

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

In the Matter of:

Digital Performance Right in Sound
Recordings and Ephemeral Recordings

Docket No. 2009-1
CRB Webcasting III

**WRITTEN DIRECT STATEMENT
OF SOUNDEXCHANGE, INC.**

Volume 1: Introductory Materials

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September 29, 2009

Table of Contents
for the Written Direct Statement of SoundExchange, Inc.
2009-1 CRB Webcasting III

- Volume 1: Introductory Materials
- A: Introductory Memorandum
 - B: Proposed Rates and Terms
 - C: Index of Witness Statements
 - D: Index of Exhibits
 - E: Certificate of Service

Volume 2: Witness Statements and Exhibits

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**INTRODUCTORY MEMORANDUM TO THE
WRITTEN DIRECT CASE OF SOUNDEXCHANGE, INC.**

SoundExchange, Inc. (“SoundExchange”), through its undersigned counsel, respectfully submits this Introductory Memorandum to its written direct case in accordance with 37 C.F.R. § 351.4. This Memorandum describes the contents of SoundExchange’s written direct case and briefly summarizes the testimony of its witnesses.

CONTENTS OF SOUNDEXCHANGE’S WRITTEN DIRECT CASE

Volume 1 contains: (A) this Introductory Memorandum; (B) SoundExchange’s Proposed Rates and Terms; (C) an index of SoundExchange’s witness testimony; (D) an index of SoundExchange’s exhibits; and (E) a certificate of service.

Volume 2 contains the written direct testimony of SoundExchange’s six witnesses and SoundExchange’s exhibits.

Pursuant to 37 C.F.R. § 350.4(a), § 351.4(a), and the Court’s Order of June 24, 2009, SoundExchange is filing an original, five copies, and an electronic copy of the materials in Volumes 1 and 2.

The written testimony of two of SoundExchange’s witnesses and four of SoundExchange’s exhibits contain information that SoundExchange has marked as Restricted, as

that term is defined in Paragraph 2 of the Protective Order entered by this Court on September 23, 2009. Pursuant to footnote 1 in this Court's Order Granting Joint Motion to Adopt Protective Order (Sept. 23, 2009), SoundExchange is filing a motion for application of the Protective Order to the portions of the testimony and the exhibits it has marked as Restricted. In connection with that motion, SoundExchange is filing a Declaration and Rule 11 Certification of Michael B. DeSanctis, declarations from the two witnesses in further support of the motion, and a redaction log identifying the page number of each proposed redaction and briefly describing the nature of the Protected Material proposed to be redacted.

As set forth in its motion for application of the Protective Order, SoundExchange requests that, in the event the Court declines to apply the Protective Order to any portion of the information that SoundExchange has marked Restricted, the Court provide SoundExchange the opportunity to withdraw the information from its written direct case, or replace it with publicly available information, before the materials are made publicly available.

SUMMARY OF THE WRITTEN TESTIMONY OF SOUNDEXCHANGE'S WITNESSES

SoundExchange's written direct case includes the written testimony of the following expert and fact witnesses.

A. Expert Witnesses

Michael Pelcovits, Ph.D., is a Principal of the consulting firm of Microeconomic Consulting & Research Associates, Inc. His testimony supports SoundExchange's rate proposal. He analyzes the market for Internet music services and provides his expert opinion on a range of reasonable rates for the compulsory license fee to be set in this proceeding.

First, Dr. Pelcovits considers the license fees for statutory services that were recently negotiated under the Webcaster Settlement Acts ("WSA") between SoundExchange and two

groups of webcasters: broadcasters represented by the National Association of Broadcasters (“NAB”), and commercial webcasters represented by Sirius XM Radio (for its Internet radio service). The WSA agreements are recent and cover precisely the statutory webcasting services at issue here, negotiated on both sides between entities with an important stake in establishing reasonable rates. Second, he considers the license fees negotiated between willing buyers and willing sellers in the market for interactive, on-demand digital audio transmissions. These agreements are between companies that would be actors in the hypothetical market in this proceeding, and involve services that are similar to statutory webcasting, except for the degree of interactivity they offer to consumers.

Dr. Pelcovits recognizes the need for certain adjustments in order to derive a rate for statutory webcasting services. With regard to the WSA agreements, he states that consideration must be given to the fact that the agreements were negotiated in the shadow of a regulatory environment that prohibited the sellers from refusing to grant a license, and allowed the buyers and sellers to seek a rate from this Court if negotiation failed. With regard to the interactive, on-demand agreements, he explains that an adjustment must be made to account for the value that consumers place on the greater interactivity those services offer.

He concludes that this evidence, when properly adjusted, provides a reliable basis from which to derive a range of rates that meet the statutory criteria applicable in this proceeding, and that SoundExchange’s proposed rates fall well within this range.

George S. Ford, Ph.D., is the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis. He is also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies, a 501(c)(3) research organization that specializes in the legal and economic analysis of public policy issues involving

the communications and technology industries, and is an Adjunct Professor at Samford University in Birmingham, Alabama.

Dr. Ford's testimony supports SoundExchange's rate proposal for ephemeral copies under Section 112(e) of the Copyright Act. Dr. Ford concludes that ephemeral copies clearly have economic value and that, based on economic theory and marketplace evidence, the value of those ephemeral copies is best expressed as a fixed percentage of the overall royalty rate paid by webcasters for combined activities under Sections 112(e) and 114. In turn, Dr. Ford analyzes the unique hypothetical market set up by Sections 112 and 114 whereby payments under Section 112(e) are made directly to the record companies, while payments under Section 114 must be divided evenly between the record companies and the artists. Dr. Ford reasons that the willing buyer, willing seller market appropriate under the unique statutory regime requires consideration of all three interested parties (i.e., the webcaster, the record company and the artist). He concludes that the results of such a voluntary negotiation would be the result determined as between the record companies and the artists, as the only two entities in the negotiation with an interest in the outcome.

B. Fact Witnesses

Kim Roberts Hedgpeth is the National Executive Director of the American Federation of Television and Radio Artists ("AFTRA"). Her testimony supports the designation of SoundExchange as the sole Collective to collect and distribute statutory webcasting royalties. Her testimony also discusses the important contributions of record companies in making sound recordings available to the public.

Barrie Kessler is the Chief Operating Officer of SoundExchange. Her testimony provides background information about SoundExchange and its operations; describes SoundExchange's collection and distribution of royalties; explains why SoundExchange should be the sole

collective for collecting and distributing royalties under the Section 112 and 114 licenses; provides information related to SoundExchange's minimum fee proposal; and supports SoundExchange's proposal that the Judges continue the same terms, with certain modifications, for the statutory licenses as they adopted in the Webcasting II proceeding.

Dennis Kooker is the Executive Vice President, Operations, and General Manager, Global Digital Business and U.S. Sales, for Sony Music Entertainment ("Sony"). His testimony explains that record companies like Sony make a substantial investment in the creation, marketing and distribution of music, and that record companies rely on all streams of revenue, including revenues from webcasting and other forms of digital online distribution, in order to recoup those investments. He also explains that despite the growth in digital distribution of music in recent years, the increase in digital distribution is not sufficient to offset the considerable decline in physical forms of distribution, such as CD sales.

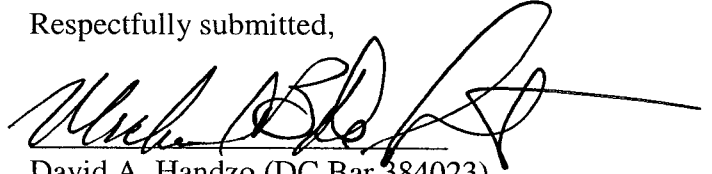
W. Tucker McCrady is Associate Counsel, Digital Legal Affairs at Warner Music Group ("WMG"). His testimony discusses the agreements between SoundExchange and certain webcasters negotiated under the Webcaster Settlement Act. He describes the licensing strategy used by WMG in various negotiated marketplace agreements for the use of WMG's copyrighted sound recordings outside the limitations of the statutory webcasting framework. In addition, his testimony supports the designation of SoundExchange as the sole Collective to collect and distribute statutory webcasting royalties.

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PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC.

Pursuant to Section 351.4(b)(3) of the Copyright Royalty Judges' Rules and Procedures, 37 C.F.R. § 351.4(b)(3), SoundExchange, Inc. ("SoundExchange") proposes the rates and terms set forth herein for eligible nonsubscription transmissions and transmissions made by a new subscription service other than a service as defined in 37 C.F.R. § 383.2(h) (collectively, "Webcast Transmissions"), together with the making of ephemeral recordings necessary to facilitate Webcast Transmissions, under the statutory licenses set forth in 17 U.S.C. §§ 112(e) and 114 during the period January 1, 2011 through December 31, 2015.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange reserves the right to revise its proposed rates and terms at any time during the proceeding up to, and including, the filing of its proposed findings of fact and conclusions of law.

I. Proposed Settlements

On June 1, 2009, SoundExchange and the National Association of Broadcasters ("NAB") submitted a Joint Motion to Adopt Partial Settlement requesting that the Copyright Royalty Judges adopt certain rates and terms for "Broadcast Retransmissions" and "Broadcaster Webcasts," as defined therein. On August 13, 2009, SoundExchange and College Broadcasters, Inc. ("CBI") submitted a Joint Motion to Adopt Partial Settlement requesting that the Copyright

Royalty Judges adopt certain rates and terms for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet, as more specifically provided therein. SoundExchange requests adoption by the Copyright Royalty Judges of the proposed regulations appended to the NAB and CBI motions as the statutory rates and terms for the activities addressed therein. SoundExchange respectfully urges the Copyright Royalty Judges to publish those proposed regulations promptly for notice and comment pursuant to 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2), because completing the notice and comment process with respect to those settlements would allow the Copyright Royalty Judges and the parties to know the status of those settlements and hopefully narrow the range of issues potentially at issue in this proceeding.

II. Other Royalty Rates

For all Webcast Transmissions and related ephemeral recordings not covered by its proposed settlements with NAB and CBI, SoundExchange requests royalty rates as set forth below.

A. Commercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114(f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2(g)) that are commercial webcasters (as defined in 37 C.F.R. § 380.2(d)) pay an annual, nonrefundable minimum fee of \$500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed settlement with NAB), subject to an annual cap of \$50,000.00 for a licensee with 100 or more channels or

stations. For each licensee, the annual minimum fee described in this paragraph 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, a licensee would receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

2. Per Performance Rates

For Webcast Transmissions and related ephemeral recordings by commercial webcasters as defined in 37 C.F.R. § 380.2(d), in addition to the minimum fee, SoundExchange requests royalty rates as follows:

<u>Year</u>	<u>Rate Per Performance</u>
2011	\$0.0021
2012	\$0.0023
2013	\$0.0025
2014	\$0.0027
2015	\$0.0029

B. Noncommercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114(f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2(g)) that are noncommercial webcasters (as defined in 37 C.F.R. § 380.2(h)) pay an annual, nonrefundable minimum fee of \$500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed

settlement with CBI). For each licensee, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B).

2. Per Performance Rates

For Webcast Transmissions and related ephemeral recordings by noncommercial webcasters as defined in 37 C.F.R. § 380.2(h), SoundExchange requests that if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 aggregate tuning hours (as defined in 37 C.F.R. § 380.2(a)) on any individual channel or station, the noncommercial webcaster shall pay additional fees for the transmissions it makes on that channel or station in excess of 159,140 aggregate tuning hours at the following rates:

<u>Year</u>	<u>Rate Per Performance</u>
2011	\$0.0021
2012	\$0.0023
2013	\$0.0025
2014	\$0.0027
2015	\$0.0029

C. Ephemeral Recordings

SoundExchange requests that the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral recordings used by the licensee solely to facilitate transmissions for which it pays royalties as provided above shall be included within, and constitute 5% of, such royalty payments.

III. Terms

SoundExchange requests that the terms currently set forth in 37 C.F.R. Part 380 be continued, subject to the changes described herein.

A. Server Log Retention

SoundExchange requests that the regulations expressly confirm that the records a licensee is required to retain pursuant to 37 C.F.R. § 380.4(h), and that are subject to audit under 37 C.F.R. § 380.6, include original server logs sufficient to substantiate rate calculation and reporting, which must be made available to the qualified auditor selected by the Collective in the event of an audit.

B. Late Fees for Reports of Use

SoundExchange requests that reports of use be added to the list in 37 C.F.R. § 380.4(e) of items that, if provided late, would trigger liability for late fees.

C. Identification of Licensees

SoundExchange requests that the regulations require statements of account to correspond to notices of use and reports of use by (1) identifying the licensee in exactly the way it is identified on the corresponding notice of use and report of use, and (2) covering the same scope of activity (e.g., the same channels or stations). In addition, SoundExchange requests that the regulations make 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 notices of use, statements of account, and reports of use. Finally, SoundExchange requests that the regulations require licensees to use an account number, that is assigned to them by SoundExchange, on their statements of account and reports of use.

D. Technical and Conforming Changes

SoundExchange requests certain technical and conforming changes to the regulations, including ones for the sake of clarity or consistency across licenses. These proposed changes are reflected in the redlined proposed regulations that SoundExchange is submitting as an attachment

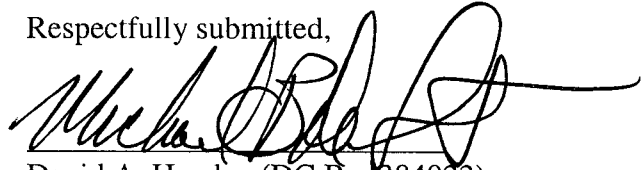
hereto. Only provisions affected by these technical and conforming changes are included in the redlined attachment.

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Attachment
SoundExchange's Requested Technical and Conforming Changes

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

§ 380.1 General.

(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~~ Licensees shall apply in lieu of the rates and terms of this part to transmission within the scope of such agreements.

§ 380.2 Definitions.

(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)) other than a Service as defined in § 383.2(h), 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.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(b)(2)(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~~ 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 ~~such~~ the Collective.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 ~~by~~ on a monthly basis on or before 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.

(g)(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~~ royalties shall be handled in accordance with § 380.8.

§ 380.6 Verification of royalty payments.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board ~~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.

§ 380.7 Verification of royalty distributions.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board ~~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.

Index of Witness Statements

Tab	Witness	Title
1	Michael Pelcovits	Principal, Microeconomic Consulting & Research Associates, Inc.
2	George S. Ford	President, Applied Economic Studies
3	Kim Roberts Hedgpeth	National Executive Director, American Federation of Television and Radio Artists
4	Barrie Kessler	Chief Operating Officer, SoundExchange, Inc.
5	Dennis Kooker	Executive Vice President, Operations, and General Manager, Global Digital Business and U.S. Sales, for Sony Music Entertainment
6	W. Tucker McCrady	Associate Counsel, Digital Legal Affairs, Warner Music Group

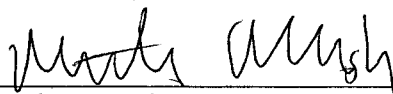
Index of SoundExchange Exhibits

Exhibit No.	Sponsored By	Description
SX Ex. 101-DP	W. Tucker McCrady	Webcaster Settlement Act Agreement for Broadcasters made between SoundExchange, Inc. and the National Association of Broadcasters, on behalf of its members
SX Ex. 102-DP	W. Tucker McCrady	Webcaster Settlement Act Agreement for Commercial Webcasters made between SoundExchange, Inc. and Sirius XM Radio Inc.
SX Ex. 103-DP	W. Tucker McCrady	Webcaster Settlement Act Agreement for Noncommercial Educational Webcasters made between SoundExchange, Inc. and College Broadcasters, Inc.
SX Ex. 104-DR	W. Tucker McCrady	Subscription Services Agreement between Warner Music Inc. and Napster, LLC, Nov. 13, 2005 (RESTRICTED - not included in public version of direct case)
SX Ex. 105-DR	W. Tucker McCrady	Napster Subscription Earnings Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)
SX Ex. 106-DR	W. Tucker McCrady	Bundled Offer Agreement between Warner Music Inc. and Napster, LLC, May 18, 2009 (RESTRICTED - not included in public version of direct case)
SX Ex. 107-DR	W. Tucker McCrady	Napster Bundled Offer Royalty Statement for Warner Music Inc., May 2009 (RESTRICTED - not included in public version of direct case)

CERTIFICATE OF SERVICE

I, Matthew Hersh, do hereby certify that copies of the foregoing WRITTEN DIRECT STATEMENT OF SOUNDEXCHANGE, INC. were sent via e-mail (without exhibits) and overnight mail (with exhibits) this 29th day of September, 2009 to the following:

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