

**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**

**KIM ROBERTS HEDGPETH**

**National Executive Director  
American Federation of Television and Radio Artists**

**September 2009**

## **WRITTEN DIRECT TESTIMONY OF KIM ROBERTS HEDGPETH**

### **Background and Qualifications**

I am the National Executive Director of the American Federation of Television and Radio Artists (AFTRA), the 70,000 member labor union representing the people who entertain and inform America: actors, journalists, singers, dancers, announcers, hosts, comedians, disc jockeys, and other performers across the spectrum of television, radio, cable, sound recordings, music videos, commercials, audio books, non-broadcast industrials, interactive games and emerging digital media. My responsibilities at AFTRA over the course of my 28-year association with the union have included negotiation of labor contracts in the areas of news, television and radio broadcasting, advertising, sound recordings and entertainment programming exhibited through traditional television, cable and emerging media.

I currently serve as a Trustee of the AFTRA Health and Retirement Funds, a multi-employer health and pension fund, with assets of over \$1.5 billion; and I am a member of the Boards of the AFM-AFTRA Intellectual Property Trust Fund, the Alliance of Artists and Recordings Companies and of SoundExchange. I also serve as AFTRA's representative to the AFL-CIO's Department for Professional Employees and as its representative to FIA, the International Federation of Actors.

I received a B.A. from Harvard University and a J.D. from the Georgetown University Law Center.

### **Discussion**

I am submitting this testimony to express AFTRA's support for the designation of SoundExchange as the sole Collective to collect and distribute the statutory webcasting royalties

at issue in this proceeding for the period 2011 through 2015. In this testimony, I also discuss the important role that record companies serve in making sound recordings available to the public.

## **I. AFTRA**

AFTRA is a national labor organization representing over 70,000 actors, performers, journalists and other professionals and artists employed in the news, entertainment, advertising and sound recording industries. AFTRA's membership includes approximately 12,000 vocalists on sound recordings, including approximately 4,000 artists who have royalty contracts with record labels (also known as “royalty artists”), as well as approximately 8,000 who perform as non-featured artists on sound recordings (also known as “session artists”). AFTRA actively pursues the rights of these recording artists through collective bargaining, public policy advocacy and legal action.

AFTRA and the American Federation of Musicians (AFM) worked to gain passage of the Digital Performance Right in Sound Recordings Act in 1995, which provided the first U.S. sound recording performance right of any kind and which ensured that the royalties collected pursuant thereto were shared with performers, including those represented by AFTRA and AFM, whose artistic creations bring the magic to sound recordings. AFTRA and AFM also worked to secure passage of the Digital Millennium Copyright Act of 1998 to clarify, among other things, that the digital performance right included webcasters.

One of AFTRA's primary goals is to ensure its members' livelihoods by securing adequate compensation for the use of copyrighted sound recordings. Vocal performance is the dedicated profession of AFTRA's recording artist members, both “royalty artists” who are generally featured artists who earn royalties from record companies, and session artists, who are paid, but not entitled to royalties from record companies for their work on a recording. All of

these artists rely on their vocal performance to earn a living, support their families, and provide access to health insurance and retirement security. The compulsory license fees at issue in this case can make a meaningful difference in the lives of recording artists.

## **II. Designation of SoundExchange as the Sole Collective**

In the previous webcasting proceeding, Docket No. 2005-1 CRB DTRA, I provided a letter to Tom Lee, the President of AFM, for submission in connection with his testimony in that proceeding. In that letter, I expressed AFTRA's support of SoundExchange as the sole Collective for the collection and distribution of statutory royalties. I renew that support now, because I continue to believe there are several reasons why SoundExchange is the best choice for recording artists.

### **A. SoundExchange Represents Both Recording Artists and Copyright Owners.**

SoundExchange is governed by a Board that includes representatives of artists and copyright owners – the very constituencies that are entitled by statute to receive the royalties that SoundExchange collects and distributes. This direct representation helps ensure the honest, efficient and fair distribution of royalties.

Half of the members of SoundExchange's Board directly represent the interests of artists. This institutional structure reflects the fact that half of the statutory royalties required under Section 114 are paid to artists and ensures equal participation of artists in the governance of SoundExchange. It also gives artists an equal voice in the organization, so that SoundExchange is attentive to the particular needs and concerns of recording artists.

SoundExchange has demonstrated its commitment to serving the best interests of artists. To ensure that artists are aware of the royalties to which they are entitled, SoundExchange engages in extensive outreach efforts, such as contacting artists and their representatives directly

and attending industry conferences and panels to publicize SoundExchange's mission and to encourage artists to register with SoundExchange. SoundExchange has also advocated vigorously for favorable royalty rates in rate-setting proceedings, and has worked tirelessly to create the legal and technical environment necessary to administer the statutory licenses. Through all of these efforts, SoundExchange has earned the trust of artists and copyright owners alike. Perhaps the best evidence of SoundExchange's commitment to the fair representation of artists and copyright owners is that tens of thousands of artists and copyright owners have registered with SoundExchange.

**B. SoundExchange Is a Non-profit Organization.**

As a non-profit organization, SoundExchange collects royalty payments for distribution to artists and copyright owners, not for its own financial gain. These royalty payments represent real money for many of AFTRA's members, and the payments should not be reduced by profits taken by a distribution collective which might occur if the license were administered by a for-profit entity. The purpose of the digital performance right is to compensate performers and copyright owners for the use of their recordings, not to create a business opportunity for organizations that collect and distribute royalties. The Collective should base the decisions it makes on the best interests of performers and copyright owners, not on the best way to generate a profit for itself. As a non-profit, SoundExchange's incentives are properly aligned with the interests of royalty recipients. AFTRA would have grave concerns about designating a for-profit entity to collect and distribute the statutory royalty payments that are due our members.

**C. SoundExchange Has Substantial and Unparalleled Experience Collecting and Distributing Statutory Royalties and Has Devoted Significant Resources to Developing a Distribution Infrastructure.**

I am aware that in the previous webcasting proceeding, the Copyright Royalty Judges and the D.C. Circuit held that the best approach was to designate a single Collective. I very much agree with this conclusion.

The single Collective should be SoundExchange. SoundExchange has a demonstrated record of serving the interests of recording artists, seeking to maximize royalty payments to them, and searching far and wide for recording artists (regardless of whether they are SoundExchange members) to distribute their royalty payments to them. To choose a new Collective now would not serve the interests of artists or copyright owners. SoundExchange has made substantial investments and developed expertise in the complex tasks of administering the statutory license. If a new Collective were selected to replace SoundExchange, the benefits of that work would be lost, and a new Collective would need to re-learn much of what SoundExchange already knows. In that circumstance, artists and copyright owners would likely suffer as administrative costs would be needlessly incurred in transitioning to a new Collective and as distributions could be delayed and processed less efficiently. The best interests of the royalty recipients will be served by renewing SoundExchange as the Collective.

If additional entities were designated to collect and distribute royalties so that there were two or more Collectives, it would introduce counterproductive inefficiencies into the system, and would needlessly require the additional expenditure of time, money and resources. This would hurt artists and copyright owners, as they would have to pay for duplicative systems to administer the statutory licenses.

Furthermore, having multiple Collectives could lead to substantial confusion and delay in the collection and distribution of royalties – all of which would negatively impact artists and copyright owners. For example, disputes between the Collectives would inevitably arise related to how to interpret the applicable regulations, and there would be no obvious way to resolve them. Similarly, I understand it is not uncommon for disputes to arise related to how to allocate royalties among performers in a group. SoundExchange works to resolve these disputes, but if there were two Collectives, the Collectives might well disagree about the best resolution (especially if different artists in a group were represented by different Collectives), which would delay the distribution of royalties and might require a third party to resolve.

Adding another Collective into the mix would also make complying with the statutory license more complicated for webcasting services. The statutory and regulatory scheme for collecting and distributing royalties is already complex. It would undoubtedly be confusing and inefficient for webcasting services to have to submit payment and usage information to multiple Collectives.

In short, artists and copyright owners have been well served, and will be better served in the future, by designating SoundExchange as the sole Collective and, thereby avoiding inefficiencies.

**D. RLI Is Not an Appropriate Collective.**

I am aware that in the past proceeding, RLI sought to compete with SoundExchange to collect and distribute statutory royalties, and I understand RLI has indicated its intention to participate in this proceeding. AFTRA believes that RLI is not an appropriate entity to serve as the Collective to collect and distribute royalties for several reasons. To the best of my knowledge, RLI is a for-profit entity, and it has indicated that it is interested in royalty collection

and distribution to make money; RLI's structure does not ensure equal participation by artists in its governance; and RLI has close ties to music licensees and is closely affiliated with Music Reports, Inc., a company that represents the interests of music licensees. As there is no need for more than one Collective (indeed, multiple Collectives would be inefficient), the choice between SoundExchange and RLI could not be easier – SoundExchange is by far the better choice, for all the reasons discussed above.

### **III. The Important Role of Record Companies**

It is no secret that in some contexts, artists and record companies do not always see eye to eye on a number of issues. Nonetheless, I recognize the important role that record companies play in today's marketplace, and would like to comment briefly on it here. With the development of the Internet, it is tempting to think that recording artists have greater opportunities than ever before to deliver their recordings directly to their fans and that the role of record companies may have diminished. In reality, record companies continue to serve the interests of artists, and foster the availability of sound recordings to the public. Without record companies, many of the sound recordings that webcasting services play might never get created. Record companies provide upfront funding for artists to create recordings.

After the recordings have been created, record companies play a central role in marketing and promoting recordings. Although an artist could always try simply to post his or her songs on a website and hope that they will somehow become popular and generate income, those are not realistic expectations. The entertainment market, including the Internet, is so diffuse and so crowded with options that a recording artist cannot rely on releasing a recording into the digital space and then waiting for the revenue to start flowing. It is far too easy for a sound recording to get lost on the Internet. To generate consumer interest – and ultimately revenue – from a



recording, a coordinated marketing and promotional campaign is needed. More often than not, it is record companies that develop, execute and pay for such campaigns. Record companies have developed the infrastructure and expertise necessary to provide this important service for their artists. They marshal their resources and expertise to determine how best to position a recording so that it is targeted to the appropriate audience in an appealing way. These efforts help artists to the extent they result in revenue-generating opportunities (such as plays by webcasting services), and they help webcasting services by providing them with valuable and popular sound recordings to play.

Record companies also help recording artists create the sound recordings that webcasting services play by providing artists with some measure of financial security and stability. For example, not only do they fund the creation of recordings, but record companies often pay artists advances that provide an important source of income for artists before their recordings are able to generate revenue. In addition, record companies act as a stabilizing influence in the industry, as they generate employment for AFTRA members that provides wages and other benefits established pursuant to collective bargaining agreements negotiated between the record companies on the one hand and AFTRA on the other – these negotiated wages and benefits are important to assist our members in providing for themselves and their families in an industry in which careers can be otherwise insecure or reliant upon uncertain income streams.

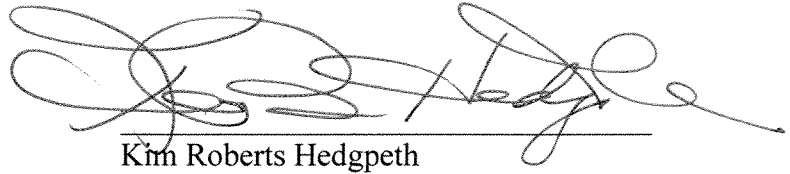
In short, when a webcasting service plays a recording, it is benefiting not only from the hard work and creativity of recording artists, but also from the substantial investments and contributions of record companies.

Finally, based on my experience in the industry, I am generally aware that CD sales have been declining in recent years. This trend hurts artists, including AFTRA members, because

with fewer sales, there is less revenue for artists. In this environment, the royalty paid by webcasters is becoming more important. While the royalties that artists receive from SoundExchange do not by themselves replace lost income from declining CD sales, it is an important revenue stream, especially as there remain relatively few ways for recording artists to generate income through the Internet.

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

Executed on September 28, 2009



Kim Roberts Hedgpeth