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

TESTIMONY OF

GEORGE S. FORD

President, Applied Economic Studies

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I. My Experience and Qualifications

My name is George S. Ford. I am the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis, located in Birmingham, Alabama. I am also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies, a Washington, D.C. based 501(c)(3) research organization that specializes in the legal and economic analysis of public policy issues involving the communications and technology industries. In addition, I am an Adjunct Professor at Samford University, a private university located in Birmingham, Alabama, where I teach economics in the graduate program of the business school. I serve as a member of the Alabama Broadband Taskforce upon appointment by Alabama Governor Bob Riley.

I received a Ph.D. in Economics from Auburn University in 1994. Since then, I have worked as a professional economist in both government and industry. In 1994, I became an economist in the Competition Division of the Federal Communications Commission, an organization located in the General Counsel's Office that provided competition analysis support to the many bureaus of that organization. My primary interests were multichannel video services and broadcasting policies, though my work ranged from international policy to radio interference standards to statistical analysis. After my government tenure, I became an economist at MCI Communications, where my work focused on telecommunications policy. In April 2000, I became the Chief Economist of Z-Tel Communications in Tampa, Florida, a small competitive telephone company where I performed both regulatory and business analysis. I have been in my present employment since the Summer of 2004.

My areas of specialty in economics include Industrial Economics, Regulation, and Public Policy, with an emphasis on the communications industries, including broadcast radio and television. I have written many papers on telecommunications and media policy, and much of this work has been published in economic and law journals including the *Journal of Law & Economics*, *Empirical Economics*, the *Journal of Business*, the *Journal of Regulatory Economics*, the *Antitrust Bulletin*, *Energy Economics*, the *Yale Journal on Regulation*, the *Federal Communications Law Journal*, and many others. I have testified before numerous public service commissions, state legislative bodies, and committees of the U.S. Congress on communications policy and rate setting. In June of this year, I filed testimony before the Copyright Royalty Judges in the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005. A copy of my curriculum vitae is attached as Appendix A.

II. Summary of My Testimony

The purpose of this proceeding is to establish the rates and terms for certain digital public performances of sound recordings under Section 114 of the Copyright Act and for the making of ephemeral copies in furtherance of such performances under Section 112(e) of the Copyright Act. I was engaged by SoundExchange, Inc. to provide an economic framework useful for establishing a rate for ephemeral copies under the statutory license provided in Section 112(e) of the Copyright Act and to canvas available sources for information relevant to that task.

In the course of my work, I have been given free reign by SoundExchange to examine any sources that I believed might be relevant in setting a rate for ephemeral copies. I have reviewed the relevant statutory provisions and the various decisions of the CRB and its predecessor, the CARP, as well as the Register of Copyrights, interpreting

those provisions. I have familiarized myself with the terms of marketplace agreements for non-statutory forms of music streaming licensing. I have familiarized myself with the technological issues arising from ephemeral copies. I have conferred with SoundExchange's other expert, Dr. Michael D. Pelcovits, Ph.D. I have also carried out a free-ranging search of online materials in an effort to determine whether there is any information that would help establish the proper royalty rate for ephemeral copies in the webcasting context.

As I will explain below in further detail, I have concluded that sound principles of economic theory as well as observed marketplace benchmarks firmly establish that ephemeral copies have economic value. I have also concluded on the basis of marketplace benchmarks that the economic value of ephemeral copies is properly measured as a fixed percentage of the overall value of the rights acquired by webcasters under Sections 112 and 114. However, there exists very little in the way of traditional marketplace benchmarks to facilitate the proper computation of that percentage. This is because the hypothetical "marketplace" envisioned by Sections 112 and 114 is made up of actors with very different economic interests from the marketplace that exists outside of the statutory framework. In the unregulated marketplace, where copyright owners and services that publicly perform sound recordings freely negotiate to determine rates, the "willing buyers" and "willing sellers" are less concerned about the allocation of those royalty rates between payments for ephemeral copies and payments for public performances. However, when copyright owners and the service providers must abide by rates determined under Sections 112 and 114, the explicit allocation of payments between those two components becomes much more relevant, because the ephemeral copy payments under Section 112(e) are made

directly to copyright owners (or record companies in this case), while the performance payments under Section 114 are shared equally between copyright owners and artists. This particular division of payments is solely an artifact of the statute and does not bind or constrain market transactions.

While this division of royalties among upstream providers makes little difference to the "willing buyer" in this hypothetical marketplace — that is, the webcasters — it makes a significant difference to the "willing seller" or "sellers", i.e., the record companies that own the rights to the sound recordings and the artists who get a share of the royalties. Record companies and artists care about what portion of royalty payments are allocated to ephemerals because the higher the portion allocated to ephemerals, the lower the portion paid directly to artists per the terms of the Section 114 license. Record companies and artists therefore have every incentive to negotiate over the proper percentage of royalty payments that are allocated to ephemeral copies. This negotiation is precisely what one would expect to happen in a hypothetical free market in which both artists and record companies are forced by statute to share 50-50 in performance royalty payments.

Such a negotiation is the basis of the rate proposal advanced by SoundExchange. SoundExchange, a collective made up of both record companies and artists, has proposed a rate that represents the result of negotiations between the artists and the record companies that make up its board. As long as the ephemeral rate is defined as a percentage subset of the total royalty payment, the willing buyer — the webcaster — is indifferent to the ephemeral copy rate. As such, marketplace negotiations between the "willing buyer" — the webcaster — and the "willing seller" — the copyright owner — while potentially informative, may or may not establish a specific ephemeral copy rate. From a ratemaking

standpoint, it does not matter. The SoundExchange proposal is what the willing seller in such a marketplace would propose. Because the willing buyer is indifferent, the rate proposed by SoundExchange is legitimately viewed as the proper marketplace rate for ephemeral copies. The proposal resolves the problem of a non-market allocation of royalties, and is the best evidence available of the market rate of, and rate mechanism for, ephemeral copies under Section 112.

III. Background on Section 112

For the convenience of the reader, I will begin by setting forth some basic observations about Section 112's unique design as well as the decisions that have interpreted and applied Section 112 to date.[1]

A. Legislative History of Section 112

As originally enacted, Section 112 of the Copyright Act of 1976 did not provide a statutory license for ephemeral copies. Rather, Section 112 merely provided that anyone

[1] I am not interpreting or opining on the statutes and legal decisions that follow. Rather, because the unique marketplace that I have been asked to analyze here is wholly a creature of the applicable statutes, regulations and legal decisions, they, of course, are critical background for my economic analysis. It is very common — indeed, as here, often essential — in my work that I would begin my study and analysis of an economic issue in a regulated industry by first analyzing the relevant regulatory framework. Thus, in the course of this statement I will refer to and discuss the following published opinions: (1) *Report of the Copyright Arbitration Royalty Panel in the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9, CARP DTRA 1 & 2 (Feb. 20, 2002) (hereinafter "Webcaster I CARP Opinion"); (2) *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240 (Jul. 8, 2002) (hereinafter "Webcaster I Final Rule"); (3) *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084 (May 1, 2007) (hereinafter "Webcaster II"); (4) *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080 (Jan. 24, 2008) (hereinafter "SDARS Opinion"); (5) *Review of Copyright Royalty Judges Determination*, 73 Fed. Reg. 9143 (Feb. 19, 2008) (hereinafter "Register Opinion"); and (6) *Determination of Rates and Terms for Business Establishment Services*, 73 Fed. Reg. 16199 (Mar. 27, 2008) (hereinafter "Business Services Opinion").

authorized to publicly perform or display a work by transmitting it to the public as part of a transmission program, pursuant to a license or transfer of the copyright, is entitled to make a single copy of it in order to facilitate those transmissions.[2] That copy was to be used solely for transmission purposes and was to be destroyed (unless kept for archival purposes) within six months of transmission. *Id.*

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRA"), which amended Section 106(6) of the Copyright Act to provide copyright owners of sound recordings with the exclusive right to perform the work publicly by means of a digital audio transmission.[3] Congress also amended Section 114 of the Copyright Act to create a new compulsory license for certain subscription digital audio services that transmit sound recordings on a non-interactive basis.[4] The DPRA also provided that royalties payable under the newly amended Section 114 were to be split 50-50 between copyright owners and performers.[5] Significantly, these allocations are statutory and need not comport with any market outcome.

In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA"). Among other things, the DMCA amended the Section 114 compulsory license to cover digital transmissions made on a non-subscription, non-interactive basis.[6] Congress also created a new compulsory license in Section 112(e).[7] Under Section 112(e), as amended by the DMCA, webcasters and broadcasters who publicly perform sound recordings

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[2] 17 U.S.C. § 112(a) (1977).

[3] *See* 17 U.S.C. § 106(6); Webcaster I CARP Opinion at 6.

[4] *See* 17 U.S.C. § 114(f)(2) (1997); Webcaster I CARP Opinion at 7.

[5] *See* 17 U.S.C. § 114(g)(2) (1997) (allocating 45% to featured artists, 2.5% to non-featured vocalists, and 2.5% to non-featured musicians).

[6] *See* 17 U.S.C. § 114(f)(2); Webcaster I CARP Opinion at 8.

[7] Webcaster I CARP Opinion at 9; *see also* 17 U.S.C. § 112(e).

pursuant to Section 114 may use the compulsory license process to obtain "no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more)."[8] Royalties payable under Section 114 are to be split equally between copyright owners and performers, but Congress did not mandate a similar split in Section 112(e) for ephemeral copies. Thus, royalty payments under Section 112(e) are paid directly to copyright owners, who in turn pay performers according to their existing contractual arrangements presumably obtained in an unregulated market setting.

B. Relevant Decisions Applying and/or Interpreting Section 112

Since the addition of the Section 112(e) ephemeral license in the DMCA, the Copyright Royalty Judges ("CRJs") and their predecessor, the Copyright Arbitration Royalty Panel ("CARP"), have taken varying approaches in adopting rates under that Section.

In the first proceeding to set rates and terms for eligible nonsubscription services under Section 114(f) and Section 112(e) (hereinafter *Webcaster I*), the CARP found that an agreement between the RIAA and the Yahoo! service provided an appropriate benchmark.[9] Under that agreement, Yahoo! paid a flat fee for the right to make ephemeral copies under Section 112 that constituted 8.8 % of Yahoo!'s total performance royalty payments.[10] The Webcaster I CARP thus set the rate at 9%, using the 8.8% Yahoo! rate as a baseline and adjusting up slightly to account for the 10% of royalty payments rate found in other marketplace agreements.[11]

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[8] 17 U.S.C. § 112(e)(1).

[9] Webcaster I CARP Opinion at 104.

[10] Webcaster I CARP Opinion at 100-101.

[11] Webcaster I CARP Opinion at 104. The Librarian of Congress, acting upon the recommendation of the Register of Copyrights, later rejected the CARP's upward

In the Webcaster II and SDARS proceedings, by contrast, the CRJs declined to set a separate rate for ephemeral copies. In both of those proceedings, SoundExchange proposed that 8.8% of the overall royalty fees for online and satellite-based streaming should be attributed to the making of ephemeral copies.[12] The CRJs agreed that the ephemeral royalty fee should be included within the overall performance royalty fee, but declined to "ascribe any particular percentage of the section 114 royalty as representative of the value of the section 112 license."[13]

However, the Register of Copyrights has since determined that, if the ephemeral rate is to be included as a percentage of the performance rate, that percentage must be specified.[14] The Register noted that there was an important "practical reason" for doing this, as royalties paid under Section 114 are paid to the performers and copyright owners, while royalties paid under Section 112 are paid only to copyright owners.[15]

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adjustment, and set the rate at the original 8.8% derived from the Yahoo! agreement. Webcaster I Final Rule at 45262. In 2003, SoundExchange and the webcasting services later agreed to "push forward" these rates for subsequent years. However, in their agreement the 8.8% ephemerals rate was not included as an extra charge. Rather, the agreement provided that 8.8% of the total performance fee paid for section 112 and section 114 activities was "'deemed' to comprise the charge for ephemeral recordings." Webcaster II at 24101.

[12] *See* Webcaster II at 24101; SDARS Opinion at 4098.

[13] Webcaster II at 24102; *see also* SDARS Opinion at 4098 (same).

[14] *See* Register Opinion at 9143; 9146.

[15] Register Opinion at 9146.

IV. My Conclusions

Section 112(e), which governs the compulsory license for ephemeral copies, provides in relevant part that:

> 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. . . . [16]

Despite minor differences in the language between Section 112(e)(4) (governing ephemeral licenses) and Section 114(f)(2) (governing statutory licenses for nonsubscription services and new subscription services), the economic criteria for setting rates and terms under those licenses are, in the words of the CARP, "essentially identical."[17] In measuring the value of the Section 112(e) statutory license, just as in measuring the value of the Section 114(f)(2) license, a key consideration in setting a proper rate is the identification of proper marketplace benchmarks. As the CARP has observed: "[T]he quest to derive rates which would have been observed in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances."[18]

As I will explain below, in reviewing the most closely analogous marketplace agreements, I come to three conclusions about the proper royalty rate for ephemeral copies under Section 112(e). First, marketplace benchmarks as well as basic economic theory demonstrate that ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot as a practical matter properly function without those copies. Second, marketplace benchmarks show that the royalty rate for

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[16] 17 U.S.C. § 112(e)(4)

[17] Webcaster I CARP Opinion at 25; *see also* Webcaster II at 24100-01.

[18] Webcaster I CARP Opinion at 43; *see also* Webcaster II at 24092 ("we adopt a benchmark approach to determining . . . rates").

ephemeral copies, if directly established, is almost always expressed as a percentage of the overall royalty rate for combined activities under Sections 112 and 114. Third, because the only actors in the hypothetical three-party market established by the statute — webcasters, record companies, and artists — that have any economic interest in the measure of that allocation are the artists and the copyright owners, the agreement reached between them as to that allocation is the best measure of how a willing buyer and a willing seller would allocate royalty payments between performance royalties and ephemeral copies, and would value the ephemeral license in the course of a marketplace negotiation for public performances.

A. The Ephemeral License Has Economic Value.

As an initial proposition, it is beyond serious question that ephemeral copies of sound recordings have economic value. This is because, as Congress recognized in enacting Section 112(e), webcasters simply could not exist without the ability to make ephemeral copies. In fact, because webcasters must have both the ephemeral copy right as well as the performance right in order to operate their services, as a matter of economic theory one could say that the Section 114 right has zero economic value without the Section 112 right, and the Section 112 right has zero economic value without the Section 114 right. One cannot remove the Section 112(e) right from the full complement of rights required by webcasters any more than one can remove oxygen molecules from water and still have water.

This theoretical proposition is confirmed by a number of marketplace benchmarks. First, in the marketplace deals between record companies and webcasters for non-statutory forms of licenses, it is typical for ephemeral copy rights to be expressly included among the grant of rights provided to the webcaster. Most of these agreements do not set a

distinct rate for those ephemeral copies, incorporating them instead into the overall rate that the webcaster pays for the combined ephemeral copy rights and performance rights. Nonetheless, economic theory teaches that rational companies do not give away something for nothing. Because these ephemeral copy rights are essential for webcasters to operate their services, it follows that the value of ephemeral copy rights has been included in the overall rate that webcasters pay under these agreements.

Second, I am aware of several agreements over the years between record companies and services that publicly perform sound recordings that do establish specific rate mechanisms for ephemeral copies. For example, I have reviewed a current agreement between a major record label and a webcaster that covers ad-supported internet radio service, subscription radio service, and on-demand streaming and recites the parties' agreement that 10% of the royalty payments made under the agreement shall be designated as payment for ephemeral copies. Other agreements have contained similar language. For example, in Webcaster II and SDARS the CRJs were presented with evidence of agreements negotiated by Sony BMG and by Warner Music Group which provided that 10% of the overall fees for streaming are attributable to the making of ephemeral copies.[19]

[19] *See* Webcaster II at 24101. The actual rates established in such marketplace agreements, while potentially informative, are not necessarily the best proxy for the ephemeral rate in the instant proceeding. These agreements are made without statutory constraints on how ephemeral and performance royalties are allocated between copyright owners and artists. Had these agreements been bound by such statutory conditions, then the outcomes may very well have been different. But these agreements are relevant in two important ways: First, they demonstrate that willing buyers and willing sellers do trade in ephemeral rights, which would be economically irrational if they had no value. Second, as discussed more fully in the next section below, they demonstrate that the payments for ephemeral rights, even absent regulatory constraint, employ a percent-of-total mechanism where ephemeral royalties are expressed as a percentage of payments metered on performances.

Third, I am also aware that, more recently, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. In these agreements, the willing participants in the market agreed to structure the ephemeral reproduction rate as an allocation of the correlative performance royalty.[20]

B. It Is Appropriate to Express the Value of Ephemeral Copies as a Fixed Percentage of the Performance Royalty.

Setting the ephemeral rate as a share of the total performance royalty fee does no injustice to economic theory. In fact, marketplace benchmarks consistently confirm that a percent rate is the appropriate measure. The marketplace has spoken with near unanimity in structuring the Section 112(e) ephemeral reproduction license as a percentage of the Section 114 performance royalty where such performance royalty is established. As discussed above, I have seen numerous voluntary agreements between willing buyers and willing sellers in which the rate for the ephemeral reproduction license was expressed as a percent of the performance royalty. Similarly, as mentioned above, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. There, again, the willing participants in the

[20] Notification of Agreements Under the Webcaster Settlement Act of 2008, Agreed Rates and Terms for Broadcasters, 74 Fed Reg. 9293, 9299 (2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, Agreed Rates and Terms for Webcasts by Commercial Webcasters, 74 Fed Reg. 40614 (2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, Agreed Rates and Terms for Noncommercial Educational Webcasters, 74 Fed Reg. 40614, 40616 (2009).

market agreed to structure the ephemeral reproduction rate as an allocation of the correlative performance royalty.[21]

Thus, it appears that, where a rate for ephemeral copies is set in the marketplace, it is set as a percentage of overall royalties. As a structural matter, the available evidence suggests that setting the ephemeral rate as a percent of an overall payment is consistent with marketplace negotiation.

C. The Best Market Benchmark is the Agreement Between Artists and Record Companies.

Having established that the Section 112(e) ephemeral reproduction right clearly has value and is best expressed as a percentage of the Section 114 performance royalty where such royalty is set, the final step in the analysis is to determine how to set an actual percentage as required by the Register. As noted above, most agreements that set a rate for ephemeral copies specify that rate as a percentage of total royalty payments. Given the nature of the rights at issue, that is not a surprising outcome. Where performance royalties for streaming activities are negotiated in a free market setting, that is, outside of the Section 114 context, the copyright owner (in this case the record companies) and the service provider should have less at stake with respect to the allocation of payments between ephemeral copies and performances.

By contrast, in the Section 114 context, Congress radically altered this market dynamic when it comes to statutory licenses. There is a very significant difference between payments under the Section 112(e) compulsory license and the Section 114 compulsory license: payments under Section 114 are by law split between copyright

[21] Although these agreements do not set the specific allocation, but leave that open to future determination, the point here is that the willing buyers and willing sellers agreed to structure the ephemeral rate as an allocation of the performance rate.

owners and artists, while payments under Section 112(e) go directly to copyright owners. The implication of this phenomenon is immediate. The sharing of income between record companies and artists for performances is set by law. Thus, if it is to have any relevance for the Judges, the willing buyer / willing seller market analysis suggested by Section 112(e) for ephemeral rates must reflect this statutory alteration to the market dynamics whereby the artists and the record companies jointly have a real interest in negotiating the Section 112(e) rate while the webcasters (as the willing buyers) do not.

By the very nature of the statute, the agreements reached under the constraints relevant in this proceeding will not be the same as in the unregulated market. Evidence suggests that the terms between the "willing buyer" in this hypothetical market — the webcaster — and the "willing seller" — the record companies — will either embody the ephemeral copy rate in the performance rate or express the ephemeral rate as a percent of the total overall performance royalty. If so, the buyer is indifferent to the allocation of payments between ephemeral copies and performance royalties. But the "willing seller" — the record companies — will not be so indifferent under the statutory division of royalties that cannot be assumed away. Under plausible conditions, only the record companies and artists are parties to the establishment of the ephemeral rate, and these parties have arrived at a royalty rate for ephemeral copies that reflects a more market based allocation of payments between ephemerals and performance royalties.

Because the willing buyer is disinterested with respect to that allocation, the agreement between the record companies and the artists thereby becomes the best indication of the proper allocation of royalties.

My understanding is that the recording artists and the record companies have reached an agreement that five percent (5%) of the payments for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities. In light of the principles I have articulated above, that appears to be a reasonable proposal, and credibly represents the result that would in fact obtain in a hypothetical marketplace negotiation between a willing buyer and the interested willing sellers under the relevant constraints.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 9/29/09

George S. Ford

Appendix A

George S. Ford, Ph.D.

Phoenix Center For Advanced Legal & Economic Public Policy Studies
5335 Wisconsin Avenue NW, Suite 440
Washington, DC 20015
www.phoenix-center.org
Mailing Address:
1048 Greystone Cove Dr.
Birmingham, Alabama 35242
205-909-3709; Fax: 866-828-9788

george.ford@phoenix-center.org

EDUCATION:

Ph.D., Economics, Auburn University, 1994.

B.S., Economics (magna cum laude), Auburn University, 1990.

EXPERIENCE:

2000 - Present	**PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES** **Washington, DC** Chief Economist
2006 - Present	**SAMFORD UNIVERSITY, Birmingham, Alabama** Adjunct Professor
2004 – Present	**APPLIED ECONOMIC STUDIES, Birmingham, Alabama** President
2000 – 2004	**Z-TEL COMMUNICATIONS** **Tampa, FL** Chief Economist, Strategic Policy and Planning
1996 - 2000	**MCI WORLDCOM CORPORATION** **Washington, D.C.** Senior Economist, Office of Policy and Strategic Planning
1994 - 1996	**FEDERAL COMMUNICATIONS COMMISSION** **Washington, D.C.** Economist, Office of the General Counsel & Cable Bureau, Competition Division

PUBLISHED RESEARCH:

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