small'' noncommercial webcasters) in the proceeding.

The Judges find that IBS did not interpose a proper objection under section 801(b)(7)(A)(ii) of the Act that would require the Judges to weigh the reasonableness of the CBI/SoundExchange Agreement. IBS's objection is premised on the erroneous assumption that adoption of the agreement would prevent IBS from pursuing its rate proposal. IBS's proposal relates to different categories of webcasters from those covered by the CBI/SoundExchange Agreement. While the latter covers noncommercial educational webcasters, the IBS proposal covers noncommercial webcasters (whether or not they qualify as ''educational'') that fall within its definitions of ''small'' and ''very small.'' Adoption of the one does not preclude (and has not precluded) consideration of the other.

In addition, even if the Judges were to consider IBS's objection to be proper, IBS failed to present any evidence to support a conclusion that the CBI/SoundExchange Agreement does not form a reasonable basis for setting rates and terms for noncommercial educational webcasters. IBS's counsel made dire predictions that the rate structure adopted in the agreement would prevent many IBS members from performing webcasting services. *See, e.g.,* 5/5/10 Tr. at 62–64 (Hearing on Joint Motion to Adopt Partial Settlement). IBS did not offer testimony from any adversely affected member, however, in spite of the Judges' invitation to do so. *Id.* at 81–82. By contrast, 24 noncommercial webcasters filed comments with the Judges stating that they support the rates and terms of the CBI/SoundExchange Agreement, which they found reasonable and affordable. The Judges find those comments to be both credible and persuasive.

Finding neither a proper nor a credible objection to the CBI/SoundExchange Agreement, nor other grounds requiring rejection, the Judges adopt the agreement (with the modification described *supra* at note 52) as the basis for rates and terms for noncommercial educational webcasters for the period 2011–2015.

B. Other Noncommercial Webcasters

1. Rate Proposals of the Participants

For noncommercial webcasters, SoundExchange proposes a royalty of $500 per station or channel (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed settlement with CBI) for each calendar year or part of a calendar year during which the webcaster is a licensee under sections 114 and 112 of the Act. The licensee would pay the royalty in the form of a $500 per station or channel annual minimum fee, with no cap. The $500 fee would constitute the minimum fee under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B), and would permit the noncommercial webcaster to perform sound recordings up to a limit of 159,140 ATH per month. If a station or channel were to exceed the ATH limit in any month, then the noncommercial webcaster would pay at the commercial usage rates for any overage. *Second Revised Proposed Rates and Terms of SoundExchange,* at 3–4 (July 23, 2010). SoundExchange's proposal would cover all noncommercial webcasters that are not covered by the CBI/SoundExchange Agreement (*i.e.,* noncommercial educational webcasters).

The IBS rate proposal is more difficult to discern. *See, e.g.,* 4/22/10 Tr. at 774–93 (Kass).[57] IBS proposes to create two new categories of noncommercial webcasters: Small noncommercial webcasters (defined as noncommercial webcasters with usage up to 15,914 ATH per month) and very small noncommercial webcasters (defined as noncommercial webcasters with usage up to 6,365 ATH per month). *Amplification of IBS's Restated Rate Proposal,* at 1 (July 28, 2010). Under the IBS proposal, small noncommercial webcasters would pay a flat annual fee of $50, which would also constitute the minimum fee. Very small noncommercial webcasters would pay a flat annual fee of $20, which would constitute the minimum fee. *Id.* at 2. Noncommercial webcasters that exceed

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[56] [THE JUDGES]: You're not proposing a rate for noncommercial educational webcasters. Only CBI and SoundExchange are.

MR. MALONE: Right.

[THE JUDGES]: So why are you objecting to the adoption of that if you have a—two separate categories that you want adopted?

MR. MALONE: Well, the judges can certainly say that—I mean, there's nothing incompatible with them. The—

[THE JUDGES]: But I'm asking you why are you still objecting to the adoption of a $500 minimum fee for noncommercial educational webcasters when you have proposed new fees for two new types of services and have not proposed a fee for something called a noncommercial educational webcaster?

MR. MALONE: Well, our—

[THE JUDGES]: Where is your dog in that fight? I don't see it.

MR. MALONE: All right. The dog in that fight is—and, again, excluding indirect effects that I understand to be the context of your question. We have no objection to the terms that are there as long as they don't apply to our small stations.

[THE JUDGES]: So you're just objecting to it on the theory that you just hope that what's ever in there doesn't somehow get applied to your case, even though you're asking for two completely different services?

MR. MALONE: That's essentially correct, Your Honor.

9/30/10 Tr. at 660–61 (IBS Closing Argument).

[57] IBS did not file a formal rate proposal with the Judges prior to the evidentiary hearing. Instead, IBS included a vague request in the written direct testimony of one of its three witnesses, Frederick J. Kass, Jr., IBS's chief operating officer. Kass WDT at 1, 9 (''IBS Members should only pay for their direct use of the statutory license by the IBS Member. There should be no minimum fee greater than that which would reasonably approximate the annual direct use of the statutory license, not to exceed $25.00 annually.''). Capt. Kass's written testimony also included as an exhibit a joint petition to adopt an agreement negotiated between the RIAA, IBS, and the Harvard Radio Broadcasting, Co. that was submitted to the Copyright Office on August 26, 2004. That agreement contained rates that diverged from those Capt. Kass proposed in his testimony. This discrepancy led to a convoluted discussion during Capt. Kass's live testimony as the Judges strived to determine precisely what rate structure IBS was seeking. 4/22/10 Tr. at 774–93 (Kass). After the hearing, IBS submitted a ''Restatement of IBS's Rate Proposal'' on May 21, 2010, and an ''Amplification of IBS's Restated Rate Proposal'' on July 28, 2010. The proposal summarized in text is from IBS's July 28, 2010, submission.

15,914 ATH would be subject to the noncommercial webcasting rates proposed by SoundExchange, including SoundExchange's proposed per performance rates for transmissions in excess of 159,140 ATH per month. *Id.* IBS also expressly adopted SoundExchange's proposal with regard to ephemeral recordings under section 112. *Id.*

IBS also proposed that noncommercial webcasters transmitting more than 15,914 ATH but no more than 55,000 ATH per month, be permitted to pay a $100 annual proxy fee in lieu of submitting reports of use. *Id.* at 3. IBS proposed that noncommercial webcasters transmitting fewer than 15,914 ATH per month be exempted from making reports of use. *Id.* While couched as part of IBS's rate proposal, this is a proposed term that the Judges will consider in the discussion of terms, *infra,* part VI.

As an alternative to the foregoing proposal, IBS stated that it was ''prepared to offer to SoundExchange'' an annual $10,000 payment to cover IBS members that are small noncommercial webcasters. *Id.* The $10,000 payment was apparently an estimate based on IBS's proposed rates for ''small'' and ''very small'' noncommercial webcasters; to the extent that participation by IBS members were to exceed $10,000, ''there would be a true up within 15 days of the end of the year.'' *Id.*[58]

2. Evaluation of the Rate Proposals and Determination of Rates

Section 114(f)(2)(B) of the Act directs the Judges to ''distinguish among the different types of . . . services then in operation'' in applying the willing buyer/willing seller standard to determine rates and terms. *Id.* The recognition of different services is to be ''based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.'' *Id.*

In *Web II,* the Judges found that noncommercial webcasters constituted a different type of service that should be subject to a different rate from commercial webcasters.

> Based on the available evidence, we find that, up to a point, certain ''noncommercial'' webcasters may constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than . . . for Commercial Webcasters. A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve . . . . The multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. By definition, if the commodity in question derives its demand from its ultimate use, then the marketplace can remain segmented only if buyers are unable to transfer the commodity easily among ultimate uses. Put another way, each type of ultimate use must be different.

Web II, 72 FR at 24097. As a safeguard to ensure that the distinct segment of the market occupied by noncommercial webcasters did not encroach on the segment occupied by commercial webcasters, the Judges capped eligibility for the noncommercial rate at 159,140 ATH per month. *Id.* at 24097, 24099–100.

In this proceeding both SoundExchange and IBS have proposed rates for noncommercial webcasters that differ from the rates for commercial webcasters, implicitly endorsing the commercial/noncommercial distinction adopted by the Judges in *Web II.* For noncommercial webcasters that do not exceed the 159,140 ATH monthly thresholds, these participants have proposed the continuation of what is economically a zero rate for the sound recordings (together with a $500 minimum fee).

The Judges conclude that it is appropriate to continue this commercial/noncommercial distinction because there is a good economic foundation for maintaining this dichotomy. More specifically, a ''noncommercial'' webcaster by definition is not participating fully in the private market. Although the costs associated with the production and delivery of a sound recording remain the same regardless of whether it is played by a commercial or noncommercial webcaster, apparently the noncommercial webcaster receives little or no customer or advertiser revenue. (Revenue must be received from some source though, in order to pay the minimum fee.)

The zero per-performance fee has an economic basis because it reflects: (i) The paucity of revenue earned by a noncommercial webcaster; and (ii) the essentially zero marginal cost to the licensors of supplying an additional copy of a sound recording. The $500 annual minimum fee per channel or station defrays a portion of the transaction costs incurred in administering the license.[59]

Where SoundExchange and IBS part company is with IBS's proposal to make further distinctions among noncommercial webcasters based on the quantity of sound recordings they transmit under the statutory license (as measured by ATH).

Section 114(f)(2)(B) expressly mentions the quantity of use of sound recordings as an element that may be considered in recognizing different types of services. If a participant in a rate proceeding were to present evidence that, in a hypothetical marketplace, a willing buyer and a willing seller would negotiate a different rate for noncommercial webcasters at a given ATH level than they would for all other noncommercial webcasters, that would argue in favor of recognizing noncommercial webcasters at that ATH level as a distinct type of service. IBS, however, did not present any such evidence.

IBS presented testimony from three witnesses as part of its direct case.[60] Mr. John Murphy, general manager of WHUS at the University of Connecticut, Mr. Benjamin Shaiken, a student at the University of Connecticut and operations manager of WHUS, and Captain Kass, each testified about the distinctions between college (and, to a lesser extent, high school) radio stations and commercial radio stations. 4/21/10 Tr. at 570–73 (Murphy); Murphy WDT ¶ 4; 4/21/10 Tr. at 615 (Shaiken); Shaiken WDT ¶ 6; 4/22/10 Tr. at 761, 765 (Kass); Kass WDT ¶ 6. This is beside the point. There is no dispute between SoundExchange and IBS as to whether there should be different rates for commercial and noncommercial webcasters. Both participants accept the commercial/noncommercial distinction that was part of the Judges' determination in *Web II,* and the Judges adopt it in this proceeding. The issue at hand is whether there should be a

[58] It is unclear whether IBS intended this proposed payment as part of the rates proposed to the Judges for adoption, or as an offer to SoundExchange. Given the Judges' rejection of IBS's proposed rate structure, it is not necessary to resolve this ambiguity.

[59] Of course, this rate structure does not permit the licensors to recoup from the noncommercial webcasters any portion of the long-term (non-marginal) costs incurred in the creation and production of sound recordings.

[60] The Judges declined to admit the testimony of IBS's sole rebuttal witness, Frederick Kass, after it became apparent that his Written Rebuttal Testimony was not submitted in accordance with the Judges' rules (it was not verified in accordance with 37 CFR 350.4(d)) and Capt. Kass was unfamiliar with its contents. 7/29/10 Tr. at 292–96 (Kass). IBS sought reconsideration of the decision, which the Judges denied. *Order Denying IBS's Motion for Reconsideration of the Rulings Excluding Its Rebuttal Case* (Aug. 18, 2010). Even if Capt. Kass's testimony had been admitted, it could not have made up for the deficiencies of IBS's direct case, as such testimony would have been outside the scope of rebuttal testimony.

distinction among different groups within the category of noncommercial webcasters.

IBS's primary contention to support a different rate for ''small'' and ''very small'' noncommercial webcasters was that entities falling into those categories are unable to pay the $500 minimum fee proposed by SoundExchange. This argument fails for several reasons.

First and foremost, there is no record evidence to support the contention that noncommercial webcasters who transmit less than 15,914 ATH per month are unable to pay a $500 minimum royalty. IBS did not offer testimony from any entity that demonstrably qualified as a ''small'' or ''very small'' noncommercial webcaster.[61] Conclusory statements by counsel that a $500 minimum royalty is unaffordable for smaller noncommercial webcasters are not evidence. *See, e.g.,* 5/5/10 Tr. at 62–64 (Hearing on Joint Motion to Adopt Partial Settlement); IBS PFF at ¶¶ 9–10; IBS PCL at ¶ 4. Further, these assertions are undercut by testimony that some of these same entities pay IBS close to $500 annually for membership dues and fees for attending conferences. *See* 4/22/10 Tr. at 803–05 (Kass). The only testimony that mentions any specifics about the finances of smaller webcasters is a reference by Captain Kass to a survey that showed that IBS members had an average annual operating budget of $9,000. Kass WDT at ¶ 9. The survey, which was conducted more than ten years ago, 4/22/10 Tr. at 835 (Kass), was not offered into evidence. Without documentary evidence that would allow the Judges to assess the validity of the survey, Capt. Kass's reference to it cannot be accepted as evidence. *See* 37 CFR 351.10(e). Even if the Judges could accept such a reference as evidence, it would not advance IBS's case. On its face, an assertion that the average operating budget for IBS members is $9,000 does not establish that its members lack the wherewithal to pay a $500 minimum royalty.

There also is no evidence in the record to establish any correlation between the quantity of sound recordings being transmitted by a noncommercial webcaster and the size of that webcaster's operating budget (and, thus, its ability to pay a $500 annual minimum fee).

In addition, the evidence strongly suggests that the ATH cutoffs that IBS proposed for ''small'' and ''very small'' noncommercial webcasters are arbitrary. It appears that IBS chose ATH levels that represent 10% and 4%, respectively, of the ATH cutoff for noncommercial webcasters employed in *Web II* and SoundExchange's rate proposal. *Id.* at 787, 791; IBS PFF at ¶ 10; IBS PCL at ¶ 1. Nothing in the record substantiates these ATH levels as definitive or conclusive of a webcaster's ability to pay a $500 minimum royalty.

Finally, even if there were a sufficient basis in the record to conclude that ''small'' and ''very small'' noncommercial webcasters are unable to pay a $500 minimum fee, that, in itself, does not demonstrate that a willing seller in a hypothetical marketplace would be prepared to negotiate a different, lower rate with them. That proposition is particularly dubious in this proceeding given the evidence in the record (discussed *infra*) that SoundExchange's average annual administrative cost exceeds $500 per station or side channel. The record does not support a conclusion that, in a hypothetical marketplace, a willing seller would agree to a price that is substantially below its administrative costs.

As to the statutory criterion of the ''nature of the use of sound recordings'' for distinguishing between types of services, there is no evidence in the record establishing that the use of sound recordings by ''small'' and ''very small'' noncommercial webcasters differs qualitatively from that of other noncommercial webcasters. 9/30/10 Tr. at 647–51 (IBS Closing Argument) (conceding the point).

For the foregoing reasons, the Judges find that IBS has failed to establish a basis for its proposal to recognize ''small'' and ''very small'' noncommercial webcasters as types of services that are distinct from noncommercial webcasters generally. The remainder of the IBS rate proposal (for noncommercial webcasters that exceed 15,914 ATH per month) is identical to the SoundExchange rate proposal. As noted *supra,* IBS proposed an additional term for a subset of noncommercial webcasters. This is discussed *infra,* part VI. The Judges, therefore, reject the IBS proposal for ''small'' and ''very small'' noncommercial webcasters and proceed to evaluate the SoundExchange rate proposal for noncommercial webcasters.

SoundExchange contends that its rate proposal (i) most closely approximates the rate that a willing buyer and willing seller would negotiate in a hypothetical market, (ii) is demonstrably affordable to a broad range of noncommercial webcasters, and (iii) is objectively reasonable given the average administrative cost per service or channel. The Judges agree.

The CBI/SoundExchange Agreement (*see* III.B.2.A, *supra*) is persuasive evidence that SoundExchange's proposal satisfies the willing buyer/willing seller standard. That negotiated agreement employs the same minimum per-channel fee without a cap, as well as the 159,140 ATH limitation. The fact that 24 noncommercial webcasters filed comments supporting the agreement corroborates that conclusion.

SoundExchange points out that it was established in *Web II* that 363 noncommercial webcasters paid royalties in 2009 similar to SoundExchange's current rate proposal, with 305 of those webcasters paying only the $500 minimum fee. *Web II (Determination on Remand),* 75 FR at 56874. Taken together with IBS's failure to present even a morsel of contrary evidence, the Judges find this fact to be strong evidence that noncommercial webcasters are able and willing to pay the proposed fees.[62]

[61] The two IBS witnesses who were actually engaged in webcasting were both affiliated with WHUS at the University of Connecticut, Storrs. There is no record evidence regarding the quantity of sound recordings transmitted by WHUS. Two facts in the record—WHUS's 2009 annual revenues of more than $500,000, and their annual profits of more than $87,000, 4/21/10 Tr. at 583–86 (Murphy)—suggest that WHUS is not a ''small'' or ''very small'' webcaster as those terms are conventionally understood. *See also id.* at 590 (''WHUS is probably one of the most financially well-off stations in the entire IBS system'').

[62] In its proposed findings, IBS introduced two new related arguments: (i) ''Congress in Section 114(f)(2) intended that the minimum rate be tailored to the type of service in accord with the general public policy favoring small businesses,'' and (ii) the Judges are required under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601(6), to determine whether the $500 fee unnecessarily burdens IBS's members. IBS PFF (Reformatted) at ¶¶ 10–13. Both contentions are without merit.

The Judges find no support in the text or legislative history of the Act for the proposition that rates adopted under section 114(f)(2) must be tailored to benefit small businesses. The statute is quite clear that the Judges' task is to determine 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).

IBS has also failed to establish that the RFA applies to this proceeding. The RFA defines a ''rule'' (that triggers review under the Act) as ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the APA. 5 U.S.C. 601(2). Determinations of the Judges in rate proceedings are not subject to the notice and comment rulemaking process under the APA. Moreover, the RFA's definition of ''rule'' specifically excludes ''a rule of particular applicability relating to rates.'' *Id.*

Nor has IBS established that any of its members (or any entities falling within its proposed definitions of ''small'' and ''very small'' noncommercial webcasters) are ''small entities'' as defined in 5 U.S.C. 601(6). IBS did not introduce any evidence concerning any webcaster other than WHUS, and never even identified its own members in this proceeding.

In any event, the Judges did consider the circumstances of noncommercial webcasters in

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Finally, the testimony of Ms. Barrie Kessler, SoundExchange's Chief Operating Officer, demonstrates that the $500 annual minimum fee is reasonable. Ms. Kessler estimated SoundExchange's annual administrative cost per station or channel to be approximately $825 on average. Kessler WDT at 25. IBS offered no persuasive evidence to dispute this estimate. As the Judges have noted in previous proceedings, it is reasonable and appropriate for the minimum fee to at least cover SoundExchange's administrative cost. *See, e.g., Web II (Determination on Remand),* 75 FR at 56873–74. With the average administrative cost exceeding $800, the Judges find a $500 minimum fee to be eminently reasonable and appropriate.

In conclusion, the Judges find that the evidence in this proceeding strongly supports SoundExchange's rate proposal for noncommercial webcasters. The Judges adopt that proposal for the 2011–2015 rate period.

VI. Terms

As part of every rate determination, the Judges adjust the regulatory language that effects the rate changes. These implementing terms are published in title 37 of the Code of Federal Regulations. The Judges are obliged to adopt agreed terms if, after published notice, no party prospectively bound by the terms objects. *See* 17 U.S.C. 801(b)(7)(A). For the Judges to adopt a contested proposed term, the proponent must show support for its adoption by reference to the record of the proceeding.

In this proceeding, both SoundExchange and Live365 proposed changes to the existing regulatory language. Some of the terms proposed by SoundExchange are contained in the NAB/SoundExchange and CBI/SoundExchange agreements adopted in this proceeding. The Judges will adopt any contested proposed terms only if the proponent meets its evidentiary burden.

A. Uncontested Terms

1. Collective

The Judges have concluded previously that designation of a single Collective is economically and administratively efficient. No party to this proceeding requested a different or additional Collective. SoundExchange seeks to continue as the sole Collective for royalties paid by commercial and noncommercial webcasters under the licenses at issue in this proceeding for the period 2011–2015.

SoundExchange is a section 501(c)(6) nonprofit organization governed by a Board of Directors comprised of an equal number of artist representatives and copyright owners. *See* Kessler WDT at 2. Over the years of its service as the Collective, SoundExchange has gained knowledge and experience and has developed efficient systems for achieving the goals of the Collective at a reasonable cost to those entitled to the royalties. *See id.* at 4. In the absence of any request or suggestion to the contrary, the Judges designate SoundExchange as the Collective for the 2011–2015 license period.

2. Stipulated Terms and Technical and Conforming Changes

SoundExchange and Live365 stipulated to certain terms in the Proposed Regulations appearing as an attachment to the Second Revised Proposed Rates and Terms of SoundExchange, Inc., filed July 23, 2010. They stipulated that some of the current provisions of the webcasting terms remain unchanged, that some provisions be removed or changed because the terms were applicable only to the 2006–2010 license period, and that some provisions be changed to reflect the terms of the NAB/SoundExchange and CBI/SoundExchange agreements.

The Judges find that the stipulated terms constitute for the most part technical and non-controversial changes that will add to the clarity of the applicable regulations. The Judges, therefore, adopt the terms proposed jointly by SoundExchange and Live365. In addition, the Judges adopt what they deem to be technical and conforming changes to the regulations proposed by SoundExchange, and not opposed by any party, in Section IV of their Second Revised Rates and Terms, filed July 23, 2010.

3. Electronic Signature on Statement of Account

SoundExchange proposed eliminating the requirement of a handwritten signature on the statement of account found in section 380.4(f)(3). SX PFF at ¶ 576. According to SoundExchange, allowing electronic signatures would make it easier for licensees to submit their statements of account. *Id., citing* Funn WRT at 3 n.1. Live365's proposed regulations would also eliminate the requirement for a handwritten signature on the statement of account. *See* Attachment to PFF, Proposed Regulations, § 380.4(f)(3).

The Judges find that this uncontested term would improve the ease and efficiency with which statements of account may be processed electronically. In addition, they find the change to be consonant with the public policy preference expressed by Congress in adopting the E–SIGN Act, Public Law 106–229, 114 Stat. 464 (June 30, 2000), which established a general rule upholding the validity of electronic signatures in interstate and foreign commerce.

The Judges note that the terms they adopted with regard to other categories of licensees did not eliminate the extant requirement for a handwritten signature on statements of account. *See, e.g.,* 37 CFR 380.13(f)(3) (for Broadcasters); 380.23(f)(4) (for Noncommercial Educational Webcasters). The signatories to the Agreements incorporating the handwritten signature requirement did not participate in the hearing, however, and did not request a change in the signature requirement in this proceeding. Given the advance of technology, the Judges anticipate such requests in the forthcoming rulemaking proceeding. *See* note 66, *infra.*

The adopted terms are included in the appended regulatory language.

B. Contested Terms for Commercial Webcasters

1. Terms Proposed by Live365

Live365 proposed changes to the definitions of two terms in section 380.2: ''performance'' and ''aggregate tuning hours.''[63] Live365 PFF at ¶ 387 and PCL at ¶ 79. Specifically, Live365 proposed to modify the definition of ''performance'' to ''exclude[ ] any performances of sound recording that are not more than thirty (30) consecutive seconds.'' Live365 PFF at ¶ 387. Live365 suggested this modification would conform the definition of ''performance'' in section 380.2 to that of a ''performance'' or ''play'' defined in the four interactive service agreements reviewed by Dr. Pelcovits. *Id.* Live365 also contended that precedent has excluded partial performances from ''royalty-bearing'' performances, citing *Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket Nos.*

establishing the $500 fee, and found that the evidence supported their willingness and ability to pay it.

[63] In the proposed regulations attached to its proposed findings of fact, Live365 included an additional term: A proposed deadline for the completion and issuance of a report regarding an audit to verify royalty payments. *See* Attachment to Live365's Proposed Findings of Fact and Conclusions of Law, § 380.6(g). Live365 did not discuss this proposal in its proposed findings and conclusions, and Live365 presented no evidence to support the need for such a term. The Judges consider the proposal withdrawn.

2002–1 CARP DTRA3 & 2001–2 CARP DTNSRA, 68 FR 27506, 09 (May 20, 2003).

Live365's proposal regarding the definition of ''aggregate tuning hours'' sought to exclude programming that does not contain recorded music, *e.g.,* talk, sports, and advertising not containing music. Live365 PCL at ¶ 79. Live365 asserted ''programming without sound recordings should not be subject to consideration in regulations dealing with a royalty to be paid for the use of sound recordings.'' *Id.*

SoundExchange opposed both of the Live365 proposed modifications. SoundExchange contended that these proposed modifications would constitute new terms, not revisions to a rate proposal, which SoundExchange asserted may be revised, under section 351.4(b)(3), at any time up to and including submission of proposed findings of fact.[64] SX Reply Findings of Fact at ¶ 223 (hereinafter, RFF).

SoundExchange asserted that Live365's citation to interactive service agreements without more did not provide sufficient analysis and was insufficient to show the need for or benefit of the requested redefinition of ''performance.'' *Id.* at ¶¶ 226–228. SoundExchange pointed to Live365's failure to consider the potential effect of its definition of ''performance'' on the per-performance rate presented by Drs. Pelcovits and Fratrik. *Id.* at ¶ 230. SoundExchange contended that if the Live365 performance exclusion proposal were adopted, SoundExchange would require an upward adjustment to the per-performance rate.[65] *Id.*

With regard to the request to redefine ''aggregate tuning hours,'' SoundExchange argued that Live365 failed to point to anything in the record explaining, much less supporting, the need for the proposed change. *Id.* at ¶¶ 231–232. Live365 offered no evidence or analysis regarding the development of a performance rate based on the current definition of ''aggregate tuning hours.'' The parties developed their evidence regarding the proposed performance royalty rates using the existing definition.

Live365 has not met its burden regarding adoption of these terms. The Judges, therefore, decline to adopt either of Live365's proposed definitions.

[64] The Judges need not address this argument as they decline to adopt the proposal on other grounds.

[65] According to SoundExchange, the upward adjustment would result from a reduction in the number of plays in the calculation of a per-performance rate. SX RFF at ¶ 230.

2. Terms Proposed by SoundExchange

SoundExchange proposed several terms relating to the Webcasters' royalties at issue in this proceeding.[66] The terms proposed by SoundExchange follow.

a. Server Log Retention

SoundExchange urged the Judges expressly to include server logs as records to be retained pursuant to section 380.4(h). *See* Second Revised Rates and Terms of SoundExchange, Inc., Section III.A., Proposed Regulations, § 380.4(h) (July 23, 2010); Kessler Corrected WDT at 27. SoundExchange asserted that retention of these records is required under the current regulations, but requested this amendment because not all licensees retain server logs. SX PFF at ¶¶ 556–57; Kessler Corrected WDT at 27. SoundExchange asserted that ''[t]he evidence indicates marketplace acceptance of such a term,'' citing to the CBI/SoundExchange Agreement which contains an equivalent term. SX PFF at ¶ 555.

In its opposition to this term, Live365 noted that neither the NAB/SoundExchange Agreement nor the Commercial Webcasters Agreement contained this term nor do any of the interactive service agreements submitted in this proceeding. Live365 RFF at ¶ 555. Live365 further argued that SoundExchange failed to establish that the benefits to SoundExchange of this term outweigh the burden on licensees to comply. *Id.* at ¶ 557.

The Judges find that SoundExchange has failed to meet its evidentiary burden. None of the interactive agreements in evidence is as specific as the regulation SoundExchange proposes. Live365 Exs. 17 and 18; McCrady WDT, Exs. 104–DR & 106–DR. Rather, the agreements require licensees only to retain records relating to their obligations under the agreement and in terms no more specific than in the current regulation. *See, e.g.,* Live365 Exs. 17 at ¶ 7(h) and Ex. 18 at ¶ 7(h); McCrady WDT, Exs. 104–DR at ¶ 6(j) and 106–DR at ¶ 4(h). Since these agreements were negotiated in a setting free from the constraints of the regulatory scheme, they provide the best evidence of the agreement of a willing buyer and a willing seller in this respect.

[66] On October 21, 2013, during the pendency of this remand proceeding, SoundExchange filed a petition for rulemaking seeking changes to the CRB Notice and Recordkeeping regulations. In the petition, SoundExchange proposes changes to: (i) Standardize, consolidate, identify, and match reports to facilitate distribution of royalties; (ii) conform report formatting of electronic reports, including adoption of electronic signatures; (iii) require use of the International Standard Recording Code or another unambiguous identifier of tracks actually transmitted; (iv) require reports to include all performances transmitted by a licensee, even though some may not be subject to the statutory license; (v) address late or missing Reports of Use by shortening the reporting period, imposing late fees, and allowing proxy distributions; (vi) set time limits for submission of corrected or amended Reports of Use; (vii) require licensees to retain source documents for the data reported on the Reports of Use; and (viii) implement several regulatory changes denominated by SoundExchange as ''housekeeping.''

SoundExchange's assertion that inclusion of this term in the CBI/SoundExchange Agreement constitutes ''marketplace acceptance'' is overbroad. As SoundExchange acknowledged, the parties reached agreement under atypical marketplace conditions, overshadowed by the possibility of a regulatory proceeding. *See* 9/30/10 Tr. at 547–48 (SoundExchange Closing Argument). Furthermore, while the CBI/SoundExchange Agreement contains the term, the NAB/SoundExchange and Sirius XM Agreements do not, thus undercutting the thrust of the SoundExchange argument.

SoundExchange failed to note, let alone balance, the burden on licensees against the likely benefits from the proposed change. The Judges are loathe to adopt a term without such evidence. The Judges decline to amend § 380.4(h) to specify server logs.

b. Standardized Forms for Statements of Account

SoundExchange proposed to require licensees to submit statements of account on a standardized form prescribed by SoundExchange. SoundExchange asserted that a standard form would simplify licensees' calculations of the royalties owed and facilitate SoundExchange's efficient collection of information from licensees. SX PFF at ¶¶ 572, 575. At the time of hearing in this proceeding, SoundExchange provided a template statement of account on its Web site. *Id.* at ¶ 574. SoundExchange noted that noncommercial educational webcasters are required pursuant to their WSA agreement to use a form supplied by SoundExchange. McCrady WDT, Ex. 103–DP at section 4.4.1.

Live365 opposed adoption of this term because it would have general application, thus affecting parties that did not participate in this proceeding. Live365 asserted that a change with such an impact is addressed more appropriately in a rulemaking proceeding. Live365 RFF at ¶ 574.

The Judges do not find support in the record for adoption of a mandatory standardized statement of account. As Mr. Funn testified, the majority of webcasters currently use the template form made available on SoundExchange's Web site. Funn WRT at 2; 8/2/10 Tr. at 492 (Funn) (''much more than half'' of webcasters currently use template). Mr. Funn provided no information quantifying the additional work for SoundExchange to process a nonconforming statement of account from the webcasters that choose not to use the template. Further, neither the NAB/SoundExchange Agreement nor the Sirius XM/SoundExchange Agreement contains this term. McCrady WDT, Exs. 101–DP and 102–DP.

Given the already widespread use of SoundExchange's template form, the lack of quantification in the record of the time savings to SoundExchange by having a standardized form, and SoundExchange's failure to include this term in the NAB/SoundExchange and Sirius XM/SoundExchange Agreements, the Judges find that the record does not support the adoption of this term.

c. Identification of Licensees and Late Fee for Reports of Use

SoundExchange requested that the Judges harmonize identification of licensees among the (i) notice of intent to use licenses under sections 112 and 114, (ii) statements of account, and (iii) reports of use, and to impose a late fee for reports of use. These two requests differ from the rest of the SoundExchange requests in that these are notice and recordkeeping terms.[67] Ms. Kessler acknowledges, at least with respect to the late fees for reports of use, that they could be implemented either in the notice and recordkeeping regulations or in the license terms. *See* Kessler WDT at 20–23, 27–28. The Judges decline to adopt SoundExchange's proposals regarding the harmonization of licensee identification and the imposition of a late fee for reports of use. The evidence does not compel amendment of the current recordkeeping regulations; rather, these issues are more appropriately addressed in a future rulemaking proceeding.

(1) Identification of Licensees

SoundExchange asserted that harmonization of the identification of licensees can be accomplished by (i) requiring licensees to identify themselves on their statements of account and reports of use ''in exactly the same way [they are] identified on the corresponding notice of use . . . and that they cover the same scope of activity (*e.g.,* the same channels or stations),'' SX PFF at ¶ 568, Kessler WDT at 28; (ii) making the regulations clear that the ''Licensee'' is ''the *entity* identified on the notice of use, statement of account, and report of use and that each Licensee must submit its own notice of use, statement of account, and report of use,'' *id.* (emphasis in original); and (iii) requiring licensees to use an account number issued by SoundExchange. *Id.* at ¶ 571. Ms. Kessler testified that these proposals would allow SoundExchange to match to the requisite notice of use, statement of account, and report of use to the correct licensee more quickly and efficiently. Kessler WDT at 29; 4/20/10 Tr. at 461 (Kessler). She also claimed that, for ''little or no evident cost'' to licensees, their accounting and reporting efforts would be simplified by use of an account number. Kessler WDT at 29. SoundExchange also asserted that these proposals are included in the NAB/SoundExchange and CBI/SoundExchange Agreements. SX PFF at ¶ 569. In fact, neither Agreement requires use of an account number.

Live365 did not controvert SoundExchange's proposed findings of fact relating to the identification issue, nor did it stipulate to the proposed term. As the term is not agreed, the Judges treat it as a litigated term. SoundExchange's witness asserted, without evidence, that the cost to licensees of conforming their reports and using an assigned account number would be minimal. Kessler WDT at 29.

Conformity of reporting and use of an account number system, however, is not a feature of the WSA Agreements in evidence. McCrady WDT, Exs. 101–DP (NAB), 102–DP (Commercial Webcasters) and 103–DP (CBI). The CBI/SoundExchange Agreement requires that statements of account list the licensee's name as it appears on the notice of use, *see* § 380.23(f)(1), but it does not impose that requirement on reports of use. *Compare* McCrady Ex. 103–DP, section 5.2.2 *with* § 380.23(g).

If adopted in this proceeding, therefore, SoundExchange's proposal would create an inconsistency within the webcasting regulations. The Judges decline to adopt this proposal, but find that the issue would be more appropriately addressed in a future rulemaking proceeding.

(2) Late Fee for Reports of Use

SoundExchange sought imposition of a late fee of 1.5% for reports of use. The regulations currently require a late fee for untimely payments and statements of account. *See* 37 CFR 380.4(c). In support of this request, Ms. Kessler testified that there was widespread noncompliance with reporting requirements. She cited failure to file reports of use as well as late or ''grossly inadequate'' reports. Kessler WDT at 28. Ms. Kessler testified that noncompliance with the report of use and payment requirements significantly hamper SoundExchange's ability to make timely royalty distributions. Kessler WDT at 28; 4/20/10 Tr. at 458 (Kessler). SoundExchange also points to the inclusion of a late fee for untimely reports of use in the NAB/SoundExchange and CBI/SoundExchange Agreements as further support for its request. SX PFF at ¶ 564.

Live365 questioned SoundExchange's characterization of a payment as being useless without a report of use given that both the NAB/SoundExchange and CBI/SoundExchange Agreements contain reporting waivers. Live365 RCL at ¶ 20.

The Judges are not persuaded that a late fee for reports of use is necessary. None of the interactive agreements in evidence contains such a term. Live365 Exs. 17, 18; McCrady WDT, Exs.104–DR and 106–DR. Only the NAB/SoundExchange and CBI/SoundExchange Agreements contain the late fee; the parties did not include a late fee in the Sirius XM/SoundExchange Agreement.

SoundExchange failed to meet its burden with regard to this proposal; the Judges decline to adopt the proposed late fee terms.

C. Contested Terms for Noncommercial Webcasters

IBS proposed two new terms. The first is an exemption from the recordkeeping reporting requirements, or a permissive proxy fee *in lieu* of reporting, for noncommercial webcasters whose usage exceeds 15,914 ATH per month, but is less than 55,000 ATH per month. The second term proposed by IBS is an express authorization that SoundExchange ''may elect to accept collective payments on behalf of small and very small noncommercial webcasters.'' IBS PFF at ¶ 26.

The Judges decline to adopt IBS's proposed subcategories of noncommercial webcasters, rendering

[67] *See* n.66, *supra.* SoundExchange requested these same, or similar, changes in an earlier rulemaking, in which the Judges imposed census reporting for all services except those broadcasters paying no more than the minimum fee. *See* Comments of SoundExchange, Docket No. RM 2008–7, at 20–23 (Jan. 29, 2009). The requests were outside the scope of that rulemaking, which was to improve the reporting regulations in light of technological developments since promulgation of the interim regulation. The Judges deferred SoundExchange's requests for consideration in a future rulemaking. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License (Final rule),* 74 FR 52418, 52422–23 (Oct. 13, 2009).

moot their proposed exception from reporting for small and very small noncommercial webcasters. Their proposal to create an *ad hoc* subcategory of noncommercial webcasters whose usage falls between 15,914 and 55,000 ATH suffers from the same defects as their proposal to create formal categories for small and very small noncommercial webcasters. IBS presented no evidence to support differential treatment for webcasters falling in this *ad hoc* subcategory. While there was evidence regarding the appropriateness and desirability of a proxy fee for *educational* noncommercial webcasters, there was no evidence presented by any party that the same is true for noncommercial webcasters other than educational webcasters (who may already take advantage of the CBI/SoundExchange Agreement).

The Judges decline to adopt IBS's second proposal. As the Judges do not recognize IBS's proposed subcategories, the second proposal is rendered moot.

VII. Determination and Order

Having fully considered the record, the Copyright Royalty Judges make the above Findings of Fact and Determination based on the record. The Judges issue the foregoing as a Final Determination. The Register of Copyrights may review the Judges' Final Determination for legal error in resolving a material issue of substantive copyright law. The Librarian shall cause the Judges' Final Determination, and any correction thereto by the Register, to be published in the **Federal Register** no later than the conclusion of the 60-day review period.

So ordered.

Dated: February 12, 2014.

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

David R. Strickler,
Copyright Royalty Judge.

Jesse M. Feder,
Copyright Royalty Judge.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulations

■ In consideration of the foregoing, the Copyright Royalty Judges revise part 380 of title 37 of the Code of Federal Regulations to read as follows:

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Subpart A—Commercial Webcasters and Noncommercial Webcasters

Sec.

Subpart B—Broadcasters

Sec.

Subpart C—Noncommercial Educational Webcasters

Sec.

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

Subpart A—Commercial Webcasters and Noncommercial Webcasters

§ 380.1 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees as set forth in this subpart in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

Broadcaster is a type of Licensee that owns and operates a terrestrial AM or FM radio station that is licensed by the Federal Communications Commission.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Commercial Webcaster is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

Ephemeral Recording is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114, and subject to the limitations specified in 17 U.S.C. 112(e).

Licensee is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h) of this chapter, or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions, but that is not—

(1) A Broadcaster as defined in § 380.11; or

(2) A Noncommercial Educational Webcaster as defined in § 380.21.

Noncommercial Webcaster is a Licensee that makes eligible digital audio transmissions and:

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Side Channel is a channel on the Web site of a Broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the Broadcaster.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112(e) are as follows:

(1) *Commercial Webcasters.* For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Commercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(2) *Noncommercial Webcasters.* (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of $500 in 2011, 2012, 2013, 2014, and 2015.

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, and related Ephemeral Recordings, a Noncommercial Webcaster will pay a royalty of: $0.0019 per performance for 2011; $0.0021 per performance for 2012; $0.0021 per performance for 2013; $0.0023 per performance for 2014; and $0.0023 per performance for 2015.

(b) *Minimum fee*—(1) *Commercial Webcasters.* Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011–2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Commercial Webcasters, provided that a Commercial Webcaster shall not be required to pay more than $50,000 per calendar year in minimum fees in the aggregate (for 100 or more channels or stations). For each such Commercial Webcaster, the annual minimum fee described in this paragraph (b)(1) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(2) *Noncommercial Webcasters.* Each Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the period 2011–2015 during which it is a Licensee pursuant to 17 U.S.C. 112(e) or 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Noncommercial Webcasters, and is also payable for each individual Side Channel maintained by Broadcasters who are Noncommercial Webcasters. For each such Noncommercial Webcaster, the annual minimum fee described in this paragraph (b)(2) shall constitute the minimum fees due under both 17 U.S.C. 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

(c) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 on a monthly basis on or before the 45th day after the end of each month for that month. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the related statement of account are received by the Collective.

(f) *Statements of account.* Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.4 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with § 380.8.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.5 Confidential Information.

(a) *Definition.* For purposes of this subpart, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties

during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart B—Broadcasters

§ 380.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Broadcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§ 380.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours means the total hours of programming that the Broadcaster has transmitted during the relevant period to all listeners within the United States from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.

Broadcaster means an entity that:

(1) Has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission;

(2) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(3) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and

(4) Is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

Broadcaster Webcasts mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are not Broadcast Retransmissions.

Broadcast Retransmissions mean eligible nonsubscription transmissions made by a Broadcaster over the Internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an Internet-only side channel.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events, and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

Small Broadcaster is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.12(c)) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria:

(1) During the prior year it made Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; and

(2) During the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; provided that, one time during the period 2011–2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding paragraph (1) of the definition of ''Small Broadcaster'' if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

§ 380.12 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty rates.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in § 380.13(g)(3), be payable on a per-performance basis, as follows:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(b) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting as set forth in § 380.3.

(c) *Minimum fee.* Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2011–2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For the purpose of this subpart, each individual stream (*e.g.,* HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the ''Proxy Fee'') to the Collective for the reporting waiver discussed in § 380.13(g)(2).

§ 380.13 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Broadcaster shall make the royalty payments due under § 380.12 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Broadcasters due under § 380.12 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) and 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments and reporting.* Broadcasters must make monthly payments where required by § 380.12, and provide statements of account and reports of use, for each month on the 45th day following the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Broadcaster shall make any minimum payment due under § 380.12(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) *Late fees.* A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.12 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Broadcasters in General.* (1) Broadcasters other than electing Small Broadcasters covered by paragraph (g)(2) of this section shall submit reports of use on a per-performance basis in compliance with the regulations set forth in part 370 of this chapter, except that the following provisions shall apply notwithstanding the provisions of such part 370 of this chapter from time to time in effect:

(i) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in paragraph (g)(3) of this section.

(ii) Broadcasters shall submit reports of use to the Collective on a monthly basis.

(iii) As provided in paragraph (d) of this section, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(iv) Except as provided in paragraph (g)(3) of this section, Broadcasters shall submit reports of use to the Collective on a census reporting basis (*i.e.,* reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(v) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis;

(vi) Broadcasters shall transmit each report of use in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the report covers a single station only, the call letters of the station.

(vii) Broadcasters shall submit reports of use with headers, as presently described in § 370.4(e)(7) of this chapter.

(viii) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes:

(A) The name of the Broadcaster, exactly as it appears on its notice of use, and

(B) If the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations. Small Broadcasters that have made an election pursuant to paragraph (h) of this section for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to paragraph (g)(1) of this section may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if:

(i) Census reporting is not reasonably practical for the programming during those hours, and

(ii) If the total number of hours on a single report of use, provided pursuant to paragraph (g)(1) of this section, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

(A) 2011: 16%;

(B) 2012: 14%;

(C) 2013: 12%;

(D) 2014: 10%;

(E) 2015: 8%.

(iii) To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to paragraph (g)(3) of this section, the Broadcaster shall

(A) Report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour;

(B) Pay royalties (or recoup minimum fees) at the per-performance rates provided in § 380.12 on the basis of paragraph (g)(3)(iii)(A) of this section;

(C) Include Aggregate Tuning Hours in reports of use; and

(D) Include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) *Election of Small Broadcaster Status.* To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.11 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Broadcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon information provided under the report of use requirements for Broadcasters contained in § 370.4 of this chapter and this subpart, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Broadcaster, such distribution may be first applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(j) *Retention of records.* Books and records of a Broadcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.14 Confidential Information.

(a) *Definition.* For purposes of this subpart, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the

Collective with respect to verification of a Broadcaster's statement of account pursuant to § 380.15 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.16;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but not less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.15 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Broadcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Broadcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Broadcaster, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Broadcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual error or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.16 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Subpart C—Noncommercial Educational Webcasters

§ 380.20 General.

(a) *Scope.* This subpart establishes rates and terms, including requirements for royalty payments, recordkeeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) *Legal compliance.* Noncommercial Educational Webcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this subpart to transmissions within the scope of such agreements.

§ 380.21 Definitions.

For purposes of this subpart, the following definitions shall apply:

ATH or Aggregate Tuning Hours means the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011–2015 license period, the Collective is SoundExchange, Inc.

Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Eligible Transmission means an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

Noncommercial Educational Webcaster means Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that:

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution; and

(4) Is not a ''public broadcasting entity'' (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (*e.g.,* the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (*e.g.,* a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Noncommercial Educational Webcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings, including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

Qualified Auditor is a Certified Public Accountant.

§ 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Minimum fee.* Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of $500 (the ''Minimum Fee'') for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (*e.g.,* HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a $100 annual fee (the ''Proxy Fee'') to the Collective.

(b) *Additional usage fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (''Usage Fees'') for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

(1) 2011: $0.0017;

(2) 2012: $0.0020;

(3) 2013: $0.0022;

(4) 2014: $0.0023;

(5) 2015: $0.0025.

(6) For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay its Usage Fees at the per-performance rates provided in paragraphs (b)(1) through (5) of this section based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per-channel or -station basis.

(c) *Ephemeral royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered by this subpart is deemed to be included within the royalty payments set forth in paragraphs (a) and (b)(1) through (5) of this section and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting in § 380.3.

§ 380.23 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Noncommercial Educational Webcaster shall make the royalty payments due under § 380.22 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Noncommercial Educational Webcasters due under § 380.22 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc., should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31st of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. Payments of minimum fees must be accompanied by a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by the Collective, that the Noncommercial Educational Webcaster:

(1) Qualifies as a Noncommercial Educational Webcaster for the relevant year; and

(2) Did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

(d) *Usage fees.* In addition to its obligations pursuant to paragraph (c) of this section, a Noncommercial Educational Webcaster must make monthly payments of Usage Fees where required by § 380.22(b), and provide statements of account to accompany these payments, for each month on the 45th day following the month in which the Eligible Transmissions subject to the Usage Fees and statements of account were made. All monthly payments shall be rounded to the nearest cent.

(e) *Late fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with the applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly for the balance due, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully compliant payment, statement of account or report of use (as applicable) is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) *Statements of account.* Any payment due under § 380.22 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) The name of the Noncommercial Educational Webcaster, exactly as it appears on the notice of use, and if the statement of account covers a single station only, the call letters or name of the station;

(2) Such information as is necessary to calculate the accompanying royalty payment as prescribed in this subpart;

(3) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(4) The handwritten signature of an officer or another duly authorized faculty member or administrator of the applicable educational institution;

(5) The printed or typewritten name of the person signing the statement of account;

(6) The date of signature;

(7) The title or official position held by the person signing the statement of account;

(8) A certification of the capacity of the person signing; and

(9) A statement to the following effect:

I, the undersigned officer or other duly authorized faculty member or administrator of the applicable educational institution, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Reporting by Noncommercial Educational Webcasters in general*—(1) *Reporting waiver.* In light of the unique business and operational circumstances currently existing with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of $100 in lieu of providing reports of use for the calendar year pursuant to the regulations at § 370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this paragraph (g)(1) during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

(2) *Sample-basis reports.* A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to provide reports of use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at § 370.4 of this chapter, except that, notwithstanding § 370.4(d)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency. Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These reports of use shall be submitted to the Collective no later than January 31st of the year immediately following the year to which they pertain.

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to this paragraph (g)(3):

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraphs (g)(1) or (2) of this section. A Noncommercial Educational Webcaster required to report pursuant to paragraph (g)(3) of this section shall provide reports of use to the Collective quarterly on a census reporting basis (*i.e.,* reports of use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by § 370.4 of this chapter), except that, notwithstanding § 370.4(d)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with paragraph (g)(3) of this section. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with paragraph (g)(3) of this section for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under paragraph (g)(3) of this section shall be submitted to the Collective no later than the 45th day after the end of each calendar quarter.

(h) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Noncommercial Educational Webcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Noncommercial Educational Webcaster equally based upon the information provided under the report of use requirements for Noncommercial Educational Webcasters contained in § 370.4 of this chapter and this subpart, except that in the case of Noncommercial Educational Webcasters that elect to pay a Proxy Fee in lieu of providing reports of use pursuant to paragraph (g)(1) of this section, the Collective shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (h)(1) of this section within 3 years from the date of payment by a Noncommercial Educational Webcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(i) *Server logs.* Noncommercial Educational Webcasters shall retain for a period of no less than three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting under this subpart. To the extent that a third-party Web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of no less than three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

(ii) [Reserved]

§ 380.24 Confidential Information.

(a) *Definition.* For purposes of this subpart, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of Usage Fees paid, and any information pertaining to the statements of account reasonably designated as confidential by the Noncommercial Educational Webcaster submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to Confidential Information;

(2) An independent Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Noncommercial Educational Webcaster's statement of account pursuant to § 380.25 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.26;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Noncommercial Educational Webcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.25 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Noncommercial Educational Webcaster.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Noncommercial Educational Webcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Noncommercial Educational Webcaster, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Noncommercial Educational Webcaster to be audited. Any such audit shall be conducted by an independent Qualified Auditor identified in the notice and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Noncommercial Educational Webcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Noncommercial Educational Webcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Noncommercial Educational Webcaster reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Noncommercial Educational Webcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.26 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.27 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Dated: February 12, 2014.

Suzanne M. Barnett,

Chief Copyright Royalty Judge.

Approved By:

James H. Billington,

Librarian of Congress.

[FR Doc. 2014–08664 Filed 4–24–14; 8:45 am]

BILLING CODE P

UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

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)**

NOTICE OF PARTICIPANTS, COMMENCEMENT OF VOLUNTARY NEGOTIATION PERIOD, AND CASE SCHEDULING ORDER

By notice published in the *Federal Register* on January 3, 2013, the Copyright Royalty Judges (Judges) initiated this rate proceeding to determine terms and rates for licensees making ephemeral recordings and digital performances of sound recordings. Title 8 of the Copyright Act (Act) and the procedural regulations adopted by the Judges and codified in Chapter III of title 37 of the Code of Federal Regulations (Rules) govern royalty rate proceedings. This scheduling order details the Judges' expectations regarding compliance with the Act and the Rules. The specific schedule dates are set forth on "Exhibit A" to this Notice and Order.

Participation in the Proceeding

Participation in this proceeding is limited to parties in interest who filed a timely Petition to Participate. Attached to this Notice and Order as "Exhibit B" is a list of participants that filed timely Petitions to Participate.

Voluntary Negotiation Period

All participants shall engage directly or by counsel in good faith settlement negotiations aimed at resolving controversies regarding the terms and rates for payment of royalty fees for the years at issue in this proceeding. In addition to all aspects of terms and rates for payment, the negotiations shall address expressly issues relating to categories of licensees, the rate structure, fees, minimum fees, and terms of recordkeeping and reporting.

Five days after the end of the Voluntary Negotiation Period, the participants shall file a Notice of Settlement, only if some or all participants have agreed on the applicable royalty rates for both the ephemeral recording and the digital performance of sound recordings, the category or categories of licensees liable for those rates, a minimum fee, and recordkeeping and reporting requirements for each category of licensee[1]. The Judges will issue an Order for Further Proceedings for all parties not reporting a settlement. Nothing in this Notice and Order or the Order for Further Proceedings limits parties' ability to continue negotiations and reach a settlement of their differences at any time during the course of the proceeding.

Pre-Hearing Procedures

On or before the date noted on Exhibit A to this Notice and Order, any participant having or asserting an issue in controversy shall file its Written Direct Statement and deliver a copy to *all* other remaining participants, whether or not the receiving party believes it has a controversy with a given participant. On or before the date set in Exhibit A to this Notice and Order, each participant may file its Amended Written Direct Statement. The participants shall not further amend their respective Written Direct Statements after the date set in this Notice and Order.

After receiving the participants' Joint Settlement Conference Report, the Judges will proceed to hearing. Approximately 15 days prior to a scheduled hearing, the Judges will facilitate a pre-hearing conference, or telephone conference, to discuss, *inter alia,* issues remaining for evidentiary hearing, order of presentation, exhibit numbering and presentation, scheduling concerns, disabilities to accommodate, or any other matter that might affect conduct of the hearing. Participants in the pre-hearing conference shall have knowledge of the issues and of the availability of all counsel and witnesses.

Not less than ten days prior to the date set for a hearing, all participants shall file and deliver to all other participants a list of witnesses the participant intends to call and a list of exhibits the participant intends to offer into evidence. The witness list shall include the witness's name, contact information, a brief statement of the substance of the witness's testimony, and an estimate of the time required for direct examination of the witness. The exhibit list shall include the exhibit's unique number, the title or a description of the exhibit, and whether the exhibit or any part of it is "restricted" under the terms of any protective order.

Not less than five days prior to the date set for a hearing, the participants shall deliver to the Judges and to (or as directed by) all other participants copies of all exhibits listed on the exhibit list, tabbed in the same order and with the same number as on the exhibit list.

At any time up to and including during the course of a hearing, the participants shall notify the Judges as soon as practicable if the participants, or any of them, reach an accommodation that obviates the need for further participation in the proceeding.

Evidentiary Hearing(s)

The case schedule appended as "Exhibit A" denotes the order of proceedings and the timeline for the proceedings based upon the Judges' interpretation of the requirements of the Act and the Rules. The case schedule provides for a written direct statement, discovery, an amended written direct statement, a settlement conference, a hearing of the direct case, a period to prepare

[1] Parties may notify the Judges of a settlement "in principle," but the Judges expect all parties to follow the case schedule until all terms of their settlement are documented and presented for publication, comment, and approval.

a written rebuttal statement, filing and delivery of a written rebuttal statement[2], a hearing on the rebuttal case, a delay, and closing argument of counsel. Parties are accustomed to this timeline and the Judges do not intend to change the case schedule *sua sponte*. If all participants agree, however, and make a joint motion for alteration of the case schedule, for example to unify the hearings, or the hearings and closing argument, the Judges will consider and weigh the parties' proposal under their inherent authority to manage the proceedings and the explicit authority granted by section 801(c) of the Act[3].

In any event, the 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.

Order

The Judges hereby ORDER that all participants adhere to the case schedule attached to this Notice and Order as "Exhibit A" and refer to the foregoing narrative as needed for interpretation of the schedule. At any time, a participant may file a motion stating good cause to vary the schedule, within the dictates of the statute. A party making a motion to vary the schedule shall deliver copies to all other participants to permit an opportunity for response. The Judges may sanction any participant that fails to follow the schedule or, if in doubt, to seek clarification of the schedule and its requirements.

IT IS SO ORDERED.

Suzanne M. Barnett
Chief Copyright Royalty Judge

DATED: February 19, 2014

[2] Under section 803(b)(6)(C), the Judges, upon consideration of the views of participants, may adopt an additional discovery period after participants file written rebuttal statements.
[3] Section 801(c) provides that the Judges "may make any necessary procedural or evidentiary rulings in any proceeding under this chapter [8]…."

EXHIBIT A
Rates and Terms Determination

Case event	**Date**
Initiation (publication in FR)	January 3, 2014
Deadline for petition to participate	February 3, 2014
Commencement of Voluntary Negotiation Period	February 21, 2014
End of Voluntary Negotiation Period	May 22, 2014
Parties' Notice of Settlement	May 29, 2014
Publication in Federal Register for Comment	June 9, 2014
Deadline for Comments	July 8, 2014
Publication of Revised Regulations reflecting settlement	August 7, 2014
IF PARTIES DO NOT SETTLE or if the Judges decline to adopt the settlement	
Order for Further Proceedings	June 5, 2014
Parties file Written Direct Statements Commencement of Discovery Period	October 6, 2014
End of Discovery Period	December 5, 2014
Deadline to file Amended Written Direct Statement Commencement of Settlement Conference Period	December 22, 2014
End of Settlement Conference Period	January 12, 2015
Deadline for Joint Settlement Conference Report	January 19, 2015
IF PARTIES DO NOT SETTLE	
Initial Hearing[4]	commencing on March 23, 2015
Deadline to file Written Rebuttal Statement[5]	May 7, 2015
Rebuttal Hearing	commencing on May 26, 2015
Closing Argument	June 25, 2015
Initial Determination	not later than December 15, 2015

[4] During this interval, the Judges may schedule a prehearing conference. *See* 37 C.F.R. § 351.8.
[5] *See supra* n.2.

EXHIBIT B

[List of participants and counsel]

Service List Docket No.14-CRB-0001-WR (2016-2020)

Determination of Royalty Rates for Digital Performance in
Sound Recordings and Ephemeral Recordings (WebIV)

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

Last updated February 19, 2014

Service List Docket No.14-CRB-0001-WR (2016-2020)

Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
Sound Exchange (SX)	Glen Pomerantz Kelly Klaus Anjan Choundhury	Munger, Tolles & Olson LLP	355 S. Grand Avenue, 35th Floor Los Angeles, CA 90071-1560 Glenn.Pomerantz@mto.com Kelly.Klaus@mto.com Anjan.Choudhury@mto.com	P:213-683-9100 F:213-687-3702
	C.Colin Rushing Bradley Prendergast		SoundExchange, Inc. 733 10th Street, NW, 10th Floor Washington, DC 20001 crushing@soundexchange.com bpendergast@soundexchange.com	P: 202-640-5858 F: 202-640-5883

Last updated February 19, 2014

Service List Docket No.14-CRB-0001-WR (2016-2020)

Determination of Royalty Rates for Digital Performance in
Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
Clear Channel Communications, Inc.	Mark Hansen	Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.	1615 M Street, NW, Suite 400 Washington, DC 20036 Mhansen@khhte.com Janet Malloy Link Clear Channel Communications, Inc. 75 Rockefeller Plaza, 23rd Floor New York, NY 10018 JanetLink@clearchannel.com	P: 202-326-7900 F: 202-326-7999 P: 210-832-3318 F: 210-832-3122
College Broadcasters Inc. (CBI)	David Golden	Constatine Cannon LLP	1301 K Street, N.W., Suite 1050 East Washington, DC 20005 dgolden@constantinecannon.com Catherine Gellis P.O. Box 2477 Sausalito, CA 94966 cathy@cgcounsel.com	P:202-204-3500 F: 202-204-3501 P: 202-642-2849

Last updated February 19, 2014

Service List Docket No.14-CRB-0001-WR (2016-2020)

Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
Custom Channels.net, LLC	David Rahn		2569 Park Ln. Suite 104 Lafayette, CO 80026 dave@customchannels.net	P: 303-588-2824
Triton Digital, Inc.	Brendan Collins		15303 Ventura Blvd., Suite 1500 Los Angeles, CA 91403 brendan.colllins@tritondigital.com	P: 818-528-8867

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Determination of Royalty Rates for Digital Performance in
Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
National Religious Broadcasters NonCommercial Music License Committee (NRBNMLC)	Karyn Ablin Jennifer Elgin	Wiley Rein LLP	1776 K St. N.W. Washington, DC 20006 kablin@wileyrein.com jelgin@wileyrein.com Russ Hauth, Executive Director Harv Hendrickson, Chairman 3003 Snelling Avenue, North Saint Paul, MN 55113 russh@salem.com hphendrickson@unwsp.edu	P: 202-719-7000 F: 202-719-7049 P: 651-631-5000 F: 651-631-5086

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Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
National Association of Broadcasters (NAB)	Bruce Joseph Karyn Ablin Michael Sturm	Wiley Rein LLP	1776 K Street, NW Washington, DC 2006 bjoseph@wileyrein.com kablin@wileyrein.com msturm@wileyrein.com Jane Mago, Esq. Vice President and General Counsel 1771 N Street, NW Washington, DC 20036 jmago@nab.org	P: 202-719-7000 F: 202-719-7049 P: 202-429-5459 F: 202-775-3526

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Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
CMN, Inc.	Gary Greenstein	Wilson Sonsini Goodrich & Rosati	1700 K Street, N.W., 5th Floor Washington, DC 20006 ggreenstein@wsgr.com CMN, Inc. Nick Krawczyk, Chief Executive & Creative Officer 7201 Wisconsin Avenue, Suite 780 Bethesda, MD 20814 nick@crystalmedianetworks.com	P: 202-973-8849 F: 202-973-8899 P: 240-223-0846

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Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
8tracks, Inc.	Gary Greenstein	Wilson Sonsini Goodrich & Rosati	1700 K Street, N.W., 5th Floor Washington, DC 20006 ggreenstein@wsgr.com 8tracks, inc. David Porter, Chief Executive Officer 51 Sharon Street San Francisco, CA 94114 dp@8tracks.com	P: 202-973-8849 F: 202-973-8899 P: 415-948-4216
National Public Radio, inc. (NPR)	Denise Leary		1111 North Capital Street, NE Washington, DC 20002 dleary@npr.org	P: 202-513-3021
idobi Network LLC	Thomas Cheney		1941 Vermont Avenue NW Washington, DC 20001 tom@idobi.com	P: 202-297-6977

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Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
Spotify USA Inc.	James Duffett-Smith Jared Grusd		45W. 18th Street, 7th Floor New York, NY 10011 james@spotify.com jared@spotify.com	P: 917-565-3894 P: 917-207-3543
SomaFM.com LLC	Rusty Hodge		2180 Byrant Street, Suite 208 San Francisco, CA 94110 rusty@somafm.com	P: 415-552-7662
Digitally Imported Inc.	David Oxenford	Wilkinson Barker Knauer, LLP	2300 N Street, N.W., Suite 700 Washington, DC 20037 doxenford@wbklaw.com	P: 202-383-3337 F: 202-783-5851
	Ari Shohat		Digitally Imported, Inc. 3457 Ringsby Court, Suite 212 Denver, CO 80216 ari@di.fm	P: 303-997-2202 F: 303-997-1058

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Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
AccuRadio, LLC	David Oxenford	Wilkinson Barker Knauer, LLP	2300 N Street, N.W., Suite 700 Washington, DC 20037 doxenford@wbklaw.com	P: 202-383-3337 F: 202-783-5851
Educational Media Foundation	David Oxenford Kevin Blair Brian Gantman	Wilkinson Barker Knauer, LLP	2300 N Street, N.W., Suite 700 Washington, DC 20037 doxenford@wbklaw.com Educational Media Foundation 5700 West Oaks Boulevard Rocklin, CA 95765 kblair@kloveair1.com bgantman@kloveair1.com	P: 202-383-3337 F: 202-783-5851 P: 916-251-1600 F: 916-251-1731
Beats Music, LLC	Kenneth Steinthal Joseph Wetzel	King & Spaulding LLP	101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com	P: 415-318-1200 F: 415-318-1300

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Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
Amazon.com, Inc.	Kenneth Steinthal Joseph Wetzel	King & Spaulding LLP	101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com	P: 415-318-1200 F: 415-318-1300
Rhapsody International, Inc.	Kenneth Steinthal Joseph Wetzel	King & Spaulding LLP	101 Second Street, Suite 2300 San Francisco, CA 94105 ksteinthal@kslaw.com jwetzel@kslaw.com	P: 415-318-1200 F: 415-318-1300
Apple Inc.	Lisa Widup		1 Infinite Loop Cupertino, CA 95014 lwidup@apple.com	P: 408-974-4954 F: 408-974-9105
Digital Media Association (DiMA)	Lee Knife		1050 17th Street, N.W. Washington, DC 20036 lknife@digmedia.org	P: 202-639-9509 F: 202-639-9504

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Determination of Royalty Rates for Digital Performance in Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
Harvard Radio Broadcasting Co., Inc. (WHRB)	William Malone		9117 Vendome Drive West Bethesda, MD 20817 malone@ieee.org	P: 301-365-1175
National Music Publishers Association (NMPA)	David Israelite Danielle Aguirre		975 F Street, NW, Suite 375 Washington, DC 20004 disraelite@nmpa.org daguirre@nmpa.org	P: 202-393-6672 F: 202-393-6673
Music Reports, Inc.	William Colitre, Esq.		21122 Erwin St. Woodland Hills, CA 91367 Bcolitre@MusicReports.com	P: 818-558-1400 F: 818-558-3484
Intercollegiate Broadcasting System, Inc. (IBS)	William Malone		9117 Vendome Drive West Bethesda, MD 20817 malone@ieee.org	P: 301-365-1175

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Determination of Royalty Rates for Digital Performance in
Sound Recordings and Ephemeral Recordings (WebIV)

PARTY	CONTACT	FIRM	ADDRESS(ES)	TELEPHONE AND/OR FAX
GEO Music Group	George Johnson		23 Music Square East, Suite 204 Nashville, TN 37203 george@georgejohnson.com	P: 615-242-9999
Feed Media, Inc.	Gary Greenstein	Wilson Sonsini Goodrich & Rosati	1700 K Street, N.W., 5th Floor Washington, DC 20006 ggreenstein@wsgr.com	P: 202-973-8849 F: 202-973-8899
	Jeff Yasuda		3979 Freedom Circle, Suite 610 Santa Clara, CA 95054 jeff@feed.fm	P: 650-479-4881 F: 415-449-6947

(OMB) under Executive Order 12866 (Regulatory Planning and Review).

Executive Order 12988

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 (Civil Justice Reform) and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

OSM has determined and certifies pursuant to the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local, state, or tribal governments or private entities.

List of Subjects in 30 CFR Part 918

Intergovernmental relations, Surface mining, Underground mining.

Dated: April 28, 1997.

Brent Wahlquist,

Regional Director, Mid-Continent Regional Coordinating Center.

For the reasons set out in the preamble, 30 CFR Part 918 is amended as set forth below:

PART 918—LOUISIANA

1. The authority citation for Part 918 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 918.15 is amended in the table by adding a new entry in chronological order by ‘‘Date of final publication’’ to read as follows:

§ 918.15 Approval of Louisiana regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	* *	* * * *
October 24, 1997	May 8, 1998	Sections 105.; 2537.A.11.; 2725.A., A.2., A.3., A.3.a., C.1., F; 2907.C.5.; 3705.A.2., A.2a., A.2.b.; 3711.A., B.1. through B.6.; 3717.A., A.2., A.3.; 4501.A.3., A.4.; 5333.A.1. through A.13.; 5411.A.; 5413.A.; 5503.A.2.; 5507.A.4.; 6507.A.2.; 6913 .B.; 6915.B.1.; 6917.A.; 7105.C.

[FR Doc. 98–12249 Filed 5–7–98; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 260

[Docket No. 96–5 CARP DSTRA]

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon recommendation of the Register of Copyrights, is announcing the determination of the reasonable rates and terms for the compulsory license permitting certain digital performances of sound recordings.

EFFECTIVE DATE: May 8, 1998.

ADDRESS(ES): The full text of the public version of the Copyright Arbitration Royalty Panel's report to the Librarian of Congress is available for inspection and copying during normal working hours in the Office of the General Counsel, James Madison Building, Room LM–403, First and Independence Avenue, SE., Washington, DC, 20540.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel (CARP), PO Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

I. Background

The Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA), Public Law 104–39, 109 Stat. 336, amended section 106 of the Copyright Act, title 17 of the United States Code, to give sound recording copyright owners an exclusive right, subject to certain limitations, to perform publicly sound recordings by digital audio transmissions. 17 U.S.C. 114. The bill affords certain digital transmission services a compulsory license to perform digital sound recordings publicly. The purpose of the bill is ''to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters.'' S. Rep. No. 104–128, at 15 (1995).

All non-exempt digital subscription transmission services are eligible for the statutory license, provided that they are non-interactive and comply with the terms of the license. The statute requires that the service not violate the ''sound recording performance complement,'' [1] not publish in advance a schedule of the programming to be performed, not cause any receiving device to switch from one program channel to another, include in each transmission certain identifying information encoded in each sound recording, pay the royalty fees and comply with the associated terms, and comply with any recordkeeping requirements promulgated by the Copyright Office. [2] 17 U.S.C. 114(d)(2)(A)–(E) and 114(f)(2)–(5).

The reasonable terms and rates of the section 114 statutory license are determined by voluntary negotiations among the parties and, where necessary, compulsory arbitration conducted under chapter 8 of the Copyright Act, title 17. 17 U.S.C. 114(f).

II. The CARP Proceeding To Set Reasonable Rates and Terms

On December 1, 1995, the Librarian of Congress (Librarian) initiated the statutorily mandated six month negotiation period within 30 days of the enactment of the DPRSRA, pursuant to section 114(f)(1) of the Copyright Act, with the publication of a notice initiating the voluntary negotiation process for determining reasonable terms and rates of royalty payments. *See* 60 FR 61655 (December 1, 1995). In the notice, the Library instructed those parties with a significant interest in the establishment of the reasonable terms and rates for the section 114 license to file a petition with the Copyright Office no later than August 1, 1996, in the event that the interested parties were unable to negotiate an agreement. *Id.*

Accordingly, the Recording Industry Association of America (RIAA) filed a petition with the Copyright Office in which it asked the Office to initiate an arbitration proceeding pursuant to chapter 8 of the Copyright Act. After making a determination that the petitioner RIAA had a significant interest in the proposed CARP proceeding, the Librarian published a notice setting the schedule for the 45-day precontroversy discovery period and announcing the date for the initiation of the 180-day arbitration period. 61 FR 40464 (August 2, 1996). The exchange of documents during the precontroversy discovery period did not proceed smoothly, requiring the Office to reschedule portions of the discovery period and vacate the scheduled date for the initiation of the CARP. *See* Order in Docket No. 96–5 CARP DSTRA (September 18, 1996); Order in Docket No. 96–5 CARP DSTRA (November 27, 1996). The Librarian announced the initiation of the 180-day arbitration period following the conclusion of the discovery period and the resolution of all pending motions. 62 FR 29742 (June 2, 1997).

The Parties

There are four parties to this proceeding: three digital audio subscription services (the Services) and the Recording Industry Association of America (RIAA).

1. The Recording Industry Association of America, Inc. (RIAA)—RIAA represents a collective, consisting of more than 275 record labels, established for the express purpose of administering the rights of these sound recording copyright owners. RIAA represents the interests of its members who are the copyright owners of more than 90% of all legitimate sound recordings sold in the United States. Record companies own the copyrights in the sound recordings.

2. Digital Cable Radio Associates (DCR)—A digital audio service established in the United States in 1987 by the Jerrold Communications Division of General Instrument Corporation. Current partners include Warner Music, Sony Corporation, EMI, Time Warner Cable, Continental Cablevision, Comcast Cable, Cox Cable, and Adelphia Cable.

3. Digital Music Express, Inc. (DMX)—A digital music subscription service established in 1986 as International Cablecasting Technologies, Inc. In 1997, DMX merged into TCI Music, Inc., a publicly traded company with approximately 80% of its shares held by TCI, Inc.

4. Muzak, L.P.—With roots dating back to 1922, Muzak is America's oldest background music provider for businesses. In the 1920s and 1930s, Muzak was part of the consumer music market until driven out of that market by the growing popularity of radio. Muzak remained out of the market until March, 1996, when it began providing 27 channels of digital music under the name DiSHCD, as part of Echostar's satellite-based DiSH Network.

The Position of the Parties at the Commencement of the Proceeding

RIAA, representing the interests of the sound recording copyright owners, requested a royalty rate set at 41.5% of a Service's gross revenues resulting from U.S. residential subscribers, or in some circumstances, a flat rate minimum fee. Report of the Copyright Arbitration Royalty Panel (Report) ¶ 33. RIAA also agreed to be named the single entity to collect, administer, and distribute the royalty fees. Report ¶ 184. RIAA proposed additional terms concerning the timing of payments, statements of accounts, retention of records, and audits. Report ¶ 33.

The three digital audio subscription services requested a royalty rate ranging from a low of 0.5% to a high of 2.0% of gross revenues resulting from U.S. residential subscribers, and unanimously opposed a flat rate minimum fee. Report ¶¶ 34–36, 172. The Services proposed that a single private entity or a government agency be named for purposes of administering the royalty fees, but proposed submitting payments on a quarterly basis rather than a monthly basis. Report ¶¶ 184–185. In addition, the Services proposed terms concerning recordkeeping and audits, confidentiality of business records, and payment terms for distributing license fees among featured artists and nonfeatured musicians and vocalists.

[1] (7) The ''sound recording performance complement'' is the transmission during any 3-hour period, on a particular channel used by a transmitting entity, of no more than—

(A) 3 different selections of sound recordings from any one phonorecord lawfully distributed for public performance or sale in the United States, if no more than 2 such selections are transmitted consecutively; or

(B) 4 different selections of sound recordings—

(i) By the same featured recording artist; or

(ii) From any set or compilation of phonorecords lawfully distributed together as a unit for public performance or sale in the United States, if no more than three such selections are transmitted consecutively: *Provided*, That the transmission of selections in excess of the numerical limits provided for in clauses (A) and (B) from multiple phonorecords shall nonetheless qualify as a sound recording performance complement if the programming of the multiple phonorecords was not willfully intended to avoid the numerical limitations prescribed in such clauses.

17 U.S.C. 114(j)(7).

[2] See Notice of Proposed Rulemaking, 61 FR 22004 (May 13, 1996); Notice of Proposed Rulemaking, 62 FR 34035 (June 24, 1997).

The Panel's Determination of a Reasonable Rate

The Panel evaluated the four statutory objectives,[3] and their component parts, in light of the evidence and determined that the digital audio subscription services should pay a royalty fee of 5% of gross revenues resulting from U.S. residential subscribers. Report ¶¶ 196, 200. This rate represents the midpoint of the range of possible license rates that the Panel considered appropriate (but not the midpoint of the parties' proposals). The Panel further concluded that there was no reason to impose a minimum license fee on the Services at this point, and consequently, it rejected RIAA's proposal to set a minimum fee based on a flat rate. Report ¶ 204.

In making this determination, the Panel followed the precedent set in prior rate adjustment proceedings conducted by the former Copyright Royalty Tribunal and other CARP panels which, as a first step, determined a range of possible rates after considering different proposed rates based on negotiated licenses or analogous marketplace models. Report ¶ 123. *See also,* 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884 (January 5, 1981), and the 1997 Rate Adjustment of the Satellite Carrier Compulsory License Fees, 62 FR 55742 (October 28, 1997). Each party offering a ''benchmark'' rate contends that the rate it offers represents the cost for similar products in analogous markets. The Panel considered three benchmarks, weighing each in light of the record evidence to determine whether the proposed models shed light on how the marketplace would value a performance license in sound recordings. Once the Panel identified the useful models, it used the corresponding rate information to craft a range of potential royalty rates for the section 114 license, then chose the rate within the range which would further the stated statutory objectives.

RIAA and the Services proposed rates based on three distinct marketplace models in which rates are set through arms-length negotiations. Report ¶ 124. The Services proposed two benchmarks for consideration by the Panel: Negotiated license fees for a sound recording performance right and the license fees the Services pay the performing rights organizations for use of the underlying musical works. RIAA put forth a single model for the Panel's consideration: Cable television network license fees. The Panel found the Services' models helpful in setting the rate for the digital performance right, but rejected the RIAA model for the reasons stated herein.

Both RIAA and the Services seemed to agree that the best proxy for reasonable compensation is a marketplace rate. The Panel, however, noted that the DPRSRA instructs the CARP to set reasonable rates, which need not be the same as rates set in a marketplace unconstrained by a compulsory license. In support of its interpretation, the Panel cited the statutory factors which must be considered in setting the rate. *See* Report ¶¶ 10, 124.

The Panel's Evaluation of the RIAA Benchmark

The benchmark proposed by the recording industry analogizes the cost of programming for cable television networks with the cost of procuring the right to perform the sound recordings. The analogy, however, did not withstand scrutiny by the Panel, which reasonably found that the cable television network license fees model did not represent rates for an analogous product in a comparable marketplace. Its conclusion rested on a number of findings which described analytical deficiencies in the two studies offered in support of the 41.5% proposed royalty rate. Report ¶¶ 126–150.

The RIAA model proposed using the purchase price of programming for cable television networks to determine the price the Services would pay for the right to publicly perform sound recordings, if negotiated in a free market. RIAA's Proposed Findings of Fact and Conclusions of Law (PF) ¶ 62; RIAA Proposed Conclusions (PC) ¶ 18. RIAA presented two studies that illustrate the amount of money cable television networks pay for their programming: (1) The Kagan study,[4] and (2) the Wilkofsky Gruen Associates[5] study. RIAA Exhibits (Exs.) 14 and 15, respectively. Both studies argued that the analogy between cable television networks and the digital audio services was apt because the digital audio services and the cable television networks compete head-to-head for carriage on cable and DBS systems, and for consumer time and discretionary income. Report ¶ 130.

The Kagan study analyzed data concerning the revenues and programming expenses of 31 basic cable television networks from the 1985–96 period. It concluded that a cable television network spends, on average, approximately 40% of its gross revenues for programming. RIAA Exhibit (Ex.) 14 at 7. The Panel, however, discounted the 40% figure because it represented the costs of license fees to all copyright owners, and it included the costs of programming during the start-up years, when a new cable television network may pay more than 100% of its revenues in programming costs. Report ¶¶ 127, 129, 149. Failure to adjust for these factors made it impossible for the Panel to assess the costs for the right to publicly perform the sound recordings apart from the costs of the other copyrighted works which make up the program.

Their second study, prepared by Wilkofsky Gruen Associates (WGA), analyzed only cable movie networks because Wilkofsky, the expert for the study, claimed that the ''pricing characteristics and dynamics'' of the cable movie networks were comparable in three fundamental ways: The lack of commercials, the generation of revenues through subscriptions, and the purchase of programming from third parties. Wilkofsky Written Direct Testimony (W.D.T.) at 3–5. This study concluded that the cable movie networks pay a weighted average of 41.5 % of their revenues for programming that they acquire from outside sources and by analogy, the Services should pay the same. *Id.* at 3.

The Panel rejected the conclusion of the WGA study because it ignored the following fundamental differences in market demand and cost characteristics between the cable movie networks and the digital audio services. Report ¶¶ 133–145.

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[3] (1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 114, 115, and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under section 114, 115, and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. 801(b)(1).

[4] The Kagan study was prepared by Paul Kagan Associates, a media research company that tracks and publishes financial data concerning the media and entertainment industries.

[5] Wilkofsky Gruen Associates is an economic consulting firm that specializes in the communications and entertainment industries.

1. The study provided no evidence to show that any of the movie networks directly compete with digital audio services. In fact, when people watch a movie, they devote their entire attention to the film for a period of time, and generally, do not repeat the experience with the same movie. On the other hand, subscribers to digital audio services choose to listen to the same music again and again while engaged in other activities. In other words, the subscriber chooses each service for different reasons, and therefore, they do not represent choices in the same market. Report ¶¶ 143, citing Rosenthal Written Rubuttal Testimony (W.R.T). at 13, Transcript (Tr). 1251 (Rubinstein).

2. The cable movie networks compete against other cable and broadcast stations for exclusive rights to motion pictures. Exclusive rights are highly prized, and consequently, command a premium price, but they are not implicated in the market for digital audio transmissions. Consequently, the Panel found that RIAA's failure to adjust for this aspect grossly overstated the value of programming costs in its cable movie network analogy. Report ¶¶ 137–142.

3. The Panel further discounted the analogy because RIAA ignored the promotional benefit that flows to the record companies from the constant airplay of their sound recordings. Report ¶¶ 144–145. *See also discussion infra.*

The Panel's Determination of Reasonable Terms

In addition to establishing a reasonable rate for the sound recording performance license, the Panel must also establish reasonable terms for implementing the license. The Senate Committee Report makes clear that terms include ''such details as how payments are to be made, when, and other accounting matters.'' S. Rep. No. 104–128, at 30 (1995).

RIAA and the Services proposed specific terms concerning minimal fees, payment schedules, late fees, statements of account, and audits. From these, the Panel adopted the following terms:

1. RIAA shall have sole responsibility for the distribution of the royalty fees to all copyright holders. Report ¶¶ 184, 205.

2. The license fee payments shall be due on the twentieth day after the end of each month, beginning with the month succeeding the month in which the royalty fees are set. Report ¶¶ 185, 206.

3. The Services shall make back payments over a 30-month period. The first back payment, 1/30th of the total arrearage, shall be delayed for six months. Report ¶¶ 187, 206(a).

4. A Service shall be subject to copyright liability if it fails to make timely payments. Liability for copyright infringement shall only come about for knowing and willful acts which materially breach the statutory license terms. Report ¶¶ 188, 206(b).

5. A late fee of 1.5% per month or the highest lawful rate, whichever is lower, will be imposed from the due date until payment is received. Report ¶¶ 189, 206(a).

6. Services shall submit monthly statements of accounts and payment to RIAA. Only information to verify the royalty payments need be provided on the monthly statements of account. Report ¶¶ 190, 205, 207.

7. Safeguards must be established to protect against disclosure of confidential financial and business information, which includes the amount of the royalty payment. Access to this information shall be limited to employees of RIAA, who are not employees or officers of the copyright owners or the recording artists, for the purpose of performing their assigned duties during the ordinary course of employment, and to independent auditors acting on behalf of RIAA. Report ¶¶ 191, 208.

8. The digital audio services shall maintain accurate records on matters directly related to the payment of the license fees for a period of three years. Report ¶¶ 192, 209.

9. Interested parties may conduct only one audit of a digital audio service during any given year. Report ¶¶ 193, 210(c).

- Interested parties must file a Notice of Intent to Conduct an Audit with the Copyright Office. Such notice shall be published in the **Federal Register**. Report ¶¶ 193, 210(a)–(b).
- RIAA must retain an auditor's report for a period of three years. Report ¶¶ 193, 210(d).
- An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, may serve as an audit for all interested parties. Report ¶¶ 194, 210(e).
- Interested parties shall pay for the cost of the audit, unless an independent auditor concludes that there was an underpayment of five (5) percent or more. Report ¶¶ 195, 210(f).

The Panel chose not to adopt RIAA's minimum fee proposal and the Services' proposed payment schedule for the distribution of royalties to the featured artists and the nonfeatured musicians and vocalists. The Panel found that the timing of payments to the performing artists was not within the scope of the proceeding. Report § 204; Report at 56 n.21.

The Panel's Evaluation of the RIAA Proposal To Adopt a Minimum Fee

RIAA proposed the imposition of a minimum fee as a means to insure a fair return to the copyright owners in light of business practices that might erode the value of the statutory license fee. RIAA PF ¶¶ 126–147. Specifically, RIAA sought a minimum fee to minimize the effect of discounts or credits, to address shifts in business models, and to avoid diluting the value of the sound recording when audio digital services add new channels to their offerings. *Id.* The Panel ultimately rejected this suggestion because it found that the rationale for a minimum fee was based on unsupported speculation about the business structure of the Services. Report ¶ 204.

III. The Parties' Reaction to the Determination of the Panel

The regulations governing the CARP proceedings allow parties to file petitions to modify or set aside the determination of the Panel within 14 days of its filing date. The petition must state the reasons for the petition, including relevant references to the parties' proposed findings of fact and conclusions of law. Parties who wish to file replies to a petition may do so within 14 days of the filing of such petition. See 37 CFR 251.55(a), (b).

Accordingly, on December 12, 1997, RIAA filed a Petition to Reject the Report of the CARP (Petition), contending that the Panel acted both contrary to the Copyright Act and arbitrarily in reaching its determination. In its petition, RIAA requests the Librarian to set aside the Panel's determination and set a new rate that should not be less than double the Services' 1996–2001 payments for the public performance of the underlying musical works.

RIAA contends that the Panel's determination was arbitrary and contrary to law for the following reasons:

1. The Panel disregarded precedent set by the former Copyright Royalty Tribunal (CRT or Tribunal) in applying the statutory criteria for determining a reasonable rate for the public performance right. Petition at 6, 14–15.

2. The Panel used the rates set in a corporate partnership agreement as a benchmark for establishing the new compulsory license rate. This was inappropriate because the public performance in sound recordings

license agreement was not negotiated independently, but as part of a larger complex agreement. *Id.* at 20–27.

3. When the Services publicly perform a sound recording, two groups of copyright owners receive royalties: The copyright owners in the underlying musical works, and for the first time, the record companies and performers. The Panel determined that the record companies and performers were not entitled to more royalties for their public performance right than those received by the copyright owners in the underlying musical works for the public performance of their works. RIAA contends that CRT precedent supports a determination that just the reverse is true. *Id.* at 14–15.

4. The compulsory license allows the Services to perform sound recordings publicly without infringing copyright prior to the setting of the royalty rate, so long as the Services agree to pay their accumulated royalty obligation once the rates are determined. The Panel created a payment schedule that allows the Services to pay these fees over a three year period. RIAA contends that this payment schedule is contrary to law. *Id.* at 7 n.1.

5. RIAA also contends that the CARP failed to provide a reasoned explanation for proper review, made conclusions inconsistent with its findings, made findings without record support, and failed to make findings in support of conclusions. *Id.* at 2.

RIAA, however, does not suggest that the Librarian disregard all the findings of the Panel. Instead, it recommends adopting the Panel's approach ''to determine a reasonable rate—provided that the Librarian makes the necessary adjustments to account for the precedent and considerations that the Panel ignored.'' Petition at 51–52. RIAA further allows that the Librarian need not consider the cable network benchmark in its analysis, since the Panel's analysis of the remaining benchmarks supports an upward adjustment of the 5% rate of gross revenues set by the CARP. Petition at 52 n.9.

On December 29, 1997, in response to the RIAA petition to reject the CARP report, the Services filed a reply to RIAA's Petition to Reject the CARP Report (Reply to Petition). The crux of the Services' argument in support of adopting the Panel's report is that ''[w]hen examined as a whole, the Panel's Report is eminently reasonable and amply supported by the record.'' Reply to Petition at 12. Specific arguments of the Services in support of the Panel's report are discussed below in conjunction with RIAA's arguments to reject the report.

IV. The Librarian's Scope of Review of the Panel's Report

The Copyright Royalty Tribunal Reform Act of 1993 (the Reform Act), Public Law 103–198, 107 Stat. 2304, created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review that result in final orders: the Librarian of Congress (Librarian) and the United States Court of Appeals for the District of Columbia Circuit. Section 802(f) of title 17 directs the Librarian either to accept the decision of the CARP or to reject it. If the Librarian rejects it, he must substitute his own determination ''after full examination of the record created in the arbitration proceeding.'' 17 U.S.C. 802(f). If the Librarian accepts it, then the determination of the CARP becomes the determination of the Librarian. In either case, through issuance of the Librarian's Order, it is his decision that will be subject to review by the Court of Appeals. 17 U.S.C. 802(g).

The review process has been thoroughly discussed in prior recommendations of the Register of Copyrights (Register) concerning rate adjustments and royalty distribution proceedings. Nevertheless, the discussion merits repetition because of its importance in reviewing each CARP decision.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP ''unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title.'' Neither the Reform Act nor its legislative history indicates what is meant specifically by ''arbitrary,'' but there is no reason to conclude that the use of the term is any different from the ''arbitrary'' standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A).

Review of the case law applying the APA ''arbitrary'' standard reveals six factors or circumstances under which a court is likely to find that an agency acted arbitrarily. An agency action is generally considered to be arbitrary when:

1. It relies on factors that Congress did not intend it to consider;
2. It fails to consider entirely an important aspect of the problem that it was solving;
3. It offers an explanation for its decision that runs counter to the evidence presented before it;
4. It issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint;
5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and
6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties.

Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance Co., 463 U.S. 29 (1983);

Celcom Communications Corp. v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA*, 758 F.2d 685 (D.C. Cir. 1985).

Given these guidelines for determining when a determination is ''arbitrary,'' prior decisions of the District of Columbia Circuit reviewing the determinations of the former CRT have been consulted. The decisions of the Tribunal were reviewed under the ''arbitrary and capricious'' standard of 5 U.S.C. 706(2)(A) which, as noted above, appears to be applicable to the Librarian's review of the CARP's decision.

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide ''zone of reasonableness,'' it was required to articulate clearly the rationale for its award of royalties to each claimant. See *National Ass'n of Broadcasters* v. *Copyright Royalty Tribunal*, 772 F.2d 922 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986) *(NAB* v. *CRT*); *Christian Broadcasting Network* v. *Copyright Royalty Tribunal*, 720 F.2d 1295 (D.C. Cir. 1983) (*Christian Broadcasting* v. *CRT*); *National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 689 F.2d 1077 (D.C. Cir. 1982) (*NCTA* v. *CRT*); *Recording Indus. Ass'n of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1 (D.C. Cir. 1981) (*RIAA* v. *CRT*). As the D.C. Circuit succinctly noted:

> We wish to emphasize * * * that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully * * *.

Christian Broadcasting v. *CRT*, 720 F.2d at 1319 (D.C. Cir. 1983), quoting *NCTA* v. *CRT*, 689 F.2d at 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same ''arbitrary'' standard used by the courts to review the Tribunal, he must be presented by the CARP with a rational analysis of its decision, setting forth specific findings of fact and conclusions of law. This requirement of every CARP report is confirmed by the legislative history to the Reform Act which notes that a ''clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress.'' H.R. Rep. No. 103–286, at 13 (1993). This goal cannot be reached by ''attempt(ing) to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record.'' *Christian Broadcasting* v. *CRT*, 720 F.2d at 1319.

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination. 17 U.S.C. 802(f).

V. Review and Recommendation of the Register of Copyrights

The law gives the Register the responsibility to review the CARP report and make recommendations to the Librarian whether to adopt or reject the Panel's determination. In doing so, she reviews the Panel's report, the parties' post-panel motions, and the record evidence.

After carefully reviewing the Panel's report and the record in this proceeding, the Register finds that the Panel's adoption of the DCR negotiated license fee as the starting point for making its determination is arbitrary. This conclusion compels the Register to set aside the Panel's final determination and reevaluate the record evidence before making a recommendation to the Librarian.

Section 802(f) states that ''(i)f the Librarian rejects the determination of the arbitration panel, the Librarian shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be.'' During that 60-day period, the Register reviewed the Panel's report and made a recommendation to the Librarian not to accept the Panel's report, for the reasons cited herein. The Librarian accepted this recommendation, and on January 27, 1998, issued an order stating that the Panel's report was still under review. See Order, Docket No. 96–5 CARP DSTRA (January 27, 1998).

The full review of the Register and her corresponding recommendations is presented herein. Within the limited scope of the Librarian's review of this proceeding, ''the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it.'' Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55757 (1997), citing 61 FR 55663 (October 28, 1996) (Distribution of 1990, 1991 and 1992 Cable Royalties). Accordingly, the Register accepts the Panel's weighing of the evidence and will not question findings and conclusions which proceed directly from the arbitrators' consideration of factual evidence.

The Register also adopts the Panel's approach in setting reasonable rates and terms for the digital performance license in sound recordings pursuant to 17 U.S.C. 114(f)(2), but sets aside those findings and conclusions that are arbitrary or contrary to law.

a. Methodology for Making Rate Determination

Use of a Marketplace Standard in Setting the Royalty Rate

The standard for setting the royalty rate for the performance of a sound recording by a digital audio subscription service is not fair market value, although CARPs and the Copyright Royalty Tribunal (CRT or Tribunal) in prior rate adjustment proceedings under sections 115 and 116 considered comparable rates negotiated under marketplace conditions when making their determinations.

In light of this practice, the Panel followed the same approach established in prior rate adjustment proceedings conducted by the Tribunal and the CARPs in making its determination. Namely, the Panel considered the parties' presentations of different rates negotiated in comparable marketplace transactions and first determined whether the proposed models mirrored the potential market transactions which would take place to set rates for the digital performance of sound recordings. Report ¶ 123. These benchmarks were then evaluated in light of the statutory objectives to determine a reasonable royalty rate. *Id.*

The Panel noted that RIAA and the Services ''seem to agree that the best proxy for reasonable compensation is to look to marketplace rates.'' Report ¶ 124. The parties also agreed that the rates should be based on gross revenues and further agreed on the definition of ''gross revenues.'' Report ¶ 125; RIAA PF ¶ 55; Services Joint Reply to RIAA's Proposed Findings of Fact and Conclusions of Law (Services' RF) ¶ 51.

While the Panel agreed with the parties on these two points, it noted that the statute requires the Panel to adopt reasonable rates and terms, and that reasonable rates and terms are not synonymous with marketplace rates. Report ¶ 124. Unlike a marketplace rate which represents the negotiated price a willing buyer will pay a willing seller, *see* Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (1997) (applying a fair market standard, as set forth at 17 U.S.C. 119(c)(3)(D), in setting royalty rates for the retransmission of broadcast signals by satellite carriers), reasonable rates are determined based on policy considerations. *See RIAA* v. *CRT*, 662 F.2d 1.[6] Congress granted the record companies a limited performance right in sound recordings in order to ''provide [them] with the ability to control the distribution of their product by digital transmissions,'' but it did so with the understanding that the emergence of new technologies would not be hampered. S. Rep. No. 104–128, at 15 (1995). Consequently, Congress specified that the terms were to be reasonable and calculated to achieve the following four specific policy objectives:

1. To maximize the availability of creative works to the public;

2. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

3. To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and

4. To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. 17 U.S.C. 114(f)(2) and 801(b)(1).

RIAA takes exception to this interpretation and argues that the Panel failed to follow CRT precedent that ''interpreted the Section 801(b)(1) factors as requiring it to establish a market rate.'' Petition at 33. In support of its position, RIAA relies upon the 1982 CRT rate adjustment proceeding to determine reasonable rates and terms for the statutory noncommercial broadcasting license, 17 U.S.C. 118, where the CRT stated:

> The Tribunal has consistently held that the Copyright Act does not contemplate the Tribunal establishing rates below the

[6] In reviewing how the Tribunal analyzed the statutory criteria, the court noted that ''other statutory criteria invite the Tribunal to exercise a legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users.'' *Id.* at 8.

reasonable market value of the copyrighted works subject to a compulsory license.

1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting: Terms and Rates of Royalty Payments, 47 FR 57924 (December 29, 1982). RIAA further contends that the Panel not only ignored the CRT precedent requiring it to set marketplace rates, but improperly shifted the emphasis to ensure the financial viability of the copyright users. Petition at 33.

In response, the Services contend that the Panel's analysis comports with CRT precedent on both points, noting that the CRT did consider evidence on how a proposed rate would affect the user industry in its proceedings to set rates under sections 111 and 116. Reply to Petition at 26. For example, in the 1980 rate adjustment proceeding to set the royalty rate for jukeboxes, the CRT considered the evidence and found ''only that marginal jukebox owners would be threatened by the new rate.'' *Id.* In fact, the Tribunal stated that it was ''satisfied that adequate attention (had) been given to the small operator, * * * (and adopted) an amendment to the proposed fee schedule that was proposed for the benefit of such (small) operators.'' 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 888 (1981).

The Register finds that the Panel correctly analyzed how to determine a reasonable rate under section 114. Section 801(b)(1) states that one function of a CARP is to determine reasonable rates ''as provided in sections 114, 115, and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118.'' The provision further states that the CARP must determine the rates under sections 114, 115, and 116 to achieve the four statutory objectives. The law does not state that these objectives are applicable in a rate adjustment proceeding to determine rates under sections 111 or 118. Therefore, RIAA's reliance on CRT precedents for setting rates under section 118 is without merit. Furthermore, the Panel's analysis is consistent with the prior CRT determinations establishing rates for the section 115 and 116 licenses.

In the 1980 jukebox rate adjustment proceeding, the CRT set the rate ''[o]n the basis of the marketplace analogies presented during the proceeding, taking the record as a whole, and with regard for the statutory criteria. * * * That rate takes account both of what is paid for music elsewhere under similar circumstances and, since it is a flat rate, of the Tribunal's concern for the smaller, less profitable operators.'' 46 FR 889 (1981). To recognize that this rate was not a negotiated marketplace value, one need only read Commissioner James's dissent admonishing the majority for setting a rate on ''an ability to pay theory.'' He characterized the majority's actions as follows:

> In essence, the majority reached a conclusion on the premise that a true market value would result in too large an increase in fees. The majority was set on course by what they deemed were the guiding standards of the statute which referred to minimizing the disruptive impact on the economic structure of the industries involved. It was the majority view and opinion that a large increase in fees would be oppressive to the industry and would ''impact on small operators.''

Id. at 891 (footnote omitted).

The Court of Appeals upheld the Tribunal's approach in its 1980 jukebox rate adjustment proceeding, stating that:

> In its decision, the Tribunal acknowledged that the rate which it approved could not be directly linked to marketplace parallels, but it found that such parallels served as appropriate points of reference to be weighed together with the entire record and the statutory criteria. Although we agree with ASCAP that the analogous marketplace evidence is significant, we do not believe that the Tribunal was bound by that evidence to select a fee rate within the $70–$140 ''zone'' which, according to ASCAP, governs this case. The Tribunal carefully weighed the evidence derived from the marketplace analogies and other evidence specifically in light of the four statutory criteria of section 801(b) and arrived at a royalty rate for coin-operated phonorecord players of $50 per machine.

Amusement and Music Operators Ass'n v. *Copyright Royalty Tribunal,* 676 F.2d 1144, 1157 (7th Cir. 1982), *cert. denied,* 459 U.S. 907 (1982) (*AMOA* v. *CRT*). The D.C. Court of Appeals engaged in a similar analysis when it considered the Tribunal's determination to raise the royalty rate for making and distributing phonorecords of copyrighted musical works from 2 cents to 4 cents. In that case, the copyright owners argued that Congress intended the Tribunal to set a high royalty rate under a bargaining room theory, which would create a rate ceiling for stimulating future negotiations outside the license. The D.C. Circuit found that while Congress had considered this possibility, it chose not to codify this approach, but rather to express its will through specific statutory criteria and allow the Tribunal to interpret and apply these objectives to the record evidence in a rate adjustment proceeding. *RIAA* v. *CRT,* 662 F.2d at 8–9. Furthermore, the Court ascertained that Congress did not rank the criteria in order of importance so that the Tribunal, and subsequently, the CARP, could:

> To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, * * * choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a ''zone of reasonableness.''

Id. at 9. *See also Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968); *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 585–586 (1942); *Hercules, Inc.* v. *Environmental Protection Agency,* 598 F.2d 91, 107 (D.C. Cir. 1978).

b. Benchmarks

The Panel's Disposition of the Proposed Benchmarks

The Register has reviewed the analysis of the Panel and its disposition of the three benchmarks and finds that the Panel's primary reliance on and manipulation of the DCR negotiated license fee was arbitrary. The Register also finds that the record evidence does not support the Panel's calculation of a specific range of fees for the public performance of the musical compositions. These flaws compel the Register to reexamine the record evidence and propose a rate based on her analysis while providing deference, where appropriate, to the findings of the Panel.

The Register, however, did not evaluate further the record evidence concerning either the cable television network fee or the proposed minimum fee in her deliberations to determine the appropriate rate because no party to the proceeding challenged either of these findings or continued to rely upon these matters in presenting its arguments to the Librarian.[7] Therefore, the Register forgoes a review of the Panel's analysis in these areas. This does not mean, however, that the Register and the Librarian will always forego an independent review of a Panel's actions. See, *e.g.* Distribution of the 1992, 1993, and 1994 Musical Works Funds, 62 FR 6558 (February 12, 1997)

[7] ''RIAA strongly disagrees with the CARP's conclusion that the Services should devote a smaller percentage of their revenues to license fees than do other cable networks. While the range of percentages is large, there are no cable networks that consistently spend as little as 5 percent. Nevertheless, RIAA has not challenged the CARP's decision to reject the cable network analogy.'' Petition at 52 n.9 (citations omitted). Furthermore, RIAA did not raise any challenge to the Panel's decision not to grant a minimum fee.

(recommending an upward adjustment to one party's award, although no party made a request for the adjustment); Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55742 (1997) (recommending the adoption of a zero rate for local retransmission of network signals to unserved households).

The Panel's Adoption of the DCR Negotiated License Fee and its Subsequent Manipulations of This Rate to Establish a Range of Potential Royalty Rates was Arbitrary [8]

The Panel found that the digital performance license negotiated as part of a larger partnership agreement between DCR and its two record company partners, Warner Music and Sony Music, was a useful benchmark for determining the section 114 royalty fee because it provided a ''useful precedent,'' although there were problems with using the rate for this license fee since only 60% of the industry engaged in the negotiations setting the rate.[9] Report ¶¶ 166, 200. To address this problem the panel adjusted the figure upward to reach a base rate figure arguably applicable to 100% of the recording industry market. *Id.* The Panel then doubled this number to account for the statutory provision which requires an equal distribution of the royalties collected pursuant to the compulsory license between the record companies and the recording artists. *Id.; also* 17 U.S.C. 114(g). While recognizing that a pure doubling of the base rate was inappropriate, the Panel determined that these manipulations of a ''freely negotiated rate'' set a reasonable range of rates for further consideration in light of the statutory criteria. *Id.*

RIAA opposes the use of the negotiated license fee as a benchmark for setting the compulsory license fee for the following reasons: (1) It was merely one provision in a complex transaction involving eleven interrelated agreements, RIAA PF ¶ 92; Petition at 22; Wildman [10] W.R.T. at 12–15; Transcript (Tr.) 2213–14 (Wildman); (2) the record companies interested in investing in the digital audio service would share the cost of a higher rate, thereby creating a strong incentive to create a low rate; (3) the license fee was not for the right to perform sound recordings publicly, but for the acknowledgement that a right should exist, RIAA PF ¶ 84; Tr. 2102 (Vidich); [11] (4) the record companies never viewed the established rate as precedential, citing the license provision that the rate will be superseded if Congress establishes a performance right in sound recordings, DCR Exs. 7, 8 & 15 at ¶ 9; Vidich W.R.T. at 7; Tr. 2106–2107 (Vidich); Del Beccaro [12] W.D.T. at 9, and the most favored nations clause, DCR Exs. 7, 8 & 15 at ¶ 6; (5) the record companies did not enjoy the degree of leverage in setting the rate that the Services imply in their proposed findings; (6) the fee did not represent an industry-wide agreement on the value of the performance right; instead, only three record companies, ''collectively responsible for only about 35% of the sound recordings performed by DCR,'' negotiated the rates, RIAA's Reply to Proposed Findings and Conclusions of Law (RIAA RPF)] 39; Tr. 1014 (McCarthy); [13] and (7) the DCR digital performance license differed in significant ways from the statutory license. For example, the DCR license requires the company to pay royalties on its revenues from international sources which are not recoverable under the DPRSRA, RIAA PF ¶ 83; Tr. 965 (Del Beccaro); Tr. 1014 (McCarthy); Tr. 2137 (Vidich), and it did not contemplate a distribution of a portion of the royalties to recording artists as required under the new law, RIAA PF ¶ 82.

In response, the Services assert that the Panel ''did not rely on the DCR license rate in isolation,'' and argue that its determination was informed by testimony from the parties who participated in the negotiations. Reply to Petition at 20. More specifically, the Services argue that the inclusion of the performance license within a larger, complex commercial agreement makes it more meaningful, because DCR did not purchase a license for the public performance of sound recordings. Rather, in exchange for a partnership agreement, DCR acknowledged that the right should exist for a particular rate. The Services neglect, however, to discuss why this observation is important in their initial findings. Services RF ¶ 75–77. Later, the Services argue that the Panel's decision to use the DCR license fee as an appropriate benchmark rested on a weighing of the evidence and invoke the Panel's discretion to evaluate the testimony and fashion its decision accordingly. Reply to Petition at 20–21. The Services, however, fail to address RIAA's additional concerns about the negotiated license, except to note that the partner record companies never operated a joint advertising venture nor took advantage of the provisions which gave them some measure of control over programming. Services RF ¶¶ 80–81.

While the Register agrees with the Services that the Panel carefully considered the rationale for and the circumstances surrounding the negotiations setting the DCR license rate, she finds the Panel's adoption of this benchmark and its subsequent adjustments arbitrary. In the first instance, the benchmark offered by the Services cannot represent a license for a right to perform sound recordings, because no such legal right existed at the time of the negotiations. Woodbury [14] W.D.T. at 12; RIAA PF] 84; Tr. 2102 (Vidich). DCR allowed that, in fact, it did not negotiate for a performance license in sound recordings; and instead, characterized the transaction as selling ''to its record company partners the recognition they sought 'that the right existed for a particular rate.' '' Services PF ¶ 102. To underscore this distinction, DCR insisted on a clause which stated that the United States law did not require DCR to pay a fee or royalty for the public performance of any sound recording, even though DCR agreed, as part of a complex commercial transaction, to pay its partner record companies what it calls a public performance license fee. Services PF ¶¶ 111, 136. An article in the press announcing the deal echoed this distinction. It noted that not only did the transaction allow DCR use of the record companies' repertoire, it also required DCR to support a performance right in sound recordings. DCR Ex. 27 (Paul Verna, *Time Warner Breaks New Cable Ground; Enters Cable Radio Venture With Sony,* Billboard, Feb. 6, 1996, at 1).

Consequently, the Register rejects the Panel's premise that the rate set for a nonexistent right would represent accurately the value of the performance right once it came into existence, especially where the parties

[8] Negotiated license fees and certain business information, which the Register has considered throughout her review, are not being published in the Register's review because the information is subject to a protective order. See Order Docket No. 96–5 CARP DSTRA (September 18, 1996).

[9] Sony Music and Warner Music signed a partnership agreement with DCR in January 1993. A third record company, EMI, joined the partnership in April 1994, under substantially the same terms. Report ¶ 164.

[10] Associate Professor of Communications Studies at Northwestern University and Director of Northwestern's program in Telecommunications Studies, Management, and Policy.

[11] Senior Vice-President of Strategic Planning and Business Development at Warner Music Group and a member of the Board of Directors of Digital Cable Radio Associates.

[12] President and Chief Executive Officer of Digital Cable Radio Associates.

[13] Senior Vice-President and Chief Financial Officer of Digital Cable Radio Associates.

[14] A vice-president at the economic consulting firm of Charles River Associates, Inc.

acknowledge that the agreement encompassed more than the purported value of the coveted right, namely the recognition from the audio service that a performance right in sound recordings should exist. RIAA PF ¶¶ 94–95; Tr. 2209–12 (Wildman); Wildman W.R.T. at 9–12. Arguably, that recognition was more valuable consideration to the record companies than the license fee itself.

The conclusion that the DCR license fee may serve as the benchmark for setting the section 114 rates is undermined further by the very nature of the partnership agreement. All parties agree that the agreement concerning the performance right was merely one of eleven interdependent co-equal agreements which together constituted the partnership agreement between DCR and the record companies. Such strong ties between provisions in a negotiated document raise the question of how much give-and-take occurred in negotiating the final terms. Courts recognize that complex transactions encourage tradeoffs among the various provisions and lead to results that most likely differ from those that would result from a separately negotiated transaction.[15] While DCR freely entered into the partnership agreement, the record contains no evidence that it would have freely entered into a separate performance license for sound recordings. To the contrary, the Service's own witness admits that it is unlikely that a stand-alone performance license would have been negotiated. Woodbury W.D.T. at 15. Accordingly, the Register concludes that it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the provision would not exist but for the entire agreement. Under similar circumstances, the Southern District Court of New York found that ''plucking one term out of the contract is likely to yield a fairly arbitrary result.'' *American Society of Composers Authors and Publishers* v. *Showtime/The Movie Channel, Inc. (ASCAP)*, published at 912 F.2d 572, 590 (S.D.N.Y. December 20, 1989) (No. 13–95 (WCC)) (rejecting proposal to rely upon provisions in guild agreement concerning payment of revenues where such provisions were part of a set of terms governing compensation, benefits, and working conditions).[16]

Another problem with adopting the DCR license fee is that it is not an industry-wide agreement, but rather the product of negotiations among only three record companies, which together account for approximately 35% of the sound recordings performed by DCR. RIAA PF ¶ 82; RIAA RPF ¶ 39. The arbitrators understood the limited nature of the negotiations and made an adjustment to the license fee based on the mistaken assumption that the DCR license fee represented the value of the sound recordings owned by the three record companies party to the agreement, which purportedly represented 60% of the record industry. Report ¶¶ 166, 200. This assumption arose from a statement made by the Services in the summary statement contained in the Services' joint reply to RIAA's proposed findings.[17] The statement, however, has no support in the record. See Petition at 21 n.3; Reply to Petition at 21–22. Consequently, the Panel's upward adjustment of the base figure on the merits of this assertion was arbitrary.

This is not to say that the fact that the DCR license fee was negotiated with companies owning rights to only 35% of the relevant works renders that license fee irrelevant. It is, however, a further deficiency which in combination with the other deficiencies discussed herein, renders the Panel's reliance on the DCR license fee as its exclusive benchmark inappropriate.

Furthermore, the Panel's decision to rely on the DCR license fee deviates from CRT precedent where that agency refused to adopt, as an industry-wide rate, a set of rates negotiated by only certain of the affected parties as part of a general understanding involving issues in addition to the rate of compensation. Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068 (June 8, 1978). While no Panel need slavishly adhere to the past practices of the CRT, it must articulate a reasoned explanation for its deviation from past precedent. Distribution of 1990, 1991, and 1992 Cable Royalties, 61 FR 55653, 55659 (October 28, 1996). Otherwise, its actions may be construed as arbitrary or contrary to law.[18]

The Register also finds that even if the 60% figure had record support, it would be arbitrary to adjust a negotiated license fee that purports to represent the market value of the digital performance right in sound recordings. Under the license agreement, DCR agreed to pay a percentage of its gross revenues for the right to perform sound recordings digitally, but only a portion of these fees were paid to each of DCR's three record company partners, allocated on the basis of the DCR playlist.[19] Tr. 2123–24 (Vidich); Services PF ¶ 111. Therefore, the license fee—to the extent that it was a license fee—already accounted for all copyright fees owed to the record industry, and it was inappropriate for the Panel to make any further adjustment. The Services seem to realize the Panel's error in this respect and note that the Panel was under no obligation to make an upward adjustment, since the license fee reflected the value of the sound recording and not the sum of the percentage amount each partner record company negotiated for use of its works. Reply to Petition at 22.

Furthermore, the Register finds that the Panel's conclusion that the DCR license fee ''provides a useful precedent for setting a royalty rate in this proceeding'' was arbitrary. Report ¶ 200. The only support for this finding was Woodbury's testimony that the trade article announcing the deal between DCR and its new record company partners, Sony and Warner, illustrated its precedential value, at least for the record companies. Woodbury W.D.T. at

[15] For example, in resolving a dispute between ASCAP and Showtime/The Movie Channel, Inc. over the fee for a ''blanket'' license, the Southern District Court of New York stated that:

> it is fair to assume that in any negotiation that encompasses as many disparate issues as do the guild agreements, the negotiators will agree to tradeoffs, among the various negotiated items, ... The process of negotiation is thus likely to yield a complex pattern of results, most of which would have been different if the individual issue had been negotiated entirely separately from the others. Accordingly, plucking one term out of the contract is likely to yield a fairly arbitrary result.

ASCAP v. *Showtime/The Movie Channel, Inc.*, published at 912 F.2d 572, 590 (S.D.N.Y. Dec. 20, 1989) (Civ. No. 13–95 (WCC) (footnote omitted).

[16] This is not to say that in any case in which a CARP relied on a license fee that was part of a larger agreement containing a number of provisions unrelated to the license fee, such reliance would necessarily be arbitrary. But in light of the other deficiencies in the CARP's reliance on the DCR license, discussed herein, and especially in light of the fact that the license fee was for the exercise of a nonexistent right, the Register is compelled to conclude that in this case, the CARP's reliance on the DCR license fee as its exclusive benchmark was arbitrary.

[17] ''DCR entered into a performance license with three record companies that represent approximately 60% of all recorded music sold in the United States.'' Services RF at 2.

[18] Section 802(c), of the Copyright Act, directs the CARP to ''act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c).''

[19] For example, if the DCR license fee had been 5% of gross receipts (equaling $100,000) and 40% of the sound recordings on DCR's playlist were owned by DCR's record company partners, then DCR would pay 40% of the license fees ($40,000) on a prorata basis to these partners. The remaining 60% ($60,000) represents the value of the digital performance of works owned by non-partnership record companies performed during the relevant time period—a sum that DCR would not actually pay under the terms of its license agreement.

The 5% license fee value does not represent the actual value of the negotiated fee because this information is subject to a protective order. *See* n.8 *supra*.

16. Mr. Woodbury's statements on the precedential value of the agreement, however, are full of qualifications, and he readily acknowledged that ''a successful negotiation may have required that Warner and Sony compensate Music Choice for including the performance rights payments as part of the partnership agreement. The effect of this compensation may have restrained Warner and Sony in their choice of a higher fee level.'' *Id.*

In addition, the partnership agreement itself fails to support the Panel's finding. It includes material redacted subject to the protective order, DCR Exs. 7, 8 & 15 at ¶ 6, and a provision that the rate will be superseded if Congress establishes a performance right in sound recordings. DCR Exs. 7, 8, & 15 at ¶ 9. Vidich W.R.T. at 7; Tr. 2106–2107 (Vidich); Del Beccaro W.D.T. at 9. Because the partnership agreement included language that undermined any precedential value of the digital performance license included therein, the Register finds that the Panel's reliance on the DCR license fee as precedent was an arbitrary action. *See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Insurance Co.,* 463 U.S. 29 (1983) (agency action is arbitrary where the agency offers an explanation for its decision that runs counter to the record evidence).

In setting a range of possible rates for the section 114 license, the Panel made further adjustments to the base figure to account for the payments to the recording artists. Under the DPRSRA, recording artists are entitled to half of the royalties collected under the compulsory license. 17 U.S.C. 114(g). RIAA argues that the DCR license fee must be adjusted to account for this provision in the law that entitles recording artists to a share of the royalties, because the record companies were under no obligation to share the royalties. RIAA RPF ¶ 40; Petition at 28. RIAA also argued for additional upward adjustments of the benchmark to compensate the record companies for certain differences between the DCR license and the compulsory license, including compensation for loss of royalties generated from foreign and commercial subscribers, and loss of revenue due to a shift in how the Services offer their product to subscribers.

RIAA anchors its arguments for these requested adjustments on the presumption that the responsibility of the Panel was ''to determine the royalty [rate] that would be produced through free market negotiations, absent the compulsory license.'' RIAA RPF ¶ 41. This presumption, however, misrepresents the Panel's duty, which is to establish reasonable rates and terms. See discussion *supra* concerning the use of a marketplace standard in setting the royalty rate. While RIAA may have a reasonable expectation that a Panel would make appropriate adjustments to a marketplace benchmark that the Panel adopts for further consideration in light of the statutory objectives, and that is not to say that the requested adjustments are appropriate, there is no justification for making the adjustments where the benchmark value does not fulfill that function. Therefore, having found that the DCR license fee does not represent the marketplace value of sound recordings, the Register need not consider further arguments on adjusting the rate.

For the reasons cited above, the Register finds that the Panel was arbitrary in relying on the DCR license fee for the purpose of establishing an accurate evaluation of the marketplace value for the performance right.

The Panel's Determination of a Specific Range of Fees for the Public Performance of the Musical Compositions Was Arbitrary

The Services pay separate license fees to Broadcast Music, Inc. (BMI), the American Society of Composers, Authors, and Publishers (ASCAP), and SESAC, Inc. for the public performance of the underlying musical works in the sound recordings. The Services introduced evidence on what they pay the performing rights organizations for the public performance of the musical works to illustrate the industry practice that ''licensing rates ordinarily paid in the recording and music industries for the use of copyrighted works are far less than 41.5%, and generally are within the low single digit range for use of copyrighted music and sound recordings.'' Rosenthal [20] W.R.T. at 3; Tr. 1646, 1669–70, 1674 (Massarsky).[21]

Using the license fees DMX and DCR [22] pay for the right to perform musical compositions in the BMI and SESAC repertories and the anticipated payments that ASCAP will receive upon resolution of a rate dispute between itself and the Services, and not the interim rates that the Services currently pay ASCAP, which are usually lower than the final determination of the rate court, the Panel set an upper limit on the value of the performance right for the musical compositions. Report ¶¶ 167(B)–(G). In making this determination, the Panel accepted Massarsky's testimony that ASCAP license fees are ''generally greater than, but at least no less than, BMI license fees,'' and made its calculations accordingly. Report ¶ 167(E); see also RIAA PF ¶¶ 106–108.[23] In addition to setting an upper limit on the amount the Services would pay for these performance licenses, the Panel announced a lower limit for this benchmark but provided no discussion on how it arrived at this figure.

RIAA accepts the Panel's determination for an upper limit valuation for the performance right in musical works, but challenges the Panel's determination of the lower limit of this value. Petition at 16–20. RIAA contends that because the Panel had actual figures upon which to base its calculation, it was arbitrary to set a lower limit. *Id.* at 17.

From an examination of the record, the Register cannot determine how the Panel derived the lower limit figure, but she has identified at least one way that the Panel could have settled upon the lower figure. It entails the use of the interim rates which the Services pay ASCAP currently, instead of relying on a figure equal to or greater than the rate paid to BMI. Tr. 1669 (Massarsky), Tr. 1028–1029 (McCarthy). Use of such an approach, however, is expressly

[20] An attorney with the law firm of Berliner, Corcoran & Rowe, L.L.P., in Washington, D.C., who represents recording artists, writers, production companies, record companies, and multimedia companies.

[21] An economic consultant with the firm of Barry M. Massarsky Consulting, Inc.

[22] The Services pay an interim rate set in 1989 to ASCAP for the performance of the musical works in its repertoire. Tr. 1029 (McCarthy); Tr. 1656 (Massarsky). DCR also pays an interim rate to BMI. These rate disputes are currently the subject of adjudication before the ''rate court'' in the Southern District of New York. Services RF ¶¶ 52–53; 100–105. Pending the outcome of the rate cases, DCR has agreed to pay BMI the same contractual rate that DMX pays for the musical works performance license. Tr. 1653 (Massarsky).

[23] CRT and judicial precedent supports the Panel's premise that ASCAP usually receives slightly higher royalty fees for the public performance of its works than does BMI. In *American Society of Composers, Authors, and Publishers* v. *Showtime/The Movie Channel,* 912 F.2d 563 (2nd Cir. 1990), the court affirmed the rate court decision that a ''blanket'' license rate for use of ASCAP works should be set slightly higher than the rate the cable network pays for a BMI license. This result reflected the agreed upon 55–45 ratio that ASCAP and BMI adopted in dividing their share of the royalties for compulsory licenses paid by cable system operators for retransmissions of broadcast signals. See also 1978 Cable Royalty Distribution Determination, 45 FR 63026 (Sept. 23, 1980) (CRT determined that of the 4.5% royalty share awarded to the music claimants' group in the 1978 cable distribution proceeding, ASCAP would receive 54%, BMI, 43%, and SESAC, 3% of the royalties.); 1987 Cable Royalty Distribution Proceeding, 55 FR 11988 (March 30, 1990) (CRT again adjusted the distribution percentages for cable royalties so that ASCAP received a 58% share of the disputed royalties and BMI received the remaining 42% share).

disavowed by two of the Services' own expert witnesses who agree that it is inappropriate to rely on interim rates to determine competitive market rates. Woodbury W.R.T. at 19 n.70; Tr. 2710–2711 (Woodbury); Tr. 1029 (McCarthy). The Register concurs with these witnesses's assertions, and therefore rejects any figure which uses an interim rate in calculating a value when specific evidence exists in the record discounting this methodology and nothing supports its use.

Nor could the Panel consider just the individual license fees which the Services pay to a single performing rights organization in setting the lower limit, having rejected a similar argument when the Services initially proposed making this comparison. Report ¶ 168. A single license fee covers only those musical works under the control of the individual performing rights organization granting the license. Therefore, a Service must obtain a ''blanket'' license from every performing rights organization in order to have the freedom to play virtually any musical composition without infringing its copyright. Hence, the total value attached to the performance of the underlying musical works would be the sum of the license fees paid to each of the performing rights organizations, just as the value of the digital performance right in sound recordings would be the fees paid to all record companies. See Report ¶ 168.

The Register perceives no rational connection between the Panel's factual conclusions and its decision to set a lower limit for this benchmark. Where the record provides clear evidence of what the Services actually pay for the performance licenses, and the witnesses agree that the interim rates which are currently being paid represent *de minimis* value for these licenses, the Panel need not look beyond this information to determine the value of the benchmark. For the reasons discussed above, the Register does not consider the Panel's lower limit on the performance license fees for musical compositions when proposing a royalty rate for the section 114 license.

Use of Benchmarks Approximating Marketplace Value in Setting the Section 114 Rate

A benchmark is a marketplace point of reference, and as such, it need not be perfect in order to be considered in a rate setting proceeding. In the 1980 rate adjustment proceeding for coin-operated phonorecord players, the Tribunal considered different marketplace models and found that each analogy had distinguishing characteristics, but nevertheless considered them in conjunction with the record evidence and the statutory objectives. 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 888 (1981) (''While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria''). The U.S. Court of Appeals for the Seventh Circuit approved the Tribunal's approach, stating that:

> We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets (*e.g.*, with respect to volume and industry structure) and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices.

AMOA v. *CRT*, 676 F.2d at 1157. See also *San Antonio* v. *United States*, 631 F.2d 831, 836–37 (D.C. Cir. 1980), *clarified*, 655 F.2d 1341 (D.C. Cir. 1981); *Burlington Northern, Inc.* v. *United States*, 555 F.2d 637, 641–43 (8th Cir. 1977).

When setting the rates for the statutory performance license in sound recordings, the benchmarks are merely the starting point for establishing an appropriate rate. The deciding body uses the appropriate marketplace analogies,[24] in conjunction with record evidence, and with regard for the statutory criteria, to set a reasonable rate.

In this proceeding, the Register finds that both the negotiated DCR license fee and the marketplace license fee for the performance of the musical works are useful at least in circumscribing the possible range of values under consideration for the statutory performance license in sound recordings. While the DCR license fee purports to represent a negotiated value for a right to which, by law, the record companies were not entitled (in addition to the recognition that the right should exist), the Register acknowledges that the value of the DCR license provides minimal information as to the value of the performance right ultimately granted in the DPRSRA, although it does provide some guidance for assessing the proposed rate. See Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates (115 Rate Adjustment Proceeding), 46 FR 10466, 10483 (Feb. 3, 1981) (''We find that the foreign experience is relevant—because it provides one measure of whether copyright owners in the United States are being afforded a fair return'').

On the other hand, the second reference point—the negotiated license fees for the performance of music embodied in the sound recordings—offers specific information on what the Services actually pay for the already-established performance right of one component of the sound recording. The Panel recognized this reference point's usefulness and used it to further support its choice of a royalty rate. Report ¶ 201. The question, however, is whether this reference point is determinative of the marketplace value of the performance right in sound recordings; and, as the Panel determined, the answer is no. Report ¶¶ 169, 201.

Initially, neither the Services nor RIAA placed much weight on this marketplace reference point, although RIAA has consistently argued that the value of the performance right in sound recordings is greater than the value of the performance right in the underlying musical works. RIAA RPF ¶ 16, Petition at 10–16. On the one hand, the Services argue that the musical composition is the key to a successful recording, Services RF ¶ 10–12, citing Tr. 1664 (Massarsky), and on the other hand, RIAA contends that a song lacks feeling until the recording artist breathes life into the song. Morris[25] W.D.T. at 1–2; Petition at 12–13. Because neither side presented conclusive evidence on this point, the Panel observed only that both groups are ''parents of the music.'' Report ¶ 169.

RIAA faults the Panel for its lack of discussion on the question of whose rights in the phonorecord are more valuable. Petition at 10–16. While the Register agrees that the Panel did not make specific citations to record evidence, its finding that ''[t]here was insufficient and conflicting evidence to make a determination that the

[24] A Panel is free to reject a proposed benchmark that does not reflect accurately the characteristics and dynamics of the industries subject to the proposed rate. *See e.g.*, Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 FR 25068–69 (1978) (CRT found voluntary license between BMI, Inc. and the public broadcasters, Public Broadcasting System and National Public Radio, of no assistance in setting rate for use of ASCAP repertoire); Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 FR 52146 (November 12, 1982).

[25] A country music artist who has recorded 14 albums, including five number one songs.

performers and record companies deserve a larger percentage from the Services than granted to the music works,'' was supported by the record evidence. Report ¶ 169.

To make its point, RIAA presented an analysis of revenues from record sales in support of its argument that the marketplace values the contributions of the record companies and the performing artists more than it values the contributions of the copyright owners in the musical compositions. RIAA's PF ¶¶ 112–120; Petition at 10–16. This evidence showed that copyright owners of the musical composition receive between 5–20% of the wholesale price for the sound recordings based on sales of CDs and cassette tapes—approximately 5% from the average wholesale price for an average CD and 12% from an average cassette.[26] RIAA PF ¶¶ 115, 119. Recording artists, on the other hand, receive 7–10% of the average wholesale price for a typical CD and 15–20% for a typical cassette, leaving approximately between 56–88% of the revenues from sales for the record companies. RIAA ¶ PF 116.

The Services disagreed with RIAA's interpretation of the marketplace data, contending that the reason the ''(r)ecord companies receive a bigger percentage of revenues from the sale of sound recordings (is) because they have a bigger monetary investment in the record production costs, as well as the leverage to minimize the royalties paid to songwriters, music publishers, and recording artists.'' Services RF ¶¶ 118–120. They also oppose RIAA's implication that the record companies should receive more value from the performance right in sound recordings than the songwriters receive for a similar right because the record companies garner more revenue from the use of the mechanical license than do the songwriters and composers.

The Services accurately note that the mechanical license and the digital performance license represent different and distinct rights to the copyright holders under the law, and they make no attempt to tie the value of the rights associated with the mechanical license to the value of the digital performance right, a right newly recognized with the passage of the DPRSRA. Even RIAA, the proponent of the assertion, fails to explain why the relative value of the mechanical license to the various owners and users has any application to the determination of the value of a digital performance license in sound recordings. Consequently, where no clear nexus exists between the values of different rights, the model serves no practical purpose in computing the value of the digital performance right.

Hence, RIAA's contention that the data supports its assertion that the marketplace places a higher value on the contributions of the record companies and the recording artists in the creation of the phonorecord fails, because it does not discuss the constraining effect the mechanical license has on the copyright owners in setting a value on their reproduction and distribution right. Record companies pay the copyright owners of the musical compositions no more than the statutory rate for the right to reproduce and distribute the musical composition in a phonorecord. The record company then, in turn, sells the phonorecord at a fair market price. Because both groups do not share equal power to set rates in an unfettered marketplace, it is unreasonable to compare the value of the reproduction and distribution right of musical compositions—a rate set by the government at a level to achieve certain statutory goals—with the revenues flowing to record companies from a price set in the marketplace according to the laws of supply and demand, and then to declare that the marketplace values the sound recording more than the underlying musical composition. Consequently, RIAA's evidence sheds no light on the relative value of the sound recording performance right and the musical works performance right.[27]

In addition to the foregoing discussion, the Register notes that Congress did not intend for the license fees paid under the new digital performance license to ''*diminish* in any respect the royalties payable to copyright owners of musical works for the public performance of their works.'' S. Rep. No. 104–128, at 33 (1995) (emphasis added). See also 17 U.S.C. 114(i). Although this statement does not express Congress' intent that the license be set below the value of the public performance right in the musical works, it indicates that Congress considered the possibility that such would be the outcome, and sought through express legislation to protect the current value of the performance right in musical works.

Based on a review of the record evidence, the Register concurs with the Panel's conclusion that there was insufficient evidence to determine that the performers and record companies deserve a larger percentage from the Services than that received by the copyright holders in the musical works. That being so, the Register finds no basis for making an upward adjustment to the musical works performance license fees to establish a broader range of potential rates.

c. Statutory Objectives

Section 801(b)(1) of the Copyright Act states that the rates for the section 114 license shall be calculated to achieve certain statutory objectives. The Panel evaluated each statutory objective and made a finding as to whether the Services or RIAA furthered that objective. If the Services contributed more to furthering the objective, the Panel gave more consideration to setting a rate at the lower end of the possible range, and conversely, if the record companies made the more significant contribution, the Panel found this to favor a rate toward the upper end. Report ¶ 19((A)–(D).

The Panel's analysis led it to set a rate toward the low end of its range, because a rate set toward the high end would thwart the statutory objectives under current market conditions. *Id.* The Panel expressly noted that a future Panel may reach an entirely different result based on the then-current economic state of the industry and new information on the Services' impact on the marketplace. Report ¶ 202.

RIAA contends that the Panel's findings that all factors favor setting a low rate is contrary to CRT precedent. Petition at 32. This contention relies on a statement from the D.C. Court of Appeals, which upon reviewing the CRT's 1980 Mechanical Rate Adjustment Proceeding concluded that the factors ''pull in opposing directions.'' *Id.*, citing *RIAA* v. *CRT*, 662 F.2d at 9. But in making this statement, the court merely made an observation that the statutory objectives required the Tribunal to weigh opposing factors in determining how best to achieve each objective. It went on to say that the Tribunal had the responsibility of reconciling these factors in setting a reasonable rate, but the court did not preclude the possibility that the Tribunal might find that the application of the factors to the evidence consistently supported either a high rate or a low rate. *RIAA* v. *CRT*, 662 F.2d at 9.

[26] Interested parties are free to negotiate a rate below the statutory rate for the mechanical license and often do. Tr. 1660 (Massarsky).

[27] Even if there was some value to the comparison, RIAA does not appear to factor into its calculations the value of the sound recordings in those phonorecords that do not show a profit. According to the record, ''approximately 85 percent of all sound recordings do not recoup the costs that are spent to make and to market those recordings. Indeed, over two-thirds of all sound recordings sell less than 1,000 copies.'' Report ¶ 105.

The Register approves the Panel's basic approach in utilizing the factors to determine its rate for the digital performance right and adopts the Panel's findings where the evidence supports its conclusions.

The Panel's determination that the statutory objectives supported setting a rate favoring the Services was not arbitrary

The Panel's ultimate conclusion that the best way to achieve the four statutory objectives was to set a low rate favoring the Services is supported by the evidence presented in this proceeding. How much weight to accord each objective is within the discretion of the Panel, which may accord more weight to one objective over the others so long as all objectives are served adequately. See *RIAA* v. *CRT*, 662 F.2d at 9. In *RIAA* v. *CRT*, the court reviewed the Tribunal's decision to raise the rate for making and distributing phonorecords from two cents to four cents. It found the copyright users' argument that the Tribunal failed to give adequate consideration to certain factors over others unavailing. In discussing the impact of the statutory objectives on the ratemaking process, the court stated:

(T)he Tribunal was not told which factors should receive higher priorities. To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a ''zone of reasonableness.''

Id. at 9 (citations omitted). Hence, the Panel was free to find that a rate on the low end was reasonable so long as that rate fell within the ''zone,'' and the ''zone'' was calculated to achieve the statutory objectives.

The Panel's analysis and application of the statutory objectives, however, are not without problems. The Register finds that on occasion, the Panel either did not perceive or misinterpreted the precedential underpinnings of the statutory objective.

A full discussion of the Panel's deliberations and the parties' responses concerning the evaluation and application of the four statutory objectives follows.

A. Maximize the Availability of Works. (17 U.S.C.801(b)(1)(A)).

The Panel found that the digital audio services ''substantially increase the availability of recordings by providing many channels of uninterrupted music of different genres,'' noting the diversity of the music offered by the Services. Report ¶¶ 121–122. Based on this finding, the Panel concluded at the end of its report that ''[t]o maximize the availability of creative works to the public * * * the rate should be set on the low side. A lower rate will hopefully ensure the Services' continued existence and encourage competition so that the greatest number of recordings will be exposed to the consumers.'' *Id.* ¶ 198(A).

RIAA alleges that the Panel misinterpreted this statutory objective because it focused on ''whether the Services promote the sale of sound recordings,'' rather than ''whether the proposed rate will maximize the availability of sound recordings.'' RIAA RPF ¶ 43; Petition at 37–41. In support of its position, RIAA recalls the 1980 jukebox rate adjustment proceeding, where the CRT concluded, in its discussion of section 801(b)(1)(A), that jukeboxes were not crucial to assuring the public of the availability of creative works. 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 889 (1981). The Tribunal, however, did find that ''reasonable payment for jukebox performances will add incrementally to the encouragement of creation by songwriters and exploitation by music publishers, and so maximize availability of musical works to the public.'' *Id.* On the strength of past CRT precedent and the courts' recurring observation that compensation to the author or artist stimulates the creative force,[28] RIAA disputes the Panel's conclusion, contending that the best way to maximize the availability to the public is to ensure that copyright owners receive fair compensation for their works. Petition at 38.

The Services support the Panel's findings and conclusion but offer no legal support for their position except to note that ''[t]he Courts have long held that under copyright law, reward to copyright owners is a 'secondary consideration' that ultimately serves the cause of promoting public availability of copyrighted works.'' Reply to Petition at 27 (citations omitted). The Services assert rightfully that the primary rationale for the copyright law is to stimulate the creation of artistic works for the benefit of the public. *Twentieth Century Music* v. *Aiken*, 422 U.S. 151, 156 (1975), citing *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932) (''The sole interest of the United States and the primary object in conferring this monopoly * * * lie in the general benefits derived by the public from the labors of authors''). But in underscoring the primary purpose for the copyright law, the Court in *Aiken* acknowledges that this aim is achieved by allowing the copyright owners to receive a fair return for their labor, the position advanced by RIAA. *Id.* (''The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good''). *See also Sony Corp. America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984); *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948). The positive interplay between compensation and creation is a basic tenet of copyright law, and as such, its contribution to stimulating the creation of additional works cannot be set aside lightly.

In such matters where the Panel failed to discuss any relevant case law or past precedent construing the statutory objective before rendering its determination, the Register finds the Panel acted in an arbitrary manner. The finding is based on the Panel's failure to consider CRT precedent and to provide a rational basis for its departure from prior proceedings construing the same statutory objective. *See Pontchartrain Broad.* v. *FCC*, 15 F.3d 183, 185 (D.C. Cir. 1994) (''an unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious''). *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29 (1983); *Celcom Communications Corp.* v. *FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp.* v. *FAA*, 758 F.2d 685 (D.C. Cir. 1985).

There is no record evidence to support a conclusion that the existence of the digital transmission services stimulates the creative process. Instead, the Panel made observations concerning the development of another method for disseminating creative works to the public—a valid and vital consideration addressed in the statutory objective concerning relative contributions from each party—but fails to discuss how the creation of a new mode of distribution will itself stimulate the creation of additional works.

[28] *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), quoting *United States* v. *Paramount Pictures*, 334 U.S. 131, 158 (1948). ('''[R]eward to the author or artist serves to induce release to the public of the products of his creative genius.'''); *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) (compensating authors ''serve[s] the cause of promoting broad public availability of literature, music, and the other arts''); 115 Rate Adjustment Proceeding, 46 FR 10479 (1981) (In discussing section 801(b)(1)(A), the CRT looked to the purpose of the section 115 license which was ''intended to encourage the creation and dissemination of musical compositions.'' Therefore, the Tribunal set the rate to ''afford songwriters a financial and not merely a psychic reward for their creative efforts'' as a way to maximize the availability of creative works).

Because the Panel failed to reconcile its determination with past CRT precedent and case law, the Register rejects both the Panel's findings and conclusions on this point as arbitrary. Instead, the Register concludes that the record companies and the performers make the greater contribution in maximizing the availability of the creative works to the public, a conclusion consistent with past CRT precedent.

B. Relative Roles of the Copyright Owners and the Copyright Users in Making Product Available to the Public. (17 U.S.C. 801(b)(1)(C)).

The statutory objective addressing the relative roles of the parties contains five different factors, which the Panel evaluated independently. In analyzing the first component of this objective, the relative creative contribution, the Panel found that both the recording companies and the performers make substantial creative contributions to the release of a sound recording. Report ¶ 87. Its determination credited the performers and the record companies for their work in making the musical work come alive. *Id.* ¶¶ 81–83. The Services were found to make no such significant contribution to the creation of the sound recording. Instead, their contribution was seen as more limited, since it merely enhanced the presentation of the final work through unique programming concepts. *Id.* ¶¶ 84–86. On balance, the Panel found ''that the artists and the record companies provide greater creative contributions to the release of sound recordings to the public than do the Services,'' *id.* ¶ 87, a finding supported by CRT precedent. [29]

The Panel continued its consideration of the relative contribution of the owners vis-a-vis the users in making the product available to the public and determined that the Services made the greater contribution with respect to the four remaining factors: technological contributions, capital investment, costs and risks to industry, and the opening of new markets. Report ¶¶ 88, 93, 94, 97, 98, and 109.

In making this determination, the Panel focused on the technological developments made by the Services in opening a new avenue for transmitting sound recordings to a larger and more diverse audience, including the creation of technology to uplink the signals to satellites and transmit them via cable; technology to identify the name of the sound recording and the artist during the performance; and technology for programming, encryption, and transmission of the sound recording. *Id.* ¶¶ 89–92. In contrast, the Panel found that the record companies made no contributions in these areas. *Id.* ¶ 93.

The Panel also weighed the evidence presented in support of the parties' relative roles in making capital investments in equipment and technology, the third factor. The Panel determined that the Services made a substantial showing of their $10 million investment in equipment and technology, Report ¶ 95 and cites therein, whereas RIAA did not suggest that any capital investment was required on its part. *Id.* ¶ 97.

And finally, the Panel found that the fourth factor, the relative costs and risks incurred by the parties in making the product available to the public, was greater for the Services than for the record companies and the performing artists, even though the record companies do incur substantial costs and risks in producing the product used by the Services. *Id.* ¶¶ 98–108. In making its determination, the Panel balanced the costs and risks involved in producing the sound recordings against the cost and risks associated with bringing the creative product to market in a new and novel way. *Id.* ¶¶ 99–107. In support of its findings, the Panel noted that the Services have invested significant start-up costs and are currently undergoing a shift in how they market their services. *Id.* ¶¶ 55, 73–78, 99, and 102. In addition, the Services contend, and the Panel agrees, that the Services face new competition from the internet and digital radio. Consequently, it is far from clear whether the Services can survive. *Id.* ¶¶ 72, 99.

The Panel also found that record companies face tremendous risks when producing new sound recordings, citing the record companies' submissions showing that record companies fail to recover the production costs for approximately 85% of sound recordings, much less show a profit. *Id.* ¶ 105. The Panel, however, went on to find that the record companies have adapted to the vagaries of the music business, and as an industry, have shown consistent growth in units shipped and dollar value of records, CDs, and music videos from 1982–1996. *Id.* ¶ 108.

The Panel's key finding from its analysis of the third objective was that the Services contribute more to the opening of new markets for creative expression through the development of the digital audio services. *Id.* ¶ 109. The Panel credited the Services with opening new markets for creative expression because they expose the public to a broader range of music than does traditional over-the-air radio. Unlike traditional radio, the Services offer multiple channels for classical, jazz, traditional, alternative, and ethnic formats. *Id.* ¶ 110. Because subscribers frequently purchase new music heard for the first time on the service, the Panel found that record companies arguably benefit directly from the expanded musical formats offered by the Services. *Id.* ¶ 112. The Panel also found that the Services' future plans to offer subscribers an opportunity to purchase the sound recordings directly will ''undoubtedly'' open new markets for the record companies. *Id.* ¶¶ 114–115.

The record companies do not accept the Panel's findings concerning this statutory objective, and once again, take issue with the Panel's interpretation, positing that the Panel impermissively focused on ''whether recording companies had made a particular contribution to the *Services* operations—and wholly ignored the contributions that the recording industry had made to the sound recordings themselves.'' Petition at 45–46. RIAA's predicate for its argument is its interpretation that the statutory phrase, ''in the product made available to the public,'' 17 U.S.C. 801(b)(1)(C), refers only to the creation of the sound recordings and not to the Services' creation of a new means for bringing the sound recordings to the listener. Petition at 46.

In addition to this alleged fundamental flaw in interpretation, RIAA contends that the Panel ''improperly collapsed (its cost/risk analysis) into a risk only (analysis)'' and ignored empirical evidence in the record discounting the promotional value of the Services' offerings. *Id.* at 47–48. RIAA, however, fails to note that the Panel did acknowledge that the record companies incur significant costs and risks in their business. Report ¶¶ 105–107. But the Panel also found that the Services presented no additional risk to the record companies ''*unless* the customers of the Services record the sound transmissions in lieu of purchasing these products at a retail store.'' Report ¶ 107 (emphasis added). Because the record companies introduced no evidence showing decreased overall sales of records and CDs, the Panel reasonably found that the record companies did not incur additional risk from lost sales due to the Services' activities. Report ¶¶ 107, 111.

[29] The CRT refused to award broadcasters a share of the cable royalties for their role in formatting radio stations. The Tribunal construed the claim as one for compilation which had a *de minimis* value. The U.S. Court of Appeals for the D.C. Circuit upheld the Tribunal's determination. *NAB* v. *CRT*, 772 F.2d at 931.

If anything, the Panel believed that the Services decreased the risk to the recording companies because the digital audio services have substantial promotional value. The promotional value comes from the constant airplay of new types of music not readily accessible in the marketplace, which in turn stimulates record sales. Report ¶ 110. In making this finding, the Panel relied on Simon's and Rubinstein's testimony that ''subscribers frequently purchase new music precisely because they heard it on one of the Services,'' Report ¶ 112 citing Simon [30] W.D.T. at 1; Rubinstein W.D.T. at 34; Tr. 1442 (Rubinstein), and on the record industries' practice of supplying complimentary copies of their products to the Services for use on the air to promote the sales of an album. Tr. 1291 (Rubinstein); Tr. 1182–83, 1201 (Talley) [31]; DMX Ex. 3. *See also* Tr. 2248 (Wildman) (''Is there a benefit to the record company from getting music exposed that might become a hit that wouldn't get exposed otherwise? Of course there is'').

Furthermore, RIAA's reliance on the preliminary DCR survey for the proposition that the Services do not promote sound recording sales is untenable where the record clearly shows that the record companies provide promotional copies to the Services. In fact, RIAA's own expert acknowledges ''there (are) promotional benefits to recording companies from having their music played on radio stations or the digital music services.'' Tr. 2220 (Wildman).

In contrast to RIAA's fundamental objection to the Panel's interpretation of this statutory objective, the Services contend that the Panel made a reasonable determination that the phrase, ''the product made available to the public,'' applied to both the sound recordings and the entire digital music service. Reply to Petition at 29. This finding is consistent with the 1980 rate adjustment proceeding for the mechanical license, where the CRT credited the record companies, the users of the musical compositions for purposes of the mechanical license, with developing new markets through technological innovations, and through the creation of record clubs, mail order sales, and television advertising campaigns. 46 FR 10480–81 (1981).

In making her determination on this point, the Register reflects on the statutory responsibilities of the Panel which is to set reasonable rates and terms for the public performance of sound recordings by *certain digital audio services.* (emphasis added). ''In deciding to grant a new exclusive right to perform copyrighted sound recordings publicly by means of digital audio transmission, the Committee was mindful of the need to strike a balance among all of the interests affected thereby.'' S. Rep. No. 104–128, at 15–16 (1995). By its very nature, the section 114 license contemplates weighing the contributions of the users in creating and expanding the market for the performance of the sound recording in a digital technological environment. Without dispute, the evidence reveals a large investment of capital by the Services to create a new industry that expands the offerings of the types of music beyond that which one receives over the radio, through live performances, and other traditional means of public performance. Report ¶¶ 44, 49, 52, 99, 102–104, 110, 113; Simon W.D.T. at 3–4; Rubinstein W.D.T. at 13–14; Tr. 853–54 (Del Beccaro); Tr. 1237–40 (Rubinstein); Tr. 1476–78 (Funkhouser); DMX Ex. 32. Conversely, the record companies offered little or no evidence on their contributions relating to the key factors. Report ¶¶ 93, 97, 111.

From the foregoing analysis, the Panel concluded that the record companies contributed more in only one of the five areas under consideration in evaluating this statutory objective, and consequently, the rate should be set at a minimum level in favor of the Services. Report ¶ 198(C).

C. To Minimize Any Disruptive Impact on the Structure of the Industries Involved. (17 U.S.C. 801(b)(1)(D)).

The Panel determined that a rate set too high could cause one or all of the Services to abandon the business. Report ¶¶ 117–118; Troxel [32] W.R.T. 1, 5–6; Tr. 2553–2554; DMX Ex. 49(b). The Panel considered the nature of the Services' business, noting its need to increase its subscriber base just to reach a break-even point without the added obligation of paying an additional fee for a digital performance right. *Id.* ¶¶ 119(a)–(d). The Panel also calculated that the record companies would receive substantially less than a 1% increase in their gross revenues even if the rate were set at the highest proposed level (41.5% of gross revenues), underscoring the lesser impact of the license fees on the record industry. *Id.* ¶ 119.

RIAA implies that a low statutory rate for the digital performance right will have a negative impact on their future negotiations with other digital services. RIAA RPF ¶¶ 58, 105; Petition at 43. They also object to the Panel's constant reference to revenues generated from the distribution and reproduction rights and its alleged lack of consideration of CRT precedent. Petition at 43–44.

In support of the Panel's evaluation, the Services note that RIAA failed to introduce any evidence concerning the impact a low rate would have on the record companies and performing artists, in direct contrast to the abundance of financial information submitted by the Services in support of their assertion that a high rate could devastate the industry. Reply to Petition at 28.

While RIAA correctly states that the Panel considered the record companies' revenues generated from the exercise of other rights granted to them under the Copyright Act, the Panel's purpose was merely to demonstrate the financial health of the industries. The Panel never implied that the record companies should receive anything less than reasonable compensation under the DPRSRA, nor that their revenues from the exercise of the distribution and reproduction rights are meant to compensate them for the use of their creative works under the new statutory license. Rather, it determined that a reasonable rate for the digital performance right should be set at a level to allow the three companies currently doing business to continue to do so. This balance in favor of the Services supports both the statutory objective to consider the impact on the industries and Congressional intent not to hamper the arrival of new technologies. S. Rep. No. 104–128, at 15–16 (1995). The law requires the Panel, and ultimately the Librarian, to set a reasonable rate that minimizes the disruptive impact on the industry. It does not require that the rate insure the survival of every company. See 115 Rate Adjustment Proceeding, 46 FR 10486 (1981) (''We conclude that while the Tribunal must seek to minimize disruptive impacts, in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever'').

The Register acknowledges RIAA's uneasiness with the possibility that the rate which is ultimately adopted may have precedential value for their negotiations with other digital services, but such concern is misplaced. The rate under consideration applies only to the non-interactive digital audio subscription services, provided, of

[30] Senior Vice-President of Programming at Digital Cable Radio Associates.

[31] Executive Vice-President and Chief Technical Officer of Digital Music Express who oversees research and development, and technical operations worldwide.

[32] Chief Executive Officer and President of Digital Music Express since July 1997.

course, that they are eligible under the law and comply with all legal requirements. See 17 U.S.C. 114(d)(2). Congress, fully recognizing the threat that interactive services pose to the record companies, crafted the law so that they were ineligible for the compulsory license. The result of this decision is that record companies have an opportunity to negotiate an appropriate marketplace rate for a digital performance license with these services.

> Interactive services, which allow listeners to receive sound recordings ''on-demand,'' pose the greatest threat to traditional record sales, as to which sound recording copyright owners (of sound recordings) must have the right to negotiate the terms of licenses granted to interactive services.

S. Rep. No. 104–128, at 24 (1995). Congress also included provisions in the DPRSRA to establish different rates for different types of digital audio subscription services. Section 114(f)(1) states that ''(s)uch terms and rates shall distinguish among the different types of digital audio transmissions then in operation.'' This language gives the Panel and the parties broad discretion in setting rates for different types of digital audio services, when such distinction is warranted. Nor must the record companies accept the final rate from this determination for a new type of digital audio service which emerges before the next regularly scheduled rate adjustment proceeding. The law expressly allows for another rate-setting proceeding upon the filing of a petition. 17 U.S.C. 114(f)(4)(A)(i). Together, these provisions provide an opportunity to the record companies to make their case for a higher rate, where circumstances support such a determination.

In addition, as the market conditions change and the industry shows significant growth and profitability, another Panel will have an opportunity to make adjustments to the rate, and may well find that the changed circumstances favor an upward adjustment. In any event, the Register must make her recommendation based on the evidence in the current record before the Panel, which supports the Panel's determination that the best way to minimize the disruptive impact on the structure of the industries is to adopt a rate from the low range of possibilities. Report ¶ 198(D).

D. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions. (17 U.S.C. 801(b)(1)(B)).

Usually this balance is struck in the marketplace through arms-length negotiations; and even in the case of a statutory license, Congress encourages interested parties to negotiate among themselves and set a reasonable rate which inevitably affords fair compensation to all parties. 17 U.S.C. 114(f)(1), (4); 115(c)(3); 116(b); 118(b); and 119(c). A statutory rate, however, need not mirror a freely negotiated marketplace rate—and rarely does—because it is a mechanism whereby Congress implements policy considerations which are not normally part of the calculus of a marketplace rate. See 115 Rate Adjustment Proceeding, 46 FR 10466 (1981) (determining that the mechanical license regulates the price of music to lower the entry barriers for potential users of that music).

The creation of the digital performance right embodied similar considerations. It affords the copyright owners some control over the distribution of their creative works through digital transmissions, then balances the owners' right to compensation against the users' need for access to the works at a price that would not hamper their growth.

In the current proceeding, the Panel considered proposed marketplace benchmarks, including all the economic data, and weighed the record evidence in light of the statutory objectives. This process is structured so that it affords the copyright owners reasonable compensation and the users a fair income—the purpose of the second statutory objective. See 17 U.S.C. 801(b)(1)(B). Accordingly, a recommended rate so calculated achieves this final statutory objective, in that it reflects the balance between fair compensation for the owners and a fair return to the users. As fully discussed above, the Register supports the Panel's methodology in reaching its determination (although she rejects as arbitrary the Panel's application of that methodology in some respects) and has adopted the Panel's overall approach in making her recommendation to the Librarian.

d. The Register's Recommended Rate

Rate setting is not a precise science. National Cable Television Assoc. Inc., 724 F.2d 176, 182 (D.C. Cir. 1983). (''Ratemaking generally 'is an intensely practical affair.' The Tribunal's work particularly, in both ratemaking and royalty distributions, necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within a 'zone of reasonableness' ''). It requires evaluating the marketplace points of reference and tempering the choice of any proposed rate with the policy considerations underpinning the objectives of Congress in creating the license. Because this process requires the consideration of numerous factors, the CARPs, as the Tribunal before them, have considerable discretion in setting rates designed to achieve specific statutory objectives. *See* RIAA v. *CRT*, 662 F.2d at 9 (''To the extent that the statutory objectives determine a range of reasonable royalty rates that would serve all these objectives adequately but to differing degrees, the Tribunal is free to choose among those rates, and courts are without authority to set aside the particular rate chosen by the Tribunal if it lies within a 'zone of reasonableness' '').

Discretion in setting rates, however, assumes that the underlying rationale for making a determination is sound—a finding which the Register could not make in this proceeding because the Panel's undue reliance on the rate in the DCR license agreement, and its subsequent manipulation of the license fee, were arbitrary actions. *See Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (Rate setting agency allowed to use a variety of regulatory methods in setting rates provided that the result is not arbitrary or unreasonable). Consequently, the Register recommended that the Librarian reject the Panel's determination, which he did, and set a new rate.

In formulating her recommendation as to the appropriate rate for the digital performance license, the Register, like the Panel, considered the relevant marketplace points of reference offered into evidence.[33] These reference points guided the Register in her task of setting a reasonable rate for the performance of digital sound recordings. But unlike the Panel, the Register gave more consideration to the rates paid for the performance right in the musical compositions, because these rates represent an actual marketplace value for a public performance right in the digital arena, albeit not the digital performance right in sound recordings. The Register took this approach after finding that the DCR negotiated license fee could not reflect accurately the

[33] The values of the relevant marketplace reference points, the DCR negotiated license fee and the license fee for the performance of the musical works, are subject to a protective order, and hence, their numerical values have been omitted. Nevertheless, the values of the performance rights embodied in these licenses figure prominently in the determination of the value for the digital performance right in sound recordings. In fact, the sum of these license fees establishes the outer boundary of the ''zone of reasonableness'' for this proceeding.

marketplace value of the digital performance right since no such legal right existed at the time the rate was negotiated, and the negotiating parties were unwilling to enter a licensing agreement for the digital performance right absent a partnership agreement.

Nevertheless, the Register did take into account the negotiated value of the digital performance right in the DCR license in making her determination that the statutory rate should be less than the value of the performance rights of the musical compositions. This determination followed from a review of the evidence on the relative value of the sound recording component and the musical works component of a phonorecord, which failed to support the record industry's assertion that the marketplace valued the sound recording component more than the musical works component. This being so, the Register evaluated the only other relevant marketplace point of reference, the negotiated DCR license fee. Because this fee is considerably lower than the total value of the marketplace license fees which each Service pays for the right to publicly perform the musical works, and while not a true marker for the value of the digital performance right, it supports a determination that the value of the performance right in the sound recording does not exceed the value of the performance right in the musical works.

In addition to these factors, the Register considered the statutory criteria and Congress' intent in creating the license. Unlike the Panel, which found that all four factors support a low rate, the Register found that the copyright owners did more ''[t]o maximize the availability of creative works to the public,'' see 17 U.S.C. 801(b)(1)(A), and should receive fair compensation for their contributions in this area. However, the three remaining factors, especially the fourth factor, which requires that the rate be set ''[t]o minimize any disruptive impact on the structure of the industries involved,'' see 17 U.S.C. 801(b)(1)(D), compels the Register to consider the economic health of the digital audio transmission industry.

The evidence clearly shows that the Services have been facing an uphill battle in their struggle to achieve profitability. At this time, the digital audio industry is still struggling to create a sustainable subscriber base, and as yet, no digital audio transmission service has shown a profit nor does any service expect to reach profitability in the near future. Unfortunately, the actual state of financial health within the industry is difficult to ascertain from the projected budgets put forward by the Services. Nevertheless, the 5% rate proposed by the Panel did not draw an objection from the Services, indicating a reasonable state of financial health to absorb at least a rate set at this level.

For the foregoing reasons, the Register recommends a rate that will not harm the industry at this critical point in its development and finds that a 6.5% rate achieves this aim and meets all other statutory objectives. This rate reflects the deference the Register accorded the value of the performance right in the musical works, the consideration of the financial health of the industry, and the recognition that copyright owners contribute the lion share's to the creation of new works for the public's enjoyment.

e. Terms

On June 2, 1997, the Services submitted general comments concerning proposed terms and conditions for the digital performance license pursuant to the March 28, 1997, Order of the Copyright Office. They later proposed specific terms concerning how the Services would make payment, how often they would pay, and procedures for verifying the accuracy of those payments, including terms on confidentiality, recordkeeping, and audits. Services PF ¶¶ 122–128; 284–304. Included in their submissions were proposed terms establishing a payment schedule for the distribution of royalties to the featured artists and the nonfeatured musicians and vocalists. Services PF ¶¶ 287–289. The Panel refused to adopt these terms because the Services failed to present any evidence or testimony to support their proposal, but more importantly, because the Panel found that ''the issue of the timing of payments from the RIAA Collective to artists and other performers is not within the scope of this proceeding.'' Report at 56 n.21.

RIAA made similar proposals on how to administer the royalty payments, but offered two additional considerations, a minimum fee ''equivalent to the rate adopted in this proceeding'' and a late fee for untimely payments. RIAA PF ¶¶ 125–160. The Panel rejected the proposal to impose a minimum fee, see discussion supra, but accepted the RIAA proposal to impose a 1.5% late fee.

The Register supports and adopts the Panel's decision to reject the Services' proposed terms concerning further distribution of royalties to certain copyright owners by RIAA on the grounds that no evidence was introduced in support of the terms. Because this is a sufficient ground on which to reject the Services' proposed term, the Register need not address the Panel's determination that it lacked the authority to consider a payment schedule for the performing artists. The Register also need not address the Panel's rejection of the minimum fee because no party chose to challenge the Panel's decision. *See* n. 7, *supra.*

The parties' reactions to the terms adopted by the Panel

The Services did not file a post-panel motion to modify or set aside the Panel's determination, thereby signaling their acceptance of the Panel's resolution of any conflict between the parties concerning the terms. However, RIAA has raised two key items for further review by the Librarian: The adoption of a term which defines when copyright infringement occurs for purposes of the statutory digital performance license and the creation of a payment schedule that allows the Services to spread out their payment for the performances made between February 1996, the effective date of the Act, and November 1997, the month the Panel filed its report with the Librarian of Congress.[34] Petition at 7 n. 1.

The Panel's adoption of two of its terms was either arbitrary or contrary to law

The Register has determined that the Panel had no authority to set terms which attempt to delineate the scope of copyright infringement for the digital performance license, or alter a payment schedule already set by law. See Report ¶¶ 187–189, 206(a), (b).

1. *Payment of arrears.* The Panel adopted a term which allowed the Services to make back payments over a 30-month period for use of the sound recordings between February 1, 1996, and the end of the month in which the royalty rate is set and to delay the first payment for six months. Report ¶¶ 187, 206(a). The Register has determined, however, that adoption of this term is contrary to law.

Section 114(f)(5)(B) of the Copyright Act states that ''(a)ny royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.'' The ''arrears'' referenced in the statute refers to the copyright liability that accrued to the Services for those performances made since February 1, 1996, the effective date of the Act, and the end of the month in which the royalty rate is set.

[34] RIAA did not object to the Panel's refusal to grant its request for a minimum fee in its petition, nor does the Register find any reason to question the Panel's determination. As discussed supra, the Register finds the Panel's disposition on this issue to be well reasoned and supported by the evidence.

In spite of the express statutory language, the Panel fashioned a payment schedule to ease the burden on the Services in meeting this obligation.

The Panel found support for its action in the 1980 jukebox rate adjustment proceeding, in which the CRT raised the rate from $8 to $50, but did so in a progressive fashion. Report ¶ 186. The determination required the jukebox operators to make the first increased payment of $25 per jukebox per year on January 1, 1982, and a second $25 annual payment the following year. The CRT did not require the full $50 annual rate to be paid until January 1, 1984, approximately three years after setting the rate. 46 FR 884, 888, 890 (1981). The Tribunal adopted the phase-in payment schedule relying on its duty to set rates in accordance with the statutory objectives. It found that the gradual increase in payments furthered the objective concerned with minimizing the disruptive impact on the industries. *Id.* at 889. The Panel relied upon this CRT decision in adopting its phase-in program for payment of the arrears over a 30-month period.

The Services embrace the Panel's reliance on past CRT precedent for the inclusion of the phase-in payment term and claim that RIAA also agreed to allow the Services to make the ''back payments'' over a period of time. Reply to Petition at 14 n. 5. This assertion, however, is inaccurate. RIAA agreed that a phase-in schedule would be appropriate for the minimum fee, but never posited such a payment schedule for the arrears. See Tr. 2829 (RIAA closing argument). By comparing RIAA's statement on the proposal for making payments of a minimal fee,

> The recording industry proposes that the minimum fee be phased in to help minimize any disruptive effect from the fact that, for the first time, the services are going to be paying a fair fee—in fact, any fee at all for the performance of sound recordings,

Id. at 2829, see also RIAA PF ¶¶ 150–152, with its statement concerning the timing of the payment of arrears,

> In terms of the timing of the back payment, the statute leaves absolutely no question as to when the back payment from the services is due for the period from the Act's effective date through the date on which the Panel issues its decision.
>
> Section 114(f)(5)(B) says that ''any royalty payment in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.''

Id. at 2829–2830, see also RIAA PF ¶ 157, it is absolutely clear that RIAA never agreed to a payment scheme for the arrears that would allow the Services to make partial payments over a 30-month period.

In another attempt to support the Panel's conclusion, the Services construe the statutory provision broadly and argue that arrears refers to ''any royalty payment in arrears'' and ''does not specifically cover the back payment for the extended period between the 1995 Act's February 1, 1996, effective date and the time the Panel sets the performance rate.'' Services RF ¶ 157. This assertion, however, is inconsistent with the legislative history and the plain language of the statute.

Thus, the Panel had no authority to create a graded payment schedule for the payment of the arrears because the statute expressly stated when payment was to occur. Section 114(f)(5)(B) states, without qualification, that ''[a]ny royalty payments in arrears shall be made on or before the twentieth day of the month *next succeeding the month in which the royalty fees are set.*'' (emphasis added). It is a well-established principle that, in interpreting the meaning of a statute, the language of the law is the best evidence of its meaning. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); Norman S. Singer, Sutherland Statutory Construction sec. 46.01 (5th ed. 1992 rev.) Because the statutory language is clear on its face, the Register finds that the Panel's and the Services' reliance on the CRT 1980 jukebox decision is arbitrary and contrary to well-established principles of law. And even if the statutory language were ambiguous, the legislative history supports the Register's and RIAA's interpretation of section 114(f)(5)(B).[35]

Because the Panel's action exceeded its authority, the Register recommends that the Librarian reject the proposed term because its adoption would be contrary to law.

2. *Copyright infringement.* The Panel adopted a term which stated that ''[i]f a Service fails to make timely payments, it will be subject to liability for copyright infringement. Such liability will only come about, however, for knowing and willful acts which materially breach the statutory license terms.'' Report ¶ 206(b). The Register has determined that this term is contrary to law.

RIAA contends that the Panel ''usurped the authority of Article III courts by attempting to define the circumstances where the Services are liable for copyright infringement.'' Petition at 7 n.1. In response, the Services argue that the DPRSRA supports the Panel's suggestion that minor technical violations should not result in an infringement action. Services Reply to Petition at 14 n.5. Specifically, the Services point to section 114(j)(7)(B) which limits complement to the performance of sound recordings from a single album, which Congress included ''[t]o avoid imposing liability for programming that unintentionally may exceed the complement.'' S. Rep. No. 104–128, at 35 (1995).

The Register acknowledges that Congress made provisions to protect users from copyright liability for programming that unintentionally exceeds the complement, see 17 U.S.C. 114(j)(7), but she finds it impermissible to expand a particular provision of the copyright law which limits copyright liability under one set of circumstances to include additional limitations not contemplated by Congress. *Fame Publishing Co.* v. *Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir.) *cert. denied*, 423 U.S. 841 (1975) (''We begin by noting that the compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule. Thus we should neither expand the scope of the compulsory license provision beyond what Congress intended in 1909, nor interpret it in such a way as to frustrate that purpose'').[36]

But more importantly, in examining the legislative history, it is clear that Congress meant for the CARP to have limited authority in adopting reasonable terms.

> By terms, the Committee means generally such details as how payments are to be made, when, and other accounting matters (such as are prescribed in section 115). In addition, the Librarian is to establish related terms under section 114(f)(2). Should additional terms be necessary to effectively implement the statutory license, the parties may negotiate such provisions or the CARPs may prescribe them.

S. Rep. No. 104–128, at 30 (1995). This language clearly indicates that the CARP had authority to set reasonable terms only so far as those terms insured the smooth administration of the license. There is no indication in the statutory language or in the legislative history that the scope of the terms should go

[35] S. Rep. No. 104–128, at 30 (1995) (''If the royalty fees have not been set at the time of performance, the performing entity must agree to pay the royalty fee to be determined under this subsection by the twentieth day of the month following the month in which the rates are set'').

[36] Congress defined the scope of the digital performance right granted to the copyright owner and under what circumstances a digital audio service infringes that right. *See*, e.g., 17 U.S.C. 114 (d) and (e)(5).

beyond the creation of a workable administrative system and reach substantive issues, such as defining the scope of copyright infringement for those availing themselves of the statutory license.

Congress carefully delineated the scope of the digital performance right and the limitations on that right within the provisions of the statute. Section 114(d), entitled ''Limitations on Exclusive Right,'' states with specificity when a performance by means of a digital audio transmissions is not an infringement, just as section 114(f)(5) defines when a public performance of a sound recording by means of a nonexempt subscription digital transmission is not an infringement. For the Panel to fashion a term further delineating the issue of copyright infringement when Congress has already acted is an improper exercise of authority beyond that granted under the statute.

Accordingly, the Register finds that the Panel had no authority to set a term construing the meaning of copyright infringement for purposes of section 114. See Report ¶¶ 188, 206(b). Because the Panel's action exceeded its authority, the Register recommends that the Librarian reject the proposed term because its adoption would be contrary to law.

f. Other Issues

1. *Effective date.* Section 114(f)(5)(B) states that payments in arrears for the performance of sound recordings prior to the setting of a royalty rate are due on a date certain in the month following the month in which the rate is set. Both the Panel and RIAA assume that the ''date the royalty rate is set'' is the date the Panel submits its report to the Librarian of Congress. See Report ¶ 186; Petition at 7 n.1. The Register disagrees with this assessment.

Section 802(g) governs judicial review of the Librarian's decision with respect to CARP determinations. The section allows an aggrieved party 30 days to file an appeal with the United States Court of Appeals for the District of Columbia Circuit, but does not relieve a party of his or her obligation to make royalty payments during the pendency of the appeal. In the event that no appeal is taken, the section states that ''the decision of the Librarian is final, and the royalty fee * * * shall take effect as set forth in the decision.'' 17 U.S.C. 802(g). Neither section 114 nor chapter 8 makes further reference to the possible effective date of royalty rates.

As discussed in an earlier order setting a rate for the satellite compulsory license, 17 U.S.C. 119, the Register interprets the decision referenced in section 802(g) ''to mean the decision of the Librarian, and not the decision of the CARP, since section 802(g) only refers to the decision of the Librarian. Consequently, the Register concludes that only the Librarian of Congress has the authority to set the effective dates of the royalty rates in this proceeding.'' Rate Adjustment for the Satellite Carrier Compulsory License, 62 FR 55754 (1997). See also *RIAA* v. *CRT*, 662 F.2d at 14 (''When the statute authorizing agency action fails to specify a timetable for effectiveness of decisions, the agency normally retains considerable discretion to choose an effective date'') (footnote omitted). This reasoning applies equally to the current proceeding, since no other guidance for setting the effective date is to be found in the statute or the legislative history.

The Register has pondered the question of an appropriate effective date and believes that the Panel's concern with minimizing the disruptive impact on the structure of the industries involved was well founded. See discussion supra concerning the economic health of the Services. Consequently, the Register proposes an effective date of June 1, 1998, which would require the Services to make full payment of the arrears on July 20, 1998, in addition to the payment for the month of June 1998, with subsequent payments to RIAA on the 20th day of each subsequent month. This date provides the Services with a measured amount of time to provide for any necessary adjustments in their business operations to meet their copyright obligations.

The Tribunal took a similar course when it set the effective date for implementing the rate increase for making and distributing phonorecords approximately six months after publication of its final rule. Section 115 Rate Adjustment Proceeding, 46 FR 10486 (1981). The Tribunal chose not to implement the rate change immediately in order to minimize the effect of the upward adjustment on the copyright users. The United States Court of Appeals for the District of Columbia Circuit upheld the Tribunal's decision to postpone the effective date because:

> The Tribunal's opinion demonstrates its concern ''to minimize disruptive impacts'' on the recording industry, and its view that the effective date of a royalty adjustment should be arranged so as to be ''less disruptive to the industries.'' Although the Tribunal concluded that a single increase to the full four-cent rate would not be unduly disruptive, it was within the Tribunal's discretion to give the industry adequate lead time to prepare for the increase.

RIAA v. *CRT*, 662 F.2d at 14 (citations omitted).

2. *Value of an individual performance of a sound recording.* The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the ''blanket license'' for the right to perform the sound recording, without once considering the value of the individual performance—a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, the Register has made a determination that each performance of each sound recording is of equal value and has included a term that incorporates this determination.

To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, each performance of each sound recording must be afforded equal value.

This determination does not alter the statutory provision that specifies how the copyright owner of the right to publicly perform the sound recording must allocate the statutory fees among the recording artists. See 17 U.S.C. 114(f)(2).

3. *Audit of the designated collective.* Although the membership of the collective represented by RIAA includes over 275 record labels which create more than 90 percent of all legitimate sound recordings sold in the United States, it does not represent the record companies responsible for the creation of the remaining 10% of the sound recordings. Report ¶ 20. Nevertheless, the Panel found, and the Register concurs, that the parties' suggestion to designate a single entity to collect and to distribute the royalty fees creates an efficient administrative mechanism. Report ¶ 184.

It is common practice, however, for the government body making such designations to implement safeguards to monitor the functions of the collective.[37] To this end, the Register recommends new terms that afford the copyright holders a right to audit the collective's practices in handling the royalty fees. The Register takes this step to insure copyright holders access to the records of the organization charged with the fiduciary responsibility of making an equitable distribution among those entitled to receive a portion of the funds, while at the same time preserving the confidentiality of the organization's business records. These terms mirror those formulated by the parties and adopted by the Panel which allow the collective to audit the business records of the Services to insure proper payment of the royalties.

4. *Deduction of administrative costs.* Neither the parties nor the Panel gave any consideration to the manner in which the collecting entity would deduct from payments to copyright owners its costs of administering the funds it receives and disburses. Nevertheless, the Panel should have addressed this key term of the compulsory license. Therefore, the Register finds it necessary to establish an additional term that permits the collecting entity to deduct from the royalties it pays to copyright owners the costs it incurs in administering the funds, so long as the costs deducted are reasonable and are no more than the actual costs incurred by the collecting entity.

5. *Unknown copyright owners.* The digital audio services will pay royalties on all sound recording performances without regard to the further disbursement of these fees to the numerous copyright holders. The collective will have little difficulty in identifying and locating the overwhelming majority of the copyright holders entitled to receive a portion of the fees, since the membership of the collective represents the interests of the copyright holders in over 90% of all sound recordings. Problems may arise, however, as RIAA attempts to identify and locate the copyright holders to the remaining 10% of the sound recordings. In anticipation of the likelihood that RIAA will not be able to locate all copyright holders, the Register recommends the adoption of a term that segregates the fees for unknown copyright owners into a separate trust account for future distribution to the rightful owner, or in the event that the owner is not found, allows the collective to use the funds after a period of three years, see 17 U.S.C. 507(b), to offset its administrative costs associated only with the collection and distribution of royalty fees collected under the statutory license.

6. *Rates for other types of digital audio services.* The rates and terms announced in this notice apply to DCR, DMX, and Muzak, the three digital audio transmission services participating in this proceeding, and to any other digital audio transmission service that avails itself of the compulsory license, provided that the service is of the same type. The Register raises this point to avoid any confusion over the Panel's statement which implies that the rates and terms set in this proceeding ''shall be binding on all copyright owners of sound recordings and entities performing sound recording[s].'' Report ¶ 1, citing 17 U.S.C. 114(f)(2). A general provision, however, must be read in conjunction with more specific statutory language; in this case, section 114(f)(4)(A), which provides for additional rate adjustment proceedings upon petition from any copyright owner or entity performing sound recordings when a new type of digital audio transmission becomes or is about to become operational.

VI. Conclusion

In considering the evidence in the record, the contentions of the parties, and the statutory objectives, the Register of Copyrights recommends that the Librarian adopt a statutory rate for the digital performance of sound recordings, pursuant to 17 U.S.C. 114, of 6.5% of gross revenues from subscribers residing within the United States.

In addition, the Register recommends that the Librarian adopt the reasonable terms propounded by the Panel except for those terms concerning the payment schedule for arrears and potential limitations on the scope of copyright infringement. The Register also recommends setting June 1, 1998, as the effective date for implementing the new rate and terms in order to ease the burden on each Service on meeting its initial obligations under the statutory license.

VII. The Order of the Librarian of Congress

Having duly considered the recommendations of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter to set reasonable terms and rates for the digital performance right in sound recordings, 17 U.S.C. 114, the Librarian of Congress fully endorses and adopts her recommendation to set the rate for the statutory license at 6.5% of gross revenues from U.S. residential subscribers. This rate shall apply to those digital audio services represented in this proceeding and any other eligible digital audio service of the same type that subsequently enters the market and makes use of the statutory license. The Librarian of Congress also adopts the Register's recommendation to reject the terms concerning potential limits on what constitutes copyright infringement and the proposed schedule for the payment of the arrears.

For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order which adopts new Copyright Office regulations setting reasonable terms and rates for the digital performance right in sound recordings.

List of Subjects in 37 CFR Part 260

Copyright, Digital Audio Transmissions, Performance Right, Sound Recordings

Final Regulation

In consideration of the foregoing, part 260 of 37 CFR is added to read as follows:

PART 260—USE OF SOUND RECORDINGS IN A DIGITAL PERFORMANCE

Sec.

Authority: 17 U.S.C. 114, 801(b)(1).

§ 260.1 General.

(a) This part 260 establishes terms and rates of royalty payments for the public performance of sound recordings by nonexempt subscription digital transmission services in accordance with the provisions of 17 U.S.C. 114 and 801(b)(1).

[37] A government's general policy toward the regulation of collective administration should be to limit government intervention to only ''that which is necessary to facilitate the effective operations of the collective administration organization, consistent with the private character of the rights involved, while checking possible abuses by that collective in the least intrusive manner possible within'' the overall context of the society involved. David Sinacore-Guinn, Collective Administration of Copyrights and Neighboring Rights, 544 (1993).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this part, a nonexempt subscription digital transmission service may engage in the activities set forth in 17 U.S.C. 114.

§ 260.2 Royalty fees for the digital performance of sound recordings.

(a) Commencing June 1, 1998, the royalty fee for the digital performance of sound recordings by nonexempt subscription digital services shall be 6.5% of gross revenues resulting from residential services in the United States.

(b) A nonexempt subscription digital transmission service (the ''Licensee'') shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received after the due date. Late fees shall accrue from the due date until payment is received.

(c)(1) For purposes of this section, *gross revenues* shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

(i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;

(ii) Licensee's advertising revenues (as billed), or other monies received from sponsors if any, less advertising agency commissions not to exceed 15% of those fees incurred to recognized advertising agency not owned or controlled by Licensee;

(iii) Monies received for the provision of time on the Programming Service to any third party;

(iv) Monies received from the sale of time to providers of paid programming such as infomercials;

(v) Where merchandise or anything or service of value is received by licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;

(vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the Programming Service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (c)(1) (i) through (vii) of this section.

(2)Gross revenues shall include such payments as are in paragraphs (c)(1) (i) through (viii) of this section to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from ''gross revenues'' as defined in paragraph (c)(1) of this section for affiliate revenue returned during the reporting period and for bad debts actually written off during reporting period.

(d) During any given payment period, the value of each performance of each digital sound recording shall be the same.

§ 260.3 Terms for making payment of royalty fees.

(a) All royalty payments shall be made to a designated agent(s), to be determined by the parties through voluntary license agreements or by a duly appointed Copyright Arbitration Royalty Panel pursuant to the procedures set forth in subchapter B of 37 CFR, part 251.

(b) Payment shall be made on the twentieth day after the end of each month for that month, commencing with the month succeeding the month in which the royalty fees are set.

(c) The agent designated to receive the royalty payments and the statements of account shall have the responsibility of making further distribution of these fees to those parties entitled to receive such payment according to the provisions set forth at 17 U.S.C. 114(g).

(d) The designated agent may deduct reasonable costs incurred in the administration of the distribution of the royalties, so long as the reasonable costs do not exceed the actual costs incurred by the collecting entity.

(e) Commencing June 1, 1998, and until such time as a new designation is made, the Recording Industry Association of America, Inc. shall be the agent receiving royalty payments and statements of accounts.

§ 260.4 Confidential information and statements of account.

(a) For purposes of this part, confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the nonexempt subscription digital transmission service filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a nonexempt subscription digital transmission service and an interested party, or between one or more interested parties; *Provided* that all such information shall be made available, for the verification proceedings provided for in §§ 260.5 and 260.6 of this part.

(b) Nonexempt subscription digital transmission services shall submit monthly statements of account on a form provided by the agent designated to collect such forms and the monthly royalty payments.

(c) A statement of account shall include only such information as is necessary to verify the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty fees shall not be included on the statement of account.

(d) Access to the confidential information pertaining to the royalty payments shall be limited to:

(1) Those employees of the designated agent who are not also employees or officers of a sound recording copyright owner or performing artist, and who, for the purpose of performing their assigned duties during the ordinary course of business, require access to the records; and

(2) An independent and qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist, but is authorized to act on behalf of the interested copyright owners with respect to the verification of the royalty payments.

(e) The designated agent shall implement procedures to safeguard all confidential financial and business information, including but not limited to royalty payments, submitted as part of the statements of account. Confidential information shall be maintained in locked files.

(f) Books and records relating to the payment of the license fees shall be kept in accordance with generally accepted accounting principles for a period of three years. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.

§ 260.5 Verification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by interested parties according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C.

114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f).

(b) *Frequency of verification.* Interested parties may conduct a single audit of a nonexempt subscription digital transmission service during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit a particular service with the Copyright Office, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such notification of intent to audit shall also be served at the same time on the party to be audited.

(d) *Retention of records.* The party requesting the verification procedure shall retain the report of the verification for a period of three years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all parties.

(f) *Costs of the verification procedure.* The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more; in which case, the service which made the underpayment shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their designated agents, or the entity designated by the copyright arbitration royalty panel in 37 CFR 260.3 to receive and to distribute the royalty fees.

§ 260.6 Verification of royalty payments.

(a) *General.* This section prescribes general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C. 114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f).

(b) *Frequency of verification.* Interested parties may conduct a single audit of the entity making the royalty payment during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit the entity making the royalty payment with the Copyright Office, which shall publish in the **Federal Register** a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such notification of interest shall also be served at the same time on the party to be audited.

(d) *Retention of records.* The party requesting the verification procedure shall retain the report of the verification for a period of three years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all parties.

(f) *Costs of the verification procedure.* The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more; in which case, the entity which made the underpayment shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), or their designated agents.

§ 260.7 Unknown copyright owners.

If the designated collecting agent is unable to identify or locate a copyright owner who is entitled to receive a royalty payment under this part, the collecting agent shall retain the required payment in a segregated trust account for a period of three years from the date of payment. No claim to such payment shall be valid after the expiration of the three year period. After the expiration of this period, the collecting agent may use the unclaimed funds to offset the cost of the administration of the collection and distribution of the royalty fees.

Dated: April 17, 1998.

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

[FR Doc. 98–12266 Filed 5–7–98; 8:45 am]

BILLING CODE 1410–33–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL 325–6]

Approval and Promulgation of State Implementation Plans

CFR Correction

In title 40 of the Code of Federal Regulations, part 52 (§ 52.1019 to end), revised as of July 1, 1997, in appendix D to part 52, on page 610, in the first and second columns, equations d–1 and d–2 were inadvertently omitted. Additionally, the second line in the legend for Equation D–2 was incorrectly printed. The missing equations and corrected line should read as follows:

Appendix D to Part 52—Determination of Sulfur Dioxide Emissions From Stationary Sources by Continuous Monitors

* * * * *

$$\overline{X}\ \frac{\sum_{i=1}^{n} x_i}{n} \qquad \text{Equation D-1}$$

* * * * *

$$\text{C.I.}_{95} = \frac{t_{.975}}{n\sqrt{n-1}}\sqrt{n\left(\sum \chi_i^{\,2}\right)-\left(\sum \chi_i\right)^2}$$

Equation D-2

* * * * *

$t_{.975} = t_{1-a/2}$, and

* * * * *

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 980318066–8066–01; I.D. 022698A]

Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Framework Adjustment 25; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; correction.

SUMMARY: This rule removes regulatory language inadvertently added, clarifies the raised footrope requirement for Small Mesh Area 1 & 2, and corrects an

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

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)**

TESTIMONY OF

DARIUS VAN ARMAN

Co-Founder and Co-Owner of Secretly Group

PUBLIC VERSION

Witness for SoundExchange, Inc.

Background and Qualifications

I am Darius Van Arman, co-founder and co-owner of Secretly Group, which consists of the four independent record labels Jagjaguwar, Dead Oceans, Secretly Canadian, and the Numero Group. Secretly Group is headquartered in Bloomington, Indiana and shares ownership with affiliated companies SC Distribution, Fort William Artist Management, and Secretly Canadian Publishing. Altogether, these companies employ about seventy U.S. employees.

In addition to my position with Secretly Group, I am also actively involved in the independent record label community. I am currently a non-voting observer on the Board of the Music and Entertainment Rights Licensing Independent Network or "MERLIN," a global rights agency for the independent label sector. I am also a founding and current member of the Worldwide Independent Network (or "WIN") Council, an international group of independent label owners brought together in 2013 to help advise WIN. WIN is the global representative organization founded in July 2006 to represent independent music companies and their national trade organizations. Previously, I served on the Board of Directors of the American Association of Independent Music ("A2IM"), a not-for-profit trade organization representing over 330 independently owned music labels in the United States. I am also a member of the Board of Directors of SoundExchange, Inc.

I have testified before the Copyright Royalty Judges to present the views of an independent record label in a proceeding concerning royalties payable by SIRIUS XM for its satellite radio service and certain services that stream sound recordings over satellite and cable television. I have also recently testified before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Judiciary Committee to reflect my own views and the perspective of the independent community. I understand that the purpose of this proceeding is to set the rates and terms of the compulsory license for digital sound recordings in the United States available to non-interactive services (which I will refer to generally as "webcasters") for the years 2016-2020. While I am testifying based on my own experience and that of Secretly Group, I am also testifying to offer the Judges the perspective of the independent record company community in the United States.

Independent Record Companies and the Digital Music Landscape

The independent record company community is a vibrant and vital part of the American music landscape. When I founded the record label Jagjaguwar out of my bedroom in Charlottesville, Virginia, in 1996, I hardly imagined that the labels I would become a part of would one day be the home of such prominent artists as Bon Iver, a recording artist who won the Grammy Awards for both Best New Artist and Best Alternative Album, or Tig Notaro, a 2014 Grammy nominee for Best Comedy Album. Our labels have rich and diverse rosters totaling over sixty active artists, including emerging, contemporary acts such as singer-songwriter Sharon Van Etten, electronic music project Major Lazer, and the critically acclaimed rock group The War on Drugs, as well as iconic acts like Dinosaur Jr., a band that has been releasing important records to the American public since 1984. In addition to supporting these important artists, Secretly Group helps new generations of music consumers discover classic musical gems through the efforts of the Numero Group, an archival label that creates compilations of previously released music from a variety of genres. Secretly Group releases have become gold singles and albums and have received critical recognition, including multiple Grammy nominations. More importantly, our efforts and the efforts of the artists we work with have made vital contributions to the overall music landscape in the United States.

In this way, our experience is emblematic of independent music companies in general. Independent labels release some of the most prominent and commercially successful records, including those by artists like Paul McCartney, Adele, Macklemore, Taylor Swift, and the Lumineers. In fact, according to Nielsen Soundscan figures for calendar 2013, independently-owned repertoire constituted 34.6% of the market for music sales. Independent record labels not only have a significant commercial share of the market, we also often support the release of sound recordings that would otherwise never be heard, either because the artists are undiscovered or the sound recordings appeal to devoted but niche audiences. We are proud of the quality of our artists and the music they create. And others recognize the value of these sound recordings as well. In fact, this year, independent labels and artists led the industry once again at the Grammy Awards, winning half of this year's awards and claiming half of this year's non-producer nominations. To put it mildly, the contributions of independent record companies and artists are at the center of music in the United States.

Independent Record Companies and Revenue From Digital Music

To ensure that the public is able to receive the benefit of the wonderful sound recordings of our artists, independent record companies must act as would any responsible small business. Our margin of error is much slimmer than other much larger record companies or digital music services who are often backed by significant investors and capital. We have no external source of funding so, generally speaking, we cannot afford to release albums that lose money for us.

At Secretly Group, and at independent record companies generally, we invest a lot of time and effort into each of our artists and their releases. We spend a great deal of time and effort seeking out recording artists that we believe in to sign to our rosters. We listen to a large number of the demos submitted to us by artists looking to work with one of our companies. We attend showcases, shows, and music festivals around the country, we read music websites and magazines, and we receive referrals from other artists, labels, managers and booking agents. We spend considerable time identifying artists we want to work with (based on music merits) but we also talk with them and their representatives to make sure we are compatible both philosophically and with regards to business-related expectations. We freely offer business advice to prospective artists and connect them to others that can help them in ways that we cannot. And, for those artists who ultimately sign to our labels, we spend significant resources promoting their music and career.

Our business model at Secretly Group is straightforward: break even or generate a profit on the majority of our releases. Because we have hit that goal, we remain profitable. While much of the independent record community shares that goal, not everyone is as fortunate as we are, and I often see independent labels shutter.

The reality is that this is a very difficult environment for independent record labels. Sales of physical CDs have been in steady decline for several years, and, more recently, we have seen a decline in the sales of digital downloads. Yet the costs of our efforts and resources in supporting our artists remain as high as ever. So we face declining sales revenues and if we rush to release more records, we will simply dilute our efforts, alienate our artists, and fail to operate within the general model on which the independent record label business is built on – consistent success across the majority of releases.

This challenge is compounded by the reliance of independent record companies on digital revenues. While there are exceptions, more established artists usually release records that have a higher percentage of sales through physical products. Younger, less established artists will, by contrast, tend to release records that earn more through digital products. And, broadly speaking, independent record companies tend to attract more of the younger, less established artists. Consequently, independent labels experience the overall shift to digital revenues more quickly than the remainder of the industry. For example, in just the past five years, the digital revenues of the Secretly Group labels Jagjaguwar, Dead Oceans, and Secretly Canadian, when combined, have more than tripled, and they have grown from approximately fifty (50) percent of our total distribution revenues to approximately sixty five (65) percent of our total distribution revenues.

Because of these and other challenges, every digital stream of revenue – including webcasting royalties – is crucial to our revenue outlook. No one digital stream of revenue could sustain our business by itself at this moment and the pressure on statutory streaming royalties is heightened by the noticeable decline in digital sales. I estimate that digital audio streaming revenues (noninteractive and interactive, combined) will exceed digital sales revenues for our labels within the next five years. If there is not a strong royalty rate for statutory webcasting or if that royalty rate drags down rates in other streaming models, I am afraid that we will not be able to break even on most of our releases. In that case, we may sign fewer artists, support fewer album releases or take even more drastic business measures. Needless to say, I regard a strong compulsory license rate as crucial to our business future and the future of independent record companies overall.

Independent Record Companies and Licensing of Digital Sound Recordings

Just as independent record companies come in a variety of shapes and sizes, they also license their sound recordings to digital music services in a number of different ways.

Digital Licensing via Major Record Companies. Most prominently, many independent record companies distribute their recordings through the distribution services of the three major record companies – Sony, Universal, and Warner. For instance, according to the Nielsen numbers I referenced above and solely on the basis of copyright *ownership*, 34.6% of the market share of sales of sound recordings is *owned* by independent record companies. However, many independent record companies will distribute their sound recordings through major record companies. While I cannot say for certain how large that percentage is, I do know that a substantial portion of independently-owned sound recordings are digitally distributed by one of the three majors.

When an independent record company uses the digital distribution services of a major record company, it is my understanding that generally it is the terms of the major's license with a digital music service that govern the rates and terms for distribution of those sound recordings. I am aware of exceptional circumstances – including my own past experience – where an independent record company uses a major record company primarily for physical distribution and retains digital distribution rights, but again, that is the exception. For example, whereas Secretly Group is one of the larger and more prominent independent label groups in the marketplace, it was only just recently that the digital distribution of our releases became independent of any major record company. Previously, Secretly Group releases were digitally distributed in the United States by Warner, in connection to Warner's physical and digital distribution agreement with SC Distribution. This changed at the beginning of 2014, however, when SC Distribution, as part of Independent Distribution Cooperative (or "IDC", and which also includes as members such independent record companies as Beggars Group, Domino Records, Merge Records and Saddle Creek), entered into a new physical-only distribution agreement with Alternative Distribution Alliance (or "ADA"), the Warner distribution arm that focuses on independent repertoire. So only now is Secretly Group repertoire independently distributed to digital services.

There are probably a number of reasons that an independent record company may choose to handle its own digital distribution rights. Of course, one of those reasons is that doing so can save the independent record company from paying a distribution fee to the majors. This is no small concern because independent labels often aim to and depend on breaking at least even on the majority of their releases. A hefty distribution fee can make this difficult, especially as the market becomes more focused on digital sales and streams and less concerned with physical product.

Direct Digital Licensing. While less common, some independent record companies handle digital licensing negotiations on their own. This can be challenging from a resource perspective because almost all independent record companies are small or medium-sized businesses. They often lack the staffing resources to engage in direct license negotiations, particularly with the very large and sophisticated companies whose core business turns largely on the license terms they can extract for sound recordings. For instance, Secretly Group and its affiliated companies are one of the larger collections of independent record companies, and we employ about 70 people in the United States, but as I understand it, Pandora alone has over 1,400 employees. This is not just a challenge of quantity of resources, it is one of expertise. In fact, of our 70 employees, our full business affairs team is composed of only 4 people, including me. Only three of our employees have experience with digital licensing negotiations. It would not surprise me if at many independent record companies, the number of employees with licensing expertise is only one or none. This is especially challenging because the negotiators for these digital music services are repeat players who understand what other record companies have required to license sound recordings on the same service whereas we have to learn anew each digital music service and how it intends to make our music available to consumers.

All of these challenges, of course, assume we can even get to the negotiating table with the digital music service. Despite the important value of independent music, sometimes individual independent record companies lack the scale to get the attention of digital music services. If the first challenge of the negotiation is simply to have one, it makes it difficult for an individual independent record label to secure the same terms for their sound recordings as other labels. That is probably one of the reasons that many independent labels choose to distribute their sound recordings through major record companies, despite the distribution fees in the typical range of 10 to 20% that independent labels generally end up paying to majors for digital distribution.

Digital Licensing Through Independent Distributors or Collectives. Sometimes independent record companies attempt to overcome the inherent barriers of going it alone by banding together for digital licensing.

One way to do so is to work through an independent distributor like SC Distribution. SC Distribution was founded in 1997 to attempt to address this issue and provide collective clout to independent record companies. Over the last 15 years, SC Distribution has distributed music for over 50 labels, including the four Secretly Group labels. As mentioned above, whereas SC Distribution had until very recently relied on Warner's distribution arm ADA for digital distribution services (in connection with its previous physical and digital distribution agreement with ADA), this was only for the repertoire of the three labels Dead Oceans, Jagjaguwar and Secretly Canadian. For the other labels distributed by SC Distribution, digital distribution services were provided solely by SC Distribution, through its direct agreements with digital services. As such, through SC Distribution, I have seen what it is like to negotiate directly with digital music services.

Another way that independent record companies band together for digital negotiations is through MERLIN, a global rights agency that negotiates on behalf of the independent label sectors. MERLIN negotiates on behalf of over 20,000 independent label members in 39 countries. MERLIN offers digital services – including the negotiation of agreements to license digital sound recordings to digital music services – to its members, which include Secretly Group. Our collective hope is that by allowing MERLIN to negotiate on behalf of so much repertoire, it will improve the terms that an independent company could get negotiating on its own. The conventional wisdom is that when MERLIN is able to collectively represent many independents, then we are in a better negotiating position as independent companies than if we all tried to negotiate separate deals on our own. If MERLIN is able to reach an agreement with the service, MERLIN sends its members, including me, a Notice of Proposed Action describing the deal terms and giving each member label the opportunity to opt out of the deal. Each time Secretly Group receives such a notice, we consider the terms offered before deciding whether we should agree to those terms or opt out. In several cases, we have agreed to the terms of the MERLIN-negotiated deals.

Independent Record Companies and the Direct License Market

I am a strong proponent of the compulsory license for a number of reasons not the least of which is that it is our best hope of creating a level playing field among record companies. This is especially important because of trends I have observed in the direct licensing market.

Digital Breakage. The first trend is a shift to compensating record companies on the basis of unattributable income, which I have referred to when testifying before Congress as "breakage." The issue of "breakage" is that some record companies may be receiving compensation for their sound recordings that is not readily transparent to others in the marketplace. This compensation, however, *is* part of the value a company receives for the use of sound recordings even when expressed as "breakage." The proper value of a license simply cannot be understood without including all compensation, including this "breakage" compensation. And, the overarching issue I have discussed elsewhere is that it can be difficult to negotiate in a market when one does not include all relevant consideration in understanding the marketplace.

Imagine that a digital service offers a licensing deal to a record company. There are a number of different ways in which the streaming service could offer important and valuable consideration to the record company, including a percentage of the service's revenue, a per-stream royalty rate, a minimum payment per subscriber, an advance payment at the beginning of the term, a guarantee on the back end, some form of profit participation (e.g. an equity stake) and so on and so forth. Each of these are mechanisms that compensate a rights holder in the marketplace for the use of a product — here, sound recordings. In the negotiation, both the record company and service could try to change the mix of the consideration (e.g. add an equity stake) or the amounts of particular pockets of the consideration (shift to a larger guarantee). In many instances, the other party, whether it be a record company or a service, can be indifferent to the proposal because, after all, consideration is consideration and what we are really discussing here is the method of payment, not the payment itself.

Of course, the method of payment can make a difference to those who are represented by the record company in the negotiations – e.g. artists or independent record labels distributed through a major. They are potentially at risk if the negotiating record company chooses not to attribute income from what I have called "breakage." And this is important because, in my view, breakage is valuable consideration that is included in a licensing deal as part of the total compensation for a sound recording. To act otherwise would simply understate the value of the consideration received for the use of music.

There is another side to this “breakage” story. A licensing deal made between one record company and a service may well affect the deals that are offered to other record companies, especially independent record companies who are often approached after a service is well into negotiations with the majors. By pushing consideration in certain deals into less transparent mechanisms like equity stakes or advances that cannot possibly be recouped, a service may be able to push for a lower per-stream royalty rate with record company A. Then, when the service approaches record company B – often an independent company – the service can represent that company B is receiving no worse of a per-stream royalty rate than any of its other label partners.

While I do not know the terms of the major record company licenses with Apple for its iTunes Radio services, I suspect this is essentially what happened. Having already engaged the majors in negotiations, Apple put forward a “take-it-or-leave-it” license offer for iTunes Radio to independent labels, as an amendment to their existing iTunes agreements and in a manner utilizing an online click-through mechanism (i.e. an acknowledgement checkbox). Presented in such a way, in close proximity to the launch of the new iTunes Radio service and well after iTunes had concluded negotiations with the major record companies, there was no meaningful opportunity for independent companies to negotiate iTunes Radio terms with Apple. The license offer, which was published on an internet news site, included not only iTunes Radio but other Apple digital music services, including the iTunes Store. In other words, this was not just take-it-or-leave it on iTunes Radio, it was a take-it-or-leave-the download store offer. I highly suspect but do not know for sure that we were simply offered the same per-stream rates as the majors without any of the other breakage consideration they may have received.

Indeed, with respect to other digital services, I have even heard discussions of a "negative most-favored nations" clause wherein the record company Bs of the world – often, independent record companies – must agree to provide rate relief in a deal if another record company agrees to a lower per-stream royalty. Thus, digital breakage often creates a situation where a focus only on per-stream rate parity does not reflect the total value of the deal. That creates a dangerous situation in which some music is devalued solely because of the identity of the rights holder. But, music is music and a sound recording from an independent record company is no less valuable than a sound recording from another record company, major or otherwise. The commercial value of the recording should stand and fall on its ability to resonate with consumers. It should not be based according to who has acquired the biggest bucket of rights or who has established the most control over distribution pipelines to consumers.

Importantly, digital breakage revenues are not just earned by major record companies, they are also earned by independent record companies, including MERLIN, which maintains equity stakes in some of its digital service partners. SC Distribution has itself done deals where the compensation through unrecouped advances and guarantees is expected to yield digital breakage. While apportioning breakage pro-rata based on actual performance on the service, a policy MERLIN and others have adopted and that I support, can address the attribution question between distributors, independent labels, and artists — and which mitigates to a large extent the dangerous situation discussed above where commercial value is not based on actual usage by consumers — , there is the separate issue of how breakage affects the negotiations for direct licenses. The only way I can see to avoid the distorting effects of breakage is to understand and consider all revenue received by a record company under a direct licensing deal, including digital breakage.

Pro-Rata Terms. When I was last before this Board, I explained that I am opposed in principle to a system in which the decision of what recordings are played is not based on the quality of or consumer interest in the recordings, but rather on the deal terms of a direct license. Unfortunately, this has increasingly become the direct licensing world we live in, as services seem to be offering additional plays or promotion within the service to particular rights holders to increase the rights holder's pro-rata share of plays – what I call "play-share incentives" – in exchange for lower consideration or rate relief. Without a strong statutory rate that allows record companies, whether major or independent, to reject play-share incentives, I am afraid this will become an inevitability.

My concern is that the use of play-share incentives will devolve into a race to the bottom in which you de-value your music just to have your songs heard. Moreover, deals that include incentives related to number of plays or pro-rata share weaken the market as a whole because they cannot be universalized to all rights holders as a digital service cannot promise an increase in pro-rata *share* to everyone. If someone gets the play-share benefit of signing on first, then someone else will be in the unenviable position of finishing last. It worries me that independent record companies, who often have the least leverage in direct negotiations, may be left with an impossible choice: either run to the front of the line to offer rate relief in exchange for plays or worry that we will be left out of commercially determined playlists dominated by the majors. Just three years since my last testimony, it feels like we are now cascading down that slippery slope I described and the bottom of the hill is one where access to the online word requires us to further de-value our music to overcome real, non-meritocratic obstacles.

The Importance of a Strong Statutory License Rate

Given what I have described above, it has never been more important to the independent record community to have a strong statutory license, particularly with a strong royalty rate.

A strong statutory license creates a level playing field. When repertoire is given equal value through an equal royalty rate, services have no incentive but to allow sound recordings to compete for the attention of their users and, royalty rates being equal, feature the sound recordings that are most likely to increase users and listening. Consequently, the compulsory license is the best if not only hope for this equal playing field because it is agnostic to the market position of the rights owner when determining the royalty required for a song.

This equal playing field is also important for independent record companies because the statutory license eliminates transaction costs that would be daunting if not prohibitive in the direct licensing market. Put simply, many independent labels do not have the resources to engage in direct licensing with the many digital services and webcasters so these labels have no practical option but to rely on the statutory license. For them, the statutory license is not a floor or ceiling to further negotiation because there will be no further negotiation, so the value of their music reflected in the statutory license is the value of their music they must accept. Notably, where independent record companies do negotiate directly, the statutory license still functions as a ceiling. It is hard for independent record companies to negotiate above whatever statutory rate a service may elect because the statutory license is compulsory and we have no right of refusal.

Nevertheless, the strength of the statutory license is significant for independent record companies in direct licensing negotiations as well. Much of the direct licensing world is opaque, whether because of digital breakage or otherwise, and independents are often the least well-positioned to determine the true market value of a license for a service. The statutory license, by contrast, is transparent.

The growing influence of programmed play rates on digital music services, whether interactive or not, is yet another important reason for a strong statutory license rate. For instance, I recently rejected an offer by a long-standing digital partner, [redacted], requesting royalty relief on a “blended rate” of a tier of service that combined “radio plays” with “interactive plays.” The blended rate offer, which I have attached as an exhibit to my testimony, was at [redacted] cents per stream whereas the partner’s existing deal with SC Distribution pays us a [redacted] per interactive stream. While I did not accept the offer, it was a good example to me of the increasing consumer offerings of tiers that include both non-interactive and interactive streams as well as the effect of non-interactive streams on the per-play rates of other interactive services. In other words, I expect that the compulsory rate adopted in this proceeding will, in turn, drag down and therefore interfere with the rates offered to independent record companies by digital music services that offer interactive streams as well.

Finally, a strong compulsory rate is important for independent record companies today because more than ever we rely upon statutory royalties. With both CD sales and digital download sales declining, it is apparent to everyone that the future of the recorded music industry is in streaming, whether it be non-interactive or interactive. And that future is coming quickly to independent record companies because our business model requires us to break even on more of our releases – a daunting challenge in a world of sales decline. Thus, the only way we can expect to break even enough to keep releasing the important recordings of our artists is to receive significant per-stream royalties under the level playing field of the compulsory license.

SoundExchange As the Sole Collective

I have said before and continue to believe that SoundExchange has earned the right to continue serving as the sole collective to collect and distribute statutory royalties for copyright owners and performers. The organization is governed by and represents a balance of the interests of record companies, both major and independent label alike, and performing artists. In my experience, this organizational structure ensures that the interests of all constituents are heard and represented. Also, SoundExchange is a non-profit organization, which ensures that it operates to maximize royalties for all recipients, and has a good track record of doing just that through its administration and advocacy efforts on behalf of copyright owners and performers.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: October 6, 2014

Darius Van Arman

Exhibit Sponsored By Darius Van Arman

Exhibit No.	Sponsored By	Description
SX EX. 007-DR	Darius Van Arman	Exhibit 1 - Offer Term Sheet

SX EX. 007-DR

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