PUBLIC VERSION

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service	)	Docket No. 2005-5 CRB DTNSRA

DESIGNATED PORTIONS OF THE MAY 8, 2007 DEPOSITION OF

Douglas A. Kaplan

Senior Vice President for Business Affairs and Business Development,
Entertainment and Sports,
SIRIUS SATELLITE RADIO INC.

Witness for Sirius Satellite Radio Inc.

SIR NSS Ex. 7

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS FOR A NEW SUBSCRIPTION SERVICE	)	**Docket No. 2005-5 CRB DTNSRA**

DESIGNATED PORTIONS OF DOUGLAS A. KAPLAN'S DEPOSITION TESTIMONY SUBMITTED IN LIEU OF LIVE TESTIMONY

Submitted herewith are the designated passages of deposition testimony of Mr. Douglas A. Kaplan, Senior Vice President of Business Affairs and Business Development for Entertainment and Sports for Sirius Satellite Radio Inc. ("Sirius"), taken on May 8, 2007. Sirius and SoundExchange, Inc. have stipulated that, subject to the consent of the Judges, this designated testimony, in conjunction with Mr. Kaplan's Written Direct Testimony, be admitted in lieu of live testimony from Mr. Kaplan. Copies of the referenced testimony are attached.

Designating Party	Start	Stop
SoundExchange	1	3:9
Sirius	3:7	3:9
Sirius	4:11	7:12
SoundExchange	5:2	5:14
Sirius	11:8	17:20
SoundExchange	11:8	17:9
Sirius	19:6	20:1
SoundExchange	19:18	24:15
SoundExchange	26:7	33:5
Sirius	26:16	29:14
Sirius	33:15	35:20

Designating Party	Start	Stop
Sirius	39:1	41:7
SoundExchange	39:1	41:7
SoundExchange	42:13	47:20
SoundExchange	49:5	55:14
Sirius	51:7	52:2
Sirius	54:14	58:4
Sirius	63:18	67:17
SoundExchange	63:18	67:6
SoundExchange	68:10	69:22
SoundExchange	73:16	74:13
Sirius	75:12	76:5
SoundExchange	76:10	81:16
Sirius	80:9	81:16
Sirius	82:8	83:10
SoundExchange	82:8	83:10
Sirius	89:5	92:2
Sirius	93:8	95:3
Sirius	95:15	95:22
SoundExchange	97:2	97:9
SoundExchange	98:8	99:2
Sirius	99:3	100:3
Sirius	100:17	101:14
Sirius	102:5	104:5
SoundExchange	103:17	104:22
Sirius	108:17	110:22
SoundExchange	108:17	111:5
Sirius	111:6	111:20
Sirius	116:10	118:22
SoundExchange	116:10	118:22
SoundExchange	Kaplan Deposition Exhibit 3	
Sirius	Kaplan Deposition Exhibit 4	

Respectfully submitted,

Bruce G. Joseph (D.C. Bar No. 338236)
Michael L. Sturm (D.C. Bar No. 422338)
Thomas W. Kirby (D.C. Bar No. 915231)
Karyn K. Ablin (D.C. Bar No. 454473)
Benjamin B. Reed (D.C. Bar No. 461768)
WILEY REIN LLP
1776 K St NW
Washington, DC 20006
Tel: 202.719.7258
Fax: 202.719.7049
bjoseph@wileyrein.com;
msturm@wileyrein.com,
tkirby@wileyrein.com,
kablin@wileyrein.com,
breed@wileyrein.com,

Counsel for Sirius Satellite Radio Inc.

Michael DeSanctis
Jenner & Block LLP
601 Thirteenth Street, NW,
Suite 1200 South
Washington, DC 20005
mdesanctis@jenner.com

Counsel for SoundExchange, Inc.

July 11, 2007

1 BEFORE THE UNITED STATES COPYRIGHT ROYALTY BOARD

2 LIBRARY OF CONGRESS

3 WASHINGTON, D.C.

4 ----------

5 In the Matter of:

6 DIGITAL PERFORMANCE RIGHT IN

7 SOUND RECORDINGS AND EPHEMERAL

8 RECORDINGS FOR A NEW

9 SUBSCRIPTION SERVICE,

10

11 Docket No.

12 2005-5 CRB DTNSRA

13 ----------

14

15 DEPOSITION OF DOUGLAS A. KAPLAN, a

16 Witness herein, taken by SoundExchange, Restricted

17 Pursuant to Protective Order, at the offices of

18 Jenner & Block, 919 Third Avenue, New York, New

19 York, on Tuesday, May 8, 2007, at 8:59 a.m., before

20 Debra Stevens, a Registered Professional Reporter

21 and notary public, within and for the State of New

22 York.

1 A P P E A R A N C E S :

2 WILEY REIN LLP

3 Attorneys for Sirius Satellite Radio

4 1776 K Street N.W.

5 Washington, D.C. 20006

6

7 BY: MICHAEL L. STURM, ESQ.

8

9 JENNER & BLOCK LLP

10 Attorneys for SoundExchange

11 601 Thirteenth Street, N.W.

12 Suite 1200 South

13 Washington, D.C. 20005

14 BY: ANNE RALPH, ESQ.

15 GIANNI P. SERVODIDIO, ESQ.

16

17

18

19

20

21

22

1 Whereupon,

2 DOUGLAS A. KAPLAN,

3 having been first duly sworn, was examined and

4 testified as follows:

5 EXAMINATION BY

6 MS. RALPH:

7 Q. Good morning. Would you state your name

8 for the record, please?

9 A. Douglas A. Kaplan.

10

11

12

13

14

15

16 Not Designated

17

18

19

20

21

22

1
2
3
4
5
6 Not Designated
7
8
9
10
11 Q. You are employed at Sirius Satellite
12 Radio; is that correct?
13 A. Yes.
14 Q. What is your current position at Sirius?
15 A. Senior vice president, business affairs
16 and business development for entertainment and
17 sports.
18 Q. When did you join Sirius?
19 A. In July of 1999.
20 Q. How did you come to be employed by
21 Sirius?
22 A. I was brought in by a recruiter as

1 associate general counsel.

2 Q. What are your job duties or

3 responsibilities in your current position?

4 A. I am primarily responsible for

5 negotiation of programming agreements, as well as

6 working with the team to develop programming

7 concepts and ideas and looking to put deals and

8 relationships in place.

9 Q. How long have you held this current

10 position?

11 A. For a little under three years.

12 Q. You said your current position is senior

13 vice president?

14 A. Yes.

15 Q. To whom do you report in your position as

16 senior vice president?

17 A. Scott Greenstein, president of

18 entertainment and sports.

19 Q. To anyone else?

20 A. No.

21 Q. And who reports to you?

22 A. I have an assistant reporting to me, as

1 well as a director, I believe, of special projects.
2 Q. Have you held other positions within
3 Sirius?
4 A. Yes.
5 Q. What were the other positions?
6 A. I was associate general counsel for
7 approximately one year following my arrival.
8 Thereafter, I was vice president and deputy general
9 counsel for about three, four years -- approximately
10 four years, until I assumed my current position.
11 Q. I just want to be clear on the dates.
12 You joined Sirius in July of 1999?
13 A. Yes.
14 Q. You were associate general counsel for
15 about a year?
16 A. Yes.
17 Q. Then at what point did you become a vice
18 president and deputy general counsel?
19 A. I believe it was approximately my first
20 anniversary, so it would have been July of 2000.
21 Q. And you held that position until you
22 assumed your current position as senior vice

1 president for business affairs and business
2 development?
3 A. Yes.
4 Q. And when did you assume your current
5 position?
6 A. I believe it was officially July of 2004.
7 Q. Okay.
8 A. It was a bit of transition, so I was
9 acting largely in that capacity for some period
10 before, and I continued to act in my old capacity to
11 a limited extent for a period of time until we were
12 able to bring someone else in to fill the position.
13
14
15
16
17
18 Not Designated
19
20
21
22

1
2
3
4 Not Designated
5
6
7
8 Q. I understand from your written testimony
9 that Sirius has an agreement with EchoStar to
10 transmit Sirius channels over the Dish Network
11 satellite TV system. Is that right?
12 A. Yes.
13 Q. Can you tell me how Sirius came to enter
14 this agreement with EchoStar?
15 A. We had had some on-and-off discussions
16 with EchoStar, I think going back as early as 2000,
17 that had not been productive. When Joe Clayton
18 became CEO of Sirius, he, through his experience in
19 the satellite television industry, had some strong
20 contacts at EchoStar and, along with some of the
21 employees that he brought in with him, reinitiated
22 some discussions.

1 There were really two purposes and two
2 primary missions or aspects to the EchoStar
3 agreement. One was the distribution of our music
4 channels over their satellite television network to
5 their customers, and the other was an arrangement
6 for EchoStar to distribute Sirius Satellite radios.
7 Q. So is it fair to say that even though
8 there had been discussions between Sirius and
9 EchoStar going back to 2000, discussions weren't
10 serious or productive until Joe Clayton came on as
11 CEO?
12 A. I am not sure if they weren't serious in
13 the past but they certainly were not productive.
14 Q. When did Joe Clayton come on as CEO?
15 A. I believe it was at some point during
16 2001. It would have been before our launch in 2002.
17 Can't pin it down.
18 Q. At that point, after Clayton came on as
19 CEO, was it Sirius or EchoStar who initiated the
20 negotiations for the agreement?
21 A. I don't specifically know. As I said,
22 those discussions were at the CEO level or the EVP

1 and/or CEO level. I was not in all of the initial
2 conversations. It would not surprise me if it was
3 Sirius, as we were interested in the distribution.
4 Q. When did you become involved in the --
5 did you become involved in the negotiations of the
6 agreement?
7 A. I did.
8 Q. When did you become involved?
9 A. It would have been sometime during mid to
10 late 2003.
11 Q. Was there a person at Sirius who served
12 as the lead negotiator or took a lead role in
13 negotiating the agreement with EchoStar?
14 A. Joe Clayton had some involvement
15 personally, as did Guy Johnson, who was executive
16 vice president of Sirius at that time.
17 Q. Okay.
18 A. And after a time I became very
19 prominently involved as well.
20 Q. You say you became very prominently
21 involved. How would you further characterize your
22 role in the negotiation of the agreements?

1 A. Working with Guy and Joe to put together
2 term sheets, discussing those with EchoStar,
3 ultimately drafting the agreement or putting
4 together an initial draft of the agreement, which
5 was passed back and forth numerous times during the
6 course of the negotiations.
7 Q. Was there a lead contact person at Sirius
8 for EchoStar?
9 A. It would have -- depending on issues or
10 concerns, it would have been either Guy Johnson or
11 myself.
12 Q. You mentioned Clayton, Guy Johnson and
13 yourself. Who else at Sirius worked on negotiating
14 the agreement?
15 A. No one else that I can recall in the
16 negotiations.
17 Q. Who at Sirius approved the agreement once
18 it had reached its final form?
19 A. Well, ultimately, Joe Clayton would have
20 approved it and various others looked at and
21 discussed it along the way.
22 Q. Who would those others have been?

1 A. Patrick Donnelly, general counsel; David
2 Frear, who is our CFO. Most likely some members of
3 our music programming and engineering departments
4 would have been involved as well in looking at
5 operational and technical issues.
6 Q. Do you recall when the agreement was
7 finally executed?
8 A. It was in February of 2004.
9 Q. Is there currently a lead person at
10 Sirius for the deal with EchoStar right now? By
11 that I mean a primary contact person for EchoStar.
12 A. I would imagine that there would be two,
13 one to deal with issues relating to their
14 distribution of our music channels, although clearly
15 any interaction there is somewhat limited, dealing
16 principally with operational issues or changeovers
17 as from time to time we may add or subtract music
18 channels from our line-up.
19 Then there would be someone else on the
20 distribution side dealing with EchoStar's purchase
21 and distribution of Sirius receivers, although there
22 again, contacts would be fairly limited as -- my

1 understanding is that there is not much activity at
2 all in that area.
3 Q. Who are these individuals that you are
4 referring to? You mentioned someone who would deal
5 with sort of the content distribution arm of the
6 deal.
7 A. That would really be a more operational
8 contact, and I don't know who it would be. It would
9 be a representative from either our engineering or
10 broadcast operations group.
11 Q. And you identified a person who would
12 deal with the product distribution side, receivers.
13 A. Right. Again, I don't know for sure who
14 it would be today. It would be someone reporting to
15 Bob Law, who is our senior vice president in charge
16 of product development and distribution.
17 There was at one point a Sirius employee
18 specifically dedicated to the EchoStar relationship,
19 but we no longer -- that employee is no longer with
20 us.
21 Q. When that employee left, was the position
22 of dealing specifically with the EchoStar

1 relationship eliminated?

2 A. I believe it was.

3 Q. Who was the person who held that

4 position?

5 A. His name was Jim Sowinski. I believe it

6 is S-O-W-I-N-S-K-I.

7 Q. When did he leave Sirius?

8 A. I don't know specifically. It would have

9 been sometime in 2005 or 2006.

10 Q. Do you know the reasons for his leaving?

11 A. I believe it was because the position was

12 eliminated, again because there was not much

13 activity. After somewhat of an initial push,

14 EchoStar's distribution efforts became fairly

15 limited and there just wasn't enough activity going

16 on.

17 Q. So is it fair to say that Sirius has

18 limited interaction on the business level with

19 EchoStar today?

20 A. I believe that's accurate.

21

Not Designated

22

1
2
3 Not Designated
4
5
6 Q. You said there were two goals of the
7 agreement, the first of which was to distribute the
8 Sirius service for promotional purposes. Why was
9 that important to Sirius?
10 MR. STURM: I will object. He just said
11 the purpose was to distribute the music channels,
12 not the entire service. But subject to that
13 objection, you can answer the question.
14 A. We found that exposing consumers to the
15 service can be a valuable promotional tool in
16 ultimately causing them to subscribe, which was our
17 aim.
18 Q. Why did Sirius believe that this would be
19 a valuable promotional tool?
20 A. Well, again, it was because a sampling
21 opportunity, exposing people to the service, we
22 found can be helpful in ultimately causing them to

1 become subscribers.

2 Q. You say Sirius found it could be helpful,

3 sampling could be helpful in moving people to become

4 subscribers. What analysis did Sirius do to

5 determine that sampling would cause this effect?

6 A. I think it was more about experience with

7 a couple of other initiatives that we had undertaken

8 that seemed to produce positive results.

9 Q. What were those initiatives?

10 A. We have an arrangement with Hertz to have

11 Sirius available in a portion of their rental fleet.

12 Q. Had that been effective in driving

13 subscriber acquisition?

14 A. I believe that we feel that it had. I

15 don't specifically recall any data on the number of

16 subscribers.

17 Q. Do you know whether that data on the

18 number of subscribers gained through the Hertz deal

19 was collected in any way?

20 A. I don't. I imagine we would have

21 attempted to do some research that would have

22 provided some information, but one of the challenges

1 of our business is that it is not always possible,
2 when someone becomes a subscriber, to tell exactly
3 what led them to do so.
4 Q. So you are not certain but you think it
5 is possible that there was research done on the
6 effects of the deal with Hertz on subscriber
7 numbers?
8 A. Yes.
9 Q. If that research had been done, who at
10 Sirius would maintain that or have access to it?
11 A. It would be our research department.
12 Q. Is there one person in the research
13 department who would have primary responsibility for
14 that?
15 A. There should be. Right now I am not sure
16 that there is even more than one person in our
17 research department. We have had some substantial
18 turnover over the last several months.
19 Q. Who is the person that is in your
20 research department right now?
21 A. I, unfortunately, do not know her name
22 off the top of my head. She just joined the company

1 and I can't recall it right now.

2 Q. You said that there were a number of

3 initiatives Sirius had undergone that led it to

4 believe the EchoStar deal would be valuable in

5 gaining subscribers. What were the other

6 initiatives, besides Hertz?

7 A. The other primary initiative is an

8 on-line sampling initiative.

9 Q. How did that work?

10 A. We offer consumers the opportunity to

11 have a period of free listening, a promotional

12 window, generally three days, to experience

13 initially our music channels. I believe certain

14 talk news or entertainment channels may have been

15 added to that over time.

16 Q. Is this -- let me be certain. Is this a

17 free listening period?

18 A. It is. It is a promotional -- again,

19 three-day promotional opportunity.

20 Q. When was this program started?

21 A. I don't recall specifically.

22 Q. What kind of data did Sirius maintain on

1 this free on-line sampling service?

2 A. We generally required consumers to

3 provide a name and e-mail address in order to access

4 the promotional listening.

5 Q. And did Sirius track how many of the

6 listeners who used the promotional period became

7 subscribers to Sirius afterwards?

8 A. We attempted to do so, yes.

9 Q. What do you mean, you attempted to do so?

10 A. We attempt to take the e-mails and names

11 that we obtain through the promotional campaign and

12 match them from time to time against subscribers, to

13 the extent the subscribers provide us with e-mail

14 addresses when they subscribe or that we are able to

15 compare and match up the data, which is sometimes

16 but not always the case.

17 Q. Is there any other way that you track

18 subscribers that result from the free listening

19 period? Surveys, for instance?

20 A. I am not aware of any.

21 Q. This information that we have just been

22 discussing, subscribers acquired after the free

1 on-line listening trial, are those numbers
2 maintained on a regular basis?
3 MR. STURM: Objection. I am not sure
4 which numbers you are talking about.
5 MS. RALPH: The information about
6 subscribers who joined after listening on line.
7 Q. Do you understand my question?
8 A. I believe so.
9 I don't know.
10 Q. Who would maintain those numbers at
11 Sirius?
12 A. I am not certain. It would be either our
13 interactive department, who is responsible for the
14 website, our research department or our marketing
15 department.
16
17
18
19 Not Designated
20
21
22

1
2
3
4 Not Designated
5
6
7 Q. Is it fair to say that you had primarily
8 anecdotal evidence that sampling had promotional
9 value at the time you negotiated the agreement with
10 EchoStar?
11 A. I don't know. I imagine we may have had
12 some anecdotal evidence, but I don't recall any
13 specific discussion about it. I believe we simply
14 believed that it would be a good opportunity to
15 drive some consumer awareness of our service.
16 Q. You mentioned a second primary goal of
17 the agreement between Sirius and EchoStar as being
18 using EchoStar's distribution network to distribute
19 Sirius receivers. Is that right?
20 A. Causing EchoStar to distribute receivers
21 through its network, yes.
22 Q. Tell me a little bit more about how that

1 worked.

2 A. EchoStar, as part of its satellite

3 television business, had a distribution network of

4 several thousand dealers, many of whom were in

5 outlying or rural areas, smaller independent dealers

6 that were not otherwise carrying Sirius products.

7 We were interested in both their

8 distribution network and, obviously, in EchoStar

9 putting some of its resources into distributing our

10 product.

11 Q. Why was that important to Sirius?

12 A. Our business is driving subscribers to

13 our product.

14 Q. Was Sirius experiencing problems

15 distributing its receivers to customers?

16 A. I don't know that I would say problems,

17 but we were growing at a pace that was less than our

18 competitor at that time and certainly the

19 opportunity to add several thousand points of

20 additional distribution was of interest to the

21 company.

22 Q. Did Sirius and EchoStar offer a receiver

1 that was interoperable, that would have a Sirius
2 receiver and an EchoStar receiver in one?
3 A. No.
4 Q. Did the EchoStar distributors simply also
5 distribute Sirius receivers?
6 A. That was the purpose of the arrangement,
7 yes, that EchoStar would purchase Sirius receivers
8 from some of our manufacturers or ultimately, if
9 they were so interested, manufacture their own and
10 then, in either case, distribute them.
11 Q. Do you know, were these receivers for
12 automobile use or for home use? What kind of use
13 were they for?
14 A. The receivers that were contemplated are
15 what we would call plug-and-play or transportable
16 receivers that can be used in a vehicle and also
17 removed from a vehicle and used in the home with a
18 home kit that would connect into a stereo. The
19 agreement didn't limit EchoStar to that.
20 Q. When you say "the agreement didn't limit
21 EchoStar to that," do you mean it didn't limit
22 EchoStar to plug-and-play receivers?

1 A. Yes, that's correct.

2 Q. You said earlier that Sirius's contact

3 with EchoStar, as far as the distribution of

4 receivers, is limited today; is that right?

5 A. Yes.

6 Q. Do you have a view of how successful the

7 initiative to have EchoStar distributors also

8 distribute Sirius receivers has been for Sirius?

9 A. I would say ultimately not as successful

10 as we had hoped at the time.

11 Q. Why do you say that?

12 A. Because we have not gained substantial

13 numbers of subscribers through EchoStar's

14 distribution.

15 Q. When Sirius entered the agreement with

16 EchoStar, was there an estimate of how many

17 subscribers Sirius would gain from the relationship

18 with EchoStar Dish?

19 MR. STURM: I will object and just ask

20 you to clarify. Are you talking about the radio

21 distribution aspect of the relationship, or through

22 the promotion, through the exposure on the Dish

1 channels, or both?

2 MS. RALPH: Thank you. Both.

3 Q. First, was there an estimate of how many

4 listeners Sirius would reach through distribution on

5 Dish Network? And, second, was there an estimate of

6 how many subscribers to the SDAR service Sirius

7 would gain through the promotion on Dish Network?

8 MR. STURM: Can you read that back?

9 (Record read.)

10 MR. STURM: Object to the form of the

11 question. You can answer it, if you understand it.

12 Q. Mr. Kaplan, do you understand the

13 question?

14 A. By your first question, do you mean how

15 many Dish Network satellite television subscribers

16 would listen to Sirius channels when they were

17 distributed over Dish's TV platform?

18 Q. I meant at the time the agreement was

19 negotiated, was there an estimated number of Dish

20 subscribers who would receive the Sirius channels

21 over Dish? Does that make sense?

22 A. I believe you are saying the same thing

1 that I am saying.

2 Q. Okay.

3 A. I don't recall a specific estimate as to

4 the number of Dish satellite TV subscribers that

5 would listen to our music channels over their

6 televisions. We knew that Dish, overall, had, I

7 believe, approximately 8 million subscribers, and I

8 believe that something above 6 million of them would

9 be given access to the Sirius music channels.

10 I don't recall specific projections as to

11 how many of those subscribers would actually ever

12 listen to the music channels over their televisions.

13 I believe we would have expected it to be a

14 relatively modest, limited number, but I don't

15 recall specific...

16 Q. Why did Sirius expect it to be a modest

17 number of Dish subscribers who would listen to the

18 Sirius channels?

19 A. Well, modest perhaps on a percentage

20 basis. Obviously, with millions of potential

21 customers, it would possibly have been a somewhat,

22 you know, aggregate number that was reasonable.

1 But I don't think it was our expectation
2 or belief that a substantial number of their
3 television subscribers would listen, at least on a
4 regular basis, to the music channels.
5 Q. Why not?
6 A. Because I don't believe that a
7 substantial number of cable and/or satellite
8 television subscribers that have access to audio
9 music services over their televisions are regular,
10 meaningful listeners.
11 Q. As to the second part of my two-part
12 question, when Sirius entered the agreement with
13 EchoStar, did Sirius have an estimate of how many
14 subscribers to its satellite radio service it would
15 gain through the deal with EchoStar?
16 MR. STURM: And this is through all
17 aspects of the deal?
18 MS. RALPH: Excuse me?
19 MR. STURM: Through all aspects of the
20 deal, both selling radios and the exposure?
21 MS. RALPH: Yes.
22 A. I am not aware of specific estimates. I

1 am sure we would have looked at possibilities based
2 upon the number of EchoStar subscribers with whom
3 EchoStar could communicate to try to market the
4 receivers, as well as based upon the points of
5 distribution that they had.
6
7
8
9
10 Not Designated
11
12
13
14
15 Q. At the time that Sirius was negotiating
16 the deal with EchoStar, did it think of what you
17 described as the two arms of the deal -- selling
18 radios and exposure to Sirius music channels -- did
19 it think of those separately, as separate mechanisms
20 to gain customers, or sort of as an aggregate?
21 A. Ultimately, our business is, and both of
22 those aspects of the relationship were aimed at

1 driving subscribers to the satellite radio service.
2 Obviously, distribution of our music channels over
3 Dish's TV network was one step further removed and
4 was more of an awareness of promotional initiative
5 as opposed to the sale of radios, which was directly
6 aimed at generating subscribers.
7 So in that sense, we might have viewed
8 them as separate. But, ultimately, the goal in
9 either case was the same. And I would expect that
10 since Dish was readily able to market directly to
11 its satellite television customer base, that we
12 would have viewed probably the success of one as
13 likely to have some influence over the success of
14 the other.
15 Q. When you were negotiating the deal, was
16 there one of those aspects, exposure over Dish and
17 selling radios, that you treated in your
18 negotiations as more important?
19 A. I don't think so.
20 Q. Would you say they were equally
21 important?
22 A. Probably. Again, direct sale of

1 receivers, direct generation of customers is always
2 the end goal, but exposure and sampling can help
3 toward that, so they were both important.
4 Q. And was there one of those aspects that
5 you or Sirius regarded as more likely to attract
6 subscribers?
7 A. I would not say it that way. Obviously,
8 to the extent that someone buys a radio, their
9 intent is normally to subscribe. But it was more
10 likely that -- not more likely. I don't know that
11 we expected -- we certainly didn't expect everyone
12 who ever sampled our music channels over Dish's
13 network to then become a subscriber.
14 Q. Did you expect every person who walked
15 into an EchoStar dealer or distributor to purchase
16 an EchoStar receiver to become a subscriber?
17 A. No. I think we expected everyone who
18 bought an EchoStar-distributed Sirius receiver, or
19 just about everyone who bought a Sirius receiver
20 from EchoStar to become a subscriber.
21
22

Not Designated

1 Q. Mr. Kaplan, does Sirius pay a fee to
2 EchoStar to distribute its channels over EchoStar's
3 system?
4 A. Effectively, no.
5 Q. What do you mean by that?
6 A. [[
7
8
9
10
11
12
13
14]]
15 Q. So no money changes hands?
16 A. That's correct.
17 Q. Why was the deal structured this way,
18 with]and no money changing
19 hands?
20 A. Because EchoStar was unwilling to pay for
21 the right to carry our music channels.
22 Q. Why was that?

1 MR. STURM: Objection. Calls for
2 speculation, but you can answer.
3 Q. As you were negotiating the agreement,
4 did EchoStar express a reason why they were
5 unwilling to pay for the music channels?
6 A. Not that I specifically recall.
7 Q. You have said that you had great
8 responsibility for negotiating the agreement. Did
9 either Sirius or EchoStar ever bring up the
10 possibility of Sirius being paid money for its
11 channels?
12 MR. STURM: Object to the form of the
13 question, the "great responsibility," but you can
14 answer.
15 A. As I stated earlier, I was not involved
16 with some of the initial discussions that took place
17 at the CEO level, so I don't know. I certainly
18 imagine that we would have asked to be paid.
19 Q. But you are not aware, yourself, of
20 Sirius asking to be paid?
21 A. Not that I recall, but it would have been
22 a natural place for us to want to be. We normally

1 don't give away our product for nothing.

2 Q. So Sirius would have liked to have gotten

3 revenue from the deal with EchoStar?

4 A. Yes.

5 Q. It is your understanding that EchoStar

6 was not willing to pay Sirius for its content?

7 A. That's correct.

8

9

10

11

12

13

14

15 Not Designated

16

17

18

19

20

21

22

1
2
3
4
5
6
7 Not Designated
8
9
10
11
12
13 Q. You said earlier that one of the reasons
14 that Sirius entered the agreement with EchoStar was
15 because Sirius believed that sampling some of its
16 channels would be an effective form of promotion; is
17 that right?
18 A. It would be a good opportunity for
19 exposure. We hoped it would wind up being effective
20 and believed it could be effective.
21 Q. During your involvement in the
22 negotiation of the agreement, did you or anyone at

1 Sirius consider that you might be wrong about the
2 promotional effect?
3 A. I don't know that we would have
4 considered it to be a right or a wrong. I believe
5 the question we would have considered is would we be
6 deriving sufficient promotional value to make it a
7 worthwhile investment of the dollars that the
8 transaction would cost us in terms of having to pay
9 royalties.
10 Q. When you were considering whether it
11 would be a worthwhile investment, what sort of --
12 what revenues did you project Sirius would need to
13 bring in to make it a worthwhile investment?
14 A. I don't recall any specific revenue
15 projections. Again, it is often not possible for us
16 to even associate revenues with specific expenses
17 because we don't know where someone might buy a
18 radio after hearing our music on EchoStar or
19 specifically why they might buy that radio. So, it
20 is very difficult to associate subscribers or
21 revenues directly with the specific initiative such
22 as the distribution on EchoStar.

1 Q. Even though you say it is difficult, does
2 Sirius attempt in any way to track subscribers who
3 are attracted through a certain path?
4 A. Yes. I think we did attempt in this case
5 to do so.
6 Q. How?
7 A. We sought to obtain from EchoStar --
8 sought to work with EchoStar to try to match our
9 database of subscribers against their database of
10 subscribers so that we could determine whether it
11 seems that we would be under or over-represented in
12 their database against what one would expect from
13 the population generally.
14 Q. You say Sirius sought to do that. Are
15 those efforts ongoing?
16 A. I don't believe that they are. EchoStar
17 was unwilling to allow us access to their database
18 to do such a comparison, so we have been unable to
19 do it. I am not aware that the efforts are
20 continuing.
21 Q. Did EchoStar give a reason why they were
22 unwilling to give you access to the database?

1 A. I don't know. I was not directly
2 involved in those requests.
3 Q. So Sirius was never actually able to
4 compare their subscriber database against
5 EchoStar's; is that right?
6 A. Yes, that is correct.
7 Q. In negotiating the agreement, did you or
8 anyone at Sirius ever consider that distributing
9 Sirius music channels over Dish for free might
10 substitute for a person who would otherwise pay a
11 12.95 monthly subscription to Sirius?
12 A. I don't recall discussing that. I think
13 our view was that it was in fact more likely to
14 drive subscriptions to Sirius; that the opportunity
15 to experience a subset of our entire service in your
16 home would cause interest in, A, experiencing the
17 entire service; and, B, being able to experience it
18 in your car, which is the primary driver of
19 subscriptions to our business.
20 Q. On what did you base that view that you
21 just described?
22 A. On -- on the points we discussed earlier

1 about the notion of a sampling opportunity being a
2 tool for driving subscriptions.
3 Q. So you weren't concerned that a Dish
4 subscriber might say, "Hey, I get Sirius's music
5 channels at home; I don't need to describe to Sirius
6 now"?
7 A. It is -- I don't specifically recall.
8 It's very possible that that would have come up as a
9 subject. It was ultimately, you know, not so much
10 of a concern that we didn't want to do the deal.
11 Again, I think for the reasons I stated, that we
12 ultimately thought it would lead people to want to
13 experience the entire service and to be able to take
14 it with them in their cars.
15 Q. You said that Sirius wasn't able to
16 compare its subscriber database to EchoStar's. Are
17 you aware of any data that would show that the
18 sampling of Sirius's music channels on Dish Network
19 has been promotional for Sirius Satellite Radio
20 service?
21 A. I believe we may have attempted to
22 somehow, through a third party I would imagine, try

1 to do some research to find a group of EchoStar
2 subscribers to try to determine whether we might
3 have had more representation there than we would
4 otherwise have expected.
5 Q. You believe this was conducted. Are you
6 certain whether it was conducted?
7 A. I am not a hundred percent certain. I
8 vaguely recall that we may have tried to do that. I
9 don't recall results being particularly strong.
10 I feel like we might have done something
11 and it didn't show a whole lot of, if any,
12 additional subscribers. But again, I am not a
13 hundred percent sure.
14 Q. Do you recall who was the third party who
15 conducted this research?
16 A. No. I wouldn't -- I had no involvement
17 with it. I would not have known. I believe that
18 there are consumer research organizations who you
19 can go to to attempt to do something like this, but
20 I have no direct knowledge of it.
21
22

Not Designated

1
2
3
4

Not Designated

5 Q. Sure. Does the Sirius Dish programming
6 compete with the Sirius Satellite Radio service?
7 MR. STURM: Objection. You can answer.
8 A. I would expect it to be more promotional
9 than substitutional, but I suppose it is possible
10 that someone who might have an interest limited to
11 music or certain types of music and who only would
12 listen to music in their home and who would
13 otherwise be able to listen to Sirius in their home
14 could ultimately not subscribe to Sirius as a result
15 of it being on Dish. But I would expect that to be
16 outweighed by the value of exposing people to Sirius
17 on Dish and, therefore, it would cause them to want
18 to become Sirius subscribers.
19 I think also EchoStar was already
20 carrying a music service, and continues to carry, I
21 believe, music service produced by Muzak on its
22 platform, so I don't know that I would have expected

1 any greater substitutional impact from having our
2 service on Dish than the music channels they may
3 already have been carrying -- significantly greater,
4 I should say. I probably would expect somewhat
5 greater because I think we do better music channels
6 than Muzak does.
7 Q. To the extent that Sirius does want
8 people to listen to Sirius Satellite Radio in the
9 home, does the Sirius SDAR service compete with the
10 Sirius Dish service in that market?
11 MR. STURM: Object to the form of the
12 question. In particular, the use of the term
13 "market." You can answer the question if you are
14 able to.
15 A. Could you repeat it, please?
16 (Record read.)
17 A. Again, I would say to the extent that
18 someone is satisfied with the music service as
19 delivered over Dish and does not have interest or
20 want to become also able to listen to all of the
21 other sports and news and entertainment and talk
22 offerings which we have and which are talked about

1 on the music channels, then, yes, it is possible
2 that we would lose satellite radio subscribers by
3 virtue of having the music channels carried on Dish.
4 Q. Are you aware of any research data that
5 would back that up?
6 A. No.
7 Q. Mr. Kaplan, do you know, do all EchoStar
8 Dish subscribers get the Sirius channels?
9 A. No, not all do.
10 Q. Are the Sirius channels available only on
11 certain packages?
12 A. That is my understanding, yes.
13 Q. Do you know how many people actually get
14 Sirius over Dish today?
15 A. I do not. I know that it is the
16 significant majority of Dish subscribers. I don't
17 know exactly the percentage or the number of
18 subscribers Dish has today.
19 Q. Do you know who determines which packages
20 receive the Sirius channels?
21 A. Dish is obligated to include the channels
22 in certain of their packages. Beyond that, they

1 have the right to add them to the remainder of their
2 packages, so that would be their option.
3 Q. Do they need to consult with Sirius about
4 making the channels available on other packages?
5 A. I don't believe so. It is fairly
6 straightforwardly covered in the agreement. I don't
7 think it...
8 Q. You didn't recall the number of people
9 who actually get the Sirius channels over Dish
10 today. Do you know, of the people who do receive
11 it, how many ever listen to it?
12 A. No, I do not.
13 Q. Does Sirius track numbers like that?
14 A. We have no ability to track that.
15 Q. Does Sirius survey EchoStar subscribers
16 to determine those numbers?
17 A. Currently not to my knowledge.
18 Q. Has Sirius ever surveyed EchoStar
19 customers to determine those numbers?
20 A. Not that I am aware of. I don't know --
21 I don't believe, I don't know if EchoStar even has
22 the ability to do that themselves through their

1 hardware. If they do, we may have asked, but again,
2 they weren't forthcoming with information so I don't
3 believe they would have supplied it.
4 If we did do research of the type that we
5 were discussing earlier through some sort of
6 third -- independent third party, we might have
7 tried that. I am not aware of us ever doing it or
8 of us ever obtaining information.
9 Q. Are you aware of any data possessed by
10 Sirius of the average hours per week or per day that
11 people listen to the Sirius Dish channels?
12 A. Not that I am aware of. It may be
13 possible that there are third-party research
14 organizations that publish information like that. I
15 haven't -- I don't recall ever seeing it.
16 Q. Who at Sirius would have this
17 information?
18 MR. STURM: Objection. It assumes it
19 exists.
20 Q. If it exists, who at Sirius would have
21 this information?
22 A. I would have to assume that it exists and

1 that someone at Sirius has it. I am not aware of
2 anyone having it.
3 Q. Has Sirius tracked or does it track the
4 number of customers who have signed up for Sirius's
5 SDAR service as a result of hearing Sirius over
6 Dish?
7 A. As I described earlier, we don't have the
8 ability to track that, so, no, I don't believe so.
9 Q. Does Sirius ask questions of customers
10 who are signing up for the SDAR service, for
11 instance, asking them how did they learn of the
12 Sirius service?
13 A. Not to my knowledge.
14 Q. Mr. Kaplan, what Sirius channels are
15 available over the Dish service?
16 A. Substantially all of our music channels.
17 I believe Dish is featuring 64 of our music
18 channels. I am not a hundred percent sure of the
19 number. If it is not 64, it is something very, very
20 close to it.
21 Q. How many total music channels does Sirius
22 have?

1 A. We have 68 music channels that we
2 produce. There are also some music channels
3 produced by our Canadian affiliate, which are not,
4 to my knowledge, carried on Dish.
5 Q. Are Sirius music channels the only
6 channels available on the Dish service?
7 A. You mean the only Sirius channels?
8 Q. Yes, the only Sirius channels.
9 A. Yes.
10 Q. Are the Sirius music channels provided
11 over Dish exactly like the Sirius music channels on
12 the SDAR service?
13 A. They are simulcasts, so, yes, they are
14 absolutely identical.
15 Q. How was the decision made that Dish would
16 carry only Sirius music channels -- let me back up.
17 Does Dish carry any other Sirius channels
18 besides Sirius music channels?
19 A. No.
20 Q. How was the decision made that Dish would
21 carry only Sirius music channels?
22 A. There were several aspects to it. At the

1 time I think Dish was looking to supplement or
2 enhance the music channels that it offered by
3 bringing branded products such as Sirius in, in
4 addition to the music channels they were already
5 carrying.
6 At the time, we had fewer and different
7 talk, news and entertainment channels, a number of
8 which, the majority of which we did not produce or
9 control, so our rights to provide those to Dish
10 would have been limited. In addition, a number of
11 them were simply the audio feeds of cable television
12 channels which Dish was already carrying and it
13 would have been redundant for them to carry the
14 audio alone without the pictures.
15 Q. Any other reasons for Dish to carry only
16 Sirius music channels?
17 A. Beyond that -- beyond that, we were not
18 willing and would not be willing today, certainly,
19 to make available to Dish any of our proprietary
20 talk, news and entertainment channels.
21 Q. Why not?
22 A. Because they are not paying us. We would

1 consider making them available, perhaps, if an
2 appropriate business arrangement could be reached.
3 Q. Has such an arrangement ever been
4 proposed?
5 A. Not to my knowledge. It would be a
6 substantial commitment, I think, on Dish's part to
7 persuade us to do that, and I am not aware of any
8 conversations in that direction.
9 Q. During your involvement in the
10 negotiation of the agreement between Sirius and
11 EchoStar, what channels did EchoStar ask to carry?
12 A. The music channels. And they made some
13 general requests about having rights to perhaps add
14 some of the other channels, to which we said no for
15 some of the reasons I have been describing.
16 The most specific piece of content which
17 they would like perhaps to have carried would have
18 been our NFL football channel and, even more
19 particularly if possible, the NFL games because one
20 of their key competitors, satellite television
21 competitor, DIRECTV, had an exclusive NFL
22 arrangement to carry all the out of market games.

1 Dish would have been interested in at
2 least having the audio, but we didn't have any
3 rights to provide it for them, so that was a very
4 short conversation.
5
6
7
8
9
10
11
12
13 Not Designated
14
15
16
17
18
19
20
21
22

1
2
3
4
5
6
7
8
9 Not Designated
10
11
12
13
14
15
16
17
18 Q. Mr. Kaplan, I understand from your
19 testimony that at some point the agreement between
20 EchoStar and Sirius was renegotiated; is that right?
21 A. Yes.
22 Q. Who initiated the process of

1 renegotiation?

2 A. Sirius did.

3 Q. When did they do this?

4 A. I don't specifically recall. Probably

5 sometime in the later part of 2005 or early 2006.

6 Q. Were you involved in the renegotiation of

7 that Sirius EchoStar agreement?

8 A. No, I was not.

9 Q. Who at Sirius was?

10 A. Our CEO, David Frear.

11 MR. STURM: CFO.

12 THE WITNESS: Sorry. CFO.

13 An attorney named Jennifer Olan, O-L-A-N.

14 Possibly Mr. Sowinski, who I referred to earlier.

15 Possibly one or two others. I am not sure.

16 Q. Did you have any responsibility for

17 approving the renegotiated agreement?

18 A. For approving the agreement?

19 Q. Yes.

20 A. No.

21 Q. What was your involvement, if any, in the

22 renegotiation process?

1 A. Internally, I was involved in some
2 discussions about the terms of the deal.
3 Q. What kinds of discussions?
4 MR. STURM: Don't go into anything that
5 may be privileged. Otherwise, you can answer.
6 A. [[
7
8]]
9 Q. What can you tell me about the content of
10 these internal discussions?
11 A. [[
12
13
14
15
16
17
18
19
20
21
22

1 [redacted]]

2 Q. On what did you base your original

3 understanding expressed in the original agreement of

4 the license fees?

5 A. We had had some information that we

6 believed accurate about Music Choice and its deal

7 with DIRECTV. We also had some information from a

8 few years earlier about DMX and the fees that it

9 charged to cable companies for providing a music

10 service.

11 Q. On what did you base your later

12 impression that the[[[redacted]

13 [redacted]

14 [redacted]

15 [redacted]

16 [redacted]

17 [redacted]

18 [redacted]

19 [redacted]

20 [redacted]

21 [redacted]

22 [redacted]

1 [redacted]

2 [redacted]

3 [redacted]

4 [redacted]

5 [redacted]

6 [redacted]

7 [redacted]

8 [redacted]

9 [redacted]]] Were other terms of the

10 agreement renegotiated?

11 A. Not to my knowledge.

12 Q. Did the two sides reach an agreement on

13 the renegotiation?

14 A. I believe so.

15 Q. Do you know, was the renegotiation

16 agreement executed?

17 A. Not to my knowledge.

18

19

20 Not Designated

21

22

1
2
3
4
5 Not Designated
6
7
8
9
10 Q. Mr. Kaplan, do you know of any other
11 services that are similar to the Sirius over Dish
12 service?
13 A. As I have mentioned earlier, Muzak
14 provides music channels to Dish. Music Choice
15 provides music channels to a number of cable
16 services. XM Satellite Radio provides music
17 channels to DIRECTV.
18 Q. Do you think the service, just Sirius
19 music channels delivered to TV's, could survive on
20 its own if it wasn't linked to programming packages?
21 MR. STURM: Objection. Calls for
22 speculation, but you can answer it.

1 A. Can you clarify the question? I am not
2 sure I follow.
3 Q. If Sirius simply made its music channels
4 available over the TV without being connected to
5 other programming, for a fee, do you think that
6 service would survive?
7 MR. STURM: Same objection. You can
8 answer.
9 A. Do you mean if it were offered on an
10 a-la-carte basis by Dish or other cable or satellite
11 television systems?
12 Q. Yes.
13 A. I don't think that there would be much of
14 a business there. It would survive to the extent
15 that we are offering channels which we are otherwise
16 producing so there are not tremendous costs
17 involved, other than perhaps the cost of the
18 distribution. I don't think we'd make any money at
19 it.
20 Q. Do you think it would be a viable
21 business model?
22 A. I think it unlikely.

1
2
3
4
5
6
7
8 Not Designated
9
10
11
12
13
14
15
16 Q. Turning the page to page 2, paragraph 4,
17 you cite some subscriber numbers from July 2006. Do
18 you have more recent subscriber numbers, subscribers
19 to the Dish Network who receive Sirius Dish?
20 MR. STURM: You mean Sirius on Dish, I
21 assume?
22 MS. RALPH: Yes.

1 A. Sirius, I am certain, does. We receive
2 information from Dish on a monthly or quarterly
3 basis so that we are able to make our royalty
4 payments. But I am not aware of what the numbers
5 would be.
6 Q. But these numbers do exist? Someone at
7 Sirius has them?
8 A. They certainly should.
9 Q. Do you know, have the subscriber numbers
10 gone up or down?
11 A. I have to assume they have gone up as
12 Dish has expended its business, but I don't
13 specifically know.
14
15
16
17
18 Not Designated
19
20
21
22

1
2
3
4
5
6 Not Designated
7
8
9
10
11
12 Q. To your knowledge, have the Sirius music
13 channels been offered over Dish on an a-la-carte
14 basis?
15 A. No.
16 Q. In paragraph 5, you say that Sirius's
17 primary motivation in negotiating the agreement with
18 EchoStar was to expose Dish subscribers to Sirius
19 channels in order to generate new subscribers for
20 Sirius's SDAR service. Is that right?
21 A. Yes.
22 Q. What were the other reasons behind the

1 agreement?

2 A. To arrange for Dish to distribute Sirius

3 receivers as well.

4 Q. Any others?

5 A. Not that I recall.

6

7

Not Designated

8

9

10 Q. Also in paragraph 5, you note that

11 "Sirius has found that an effective method for

12 introducing its service to consumers is through

13 sampling or allowing people to listen to various

14 channels of its service."

15 What did you mean by using the word

16 "effective"?

17 A. That exposing people to the service is a

18 good way to cause them to become interested in the

19 service.

20 Q. Did you mean that sampling would increase

21 the number of subscribers to the service?

22 A. I mean that sampling is one way to cause

1 people to subscribe to the service; yes.

2 Q. On what do you base this testimony?

3 A. As discussed earlier, the experience we

4 have with Hertz and with our on-line internet

5 sampling from our website.

6 Q. Anything else?

7 A. Not that I can...

8 Q. Are you aware of any data that support

9 your testimony?

10 A. Not specific data, no. I am aware that

11 we have looked at it, especially in the context of

12 our internet service, as I described before, where

13 we have some ability to track names and e-mails that

14 we have collected against subscribers to the

15 service, and have been somewhat pleased with the

16 results.

17 Q. Are those results still maintained on a

18 regular basis?

19 A. I don't know.

20 Q. How often are those results collected?

21 A. I don't know. I am not involved with the

22 collection.

1 Q. Were you aware of those results at the
2 time you negotiated the agreement with EchoStar?
3 A. I was not personally, no.
4 Q. Did you consider them -- you weren't
5 aware of them, so you couldn't consider them. Is
6 that correct?
7 A. That's correct .
8 Q. In paragraph 6 you discuss -- and I am on
9 page 3 now --[[
10
11
12
13
14
15
16
17
18
19
20
21
22

1 [redacted]

2 [redacted]

3 [redacted]

4 [redacted]

5 [redacted]

6 [redacted]

7 [redacted]

8 [redacted]

9 [redacted]

10 [redacted]

11 [redacted]

12 [redacted]

13 [redacted]

14 [redacted]

15 [redacted]

16 [redacted]

17 [redacted]

18 [redacted]

19 [redacted]

20 [redacted]

21 [redacted]

22 [redacted]

1 [redacted]

2 [redacted]

3 [redacted]

4 [redacted]

5 [redacted]

6 [redacted]

7 [redacted]

8 [redacted]

9 [redacted]

10 [redacted]

11 [redacted]

12 [redacted]

13 [redacted]

14 [redacted]

15 [redacted]

16 [redacted]

17 [redacted]

18 [redacted]

19 [redacted]

20 [redacted]

21 [redacted]

22 [redacted]

1 [redacted]

2 [redacted]

3 [redacted]

4 [redacted]

5 [redacted]

6 [redacted]

7 [redacted]

8 [redacted]

9 [redacted]

10 [redacted]

11 [redacted]

12 [redacted]

13 [redacted]

14 [redacted]

15 [redacted]

16 [redacted]]]

17

18

19

20 Not Designated

21

22

1
2
3
4 Not Designated
5
6
7
8 Q. In paragraph 7 of your testimony you use
9 the term "double counting." You say that record
10 companies and performing artists already receive
11 royalties from Sirius for the SDAR service and that
12 any added obligation by Sirius to pay royalties
13 under the EchoStar agreement would be "double
14 counting."
15 What is your basis for saying this?
16 A. The fact that the reason we have our
17 music channels on Dish is to drive subscribers to
18 our SDAR service, and as we gain subscribers to our
19 SDAR service, we pay royalties to the record
20 companies for the provision of that service. So,
21 the notion that we are paying for the promotion in
22 order to pay again for the delivery is -- feels like

1 paying twice.

2 Q. Would it be double counting if someone

3 who listened to Sirius music channels at home on

4 Dish never ended up subscribing to the SDAR service?

5 Would you still think that was double counting?

6 A. To the extent that we consequently would

7 never gain a subscriber, do not gain that subscriber

8 and, therefore, derive no revenue or benefit from

9 our promotional activity, then it would be paying

10 for value that we never received.

11

12

13

14

15

16

Not Designated

17

18

19

20

21

22

1

2

Not Designated

3

4

5 Q. Mr. Kaplan, turning back to your

6 testimony, in paragraph 8, you[[

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21]]

22 Q. In that same sentence you write about the

1 revenues typically received in this industry. What
2 do you mean by the term "this industry"?
3 A. The provision of audio music service over
4 a cable or DBS system.
5 Q. Also in paragraph 8, you testified that
6 Sirius and EchoStar renegotiated the EchoStar
7 agreement and, effective as of January 1, 2006,
8 [[[redacted]
9 [redacted]
10 [redacted]
11 [redacted]
12 [redacted]
13 [redacted]
14 [redacted]
15 [redacted]
16 [redacted]] As we discussed earlier, neither
17 company has ever paid the other company anything.
18 [[[redacted]
19 [redacted]]]
20 Q. So what kind of agreement is there
21 between Sirius and EchoStar at this point if there
22 is no written renegotiation agreement?

1 A. It is an understanding reached between
2 executives of our company and someone on the
3 EchoStar's side.
4 Q. What is the practical effect of that
5 agreement? Is it still the case that no money
6 changes hands?
7 A. Yes.
8 Q. And no agreement replacing the original
9 agreement has been signed; is that right?
10 A. That's correct.
11 Q. [[[redacted]
12 [redacted]
13 [redacted]
14 [redacted]
15 [redacted]
16 [redacted]
17 [redacted]
18 [redacted]
19 [redacted]
20 [redacted]
21 [redacted]
22 [redacted]

1 [redacted]

2 [redacted]]]

3

4

5

6

7

8

9

10

11

12

13 Not Designated

14

15

16

17

18

19

20

21

22

1
2
3
4 Not Designated
5
6
7
8 Q. Do you think the musical works benchmark
9 is a good benchmark in this case?
10 A. I do, yes.
11 Q. Why is that?
12 A. Because it is a payment for a comparable
13 right in the same ultimate music that is being
14 performed.
15 Q. You state in paragraph 11 of your
16 testimony that Sirius has received firm offers for
17 the Sirius Dish service from ASCAP and BMI.
18 You submitted this written testimony in
19 October of 2006; correct?
20 A. Yes.
21 Q. Have there been any developments in
22 Sirius's relationships with ASCAP and BMI as far as

1 the Dish service since you submitted your written
2 testimony?
3 A. Yes. We now have a written agreement
4 with ASCAP at the 2.5 percent rate. BMI we had a
5 preexisting interim agreement at a higher rate that
6 was -- where payments have now been adjusted to this
7 2.5 percent rate.
8 Q. What was the initial rate in the BMI
9 agreement?
10 A. The 3.75 percent rate that had been
11 adopted by the District Court in the BMI case at
12 that time.
13 Q. Have you signed -- have you signed an
14 agreement with BMI for the Sirius Dish service?
15 A. We have a signed -- the same signed
16 interim agreement with the 3.75 percent rate. We
17 have not actually signed an amendment to change the
18 payments to 2.5 percent, but we have been paying
19 them at 2.5 percent for approximately a year now,
20 based on a verbal understanding.
21 Q. Does Sirius anticipate signing an
22 agreement with BMI for this 2.5 percent rate?

1 A. I would expect that we would probably
2 sign a final agreement at that rate rather than
3 adjusting the interim.
4
5
6
7
8
9 Not Designated
10
11
12
13
14
15 Q. Mr. Kaplan, were the rates that Sirius
16 pays to ASCAP and BMI for the Sirius Dish service
17 negotiated separately from the rates paid for the
18 SDAR service?
19 A. Yes.
20 Q. Why is that?
21 A. Because it is a different service offered
22 through different distribution.

1 Not Designated

2 Q. Do you have any data that because of the
3 Sirius Dish service people buy more CD's or recorded
4 music?
5 A. Not that I am aware of.
6 Q. Do you have any data that the Dish
7 service promotes rather than substitutes for sales
8 of recorded music?
9 A. Not that I am specifically aware of, no.
10
11
12
13
14
15
16 Not Designated
17
18
19
20
21
22

1
2
3
4 Not Designated
5
6
7
8 Q. In paragraph 13 of your testimony you
9 note that Sirius would accept a minimum fee of
10 $100,000. The last two sentences of paragraph 13.
11 How did you reach this $100,000 minimum
12 figure?
13 A. Well, as stated here and earlier in the
14 testimony, we believe that we qualify as a PSS and
15 the rules established for PSS require a $100,000
16 minimum. So we are simply indicating that since it
17 is hard to otherwise value any kind of benefit that
18 we receive from the marketing exposure, and in the
19 absence of any revenue for providing the service to
20 Dish, we would be willing to accept $100,000 as a
21 minimum fee.
22 Q. Is this fee based on anything other than

1 the minimum set in the statute?

2 A. No.

3 Q. In paragraphs 14 and 15, you discuss the

4 fair market value of the package of advertising,

5 promotional and marketing benefits provided to

6 Sirius by EchoStar under the agreements. What value

7 do you attribute to that package?

8 A. [[

9

10

11

12

13

14

15

16

17

18

19

20

21

22

1 [redacted]

2 [redacted]

3 [redacted]]]

4

5

6

7

8

9

10 Not Designated

11

12

13

14

15

16

17 Q. In paragraph 17 on page 7, you discuss

18 Sirius's rate proposal. You note that "Sirius

19 proposes a rate that is at the low end of

20 Dr. Chipty's revenue ranges."

21 MR. STURM: Read that paragraph.

22 (Pause.)

1 Q. Why did Sirius propose a rate at the low
2 end of Dr. Chipty's ranges?
3 A. For primarily the reasons stated in my
4 testimony, which are, we're receiving no revenue for
5 this service. Our benefit from the relationship is
6 promotional value, which drives subscriptions, or we
7 hope drives subscriptions to our satellite radio
8 service, for which the record companies are already
9 being compensated.
10 Also, as Dr. Chipty discusses, some of
11 the assumptions she utilizes in getting the rate
12 ranges she proposes are somewhat conservative. For
13 some of those reasons we believe the more
14 appropriate rate was at the low end of the range.
15
16
17
18
19 Not Designated
20
21
22

1

2

3 Not Designated

4

5 Q. What makes you think that this rate would

6 be the outcome of a market transaction between a

7 willing buyer and a willing seller?

8 (Pause.)

9 A. That's a fairly broad question that could

10 lead to a lot of discussion. I think ultimately a

11 lot of it is discussed in Dr. Chipty's testimony.

12 I think that, again, from the Sirius

13 perspective in this, as the buyer, this is a service

14 for which we could not get EchoStar to actually pay

15 us anything, so to the extent that we derive any

16 value at all from providing it, it is promotional

17 value, which has some value but ultimately is not a

18 direct source of revenue to us and is hard to put a

19 direct value upon, except to the extent that it does

20 lead to subscribers to our satellite radio service,

21 for which we are already paying a royalty.

22 So I think in this kind of a context,

1 there is really a limited, A, value to the service
2 -- and we provide an imputed revenue here. Based
3 upon that revenue and all of the other inputs and
4 factors that go into it, this is what we feel is an
5 appropriate royalty to pay for the performance
6 right.
7 Q. So is it fair to say, as the willing
8 buyer, that represents the amount you would be
9 willing to pay?
10 A. I think that we, obviously, prefer
11 perhaps an even lower number. But by virtue of the
12 fact that we have proposed it, yes, we have stated
13 that we are willing to pay it.
14 Q. I know we have talked about the
15 agreement. There is just a few specifics that I
16 want to talk about.
17 MS. RALPH: I would like to mark this
18 Kaplan 3.
19 (Kaplan Exhibit 3, 2/2004
20 Sirius/EchoStar agreement, was marked
21 for identification.)
22 Q. Mr. Kaplan, do you recall having seen

1 this document before?

2 A. Yes.

3 Q. Can you identify it for me?

4 A. This is the agreement we entered into

5 with EchoStar in February 2004.

6 Q. Do you see the initials at the bottom of

7 the first page?

8 A. Yes.

9 Q. One set of those initials appear to be

10 DAK. Are those your initials?

11 A. Yes.

12 Q. Do you recall initialing this page?

13 A. Not specifically, no, but I am fairly

14 comfortable that I did.

15 Q. What would initialing at the bottom of

16 the page signify?

17 A. Simply that the two people responsible

18 for drafting the agreement -- in this case, myself

19 and a gentleman named Stanton Dodge, who is counsel

20 for EchoStar -- were indicating that this was the

21 final agreement that we reached such that our

22 principals could be comfortable executing it.

1
2
3
4
5
6
7
8
9 Not Designated
10
11
12
13
14
15
16
17 Q. [[[redacted]
18 [redacted]
19 [redacted]
20 [redacted]
21 [redacted]
22 [redacted]

1 [redacted]

2 [redacted]

3 [redacted]

4 [redacted]]]

5 A. I believe so, but do you want to maybe

6 just ask that again so I can be sure?

7 Q. Sure.

8 A. If you are --

9 MR. STURM: [[[redacted]

10 [redacted]

11 [redacted]

12 [redacted]

13 [redacted]

14 [redacted]

15 [redacted]

16 [redacted]

17 [redacted]

18 [redacted]

19 [redacted]

20 [redacted]

21 [redacted]

22 [redacted]

1 [redacted]
2 [redacted]
3 [redacted]
4 [redacted]
5 [redacted]
6 [redacted]
7 [redacted]
8 [redacted]
9 [redacted]
10 [redacted]
11 [redacted]
12 [redacted]
13 [redacted]
14 [redacted]
15 [redacted]
16 [redacted]
17 [redacted]
18 [redacted]
19 [redacted]
20 [redacted]
21 [redacted]
22 [redacted]

1 [redacted]

2 [redacted]

3 [redacted]

4 [redacted]

5 [redacted]]]

6 MS. RALPH: I would like to mark Kaplan

7 Exhibit 4, please.

8 (Kaplan Exhibit 4, Draft

9 amendment, was marked for

10 identification.)

11 Q. Mr. Kaplan, do you recognize this

12 document?

13 A. Yes.

14 Q. Can you identify it for me, please?

15 A. It is a draft amendment to the EchoStar

16 agreement.

17 Q. [[[redacted]

18 [redacted]

19 [redacted]

20 [redacted]]]

21

22

Not Designated

1
2
3
4
5 Not Designated
6
7
8
9
10 Q. As a result of this licensing deal, as
11 far as the effect the licensing deal has had on the
12 number of subscribers to Sirius's SDAR service, do
13 you consider that the deal has met your
14 expectations?
15 A. Again, we have limited ability to
16 directly tell how many subscribers we may have
17 gotten through the deal, but I don't know if,
18 presented today with the same opportunity, we would
19 make the same decision.
20 Q. Why not?
21 A. I am not sure that we would feel it to be
22 an appropriate or the best use of our marketing or

1 promotional resources.

2 Q. [[

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

1 [redacted]

2 [redacted]

3 [redacted]

4 [redacted]

5 [redacted]

6 [redacted]

7 [redacted]

8 [redacted]

9 [redacted]

10 [redacted]

11 [redacted]

12 [redacted]

13 [redacted]

14 [redacted]

15 [redacted]

16 [redacted]

17 [redacted]

18 [redacted]

19 [redacted]

20 [redacted]

21 [redacted]

22 [redacted]]

1 I HEREBY CERTIFY that I have read this
2 transcript of my deposition and that this transcript
3 accurately states the testimony given by me, with the
4 changes or corrections, if any, as noted.
5
6
7
8 x
9
10
11 Subscribed and sworn to before me this 8th day of
12 June 2007.
13
14
15
16
17
18 Notary Public

DENISE M. FLEMM
NOTARY PUBLIC, STATE OF NEW YORK
No. 01FL5084199
Qualified in New York County
Commission Expires Sept. 2, 2009

19
20 My commission expires:
21
22

1 INDEX TO TESTIMONY

2

3 WITNESS EXAMINATION BY PAGE

4

5 Douglas A. Kaplan Ms. Ralph 3

6

7

8 INDEX TO EXHIBITS

9 PLAINTIFF'S

10 EXHIBITS DESCRIPTION PAGE

11

12 1 Kaplan testimony 72

13 2 Series of documents 87

14 3 2/2004 Sirius/EchoStar 103

15 agreement

16 4 Draft amendment 111

17

18

19 TO BE PRODUCED/INSERTED

20 DESCRIPTION PAGE

21 Sirius/ASCAP agreement 95

22

1 C E R T I F I C A T I O N

2 I, DEBRA STEVENS, a Registered
3 Professional Reporter and notary public, within and
4 for the State of New York, do hereby certify:
5 That DOUGLAS A. KAPLAN, the witness
6 whose examination is hereinbefore set forth, was
7 first duly sworn by me, and that transcript of said
8 testimony is a true record of the testimony given by
9 said witness.
10 I further certify that I am not related
11 to any of the parties to this action by blood or
12 marriage, and that I am in no way interested in the
13 outcome of this matter.
14
15 IN WITNESS WHEREOF, I have hereunto set
16 my hand this 11th day of May, 2007.
17
18 Debra Stevens (bj)
19 DEBRA STEVENS, RPR-CRR
20
21
22

Deposition Ex. 3

THIS EXHIBIT IS RESTRICTED

Deposition Ex. 4

THIS EXHIBIT IS RESTRICTED