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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**

WRITTEN DIRECT STATEMENT OF SOUNDEXCHANGE, INC.

Volume 5 of 6
Designated Testimony from 2005-1 CRB DTRA:
Written and Oral Testimony of Barrie Kessler

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October 30, 2006

Public Version

SX Trial Ex. 7A

<u>Written Direct Statement of SoundExchange, Inc.</u>
Volume 5 of 6: Designated Testimony from 2005-1 CRB DTRA: Written and Oral Testimony of Barrie Kessler

Written Testimony

Oral Testimony

- June 6, 2006 (Open)
- June 8, 2006 (Open)
- June 8, 2006 (Closed)

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DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	)	Docket No. 2005-1 CRB DTRA

TESTIMONY OF

BARRIE L. KESSLER

Chief Operating Officer, SoundExchange, Inc.

October 2005

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QUALIFICATIONS

I am the Chief Operating Officer of SoundExchange, Inc. ("SoundExchange"). I have held this position since July 2001. Before I became Chief Operating Officer, I served as SoundExchange's Senior Director of Data Administration, beginning in November 1999. Prior to that, I worked as a database and technology consultant for the Recording Industry Association of America, Inc. (RIAA) for seven years. There, I developed the certification system for Gold, Platinum and Multi-platinum record sales, and created the royalty distribution system for the Alliance of Artists and Recording Companies (AARC).

My responsibilities as SoundExchange's Chief Operating Officer include overseeing the collection and distribution of royalty payments for the performance of sound recordings on webcast, cable, and satellite services. In this capacity, I supervise SoundExchange staff who receive royalty payments from webcasting and broadcasting services, determine the amounts owed copyright owners and performers, and distribute the royalties to those individuals and entities. Additionally, I oversee SoundExchange's license compliance activities, manage its budget, and coordinate its systems requirements, development, and testing. A statement of experience is attached to my testimony.

OVERVIEW

In Section I of my testimony, I describe how SoundExchange collects and distributes royalty payments. In Section II, I discuss a number of issues related to the terms that are adopted for the administration of the statutory licenses found in 17 U.S.C. §§ 112(e) and 114(d)(2). Among other things, I briefly explain the importance of full and accurate census data to SoundExchange's ability to distribute royalties to their rightful owners, a topic that has been thoroughly reviewed in SoundExchange's filings with the Copyright Office and the Copyright Royalty Board ("CRB" or "Board") in the notice and recordkeeping rulemakings. I also explain

why a collection/distribution system with a single agent responsible for both collecting and distributing royalties is more efficient and reliable than a system with multiple agents. Finally, I address proposed changes to a number of the terms currently applicable to eligible nonsubscription transmission services and new subscription services.

DISCUSSION

I. SOUNDEXCHANGE'S COLLECTION AND DISTRIBUTION OF ROYALTIES

A. Overview of SoundExchange

SoundExchange is a 501(c)(6) nonprofit performance rights organization established to ensure the prompt, fair and efficient collection and distribution of royalties payable to performers and sound recording copyright owners for the use of sound recordings over Internet, cable, and satellite radio services (hereinafter collectively "services" or "licensees") via digital audio transmissions. Originally an unincorporated division of the RIAA, SoundExchange was separately incorporated in September 2003.

Collecting royalties from hundreds of services and distributing the royalties to thousands of payees is an enormous undertaking. To fulfill its function, SoundExchange has invested significant time and money to develop systems that facilitate the receipt and distribution of royalties in the most efficient manner possible. Working together with statutory licensees, artists, unions and record labels, we endeavor every year to streamline our processes and ensure that the maximum amount of royalties we collect are paid out to those entitled to them. SoundExchange has automated many of its functions (and such automation is critical to ensuring efficient distribution of royalties), but, in many cases, SoundExchange staff still must undertake the laborious process of tracking down individuals entitled to royalties and correcting or completing misreported performance data.

Although SoundExchange is a non-member corporation, we frequently refer to those record labels and artists who have specifically authorized us to collect royalties on their behalf as "members." We have thousands of such record label and artist members, but also pay non-members — copyright owners and performers alike — as if they were also members. We do not discriminate between members and non-members; in fact, current Copyright Office regulations require us to treat members and non-members equally when initially allocating statutory royalties. Members, however, can agree among themselves as to alternative distribution policies as described in more detail below, *see infra* at 13.

SoundExchange has been the representative of artists and record labels on a vast array of issues, including notice and recordkeeping and rate-setting through the CARP process and the new CRB process. Throughout, on behalf of all artists and record labels, SoundExchange has sought the establishment of marketplace royalties and regulations that enable the prompt, fair and efficient distribution of royalties to all those artists and copyright owners entitled to such royalties.

B. Royalty Collection and Distribution

SoundExchange's core mission is to collect and distribute statutory royalties as efficiently and accurately as possible. As discussed throughout this statement, SoundExchange has made significant investments in systems and infrastructure and personnel to perform the task of royalty collection and distribution. These investments were made over several years and will likely require further improvements ("extensions" in the language of software developers) as the demands on the royalty system increase over time. For example, we will strive to further reduce costs by automating certain functions and will look to increase the frequency of our distributions.

For managing royalty collection and distribution, SoundExchange employs the following operational procedures. I have attached a flow-chart illustrating these steps as SX Ex. 211 DP.

Step 1: Payment and Log Receipt

SoundExchange's Royalty Administration Department receives from statutory licensees royalty payments and, ideally, three reports: Statements of Account ("SOAs") that reflect the licensee's calculation of the payments for the reporting period; Notices of Election which indicate whether the licensee has utilized any optional rates and terms pursuant to 37 C.F.R. § 262.3(a); and reports of use that log performances of sound recordings. Samples of these reports are provided as SX Ex. 212 DP, SX Ex. 213 DP, and SX Ex. 214 DP.

Upon receipt of payment from a licensee, the payment is logged into our licensee database. If this is the first payment from a licensee, a new profile is created for the licensee. If the licensee has previously paid royalties, then the payment is entered under the existing profile. Where licensees operate under more than one statutory license, the royalty payments from a licensee are allocated among the various licenses under which the service is operating. Similarly, where one parent corporation is paying royalties for multiple corporate "children," such as in the case of a broadcast station group paying for individual terrestrial radio stations simulcasting their signals on the Internet, the royalty payments are allocated among the individual radio stations to the extent the licensee provides sufficient information for the allocation. For example, if a broadcast network provides royalty accounting for its 70 radio affiliates on a per-radio station basis, but pays the royalties owed by all of the affiliates with a single check, then SoundExchange will allocate a portion of that total payment to each of the 70 individual stations. Allocating payments to individual stations is critical for distributing royalties because distribution is based on the performance information in reports of use, which should be submitted on a per-station basis.

Once a licensee has paid royalties and its payment is entered into our database, we also seek to confirm whether the licensee has filed a Notice of Use of Sound Recordings Under

Statutory License with the U.S. Copyright Office. If a service has not filed such a Notice of Use with the Copyright Office, then my understanding is that the service does not enjoy the protections of the statutory license even if they are paying royalties. The filing of a Notice of Use with the Copyright Office does not mean that a service is making transmissions. The Notice of Use is supposed to be filed before a service commences transmissions or the making of ephemeral phonorecords but just because a service files a Notice of Use does not mean it has commenced streaming.

The reports of use ("logs") provided by services are loaded into SoundExchange's system by the Distribution Operations Department. SoundExchange is currently receiving performance logs from Music Choice, Muzak, XM Satellite Radio, Sirius Satellite Radio and a handful of other services. The vast majority of subscription and nonsubscription services, however, do not currently provide performance logs to SoundExchange because regulations specifying the format and delivery specifications have not yet been promulgated. The following discussion of log processing is therefore based principally upon SoundExchange's experience handling logs from preexisting subscription services and the satellite radio services.

Occasionally, logs — which contain text information about the song title, album, artist, label and other information, in addition to other transmission information — will fail to conform to SoundExchange's existing format and delivery specifications. When a log does not conform to those specifications, it fails to load automatically. SoundExchange personnel must then review the reports, identify errors, obtain a corrected log from the service (or in some cases rectify the errors internally) and then re-upload the reports into the SoundExchange computer software system. The failure of logs to follow a standardized format creates enormous burdens for SoundExchange and decreases our efficiency in managing royalties. It is also frequently the

case that services fail to accurately report identifying data for sound recordings by, for example, identifying an artist as "Various," reporting a performer as "Beethoven" or "Mozart," or simply not providing required information. In each of these instances my staff has to research the partially identified sound recording in order to identify accurately the sound recording copyright owner and performers entitled to royalties. It is my understanding that the only penalty that a service may be subject to for failing to file a proper report of use is an infringement action.

Step 2: Matching

SoundExchange's Distribution Operations staff run the software program to match the data reported in licensee logs with information in the SoundExchange database identifying copyright owners and performers of particular sound recordings. Our complex log loading algorithm attempts to match identical and similar data elements and combinations of data elements from the incoming log against performance information previously received from the services. If there is a match for a particular sound recording, then the program identifies the corresponding copyright owner and performer information. If there is not a match, we then conduct research as described in step three below.

Each description of a performance on a service's log is retained in our database, even if the description incorrectly identifies a sound recording and SoundExchange staff has corrected it before uploading the log. Our system assumes that services will continue to report the performance incorrectly in future logs. Rather than correct these performances each time they appear in a log, the system matches to the incorrectly reported performances and then applies the corrected information.

Step 3: Research

If there is no match for a sound recording, Distribution Operations personnel manually examine the entry for the sound recording and attempt to determine whether it is new to the

SoundExchange database or whether it is already in the database under different identifying information. This research requires a significant amount of staff time. Such research is often required for new releases, works reported for the first time, works from small labels, compilation albums and foreign repertoire. In the case of compilation albums, for example, finding copyright ownership information is particularly time-consuming because, although the album is issued by one label, each of the sound recordings on it could be owned by a different label. SoundExchange previously identified the problem of compilation albums in its filings with the Copyright Office on notice and recordkeeping. *See* Reply Comments of the Recording Industry Association of America, Inc., in Docket No. RM 2002-1A at 57058, 60 (Apr. 26, 2002) (SX Ex. 414 DP); *see also* Comments of the Recording Industry Association of America, Inc., in Docket No. RM 2002-1A at 64 (Apr. 5, 2002) (SX Ex. 415 DP).

SoundExchange conducts extensive data quality assurance work to ensure the correct association of copyright owners and performers, on the one hand, and particular performances, on the other. For example, the SoundExchange system detects what we call "performances in conflict," a situation in which performances of the same sound recording are reported as being on more than one label. In such cases, we conduct research to determine the correct label for the sound recording. We also review situations in which an artist has performances of different sound recordings with different labels or with "unassociated labels," which may indicate that the label information provided to us was incorrect.

Step 4: Account Assignment

SoundExchange's Account Managers assign sound recording performances to accounts belonging to copyright owners and performers. For example, a performance of Stevie Wonder's *Isn't She Lovely* from his *Songs in the Key of Life* album under the Motown record label (part of Universal Music Group ("UMG")) would be assigned to (1) Stevie Wonder's account and

(2) Motown's account. Performances of Motown's sound recordings would be consolidated with other UMG labels and the resulting royalty payment would be made to UMG. Account assignments are based on the copyright owner and performer information provided by the licensee as well as any information already in the SoundExchange database that copyright owners and performers have supplied.

Not all performances can be assigned to a copyright owner or artist account in the time leading up to a distribution. Performances for which a copyright owner or artist account is not identifiable are assigned to a "suspense" account for later review and research. As soon as the identification is made, these royalties are released in the next scheduled distribution.

Step 5: Royalty Allocation and Distribution

Once we have processed all of the logs by a given class of services for a given period, we are able to allocate royalties. Allocation takes place only after all quality assurance steps are taken to ensure accounts are payable, address and tax identification information is complete, performances in conflict are resolved and copyright owner conflicts are resolved (to the extent possible).

Allocation is the process by which a service's royalty payments (made on a channel-by-channel or station-by-station basis) for a given distribution period are paired with the transmissions of sound recordings by that service during that period. The Royalty Administration Department first identifies the services and associated royalty payments that will be distributed. Minimum fees must be prorated to the period to which they apply. Once I have reviewed and certified the prorating of the minimum fees and the amount of the total fees, those fees are entered into the distribution portion of our system. The allocation and distribution processes are then run.

As stated above, allocation pairs royalties collected from a service with the service's sound recording performances. Once all allocations are completed, "adjustment processing" is run. Adjustment processing involves assigning debits and credits to accounts in order to rectify errors that occurred in a prior distribution. Upon completion of necessary adjustments, the distribution occurs.

Distribution begins with consolidating allocations according to earning entity (*i.e.*, the copyright owner or featured artist who has "earned" the money for tax purposes). The consolidated allocations are then assigned to copyright owners, artists or other payees based on the payment schedule for each. SoundExchange staff create a series of distribution certification reports, which I review and then certify. Next, the system generates a payment file, which we transmit to our banking partner. The bank then makes the payments in the form of a check or electronic funds transfer. For performances of sound recordings, 50% of the royalties net of allocable deductions are paid to copyright owners, 45% are paid to featured artists and their third-party payees,[1] and 5% are paid to non-featured artists,[2] in accordance with 17 U.S.C. § 114(g)(2). Royalties paid for the making of ephemeral phonorecords under 17 U.S.C. § 112(e) are allocated solely to sound recording copyright owners. SoundExchange provides each royalty-earning entity with a statement that reflects the performances (and the licenses under which the sound recordings were performed) for which the royalty payment is made. Sample statements for copyright owners and featured artists are attached as SX Exs. 252 DP and 253 DP hereto.

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[1] A third-party payee is an individual to whom an artist has authorized SoundExchange to pay a portion of the artist's statutory royalties. Producers and managers are common third-party payees.

[2] We pay the 5% non-featured artists' share to an independent administrator who is responsible for the further distribution of those funds to nonfeatured vocalists and musicians.

SoundExchange's database containing payee information is derived from account information received from record labels and artists, and includes such payees as the copyright owners and artists themselves, management companies, production companies, estates and heirs. We must, however, verify address and other information and secure appropriate tax forms directly from each artist and label. If an earning entity[3] fails to provide SoundExchange with tax information, then we can still distribute royalties but must withhold a portion of the royalties pursuant to Internal Revenue Service ("IRS") guidelines. All of the information provided to SoundExchange from copyright owners and performers must be entered manually into the royalty system. We hope to allow copyright owners and performers to input their information directly into our systems in the future, but there are costs and security issues involved in building those extensions into our current system.

The threshold for distributing royalties to a payee is $10. Rather than distribute smaller amounts (and incurring significant additional transaction costs), SoundExchange waits until a payee is owed more than $10, at which point the full amount is distributed.

SoundExchange presently conducts distributions four times a year, at least twice for statutorily licensed performances (*i.e.*, performances pursuant to 17 U.S.C. §§ 112(e) and 114) and twice for non-statutorily licensed performances for which SoundExchange has collected royalties, typically from non-U.S. performing rights organizations who have money for U.S. performers or copyright owners. We are working to increase the frequency of distributions. Payments for which SoundExchange lacks sufficient information to distribute to the appropriate copyright owner and performer are allocated to separate accounts in accordance with 37 C.F.R.

[3] An "earning entity" is the person or entity who has earned the royalties from a tax standpoint and does not have to be the person who receives royalties.

§§ 260.7, 261.8 and 262.8. When SoundExchange subsequently obtains the information necessary to distribute royalties to a particular copyright owner or performer, it will do so during the next scheduled distribution. Recipients of royalty payments may contact SoundExchange regarding any perceived errors in distributed payments. Errors in payment distributions may occur as a result of a service's reporting incorrect or incomplete information for a given performance.

Step 6: Adjustments

In the event an improper amount of royalties is paid to an entity (either too little or too much), SoundExchange staff will make adjustments to accounts to correct any errors in a royalty distribution. For example, if Copyright Owner A was incorrectly reported as the copyright owner of Song X and received royalties for Song X, but the actual owner of that song was Copyright Owner B, then SoundExchange would need to credit Copyright Owner B in a future distribution and debit Copyright Owner A's account for the improper distribution. Adjustments typically take the form of an additional payment or a reduced payment to an existing account in the next scheduled distribution. For copyright owners and artists who are newly identified and for whom royalties have been accruing, a new account is created and royalties attributed to the suspense account are transferred to the new account.

C. Challenges Faced by SoundExchange

While these operational steps may sound straightforward and although SoundExchange has gained tremendous efficiencies through its custom software system, the massive scope of the undertaking and the frequency with which novel circumstances arise render the actual task of collecting and distributing royalty payments extremely complex. SoundExchange maintains licensee accounts for more than 1,800 webcast, cable, and satellite services that play sound recordings originating from all over the world, in many cases twenty-four hours a day, seven

days a week. SoundExchange distributes royalties to nearly 15,000 copyright owner and performer accounts. To date, SoundExchange has processed over 650 million sound recording performances. And it is important to remember that those 650 million performances are principally from the preexisting subscription services and the satellite services. That number will increase tremendously once reporting regulations are finalized for the subscription and nonsubscription services for whom rates are being established in this proceeding. I would not be surprised if we had to match billions of performances each year once all webcasters start providing reports of use.

The process of matching performances of specific sound recordings to individual copyright owners and performers is often difficult because many business arrangements in the recording industry are intricate and continually evolving. For a given sound recording, there may be multiple artists as well as multiple payees entitled to receive a portion of the royalties, including production companies and management companies paid under Letters of Direction, as well as the IRS. Further, members of a band often change over the course of the band's existence.[4] When a band whose members have changed releases multiple versions of the same song, each release may involve payments to different people. Matching the performing band members to a particular sound recording of such a song can be complicated. The make-up of the Grateful Dead, for instance, changed several times during the three decades that the band played (1965 to 1995, when Jerry Garcia died), and the band regularly released studio albums and live albums (and it continues to release "new" recordings from its vault of concert tapes). Because

[4] The examples of band compositions that make distribution of royalties difficult illustrate a few reasons why sufficient data to identify a specific sound recording is critical to SoundExchange's ability to distribute royalties to the parties to whom they rightly belong, as SoundExchange explained in its Supplemental Comments concerning the proposed notice and recordkeeping requirements. Comments
(footnote continued on next page)

the membership of the Grateful Dead was not static, identifying which members are entitled to royalties for performances of a particular sound recording is exceedingly difficult where the same titled song appears on multiple albums. Fleetwood Mac similarly has undergone multiple changes in membership since it originally formed in 1968, making the task of determining which royalties belong to which members arduous. And Sade is the name of both the individual artist Sade Adu and the band with which she has sung. When SoundExchange receives reports from licensees that list only "Sade" as the performing artist, it can be difficult to determine whether Sade Adu or Sade the band is the proper recipients of royalties for a sound recording performance.

Band members may also share royalties on an unequal basis. In the easy case, bands or artists have a corporation that receives the royalties and the corporation assumes responsibility for dividing and distributing royalties among the band members. In some cases, however, SoundExchange itself has to locate the information regarding shares, divide the royalties, and make the payments to each band member.

The general rule we have created is to distribute royalties on a pro rata basis among the members of a band, but that is not always as easy as it may sound. For example, there is no guidance in the statute or legislative history on how SoundExchange should distribute royalties to Tom Petty and the Heartbreakers. Is Tom Petty entitled to 50% of the featured artist share with the remaining 50% allocated on a pro rata basis among the members of the Heartbreakers? Similarly, should there be a special split for the Dave Matthews Band, where the name of the band is the name of one of the members of the band? And what about in the case of Diana Ross

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of SoundExchange in Docket No. RM 2005-2 (Aug. 26, 2005) (SX Ex. 417 DP); Reply Comments of SoundExchange in Docket No. RM 2005-2 (Sept. 16, 2005) (SX Ex. 418 DP).

& the Supremes versus The Supremes? In one instance Diana Ross is identified separately, but does this mean her share of royalties should increase?

Distributions are also complicated if an artist is deceased and there are multiple heirs (each of whom may have a different share) entitled to the royalties from the performance of a single sound recording; this is particularly true where the artist is a group and more than one group member is deceased.

Distributions could become far more complicated if the members of a band were represented by different agents, with one member of a band represented by one collective and all remaining members represented by SoundExchange. Under the theory of certain entities, the members paid through SoundExchange would receive less than the members paid through another entity due to the possibility of others free riding on SoundExchange's investments without having to share in the cost of those investments. And, if there were multiple collectives, then the difficulties associated with allocating royalties and deducting costs could be exacerbated, as explained in more detail below. *See infra* at 16.

In an effort to maintain accurate information on artists' arrangements for division of royalties as well as basic contact and tax information, SoundExchange actively engages in artist outreach. SoundExchange regularly attends music industry conferences and makes presentations to artist management firms, record labels, performing rights organizations and law firms that represent artists. SoundExchange also works with music associations to spread awareness of its services, and it advertises online, on television, in print and over the radio. SoundExchange personnel are available to artists (as well as to copyright owners and licensees) to provide information and answer questions, and we do so on a regular basis. SoundExchange encourages copyright owners and performers to join as members but, as explained above, provides

information and distributes royalties to copyright owners and performers regardless of membership.

For undistributed royalties, eight SoundExchange staff members' responsibilities include conducting research to locate artists and obtain their payee information. Even where SoundExchange is able to determine the identity of the artist and record label, that does not mean that SoundExchange knows where to locate them. Locating accurate payee information for a sound recording can be very difficult, especially if the recording is listed in a non-active, deep "catalog," or involves an artist who does not have a U.S. corporate entity designated to receive royalties on his or her behalf. Through niche programming, services perform many sound recordings of smaller, less well-known labels and performers who are hard to find (and the problem is magnified if they are no longer in existence). SoundExchange spends a significant amount of time addressing this problem in two ways. First, SoundExchange personnel publicize the organization, its mission, and its functions in order to ensure that artists and copyright owners are aware that they may have royalties owed to them. We hope that individuals who learn about us will contact us to provide us with the information we need to pay them. Second, SoundExchange performs extensive research to locate and contact individuals who may be entitled to royalties. For example, we rely on databases such as Celebrity Access and All Music Guide as well as information provided by other organizations within the music industry, both domestic and foreign, to locate artists. SoundExchange also utilizes temporary employees and interns to assist in locating individuals and entities entitled to royalty payments. I suspect that the number of "difficult-to-pay artists" and labels will increase tremendously once webcasters start providing reports of use to SoundExchange following the promulgation of format and delivery specifications.

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Under my direction, SoundExchange has conducted a total of nine royalty distributions covering over 650 million sound recording performances, the most recent having occurred on September 20, 2005. To date, SoundExchange has allocated more than $55 million in royalties. SoundExchange strives to minimize the administrative costs associated with royalty collection and distribution, and it has decreased those costs each year that it has been in operation. SoundExchange maintains a staff of fewer than 20 individuals. We project administrative costs (exclusive of expenses incurred in participating in rate adjustment proceedings) of under 12.5% of total revenue for 2005 and under 10% of total revenue for 2006. For comparison purposes, I believe the administrative costs for the American Society of Composers, Authors and Publishers ("ASCAP") and BMI are typically around 16% of total revenue.

II. A SINGLE COLLECTIVE SHOULD BE DESIGNATED TO COLLECT AND DISTRIBUTE ROYALTIES

As a practical matter (and generally as a legal matter as well), SoundExchange (or its precursor) has operated as the sole collection and distribution agent for royalties under the Section 112 and 114 licenses. Other than Royalty Logic, Inc. ("RLI") and the small number of copyright owners and performers it purports to represent, I am not aware of any copyright owner or performer — let alone any service — who will advocate for the creation of a multi-tier system for collection and distribution of royalties[5] or for the designation of multiple agents.[6] In fact, the licensee webcasters appear to object to the creation of a multi-tiered system or any

[5] Under a multi-tier system, SoundExchange would be required to collect royalties and then transfer them to another agent that has been designated by a copyright owner or performer to distribute its royalties. Allocations would need to be run to determine what portion of collected royalties should be paid to another agent who may represent only one copyright owner or performer.

[6] Under a multi-agent system, licensees could have to make their royalty payments to different agents according to the designations made by copyright owners and performers.

obligation to provide payments and reports of use to any entity other than SoundExchange. *See* Joint Comments of Radio Broadcasters in Response to the Copyright Royalty Board's Supplemental Questions Regarding Format and Delivery in Docket No. RM 2005-2 at 23 (Aug. 26, 2005). This is true even though the large commercial webcasting services in the first webcaster proceeding presented Ron Gertz, the owner of RLI, which purports to be a competing collection and distribution agent, as a rebuttal witness on their behalf. If the services are not supporting the creation of a multi-tiered system and the overwhelming majority of copyright owners and performers, as represented by SoundExchange, oppose such a system, I question how such a system could be created under the willing buyer/willing seller standard set forth in the statute.

I discuss the problems associated with a system that includes more than one collection and distribution agent because I anticipate that RLI will raise the issue in this proceeding. If a system were created to allow for at least two collection and distribution agents, then I question how the rationale could be applied to limit the number of agents to two. If each copyright owner or performer had the right to designate his/her own agent, then the Board would potentially have to allow an unlimited number of collection and distribution agents to collect and distribute royalties. *See id.* If this were the case, then there would be an incentive for copyright owners and performers — even SoundExchange's members — to designate agents other than SoundExchange so that they could avoid certain costs that SoundExchange incurs for the benefit of all copyright owners and performers and shift those costs to the copyright owners and performers remaining with SoundExchange. Adding multiple distribution agents to the process would substantially increase the administrative costs SoundExchange already incurs, as explained in more detail immediately below, and the result would be substantially increased

overall administrative costs associated with the royalty collection/distribution process. Thus, a multi-agent system would appear inconsistent with the concept of an efficient licensing system whose costs are borne by all copyright owners and labels.

The purpose of the royalty collection and distribution process is "to make prompt, efficient and fair payments to Copyright Owners and Performers with a minimum of expense." 67 Fed. Reg. 45,240, 45,267 n.46 (July 8, 2002) (SX Ex. 407 DP). Each of SoundExchange's procedures that I have outlined above is designed to further this purpose. The Librarian of Congress has recognized that "Copyright Owners and Performers commend Sound Exchange . . . [and prefer it as] a non-profit organization that has already invested heavily in a system designed to locate and pay Copyright [O]wners and Performers." *Id.* at 45,267. Indeed, through our five years of experience collecting and distributing royalties and our substantial investments in recruiting and training the SoundExchange staff and in developing our custom computer software system, we have developed an efficient process for prompt and fair payments.

Much of that efficiency would be lost if additional agents were inserted into the collection and distribution process. The Librarian was right to express skepticism of a system involving more than one collection or distribution agent on the grounds that it would likely add unnecessary expense and administrative burden. *See id.* A multi-agent system would be costly, overly complicated, prone to delay and unreliable.

Based on previous discussions with outside software consultants, other collecting societies as well as my staff's and my experience with adjustments, conflicts in ownerships and claims and dispute resolution (to track the affiliations of each copyright owner and performer on a sound recording-by-sound recording basis), I estimate that modifying our systems to accommodate a multi-agent system would cost, at a minimum, between $250,000 and $350,000.

For example, if only one member of a band were represented by someone other than SoundExchange, then SoundExchange's system would have to be modified to track that relationship.[7] If different administrative rates were to be applied to copyright owners or performers represented by an entity other than SoundExchange, the system would also have to be configured to calculate different administrative rates for each sound recording in the database. Given that each performance has at least two entitled payees (exclusive of the non-featured share of royalties) – (1) the featured artist (which could be a group with multiple entitled parties) and (2) the copyright owner – each of the copyright owner and the featured artist could be represented by a different distributing agent. A multi-agent system thus has the potential of requiring SoundExchange to account for every performance identified in a report of use multiple times in order to properly allocate, distribute and adjust royalties. This would not be an easy task, and it would place an enormous accounting burden on SoundExchange.

SoundExchange's system presently contains entries for 150,000 copyright owners and performers[8] and over 700,000 sound recordings. For the system to recognize multiple agents, SoundExchange would have to expend significant resources, both human and monetary, to create the accounting platform necessary to track innumerable distributing agent relationships, keep accounts current when entitled parties change affiliation with multiple agents, and still ensure timely distributions.

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[7] Lester Chambers, a member of The Chambers Brothers, previously expressed an interest in having RLI collect and distribute royalties on his behalf. As the default agent, however, SoundExchange would collect and distribute royalties on behalf of all the other members of The Chambers Brothers.

[8] For example, Paul Simon as a solo artist and Simon & Garfunkel as a group are two such performers of the 150,000 even though Paul Simon may receive a single check for all of his performances as a solo artist and as a member of a group.

Under a two-tier system with SoundExchange as the receiving agent and multiple distributing agents, SoundExchange would have to alter its procedures for processing SOAs and royalty payments. SoundExchange currently processes the two simultaneously because the functions are complementary, thereby minimizing administrative costs, reducing total processing time and limiting the number of staff involved. But, if SoundExchange were not the exclusive distributing agent, it might not be able to release a payment for distribution until it agreed with all other distributing agents that the SOAs for the distribution period were in order. It is foreseeable that situations will arise where another distributing agent identifies as problems entries on an SOA that SoundExchange would not consider problematic. SoundExchange would be restricted from using its discretion when dealing with paperwork that is incomplete, non-standard or otherwise problematic. Instead, it would have to confer with all other agents to reach a consensus on how to manage issues arising with services' SOAs, payments and other required paperwork. Considerable delays in distribution are foreseeable where payments cannot be processed until such issues are resolved. Similarly, if a licensee failed to pay royalties in a timely manner, SoundExchange and the other agents might need to discuss what steps needed to be taken and by whom to ensure the payment of royalties and any late fees due. And, if any late fees were owed and paid, there would be additional accounting to split them among distributing agents.

SoundExchange would also have to alter its system to ensure that adjustments to correct for distribution errors are properly debited or credited to royalty recipients whose affiliation with a particular distributing agent changes over time.[9] SoundExchange would no longer be able to

[9] In a multi-agent systems, regulations would have to specify how and when a copyright owner or performer may switch designations.

rely on its current procedure of crediting or debiting individual copyright owner and performer accounts, but would have to reach agreement with the other distributing agents on an adjustment system and inter-agent dispute resolution process, which would add further costs and delays. Based upon SoundExchange's prior experiences with RLI, I am not convinced that these issues can be worked out easily. When RLI was granted designated agent status in the first webcaster arbitration it imposed significant delays in the simple matter of designing the SOAs and ultimately did nothing to contribute to the creation and final form of the SOAs. I therefore believe that the regulations governing a multi-tiered distribution system would have to set forth in great specificity all of the steps to be taken to resolve problems, disputes or claims among multiple agents and include a continuing role for the Board to resolve disputes, if any arose, provided that such a role for the Board is permitted under statute.

Another example of how a multi-agent system would complicate the royalty collection/distribution process is the hindrance it would cause to licensees' ability to obtain reliable information about the statutory license. Many licensees and potential licensees rely on SoundExchange staff to answer questions, walk them through the process of complying with the terms of the statutory licenses, calculating royalties owed, and complying with reporting requirements. With a multi-agent system, licensees would not be able to rely on information from the single source of SoundExchange and would likely have to contact multiple agents according to the various affiliations of the copyright owners and performers whose sound recordings they have performed. For example, different agents may have different interpretations of the provisions of a statutory license (*e.g.*, what level of interactivity is permitted, if any, or how should the sound recording performance complement be interpreted for purposes of classical recordings) or governing regulations, and a licensee, to avoid potential

liability for copyright infringement, may feel the need to contact each agent in order to protect itself. Under a multi-tier system with distinct receiving agents and distributing agents, it would be unclear which entity's information would be definitive. The confusion associated with such a system inevitably would add costs and delays not present in a single-agent system, particularly if licensees relied upon information from an agent other than SoundExchange, information which SoundExchange disputed. In the alternative, SoundExchange might still have to field all of these inquires and incur the expense of providing information to licensees, and other agents could avoid these burdens by referring everyone to SoundExchange, without having to share in any of the associated costs.

A multi-agent system could create problems for distribution policy matters, such as how royalties to orchestras and non-human performers (*e.g.*, Elmo), should be paid, what rules should apply for distributing to bands where there are disputes among band members, etc. Currently, SoundExchange endeavors to develop policies that apply fairly to all interested parties but if each distribution policy decision also has to be worked out with multiple distributing agents — who may disagree with SoundExchange's proposed policies — then many distributions could be suspended or delayed due the inability of the agents to agree on allocation guidelines.

A multi-agent system could also raise problems for enforcement and audits. For example, if the copyright owners and performers represented by other agents claimed that they were not subject to any of the costs incurred by SoundExchange for audits and enforcement, would SoundExchange have to share any recoveries obtained through enforcement or audits with such other collection and distribution agents? I would hope not. If certain entities choose not to share in the costs that are expended for the benefit of all copyright owners and performers, then I do not believe the copyright owners and performers represented by SoundExchange should have

to share any late fees, collection of unpaid royalties or audit recoveries with such entities. But saying this in theory may create problems in practice, particularly when a service remits overdue royalties after receiving a demand letter from SoundExchange. The question of how those overdue royalties should be allocated will likely result in a dispute in a multi-agent environment, particularly where some agents seek to avoid joint costs, but want to share in "joint" rewards.

These examples are illustrative of the added complications, costs and delays that a multi-agent system would create. Further inefficiencies and delays are foreseeable, particularly when disputes among and between potential distributees are considered. Moreover, based on SoundExchange's experience in collecting and distributing royalties to date, I believe that there likely are additional inefficiencies that are unforeseeable. Each year that SoundExchange has been in operation, I have been confronted with conflicts and complications in the collection and distribution process, some of which I have described above, that neither I nor my colleagues foresaw when SoundExchange began operating. Injecting one or more additional agent(s) into the equation, in my opinion, would likely result in many new conflicts and complications that we cannot predict.

The Librarian of Congress has recognized the natural efficiency of a single collection and distribution agent for royalties associated with digital performance of sound recordings. 63 Fed. Reg. 25,394, 25,412 (May 8, 1998) ("designat[ing] a single entity to collect and distribute the royalty fees creates an efficient administrative mechanism") (CARP proceeding on digital performance of sound recordings by pre-existing subscription services) (SX Ex. 411 DP). Countries around the world have found that a single agent reduces administrative costs and speeds distribution, and a single collective for receipt and distribution of digital performance

royalties is the international norm.[10] A single agent will best further the purpose of the collection and distribution process — "to make prompt, efficient, and fair payments to Copyright Owners and Performers with a minimum of expense," 67 Fed. Reg. at 45,267 n.46 — and should be designated for collecting and distributing royalties for the digital performance of sound recordings under Sections 112(e) and 114 of the Copyright Act.

III. MODIFICATIONS NEEDED TO LICENSE TERMS

I am concerned that the terms for the payment of royalties and the terms for recordkeeping, once adopted, may be left unchanged in future proceedings which are likely to focus primarily on royalty rates. SoundExchange's experience over the past several years demonstrates that a few of the terms found in 37 C.F.R. Part 262 must be modified to facilitate the prompt, fair and efficient administration of the statutory licenses. As explained below, there are a few of the current terms that frustrate SoundExchange's ability to perform its function. These terms make no sense in the context of the statute's overall goal of providing fair compensation to artists and record labels. SoundExchange requests that the CRB modify the terms accordingly.

I am assuming for the purposes of my testimony that the general structure of the current system — with SoundExchange serving, in effect, as the sole agent designated to receive and distribute statutory royalties — will continue. If that structure were to change to accommodate multiple collectives, which SoundExchange strongly opposes, then there would likely have to be

[10]Over 60 other countries — including those with the most sales of sound recordings, *i.e.*, the United Kingdom, Germany, Japan, and Canada — operate under a system in which a single collective collects and distributes royalties. To my knowledge, only Brazil, Colombia, and the United States have competing collectives that receive and distribute royalties for a particular right. In Brazil and Colombia, disputes between collectives often result in royalties that are either delayed or never paid. SoundExchange's efforts to pay royalties to artists in those countries pursuant to reciprocal payment agreements are often frustrated because of the uncertainties attributable to the multi-collective systems.

substantial revisions to the regulations to account for the complexity of a multi-agent system and how conflicts and adjustments would be made among multiple agents.

A. Importance of Census Reporting

Although recordkeeping requirements are not set forth in Part 262, I do want to briefly reiterate SoundExchange's long-standing request for census reporting. SoundExchange has previously submitted extensive comments on recordkeeping and, in particular, the need for census reporting in response to the Copyright Office's and the Board's notice and requests for comments in connection with their rulemakings on recordkeeping. I incorporate those comments by reference and have attached copies of the most recent Comments (exclusive of attachments). *See* Comments of SoundExchange in Docket No. RM 2002-1H (May 27, 2005) (SX Ex. 416 DP); Comments of SoundExchange in Docket No. RM 2005-2 (Aug. 26, 2005) (SX Ex. 417 DP); Reply Comments of SoundExchange in Docket No. RM 2005-2 (Sept. 16, 2005) (SX Ex. 418 DP); *see also* Reply Comments of the Recording Industry Association of America, Inc., in Docket No. RM 2002-1A at 69-78 (Apr. 26, 2002) (SX Ex. 414 DP). I will not belabor what we have said in those submissions, but I emphasize here that accurate data is critical to the integrity of the collection and distribution process that I have described above. As SoundExchange's comments explain, receiving reports of use in census form and in a uniform format is the only way to ensure that copyright owners and performers receive accurate payments for the use of their sound recordings.

B. The Terms Should State that the Failure to Pay Royalties When Required Followed by Payment of a Late Fee does not Preclude a Copyright Infringement Claim

Statutory licensees are generally required to pay their statutory royalties 45 days after the end of each month. Unfortunately, many licensees fail to pay their royalties in a timely manner.

When a licensee fails to pay royalties when due, they are subject to a late fee of 0.75% per month.

I believe that there was an outstanding question as to whether the inclusion of a late fee provision in the regulations precluded a copyright owner from filing an infringement action against a service that failed to pay royalties in a timely manner. For example, I understood that it might have been possible for a service to argue that, when it was sued for copyright infringement for the failure to pay royalties, the service might have been able to make that litigation disappear if the service simply paid the unpaid liability plus interest. If this were true, then I think there would be a significant incentive for services to not pay royalties in a timely manner, particularly if they could never be sued for infringement and only had to pay a minimal late fee if challenged by copyright owners.

I understand that Congress, in the Copyright Royalty and Distribution Reform Act ("CRDRA"), amended Section 114 to make clear that the inclusion of a regulatory term providing for late fees does not affect a copyright owner's other enforcement rights. 17 U.S.C. § 803(c)(7) ("A determination of Copyright Royalty Judges may include terms with respect to late payment, but in no way shall such terms prevent the copyright holder from asserting other rights or remedies provided under this title"). So that the terms established through this proceeding clearly reflect the statutory preservation of copyright owners' remedies for infringement and put licensees on proper notice, I believe the Board should adopt regulations that make clear that a licensee that fails to make royalty payments on a timely basis may be subject to liability for infringement in addition to late fees.

C. The Interest Penalty for Failing to Pay Royalties When Required Should be Increased and Interest Charges Should Accrue After a Demand for Payment

As noted above, licensees are generally required to pay royalties 45 days following the end of the month for which the liability is calculated, but many services fail to meet this deadline. 37 C.F.R. § 262.4(c). Late payments can range from a few days to a few months. In some instances, services have gone several years without paying royalties. We also have experience with a service failing to pay royalties for several years, filing for bankruptcy to have its debt discharged, and then a purchaser of some, but not all, of the assets of the bankrupt licensee claiming to be a successor to the bankrupt entity for one purpose (to benefit from below-market rates) but not for other purposes (with respect to unpaid liabilities).

I do not believe the current interest rate of 0.75% per month is an effective deterrent to ensure that licensees pay royalties when they are due. In comparison, credit card companies that do not receive payments from users by the due date are permitted to charge rates that are significantly higher than the rate charged to webcasters. To ensure prompt payment of royalties, reduce SoundExchange's costs of obtaining payment from licensees, and to create disincentives for licensees to delay payments, I strongly encourage the Board to increase significantly the interest charges to be paid when a service fails to pay royalties when due. I believe increasing the monthly rate from 0.75% to 2.5% would be appropriate.

While some may view a higher interest rate as a penalty, I believe it is better characterized as motivation for those who seek the benefit of the statutory license to actually comply with the provisions of the license. A higher interest rate would also level the playing field between those services that comply with regulations and those that do not. When one combines a low interest rate (0.75%) with the high cost of bringing an infringement action for

failure to pay royalties, it is easy to see that there is an economic incentive for services to pay royalties when they feel like it rather than when the payments are due.

We have had varying degrees of success invoicing services for late fees.[11] Many services pay late fees when requested, which is typically within three weeks from the date we send out a letter requesting payment of late fees. However, there have been occasions where a service has been reluctant to pay interest penalties. We had a recent situation where a licensee received a demand letter for late fees in July 2005, but failed to pay the late fees until October 20, 2005, without being subject to any additional penalties.

To ensure that licensees do not have an incentive to refuse to pay late fees upon receipt of a demand letter from SoundExchange, I would encourage the Board to adopt a regulation that specifically addresses this situation. I propose that when SoundExchange requests the payment of late fees from a service, the service be given a 20-day grace period in which to pay its late fees. The 20-day period would run from the date of the letter or the postmark on the envelope, whichever is later. If a service failed to pay the late fees within the 20-day period, then the late fee amount should be doubled every five days that the late fee amount remains unpaid.

If a licensee makes an intervening payment for a monthly liability while a late fee penalty is still outstanding, the regulations should provide that the intervening payment is first applied to current liabilities and only after those are discharged will any surplus be applied to outstanding

[11]SoundExchange cannot calculate interest charges until payment is actually received. If a service has failed to pay monthly royalties and we send a demand notice for payment, we alert the licensee to the fact that it will be subject to interest charges but then do not invoice the service for late fees until we receive the unpaid monthly royalties. This is because late fees are calculated by multiplying the amount of royalties actually paid by the late fee rate established in the regulations, dividing that product by 30 (the estimated number of days in a calendar month) to calculate the daily late charge, and then multiplying the daily late charge by the number of days between the due date and received date.

late fees. I believe that only by making the financial penalty for failure to pay late fees significant will copyright owners and performers be ensured of prompt payment.

In order to avoid confusion about when payments are due, I would also encourage the Board to clarify in any regulations that when a payment due date falls on a weekend or federal holiday, that the due date be extended to the next business day. The current regulations provide that payments are due by the 45th day after the end of a month, which means that payments not received by the 45th day, even if that day falls on a weekend or federal holiday, are arguably late. SoundExchange has voluntarily refrained from charging late fees until the second business day following the 45th day after the end of a month if the 45th day falls on a weekend or federal holiday. Clarification of this issue would benefit licensees and SoundExchange, and I believe the clarification should be codified in the regulations.

D. Penalties Should Also Apply for Services that Fail to Submit Completed Statements of Account and Reports of Use

Current regulations require services to submit completed statements of account ("SOAs") at the same time that the service remits payment to SoundExchange. 37 C.F.R. § 262.4(f). Unfortunately, services frequently fail to submit completed SOAs or even any SOA. Because we require SOAs to confirm payments and to allocate royalties, it is critical for us to receive these forms from licensees. There is currently no penalty for failing to submit a completed and signed SOA short of the filing of an infringement action. I expect that copyright owners would be unlikely to file an infringement action against a service that paid royalties but failed to file an SOA, even though this failure creates significant problems for SoundExchange (including the inability to verify whether the licensee has paid the correct amount). I therefore encourage the Board to impose a late fee charge on any service that fails to submit a completed SOA when due.

The late fee should be calculated as if the service had failed to pay royalties when required, even if royalties were paid in a timely manner.

Similarly, I believe late fees should also apply where services fail to submit valid reports of use in a timely manner. Without a financial incentive to comply with regulations, I am afraid that many services will fail to submit their reports of use when required.

E. Licensees' Statements of Account Should be Public

Copyright owners and performers periodically ask SoundExchange for information about royalty payments for particular services' performances of their sound recordings under the licenses established by Sections 112(e) and 114. They want to know details such as how much in royalties they are earning from performances of their work by a given service and whether they are owed royalties that have not been paid. This is the information licensees supply in their SOAs (hereinafter "payment information"). *See* 37 C.F.R. § 262.4(f). The current regulations nevertheless contain a confidentiality provision that precludes disclosure of SOAs even to copyright owners, performers and SoundExchange Board Members who are copyright owners or performers. 37 C.F.R. § 262.5. While copyright owners and performers may receive information about royalties in aggregated form from SoundExchange, *i.e.*, the total amount of royalty payments they receive for a given distribution period, 37 C.F.R. § 262.5(c), they are precluded from obtaining information about specific services' royalty payments, 37 C.F.R. § 262.5(d).[12]

[12]By contrast, the Copyright Act provides for copyright owners to receive notice of the use of their sound recordings. 17 U.S.C. § 114(f)(4)(A) (directing the Copyright Royalty Judges to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings"). The Copyright Office has rejected the claim that reports of use should be kept from copyright owners based on a theory that services have a proprietary interest in prohibiting the disclosure of their playlists. 63 Fed. Reg. 34,289, 34,295 (June 24, 1998) (concluding, in announcement of interim notice and recordkeeping requirements for pre-existing subscription services, that copyright owners must have
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Licensor copyright owners and performers need payment information for several purposes. When a given service has failed to comply with a license by not paying royalties, copyright owners need details concerning the non-payment in order to make an informed decision about what action to take. They need to know how much in royalties a given service owes (*i.e.*, how much money is at stake), how frequently they pay late, and how overdue the payments are in order to decide whether a copyright infringement suit would be economically justified. For example, it might not make sense to spend thousands of dollars on an infringement action if a service had typically been paying a few hundred dollars a month and then went three or four months without paying any royalties. Conversely, if a service had been paying royalties of tens of thousands of dollars a month and then stopped paying, copyright owners might be more willing to initiate litigation against the service. By the same token, licensors need to know how far in arrears a service is in order to gauge what action is appropriate; one or two months in arrears may warrant measures less severe than if the service were six or more months in arrears.

Copyright owners also request payment information for budget purposes. They want to include estimates of incoming royalties in their revenue projections. They also need this information when they are negotiating collectively with licensees. Licensee services have occasionally directed SoundExchange to disclose details about their royalty payments to their outside counsel, but then refused to allow similar disclosure to sound recording copyright owners. I simply do not understand why the owners of the sound recordings transmitted under

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access to reports of use after weighing services' confidentiality interests against copyright owners' interest in receiving the reports as well as the services' own interest in minimizing administrative costs). Services that transmit sound recordings pursuant to Section 112(e) or 114 by definition transmit them publicly, and the playlists that they have performed are "historical fact." *Id.; see also* Unif. Trade Secrets Act § 1(4) (1985) (defining "trade secret" to mean information that "derives independent economic value, actual or potential, from not being generally known to, and not being readily

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statutory license should not have information on services' use of their sound recordings. It is my understanding that in their direct licenses (*i.e.*, licenses negotiated in the marketplace rather than established by statute), copyright owners receive detailed information on the usage of their recordings by licensees. *See, e.g.,* Testimony of Steve Bryan (Warner Music Group); Testimony of Mark Eisenberg (Sony BMG); Testimony of Ken Parks (EMI); Testimony of Larry Kenswil (Universal Music Group) (submitted herewith as part of SoundExchange's direct written case), Simply because a service takes advantage of a statutory license rather than a direct license — when the same recordings are being transmitted or distributed — should not preclude a copyright owner from learning about the uses of his/her/its product and revenue derived from such use.

Copyright owners and performers have also asked for payment information in the context of bankruptcy proceedings, for use in determining what action to take, if any, concerning royalties owed by a service that has filed for bankruptcy. SoundExchange's inability to disclose information on a bankrupt service has hindered its ability to work with its copyright owner members on royalty collection strategies. In addition, where regulations preclude us from disclosing information to individual copyright owners, those owners are themselves handicapped if they wish to file their own claims in the bankruptcy proceeding but lack sufficient information to file a proof of claim.

The current regulations, by precluding SoundExchange's disclosure of licensee-specific information to individual copyright owners, fail to recognize that SoundExchange itself likely lacks an independent cause of action against a service that fails to pay royalties. My understanding of the law is that, in order to file an infringement action, only the owner or

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ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy").

exclusive licensee has standing. SoundExchange, when granted specific rights by copyright owners, is only a non-exclusive licensee, and when it is acting on behalf of non-members, it likely would not have any right of enforcement. Therefore, current regulations limit payment and financial information to the agent that has no rights to pursue a claim to unpaid royalties, and precludes disclosure to the principals that do have enforceable rights. This situation strikes me as absurd and unworkable.

In addition, SoundExchange needs to be able to share payment information with its Board of Directors, all of whom are either copyright owners or performers. SoundExchange Board Members need full information about the royalties that the organization is responsible for collecting and distributing in order to make informed policy and operational decisions. Decisions on enforcement actions (which are funded from royalties), budgeting, and other Board responsibilities, are dependent upon the ability to review information about royalty payments. Moreover, it is an odd situation to be prohibited by regulation to disclose relevant and material information to my Board.

SOAs should be available not just to copyright owners and performers, but to the public as well. Much of the information about services' statutory activities — *e.g.*, the number of listeners or tuning hours — is publicly reported by industry analysts such as Arbitron. I understand that services voluntarily supply that information to the analysts and then attempt to capitalize on the analysts' reports for their own benefit. SoundExchange, by contrast, is not permitted to disclose to the public the information that it possesses on streaming services' activities, which could contradict the information being reported by third parties or the services themselves. The terms for the Sections 112(e) and 114(d)(2) licenses should not provide

services with the ability to restrict disclosure of information about their operations to instances where only they benefit from the disclosure.

I have not heard any public policy justification for allowing payment information from statutory licensees to be kept from the public generally or from copyright owners, performers and SoundExchange Board Members (who are themselves representatives of copyright owners and performers) specifically. Comparable information concerning other statutory licenses, *e.g.*, the Section 111 license for cable television systems and the Section 119 license for satellite carriers, is filed publicly. I have attached to my testimony as SX Exs. 259 DP - 264 DP sample statements of account filed by cable television systems and satellite carriers — which specify the licensees' royalty payments for the statement period and are available to the public at the Copyright Office. I do not believe there is a basis to conclude that simply because licensees deposit their SOAs with SoundExchange rather than the Copyright Office the information they report should be kept confidential.

Services benefit greatly from being able to transmit all of their royalty payments to a single collective agent rather than having to deal with copyright owners and performers on an individual basis.[13] Licensors rather than licensees pay for that convenience in the form of reduced royalty payments, as SoundExchange's administrative costs come out of the royalties licensees pay. This benefit to licensees should not come at the further price of licensors' inability to obtain information that they would have if services paid royalties and reported directly to them. Because the licenses are public in nature, copyright owners and performers,

[13]If the arguments of RLI for a multi-agent collection/distribution system are accepted, services might be required to provide reports of use directly to an unlimited number of agents for copyright owners and agents. If such a system were adopted, it would make no sense for an unlimited number of agents to receive information from licensees without that information also being made available to the principals of those agents.

their representatives and the members of the Board of SoundExchange should be entitled to receive all of the information that the services deliver to SoundExchange. If the services do not want to have this information disclosed publicly, then they have the right to seek a direct license from individual copyright owners. If the services believe that payment information is too sensitive for public disclosure, then they should have to at least negotiate over that right at arm's length rather than having federal regulations grant them protections that do not serve the public interest.

The terms adopted in this proceeding therefore should not include confidentiality limitations on the SOAs submitted by licensees, and SoundExchange should be permitted to make such information available to copyright owners, performers, its Board and the general public.

F. The Regulations Must be Modified to Facilitate Prompt and Efficient Verifications of Royalty Payments from Licensees

Current regulations provide for the verification of SOAs and accompanying royalty payments. 37 C.F.R. § 262.6. SoundExchange's experiences with an analogous provision that applies to preexisting subscription services, 37 C.F.R. § 260.5, indicates that the regulations on verifications[14] should be modified in the following respects:

1. The regulations should be clarified so that it is clear that the verification is to confirm the information reported on a SOA. All information necessary to verify the data reported on a

[14]I intentionally use "verification" rather than "audit" because I understand that the word "audit" may have specific meaning to accountants. I have been told that an audit generally refers to the fairness of a company's financial statements, which is much more extensive an inquiry than what SoundExchange and copyright owners and performers may want, which is an examination or verification of the calculation of royalty payments due from a service. I therefore believe the regulations should refer to verifications or examinations rather than an audit.

SOA, including financial records, computer server logs, etc., should be subject to the verification procedure set forth in Section 262.6.

2. Section 262.6 provides that only the Designated Agent, SoundExchange, is permitted to conduct a verification. This provision is the result of negotiations that took place during the first Webcaster arbitration (in 2001) and would appear to deprive copyright owners and performers — the entities entitled to royalties — of substantial rights. Specifically, I do not understand why a copyright owner or performer should be denied the right to verify royalty payments if SoundExchange, for its own business reasons, decides not to conduct a verification. For example, the copyright owner or performer of a niche genre of music may wish to verify the payments from a service that plays music from that niche, but SoundExchange, for legitimate and sound business reasons, may decide that a verification of that niche service does not make economic sense. Should the owners and performers of that music be deprived of the right to verify payments from the service because of SoundExchange's reluctance? I do not believe that is fair or appropriate, and I request that the Board modify the regulations so that all interested parties may conduct a verification of a statutory licensee's SOA. Such a change would be consistent with the provision found in Section 260.5(g) of the Copyright Office's regulations. 37 C.F.R. § 260.5(g).[15]

3. The language of Section 262.6(b) — allowing SoundExchange to conduct a single verification of a licensee "during any given calendar year, for any or all of the prior 3 calendar years" — may have appeared straightforward when it was drafted by lawyers, but in practice it

[15]Section 260.5(g) provides: "[F]or the purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their designated agents, or the entity designated by the copyright arbitration royalty panel in 37 CFR 260.3 to receive and to distribute the royalty fees." I believe performers should also be deemed interested parties now that they have been granted a right for direct payment. *See* 17 U.S.C. § 114(g)(2)(D).

has caused confusion. For example, if SoundExchange files a notice of intent to verify payments in December 2005, I think the provision allows SoundExchange to verify the years 2002, 2003 and 2004, even if the actual work will not begin until 2006, but there is at least an argument that 2002, 2003 and 2004 are not the three years prior to 2006, the year in which the work will actually take place. I think the regulation should make clear that the notice of intent to verify the payments of a service covers the three-year period prior to the year in which the notice is given, even if the audit work does not occur until an even later year. From SoundExchange's perspective, it would be better if the regulations allowed a verification of the year in which notice of intent to verify is given and/or any of the three prior years, provided that no year may be subject to an audit more than once.

4. Section 262.6(c) requires SoundExchange to file with the Copyright Office a "Notice of Intent to Audit." While I think I understand why this is required (to allow other potentially interested parties to have knowledge of the verification in case they want to also participate), I question whether this provision as drafted makes sense. For example, although the regulation requires the notice, it does not explain what happens after the notice is filed. SoundExchange has to file the notice and then the Copyright Office has to publish it within 30 days, but does this mean that the verification cannot commence until after the 30-day period runs? Can the verification commence immediately following publication of the notice in the Federal Register or must there be some additional delay? Also, what happens if other parties want to participate in the verification; what precisely would be the respective rights and responsibilities of the different parties participating in the verification?[16]

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[16]And, as noted above, in a multi-agent system, you could have one agent conducting a verification that the other agents refuse to pay for, but then have those non-paying agents seek to share in any recoveries. This is an example of why a multi-agent system does not make sense when you are talking about a
(footnote continued on next page)

I view this language as vague, and we at SoundExchange have had to guess as to how long to wait after filing a Notice of Intent to Audit to commence the verification. This ambiguity should be clarified or the provision should be stricken and each interested party should have an independent right to conduct a verification regardless of whether any other party had previously conducted a verification.

5. Section 262.6(c) also requires that an "audit . . . be conducted by an independent and qualified auditor identified in the notice."[17] The regulations, however, do not specify what independent means. For example, SoundExchange has used one company to conduct a verification where some of the principals of the company have acquired copyrights to both musical works and sound recordings. I understand that this practice is not unusual in the music industry where auditors frequently understand the value of copyrights based on their work and consequently buy copyrights as investments. But the ownership of unrelated sound recording copyrights should not preclude a person or entity from being deemed independent.

The provisions of Section 262.5(d)(2) also use the language of "independent and qualified auditor." It is my understanding that the proper interpretation of that language is also the interpretation that makes the most sense given the regulation's objective, *viz.*, that the independence of an auditor goes more to whether the person or entity is independent of the licensee that is the subject of the verification, not independent vis-à-vis the licensor that has requested the verification. Someone whose rights are potentially infringed by a service's failure

---

statutory license, where all copyright owners and performers should share in the costs of securing benefits for everyone.

[17] I do not understand why an auditor has to be identified in the notice. If for some reason SoundExchange needed to switch auditors after an initial selection and publication in the Federal Register, SoundExchange should not have to file a new notice with the Copyright Office and await another publication in the Federal Register.

to calculate and pay appropriate royalties should certainly have the right to conduct a verification. I therefore believe that the verification provision should be amended so that it is clear that the independence of an auditor means independence from the licensee and not the requesting licensor.

6. Those entitled to verify the payments from a service also should not be limited to individuals who are Certified Public Accountants ("CPAs"), as CPAs are more expensive than non-CPAs. This would needlessly increase costs, particularly to smaller entities who may wish to audit a service. It is my understanding that in the music industry, non-CPAs (such as business managers and other professional representatives of copyright owners and artists) frequently conduct verifications on behalf of artists, and I see no reason why that practice should not be applied under the statutory license. The scope of who is qualified to conduct a verification therefore should be expanded in both Sections 262.5(d)(2) and 262.6(c) to include non-CPAs.

The regulations should also make clear that a qualified individual does not mean only one experienced in interpreting financial books and records. In many instances a verification of statutory liability will require an ability to interpret server logs to determine whether performances or aggregate tuning hours were properly reported. I therefore believe the regulations should allow verifications by individuals who are competent to determine whether a service has properly calculated its statutory liability.

7. Finally, Section 262.6(g) requires the party conducting the verification to pay for the costs of the verification unless the underpayment by a licensee is determined to be 10% or more of the actual liability. I believe this threshold of 10% is too high and creates an incentive for services to underpay their statutory royalties. At a 10% threshold, services could have an incentive to underpay by 9%, knowing that the only likely consequence is an obligation to pay

the underpayment (excluding for the moment the possibility of an infringement action). This does not seem justified. Services are in sole possession of the information necessary to calculate their royalty payments and they should have to bear the risk of paying for a verification if they underpay by 5% or more. The lower the threshold for burden shifting, the greater the likelihood that services will accurately calculate their liability. Shifting the costs of verifications to SoundExchange or sound recording copyright owners or performers who do not have the right to refuse to license a service — even one with poor credit or a poor history of payment compliance — seems inappropriate. I therefore encourage the Board to reduce the threshold in Section 262.6(g) to 5%.

G. The Regulations Should Authorize the Collection of Refunds in the Event of Incorrect Distributions

I understand that when the Copyright Office makes partial distributions of royalties under Sections 111 and 119 it requires the Phase I claimants to sign a document that obligates them to refund money to the Copyright Office in the event a Phase I claimant receives royalties in excess of the amount finally determined to be allocable to them. A copy of such a document is attached hereto as SX Ex. 265 DP. I believe the regulations adopted in this proceeding should establish a similar rule – obligating copyright owners and performers who receive a distribution in excess of the amount to which they are entitled to refund such monies to SoundExchange, upon written demand.

As noted above, there are instances where an incorrect amount of royalties is distributed to copyright owners and performers. In most instances, the incorrect distribution amount will be adjusted in a subsequent distribution. But, if the amount of an incorrect distribution is too large, it may take an extended period of time for the incorrect distribution to be fully recovered. So as not to harm entitled parties or reward those who received an improper distribution, I respectfully

request that the Board include a regulation that requires the repayment of royalties in the event of an improper distribution. Such a regulation will ultimately benefit all copyright owners and performers and ensure that only those who are entitled to royalties ultimately receive them.

H. No Waiver of Rights from SoundExchange's Acceptance of Royalty Payment

SoundExchange has heard that certain services have argued that because they have paid statutory royalties to SoundExchange and SoundExchange has accepted such payments, the copyright owners and performers represented by SoundExchange have waived the right to argue that the service is making transmissions not eligible for statutory licensing. I believe this argument has no legal merit, but it does call for clarification in the regulations.

In light of the large number of services that can pay royalties to SoundExchange and SoundExchange's limited staff and resources, it is simply impossible to expect SoundExchange to evaluate each service's eligibility for statutory licensing for every month that the service pays royalties. Moreover, because SoundExchange collects royalties on behalf of all copyright owners and performers, not simply those who have specifically authorized it to serve as an agent, SoundExchange does not necessarily have the authority to reject royalty payments on behalf of those copyright owners for whom it does not have written authorization. In addition, different copyright owners may have different opinions as to whether a particular service or functionality is eligible for statutory license. Also, SoundExchange likely does not have the right to file an infringement action. For these reasons, SoundExchange's acceptance of statutory royalties should not be deemed a waiver of the rights of any copyright owner.

I believe language similar to that found in the disclaimer that SoundExchange has posted on its website — "SoundExchange's acceptance of a service's payment does not express or imply any acknowledgment that a service is in compliance with the requirements of the statutory licenses. SoundExchange, its members and other copyright owners reserve all their rights to take

enforcement action against a service that is not in compliance with those requirements" — should be codified in regulations so that all services are aware that SoundExchange's acceptance of payment from a service does not waive the rights of any of the copyright owners on whose behalf SoundExchange is accepting royalties, whether as an express agent or a default agent. http://www.soundexchange.com/licensee_home.html.

I. Transmission of Recordings of Comedic Performances Should be Clarified as Compensable

I am aware of at least two services that are making transmissions of copyright sound recordings of comedic performances. SoundExchange also has received inquiries from representatives of comedic performers about whether statutory licensees are paying royalties for the public performance of these non-musical work sound recordings. This is an issue that admittedly has not received a great deal of attention from SoundExchange, copyright owners or licensees, but it is important because of its impact on comedic performers.

I suspect that the services transmitting comedic performances are likely making such transmissions from sound recordings and not the audio portion of an audiovisual work. So that the performers on comedic works are compensated for the transmission of their works, I believe the regulations should specify that the transmission of such recordings are compensable. I also believe such works should not be classified as "talk" programming (*e.g.*, news, talk, sports or business programming), which in my mind refers to live programming and not programming specifically recorded for release to the public on a CD or in digital form.

J. Provisions Providing for Successor to SoundExchange Should be Deleted

Section 262.4 of the current regulations contains detailed provisions as to what should happen if SoundExchange is not incorporated as a separate entity, dissolved or ceases to be governed by a board consisting of equal numbers of representatives of Copyright Owners and

Performers. 37 C.F.R. § 262.4(b)(2)–(3). Because SoundExchange has been separately incorporated and has no plans for dissolution or changing its board structure, I believe Section 262.4(b)(2)–(3) should be deleted from the current regulations. These provisions were an issue at the time the rates and terms for 2003 and 2004 were negotiated and are no longer applicable.

CONCLUSION

SoundExchange has developed an effective and efficient mechanism for accomplishing the enormous task of collecting and distributing royalties for the hundreds of millions of sound recordings performed annually under Sections 112(e) and 114 of the Copyright Act. To maximize that distribution of royalties, SoundExchange should remain the sole collection and distribution agent. Consistent with the Copyright Act, it should be made clear that where a copyright owner has satisfied the elements of a claim for copyright infringement, the regulatory provision concerning payment of late fees does not preclude the claim. And information about payments under the public licensees conferred by Sections 112(e) and 114(d)(2) should be available publicly. The existing regulations should also be amended to account for the additional issues that I have described above.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge.

Barrie L. Kessler

Date: 10·28·05

soundexchange

Bio

Chief Operating Officer
Barrie Kessler

Barrie Kessler has been SoundExchange's COO since July of 2001. As COO, she manages the infrastructure and personnel of the organization and implements various strategies to maximize the overall collection and distribution of royalties to SoundExchange's labels and artists.

Ms. Kessler brought over 15 years of database design and integration to SoundExchange, having served as principal consultant for numerous national and international corporations, including many within the U.S. sound recording industry. As the chief operating officer and information specialist for SoundExchange, she spearheaded the design and implementation of the Royalty Distribution System. Ms. Kessler is also charged with quality assurance of performance log administration. She provides technical expertise regarding reporting requirements both internally and before the Copyright Office. The evaluation of emerging and existing technology solutions for webcast performance tracking and assisting licensees with reporting compliance with the statutory license granted by the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) and the Digital Millennium Copyright Act (DMCA) are conducted under Ms. Kessler's leadership.

Prior to SoundExchange, she served as Principal of Rock Creek Systems, an information technology consulting firm, where Ms. Kessler oversaw systems and database design, knowledge management, programming and data analyses for clients. Notable projects include the development of a broadcast monitoring data collection and reporting system for collecting rights societies, record companies, artists and governments in Brazil and Argentina and implementing the technology for establishing a database for a centralized musical recordings warehouse. As part of her consulting for RIAA programs, Ms. Kessler developed the certification system for Gold, Platinum and Multi-platinum record sales and created the royalty distribution system for the Alliance of Artists and Recording Companies (AARC).

Ms. Kessler's previous work included serving as Director of Systems for RSA, Inc. in Washington, D.C. where she directed project teams that provided

analytical and application design services to corporate clients. In that capacity, she created EIS systems for automating workflow and billing information for a major photojournalism corporation. She was also responsible for all aspects of the company's network administration.

Ms. Kessler also has extensive experience abroad having served two years as a database consultant for Price Waterhouse and DOS Computer Center in Madrid, Spain.

Ms. Kessler holds a Bachelor of Science degree in accounting and economics from Lehigh University.

Exhibits Sponsored by Barrie L. Kessler

211 DP	Flow-chart illustrating SoundExchange's royalty collection and distribution procedures
212 DP	Sample SoundExchange Statement of Account
213 DP	Sample SoundExchange Notice of Election
214 DP	Sample SoundExchange Report of Use
252 DP	Sample SoundExchange Copyright Owner Statement reflecting performances associated with royalty payment
253 DP	Sample SoundExchange Artist Statement reflecting performances associated with royalty payment
259 DP	Sample Statement of account filed by satellite carrier Primetime 24 Joint Venture (Copyright Office Form SC)
260 DP	Sample statement of account filed by satellite carrier DirecTV, Inc. (Copyright Office Form SC)
261 DP	Sample statement of account filed by satellite carrier DirecTV Latin America (Copyright Office Form SC)
262 DP	Sample statement of account filed by cable television system Galaxy Cable Inc. (Copyright Office Form SA1-2)
263 DP	Sample statement of account filed by cable television system ComCast of Virginia (Copyright Office Form SA1-2)
264 DP	Sample statement of account filed by cable television system Southwest Cablevision (Copyright Office Form SA1-2)
265 DP	Agreement relating to distribution of satellite royalty fees by the Copyright Office
407 DP	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45,239 (July 8, 2002) ("Webcaster I Librarian's Decision")
411 DP	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings; Final Rule and order, 63 Fed. Reg. 25,394, 25,412 (May 8, 1998) ("PES I Librarian's Decision")
414 DP	Reply Comments of the Recording Industry Association of America, Inc., in Docket No. RM 2002-1A (Apr. 26, 2002)
415 DP	Comments of the Recording Industry Association of America, Inc., in Docket No. RM 2002-1A (Apr. 5, 2002)
416 DP	Comments of SoundExchange in Docket No. RM 2002-1H (May 27, 2005)

417 DP	Comments of SoundExchange, Inc., in RM 2005-2 in response to CRB request for Supplemental Comments (Aug. 26, 2005)
418 DP	Reply Comments of SoundExchange, Inc. in RM 2005-2 in response to CRB request for Supplemental Comments (Sept. 16, 2005)

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

In the matter of:	
The Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2005-1 CRB DTRA
(Webcasting Rate Adjustment Proceeding)	

Volume 14

Room LM-414
Library of Congress
First and Independence Ave,, S.E.
Washington, D.C. 20540

Tuesday,
June 6, 2006

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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1 Freundlich for Royalty Logic. We had, I
2 think, discussed - I think Mr. Watkins on
3 that phone call, that we were going to go
4 second. We have one witness, and it just
5 made, we thought, logistical sense to just
6 put our witness on, get all the cases on
7 that side in first, and then have the
8 broadcasters come after that. But I just
9 want to sort of clarify that, because I have
10 to make plans to go back to L.A., and then
11 to get back here with my one witness.
12 CHIEF JUDGE SLEDGE: You have no
13 response at this point, but we'll get you
14 one soon.
15 MR. FREUNDLICH: Thank you.
16 CHIEF JUDGE SLEDGE: Mr.
17 Perrelli.
18 MR. PERRELLI: Thank you, Your
19 Honor. Sound Exchange would call Barrie
20 Kessler.
21 CHIEF JUDGE SLEDGE: Thank you,
22 Ms. Kessler, for remaining standing. Would

1 you please raise your right hand.
2 WHEREUPON,
3 BARRIE KESSLER
4 was called as a witness and, after having
5 been first duly sworn, was examined and
6 testified as follows:
7 CHIEF JUDGE SLEDGE: Thank you.
8 Please be seated.
9 MR. PERRELLI: Your Honor, with
10 your permission, I'll hand out binders with
11 Ms. Kessler's testimony. Thank you, Your
12 Honor.
13 DIRECT EXAMINATION
14 BY MR. PERRELLI:
15 Q Ms. Kessler, can you give your
16 full name for the record?
17 A Barrie Kessler.
18 Q And can you tell the Board your
19 job title?
20 A Yes. I'm the Chief Operating
21 Officer of Sound Exchange.
22 Q And in that job, what are your

1 responsibilities?
2 A All the operational functions of
3 the organization report to me, including the
4 membership outreach function, all of the
5 distribution operations functions, the
6 accounting and royalty administration
7 functions, and the general legal and
8 compliance functions. In addition, the IS&T
9 function, the systems development and
10 extensions report to me.
11 Q And when you say IS&T, what does
12 that refer to?
13 A Information Systems & Technology.
14 Q And how long have you served in
15 that position?
16 A Since the summer of 2001.
17 Q And what was your position before
18 your current job?
19 A I was the Director of
20 Distribution Operations.
21 Q For Sound Exchange?
22 A For Sound Exchange, yes.

1 Q And how long did you serve in
2 that role?
3 A That was since November of `99 to
4 the summer of 2001.
5 Q And what were your job
6 responsibilities in that job?
7 A In that role, my responsibilities
8 were to ascertain the business and systems
9 requirement for the royalty distribution
10 system, to design, build, and implement that
11 system, and all of the data ingestion
12 requirements around that system, meaning the
13 performance logs, as well as the royalty
14 accounts.
15 Q So with respect to the royalty
16 collection and distribution systems now
17 operating in Sound Exchange, were you in
18 charge of developing those?
19 A Yes, I was the architect.
20 Q I want to start with an overview
21 and ask you just how you describe sort of
22 overall an overview of what it is that Sound

1 Exchange does.
2 A Sound Exchange is responsible for
3 the collection and the timely, and
4 efficient, and transparent distribution of
5 royalties under Sections 112 and 114 of the
6 Copyright Act.
7 Q Okay. From whom do you collect
8 royalties?
9 A We collect royalties from a
10 number of licensee types, including the pre-
11 existing services, the SDARS, business
12 establishment services, and the webcasters.
13 Q Do you also collect royalties
14 from foreign collecting societies?
15 A Yes, we have limited collections
16 from foreign collecting societies.
17 Q And how many -- can you identify
18 how any different services you collect
19 royalties from?
20 A With respect to each one of those
21 categories?
22 Q Sure.

1 A The PES, we currently have two;
2 the SDARS we currently have two; the
3 business establishment services two;
4 webcasters over 570, I believe.
5 Q Now when you talk about 570
6 webcasters, does that reflect the number of
7 webcasting channels that are available to
8 the public?
9 A No, in no way does that number
10 reflect the number of channels. That number
11 is substantially higher. You have your
12 large commercial webcasters who have many,
13 many, many channels of music. You also have
14 licensees who are reporting as part of a
15 broadcast group, so there's one reporting
16 by, for example, a Clear Channel, but that's
17 on behalf of many terrestrial stations that
18 are simulcasting over the internet.
19 Q Do you also have webcasters
20 reporting who are aggregators?
21 A Yes, we do. In the case of Live
22 365, they aggregate many, many individual

1 webcasters, many hundreds.
2 Q And to whom do you distribute
3 royalties?
4 A We distribute royalties to the
5 copyright owner of the sound recording
6 transmitted, as well as the featured
7 performer, and also the non-featured
8 performers through their union. That would
9 be AFTRA and AF of M.
10 Q And how do you decide how much to
11 give each of those groups?
12 A It's set by the statute. There's
13 a statutory split of 50 percent to the
14 copyright owner, 45 percent to the feature
15 performer, and 5 percent total to the non-
16 feature performers. And that's with respect
17 to the 114.
18 Q And with respect to Section 112?
19 A That is 100 percent of those
20 royalties are distributed to the copyright
21 owners.
22 Q Do you have to be a member of

1 Sound Exchange in order to receive royalty
2 distributions?
3 A No, you do not. Membership is
4 not required, and we make no distinction
5 between a member of a non-member with
6 respect to collections and distributions.
7 Q And can you give the Board a
8 rough sense of the number of performances of
9 sound recordings that Sound Exchange has --
10 on which Sound Exchange has received reports
11 to-date?
12 A Yes. We have currently processed
13 just about 700 million performances from
14 licensees who are reporting.
15 MR. PERRELLI: Okay. With the
16 Court's permission, I'm going to put up the
17 demonstrative exhibit. And for the record,
18 this is a blown-up versions. It's labeled
19 Sound Exchange Demonstrative 54, but it is a
20 blown-up version of Sound Exchange Exhibit
21 211DP. We're going to get into these issues
22 in a little bit more detail.

1 BY MR. PERRELLI:
2 Q Can you describe what this
3 demonstrative exhibit reflects?
4 A Yes. This demonstrative reflects
5 the basic functions of Sound Exchange from
6 the moment we collect the royalty to the
7 point where we distribute the royalties to
8 copyright owners, and artists, and some of
9 the post-distribution activities that ensue.
10 Q Okay. And what was your role in
11 developing these processes?
12 A I was the architect of these
13 business processes.
14 Q And how long did it take Sound
15 Exchange to develop the system?
16 A Sound Exchange spent a great
17 deal, a tremendous amount of time, energy,
18 and money developing both the business
19 processes and the systems that model those
20 processes to effect the distribution to
21 copyright owners and artists. And while
22 there was an initial investment in these

1 systems and services, we have since expended
2 additional resources refining, expanding,
3 and making more efficient the business
4 process, as well as the underlying computer
5 system.
6 Q Does that process continue to
7 this day?
8 A I expect it will always continue.
9 Q I want to go step-by-step through
10 the various steps of your collection and
11 distribution efforts. First of all, does
12 Sound Exchange bill webcasters for their
13 usage of sound recordings?
14 A No, we don't. We're not a kind
15 of typical business that has a product,
16 sells the product, invoices for the product,
17 receives payments, and then delivers the
18 product. We're in a situation of self-
19 invoicing by the licensees. All of the
20 information that Sound Exchange needs to
21 distribute the royalties are in the
22 possession of the webcasters, and that

1 includes the performances that they've
2 transmitted, as well as the number of
3 listeners to those performances. And in
4 addition, all the financial information is
5 in their possession.
6 Q And what kind of information does
7 Sound Exchange need from, in this instance,
8 webcasters in order to conduct its
9 collection and distribution operations?
10 A Ideally, we receive several
11 pieces of information. First is an election
12 of which license metric they're going to be
13 making their payments. We receive, ideally,
14 the payment itself, along with a statement
15 of account reflecting how the royalty
16 obligation was calculated. Concurrent with
17 the receipt of those three documents is the
18 performance log, which lists all of the
19 performances performed during a specific
20 period.
21 Q And just so we're clear, when you
22 talk about a performance, what are you

1 referring to?
2 A Performance is a transmission of
3 a sound recording that's listened to by an
4 end-user. It's a non-interactive digital
5 transmission.
6 Q You talked about several
7 different pieces of paper. Can you explain
8 what information that you receive on each,
9 for example, the statement of account?
10 A Yes. Depending if the webcaster
11 is paying on a percentage of revenue,
12 percentage of cost, per performance, or
13 aggregate tuning hour, it reflects that
14 metric, and the usage of the content times
15 the applicable rate resulting in the royalty
16 obligation. In addition to the extent a
17 minimum fee was paid, that royalty
18 obligation is reduced by the minimum fee,
19 and if the minimum fee is not exhausted,
20 then the balance is the current royalty
21 obligation.
22 Q And, again, on the reports of

1 use, what is the report of use, and what
2 information does it provide Sound Exchange?
3 A A report of use is a listing of
4 sound recordings transmitted, which includes
5 information, such as the title, the artist,
6 the album, the marketing label, in some
7 cases the catalogue number, in other cases
8 an ISRC, and it reflects transmissions
9 during a relevant period. It will also
10 reflect the number of performances or
11 aggregate tuning hours for that performance.
12 Q Now does Sound Exchange always
13 get those different pieces of paper, those
14 different pieces of information from
15 webcasters?
16 A No, we commonly don't get all of
17 the paperwork, payment, and logs at the same
18 time. We sometimes receive payments without
19 any statement of account. The alternative
20 is true, we get statements of account
21 without the attendant payment. We are
22 currently not receiving performance logs

1 from many, many, many of the webcasters, but
2 it is not uncommon for us not to receive all
3 the items necessary to log the receipt of
4 the payment, and ultimately distribute those
5 royalties.
6 Q Now without a statement of
7 account, are you able to actually distribute
8 royalties?
9 A No, we are not. The statement of
10 account reflects the period for the payment,
11 and in order to match the payment with the
12 log, we need to know what date the payment
13 is for, what period the payment is for. In
14 addition, certain services are paying on
15 behalf of a great many stations, or they are
16 paying multiple royalties in one check, and
17 so without the statement of account, we have
18 no idea how to attribute that money on a
19 station-by-station basis, or to which
20 service that licensee is paying for.
21 Q And without the reports of use,
22 are you able to distribute royalties?

1 A No, the reports of use are the
2 basis for the distribution. Without that,
3 we have no way of knowing which performer's
4 recordings have been transmitted, or
5 copyright owners, as well.
6 Q You mentioned that you don't get
7 reports of use from at least some
8 webcasters. Can you explain why?
9 A Currently there are no final
10 regulations with respect to the reports of
11 use for the webcasters to the extent of the
12 format of those reports, and the mechanism
13 that they are to deliver them to Sound
14 Exchange. There are regulations in place
15 with respect to the information they're
16 supposed to retain and ultimately report to
17 us, but without the format, the file format,
18 the manner in which they actually deliver it
19 to Sound Exchange, those regulations have
20 not been promulgated.
21 Q Why is the file format important
22 to Sound Exchange?

1 A Well, it's critical to the
2 efficient processing of the performances.
3 If webcasters can report in any old file
4 format with information in any order they
5 please, there's no way that we could build
6 an efficient system that would ensure the
7 prompt and efficient payment to the
8 copyright owners and artists that these
9 services are building their businesses on.
10 Q Let's go through the process.
11 Assuming you've gotten the statement of
12 account and the report of use, can you
13 explain the first step once Sound Exchange
14 receives payment from a licensee?
15 A When we receive the payment, of
16 course, we log that payment and deposit the
17 check. We review the statement of account
18 for completeness, and accuracy, and we
19 forward the logs to our distribution
20 operations department.
21 Q And what's the next step in your
22 processing of payment and in the logs?

1 A Well, in some cases in step one
2 there is some follow-up required, if
3 information is missing, or a payment is
4 received late, so there may be special
5 follow-up in step one. But presuming that
6 everything is received together and on time,
7 we're able then to move to step two, which
8 is the loading of the performance log into
9 our computer system for identification.
10 Q And can you explain that log
11 loading process and how it operates?
12 A Yes. First, we receive the log
13 and the system tries to recognize the log,
14 and verify that the log is structurally
15 loadable, meaning that the format is proper
16 and can be loaded. Upon successful loading
17 of the log, then each performance in the log
18 is examined to see if we have received that
19 performance in the past from this or another
20 webcaster, and to the extent that it has
21 been seen before, we match it to an existing
22 record in our database. If the performance

1 has not been matched, we move into step
2 three, and manual identification. The
3 system kind of learns as it goes along. We
4 retain all the performances from all the
5 webcasters, and all the licensees who have
6 ever reported. And we know that webcasters
7 and licensees don't always report everything
8 exactly correctly in the title, artist,
9 album, label, catalogue, copyright owner,
10 and so on in those fields, and so we expect
11 to see the same performance reported
12 incorrectly or improperly repeatedly from
13 the same service.
14 Q And how does your software
15 account for that or address that problem?
16 A We take all of those improperly
17 reported records and ascertain what the
18 proper text representation is for that sound
19 recording, and so we match all these
20 incorrect incoming - incorrect from a text
21 standpoint incoming sound recordings, and
22 match it to our standard actor processing

1 value, so it's kind of our master version of
2 all those variations of how a sound
3 recording can be reported.
4 Q You talked about matching it
5 against an existing database. Where did
6 Sound Exchange get that database?
7 A Sound Exchange built that
8 database from the reports of use from the
9 licensees themselves. It was not pre-loaded
10 by any other source. This has all be
11 discerned from the perfection of data
12 reported by the services.
13 Q Is there any requirement for
14 copyright owners to register their works
15 with Sound Exchange?
16 A No, unfortunately there is no
17 requirement for copyright owners to register
18 with Sound Exchange for the payment of their
19 royalties, and as a result, we only get the
20 information from the licensees themselves.
21 Q And when you're talking about
22 matching, how many records are you talking

1 about matching in any particular report of
2 use or log?
3 A Well, as I said, we processed
4 over or nearly 700 million individual
5 performances, and the amount of performances
6 from log to log varies depending on what
7 period we're loading, but it's in the tens
8 of millions of records. And our system is
9 able to identify in the exact matching step
10 number two, typically anywhere from around
11 70 percent to all the way up to 93 or 95
12 percent matching.
13 Q If you have the artist and the
14 name of the sound recording, is that enough
15 to tell Sound Exchange to whom to pay
16 royalties?
17 A No, it's not enough information
18 to ascertain that. Just having a title of a
19 song and an artist's name doesn't lead us to
20 the exact recording being reported.
21 Q Why not?
22 A Because artists record the same

1 songs, multiple versions of the same songs
2 throughout the life of their career, which
3 could span many decades. If the artist is a
4 group, the group members may be different on
5 one version of the sound recording to the
6 next, and the feature performer, the non-
7 featured performers, the background
8 vocalists and musicians will change from
9 version of the sound recording to the next,
10 even though it's the same song and the same
11 group.
12 Q Why can't Sound Exchange simply
13 pay Fleetwood Mac if it's a Fleetwood Mac
14 song?
15 A Well, Fleetwood Mac is a good
16 example of a featured artist who over their
17 30 or 35 year career has changed the
18 composition of their group frequently,
19 almost from album to album, and they've re-
20 released songs that they previously recorded
21 on a subsequent album, and so in their case
22 we pay the individual members of the group.

1 And unless we know what album the track has
2 been performed, we don't know which version
3 of the group it is. If we don't know which
4 version of the group it is, then we don't
5 know who the individual performers are who
6 are entitled to the royalties.
7 Q Is it sufficient for Sound
8 Exchange to pay out artists and copyright
9 owners to get a sample of data from an
10 individual webcaster showing a sample of the
11 performances?
12 A No. There's nothing that I'm
13 aware of that says some artists should be
14 paid and some shouldn't, or some copyright
15 owners should be paid and some shouldn't.
16 And by definition, a sample will exclude
17 copyright owners and artists from the
18 receipt of those royalties to the extent
19 they're not present in the log, simply by
20 virtue of it being a sample.
21 CHIEF JUDGE SLEDGE: Ms. Ablin.
22 MS. ABLIN: Your Honor, I would

1 object to this last question and answer and
2 move to strike it. Sample reporting is an
3 issue that's been dealt with in the separate
4 record keeping proceeding. It's not a part
5 of this proceeding. I think the statute is
6 clear that the terms to be set in this
7 proceeding are terms of royalty payments,
8 not record keeping terms. There's a
9 separation provision, I believe 114(f)(4)(A)
10 that talks about the record keeping
11 requirements. As Ms. Kessler testified,
12 there are already interim requirements in
13 place at the Copyright Office, and now it's
14 in the Board's hands, are dealing with
15 issues like sample versus census. It's been
16 considered in this separate proceeding.
17 However, Mr. Simson, when he testified
18 earlier in this proceeding, admitted that
19 this was not an issue, sample versus census
20 and record keeping is going to be determined
21 by the Board here. In the other proceeding,
22 there are lots of other parties that are not

1 privy to the testimony going on in here
2 which is an adjudicatory proceeding as
3 opposed to a promulgation of regulations
4 done by notice and comment, so I would move
5 to strike that, as well. That list of
6 exhibits which we can handle now or later
7 that Ms. Kessler is sponsoring and that deal
8 exclusively with the record keeping
9 proceeding.
10 CHIEF JUDGE SLEDGE: Ms. Ablin, I
11 appreciate your attention to relevance to
12 the matters before the Board, but
13 unfortunately at this point, if we had
14 applied that standard to the evidence we've
15 received, about 80 percent of what we've
16 heard would not have been heard. Your
17 motion is denied.
18 BY MR. PERRELLI:
19 Q Ms. Kessler, I want to take you
20 back and finish this topic. You talked
21 about Sound Exchange looking at sampling.
22 Has Sound Exchange looked at the impact of

1 sampling on the distribution of royalties to
2 copyright owners and performers?
3 A Yes, we have. Based on census
4 reporting supplied by a webcaster, we
5 conducted a sample on those performances
6 which reflect the two week sample per
7 quarter which has been indicated in the
8 interim regulations, and we found that over
9 40 percent of the artists performed in the
10 census were not picked up by the sample.
11 And those that were picked up by the
12 samples, some of those artists were over-
13 paid, and some of the artists, of course, we
14 under-paid.
15 Q On whom does that problem fall
16 most directly in the artist and copyright
17 owner community?
18 A It falls -- the displacement of
19 the royalty payments falls most heavily on
20 independent copyright owners, the small
21 copyright owners, and the feature artists.
22 Q We talked about Sound Exchange's

1 automated matching. Is the software that
2 Sound Exchange uses off-the-shelf software?
3 A No. It's completely custom
4 built.
5 Q Now if the software is unable to
6 match a particular sound recording with an
7 existing sound recording on Sound Exchange's
8 database, what's Sound Exchange's next step?
9 A The next step is the system will
10 present to a computer user a listing of all
11 of the sound recordings that have not been
12 matched; in other words, we have not yet
13 seen them reported or identified them
14 previously. In some cases, these sound
15 recordings are new releases, and we expect
16 around a 7 or 8 percent new release rate, so
17 we anticipate not matching everything. But
18 it also includes sound recordings that may
19 have a match in our database, but based on
20 the complex algorithm in the matching, the
21 automated matching, it was unable to a
22 degree of certainty match that sound

1 recording, and so one of our staff has to
2 look at the computer screen with the
3 unmatched recording, and then below that are
4 typically a list of six or so possible
5 matches that represent that same sound
6 recording.
7 Q Are there particular kinds of
8 sound recordings or works that raise more
9 difficult issues for matching purposes?
10 A Yes. Sound Exchange has a couple
11 of categories of problematic performances.
12 The first is the compilation album, where a
13 copyright owner is marketing the overall
14 album and licensing tracks from other
15 copyright owners. I can think of, like for
16 example, the Soprano soundtrack. I believe
17 it's a Sony compilation, but of course, they
18 license independent and other major label
19 content. Very often licensees will report
20 compilations not with the individual
21 copyright owners of each track, but the
22 overall marketing label for the sound

1 recording.
2 Further, they often won't
3 identify who the featured artist is, but
4 rather they'll report the featured artist as
5 various because it's a compilation and
6 different artists are on different tracks.
7 Kind of a running joke at Sound Exchange is
8 the first band that's named various is in
9 for quite a windfall because we've got a
10 number of recordings that are reported that
11 way. But Sound Exchange, of course, has to
12 undertake the tremendous research involved
13 in finding alternate sources of information
14 to truly identify who the copyright owner
15 is, and who the featured artist is, so
16 compilations are challenging.
17 Classical music is another big
18 challenge for us. I can't tell you how many
19 times a sound recording is reported, the
20 featured artist is really the composer, and
21 so it's -- we know who the composers are.
22 What we're trying to find out are who the

1 featured artist is, and so sometimes based
2 on other information on the record, for
3 example, the album, or the track title, we
4 can get a sense of who the featured artist
5 may be, which symphony recorded that
6 particular composition. But often, it
7 requires a tremendous amount of research to
8 make that determination.
9 Q Are there particular problems
10 caused, challenges posed by foreign works?
11 A Yes. Foreign works are another
12 challenge, in part because there's not a lot
13 of candidates for staff that have extensive
14 knowledge of all types of world music. But
15 remember, Sound Exchange is paying out sound
16 recordings that are transmitted by services
17 that are playing a vast array, a great
18 breadth and depth of music, and that
19 includes quite a lot of world music, so
20 we're not just paying U.S. artists, we're
21 paying artists who are all over the world,
22 and their content is being performed by

1 these services, and it makes it quite
2 difficult to identify with certainty what
3 the sound recording is.
4 Q And what kinds of additional
5 information is helpful to Sound Exchange
6 when it's engaged in this kind or research?
7 A We rely on additional sources of
8 sound recording information. We rely quite
9 a lot on All Music Guide with whom we have a
10 license to use their information. And their
11 information is far more extensive than the
12 title, artist, album, label type of
13 information. It has biographical
14 information, members of the groups, liner
15 notes, years an artist recorded, what other
16 bands or groups they may have participated
17 in and recorded with. And sometimes that
18 additional information, in conjunction with
19 the limited fields that are reported to us,
20 we're able to discern what the sound
21 recording really is.
22 With respect to our classical

1 music challenge, we provided AF of M, the
2 non-featured union, with a list of, I want
3 to say over 90,000 records to review. They
4 have quite a lot of -- they have staff who
5 are quite experienced with respect to
6 classical music, and so we rely on these
7 types of partners to help us through the
8 identification process.
9 Q And how large is Sound Exchange's
10 staff that works on this kind of research?
11 A Well, it will fluctuate depending
12 on that initial match rate that's
13 established, but anywhere from four to eight
14 staff members are working through the
15 unmatched performances.
16 Q Now what happens if you cannot
17 identify what sound recording a particular
18 performance, what sound recording artist a
19 particular performance is?
20 A If we can't identify the sound
21 recording, then we can't determine who's the
22 entitled party of the sound recording that's

1 entitled to the distribution of the
2 royalties.
3 Q Do Sound Exchange employees
4 continue to research unmatched performances?
5 A Oh, yes. I mean, we never stop
6 in our quest to identify what the sound
7 recording really is. And sound recordings
8 are placed in a separate account and noted
9 as unidentified, and we continually go back
10 and look, and refine, and perhaps down the
11 road another licensee will report something
12 like that track, and it will show up in one
13 of the potential matches for the sound
14 recording. And this is an ongoing process
15 that continually is occurring.
16 Q Once you have a match for the
17 sound recording, are you able then to pay
18 out the royalties owed for that sound
19 recording?
20 A No. A simple identification of
21 what sound recording this actually is, is
22 really just the start for being able to pay

1 out on that sound recording. Each
2 performance has a copyright owner
3 entitlement, a featured artist entitlement,
4 and a non-featured artist entitlement, and
5 so we have to identify who the copyright
6 owner is, how they want the royalties to be
7 paid to them. In other words, their 50
8 percent share, who to make the check out to,
9 where to send the check, where to deposit
10 the funds if it's a direct deposit or a
11 wire. And similarly, on the artist side, we
12 have to assign the appropriate account to
13 the artist side of the performance, because
14 as I mentioned, just because you know it's
15 Fleetwood Mac, doesn't mean it's a Fleetwood
16 Mac from the 80s is the same Fleetwood Mac
17 that reported in the 90s, so you have to
18 identify with certainty the sound recording,
19 and which account it should be assigned to
20 for purposes of that payment.
21 Q Now this account assignment
22 process, is it automated or manual?

1 A It's automated to the extent that
2 we have seen the performance before and it's
3 assigned to an account. It's not automated
4 if it's a new performance, or if it's one of
5 the performances that we're able to identify
6 who the sound recording is, but we never got
7 information from the copyright owner or
8 artist of how to pay out on that track, so
9 artists, we find artists, artists come to us
10 and then we register them as an account in
11 the system, and attach their performances to
12 that account. And then we establish how the
13 money is to be paid out on those particular
14 tracks.
15 Q How do you decide how to pay out
16 particular artists of a particular track?
17 A We will always take the direction
18 of the artist, and we will pay it out the
19 way the artist instructs us to. To the
20 extent that that artist is a group, the
21 whole group will tell us how to pay out
22 those tracks.

1 Q You talked about how the artist
2 might tell you to pay out a particular
3 track. What kinds of directions do you get
4 from artists in terms of different ways to
5 distribute royalties for particular tracks?
6 A Well, typically when the artist
7 is an individual, they may have a company
8 that they want us to send their royalties to
9 for business purposes. Some artists want us
10 to make the check out to them and send it to
11 someplace other their home. Some artists
12 want us to pay them the royalties and send
13 it to a particular address. Some artists
14 who are living abroad will have to have tax
15 withholding on their royalty distributions,
16 and so in the simple case of the individual
17 artists, it's typically 100 percent of the
18 royalties go to them or their company that
19 is handling the accounting for them.
20 With groups it can become more
21 difficult. Absent the direct instructions
22 from the group members, Sound Exchange has a

1 number of policies on how to split the
2 royalties among those artists.
3 Q And can you describe some of
4 those policies?
5 A Yes. I guess it's important to
6 note here that the objective is to be as
7 fair and transparent as possible with
8 respect to the distribution of royalties, so
9 in no case do we have -- the approach is to
10 value the members of the group fairly, and
11 so each member of the group will get their
12 pro rata share. So if there's four members
13 of the group, each will get 25 percent of
14 the performance for that sound recording.
15 And remember, that's of the 45 percent of
16 the performance's value, so they get 25
17 percent or 45 percent.
18 In the case where, by virtue of
19 the sound recording it's not so easy to
20 split it evenly among the group members, and
21 this is an example in classical music where
22 you have the orchestra, the soloist and the

1 conductor, and they've all contributed to
2 the creation of the sound recording - those
3 are the kinds of things that Sound Exchange
4 will not in a vacuum make a policy decision
5 about. We go out to the artist community in
6 the form of roundtables with artist
7 managers, artist attorneys, and the artists
8 themselves, present some of these examples
9 and complications to those groups. We try
10 to determine what current business practices
11 are with respect to the division of
12 royalties, with the whole objective to have
13 our stakeholders buy into the policy and
14 help Sound Exchange establish them.
15 Then the policies go to a Sound
16 Exchange committee called the Distribution
17 Policy Committee, which was created by
18 virtue of the bylaws. And the policies are
19 presented to that committee, with options or
20 recommendations that Sound Exchange has
21 gathered through these roundtables that
22 we've held. The Distribution Policy

1 Committee then will decide the best course
2 of action, and make a recommendation to the
3 full board for adoption.
4 Q And who makes up the Distribution
5 Policy Committee?
6 A It's evenly comprised of three
7 copyright owner members and three artist
8 members.
9 Q And who makes up Sound Exchange's
10 Board?
11 A That is also equally comprised of
12 artists and copyright owners, nine copyright
13 owners and nine artists.
14 Q When Sound Exchange distributes
15 its royalties to individuals, does it
16 identify for the artist, for example, how
17 the royalties may have been divided up among
18 other members of a group, for example?
19 A Yes. Sound Exchange produces a
20 very detailed and thorough statement to each
21 artist and copyright owner, for that matter,
22 who is paid a royalty. And without showing

1 confidential information, such as Tax Ids or
2 addresses, we do show each artist how that
3 group's royalties were split, so the 25
4 percent or whatever they're instructed us,
5 however they have instructed us to split the
6 royalties.
7 Q What happens if there are
8 disputes among a group, for example?
9 A We do have some disputes where
10 the members of the group can't decide how
11 the royalties, or can't agree on how the
12 royalties should be split. In those cases,
13 we immediately put the account on hold and
14 simply accrue the royalties earned by those
15 sound recordings for future distribution,
16 and we hold those royalties until the
17 dispute is resolved.
18 Q And what role does Sound Exchange
19 play in resolving that dispute?
20 A Sound Exchange would never make a
21 determination of how to split the royalties.
22 What we do try to do, however, is facilitate

1 the communication among the disputing
2 parties, remind them that the royalties
3 aren't going to get distributed if they
4 can't agree on how to allocate the payments
5 of those royalties. And we're more in kind
6 of a broker situation than anything else.
7 Q I don't mean to interrupt you.
8 Do you want to finish your answer?
9 A We haven't yet had a situation
10 where a dispute has gone on for a long
11 period of time where it had to be referred
12 to another one of Sound Exchange's
13 committees, which is the Dispute Resolution
14 Committee.
15 Q And has that committee ever
16 decided any dispute?
17 A Not to-date. I have no doubt
18 there will be an occasion when it will have
19 to, but so far, no.
20 Q One of the things we didn't talk
21 about was, are you distributing monies just
22 to artists, or also to their heirs, for

1 example?

2 A Sound Exchange has seen in its

3 performance log such a breadth of music

4 spanning many decades, and we have quite a

5 number of featured artists who have died,

6 and so rather than trying to pay the

7 featured artist, we're looking for their

8 heirs. And when you look at the breadth of

9 music being performed, and the vitality of

10 it, you see that in some cases we're

11 actually looking for heirs of heirs, so

12 we're always looking to find those entitled

13 to the royalties from a particular artist's

14 recordings.

15 Q Do performances by non-human

16 performers, Barney, for example, or the

17 Muppets, do those raise particular problems?

18 A Yes, that's another area that

19 Sound Exchange, I'm telling you, didn't

20 anticipate when we first launched, but we do

21 have the Muppet characters, and the

22 Chipmunks, and Barney, and on and on. And

1 again, webcasters do perform a lot of
2 children's music. It's a wonderful array of
3 children's music, and a lot of times these
4 are animated characters or non-human
5 characters, and Sound Exchange struggled
6 with this issue, and took it to our
7 roundtables and to our committee, and we
8 looked at the legislative history, and we
9 pondered our options around this. And it
10 was ultimately determined that we should try
11 to find the voices behind the animation, or
12 the voices in the costume. And that's
13 exactly what we're doing, so we are trying
14 to find outlets to determine who the actual
15 voice is that recorded that sound recording.
16 Q You've talked a number of times
17 about the breadth of music performed. What
18 do you expect to happen with respect to the
19 breadth of music on which you're going to
20 receive reports when all of the webcaster
21 data comes in eventually?
22 A Once all the webcasters are

1 reporting, and we do look forward to that
2 day, I expect that just the shear volume
3 will increase by virtue of going from a
4 handful of licensees reporting, to the 570,
5 plus all of their individual stations, in
6 the Live 365 example, I expect that we're
7 going to see an absolute explosion in the
8 number of performances reported. I would
9 also not be surprised if we see sound
10 recordings that aren't new releases, but
11 have never been performed by the services
12 currently reporting, again, because there's
13 just this incredible breadth of music that's
14 being transmitted by the webcasters.
15 Q We've gotten to the account
16 assignment section of this chart. If you
17 can't figure out who the copyright owner or
18 performer is, what happens to that account?
19 A The performances for whom we
20 can't identify the artist, or we don't
21 receive them from the artists instructions
22 on how to pay them, they're assigned to an

1 account, an escrow account where we continue
2 to accumulate those royalties in the hope
3 that our various outreach mechanisms will --
4 that artist will eventually come forward or
5 the copyright owner will eventually come
6 forward and make a claim to those
7 performances.
8 If we've been able to identify
9 the copyright owner but not the artist, we
10 will pay the copyright owner 50 percent
11 share. If we're able to find the featured
12 performer but not the copyright owner, we'll
13 pay that, so we pay to the extent that we
14 can. But if on either side we're unable to
15 fulfill that payment obligation, we escrow
16 those funds and identify those performances
17 as undistributable.
18 Q And for those copyright owners
19 and performers you able to identify, do you
20 have any obligations with respect to income
21 tax, for example?
22 A Can you repeat that?

1 Q With respect to copyright owners
2 or performers you are able to identify, do
3 you have any obligations with respect to the
4 Internal Revenue Service?
5 A Yes. Unless we receive the
6 proper tax information from the featured
7 artist or copyright owner, we're required to
8 withhold a certain percentage of the
9 royalties and pay that to the IRS. And if
10 it's an artist who's resident in the United
11 States, it's a certain percentage, but if
12 it's an artist resident in another country,
13 which we have quite a number of artists
14 residing all over the world, then we have to
15 determine what the tax treaties are, what
16 the proper withholding is. And even if they
17 do provide us with tax information, there is
18 sometimes a tax withholding obligation, so
19 we have to be cognizant of any of the latest
20 changes in any of those tax treaties, and
21 constantly reviewing our processing of
22 foreign artists' royalty payments to make

1 sure the withholding is done properly.
2 Q Once you've identified the
3 copyright owner or performer, does that mean
4 you know how to locate the individual or the
5 company?
6 A Oh, no, I wish it were so. We
7 spend a tremendous effort on locating
8 artists, and you think if you're an
9 organization, that's primary function is to
10 cut checks and pay the deserving artists and
11 copyright owners, it would be an easy job.
12 But we have found that, once again, the
13 breadth of the content and the vast array,
14 and just the shear numbers of artists who
15 are entitled to the royalties, it's quite a
16 daunting task to locate, find, and not only
17 that, but get the artist to tell us where to
18 send the check to. Sometimes filling out a
19 simple piece of paper, an artist isn't
20 always the easiest to get that information
21 from them. So, of course, we need to know
22 where to cut the check, or the bank routing

1 information where to make the deposit.
2 Q Once you've -- let's assume
3 you've got all that information and you're
4 ready to move to the next step, step five,
5 allocation and distribution of royalties,
6 what does Sound Exchange do there?
7 A Allocation and distribution is
8 kind of the culmination of this process
9 where we actually get to send royalties to
10 the deserving copyright owners and artists.
11 The allocations happen four times a year on
12 a quarterly basis. Distributions have been
13 done on a quarterly basis, but we're looking
14 at more frequent distributions in order to
15 get more money to more artists more
16 frequently, more timely.
17 The first step in that process
18 is, as I said, the allocation, and the
19 allocation is where we take the royalties
20 received by each licensee and allocate them
21 to the performances reported by that
22 licensee. In the case of just one

1 webcaster, if they paid us $100 and there's
2 100 performances, each one of those
3 performances is valued at a dollar. In the
4 case of a broadcast group, for example,
5 Clear Channel that's reporting for many,
6 many, many, many different stations, and
7 this goes back to why we need the statement
8 of account, we take the money attributable
9 to each station and allocate that money
10 across those performances.
11 Q Why isn't the value of a
12 performance the same regardless of the
13 licensee?
14 A First, not all webcasters have
15 opted for the per-performance or the
16 aggregate tuning hour metric of payment, but
17 more importantly, because we're in a
18 situation where it's just sample reporting;
19 in other words, the two weeks per calendar
20 quarter of reporting, we don't have a full
21 accounting of each and every performance to
22 value at the per performance rate, so our

1 only option then is to allocate the
2 royalties received across those
3 performances.
4 Q Can you explain in a little bit
5 more detail how you actually allocate
6 particular performance with or particular
7 set of featured artists or copyright owners?
8 A Yes. As I said, the first step
9 is allocating the royalties received on a
10 station-by-station, channel-by-channel,
11 licensee-by-licensee basis. Once that has
12 been done for the entire group of licensees
13 to whom we're distributing, we then
14 consolidate those allocations on the
15 copyright owner and the artist level. So in
16 the example I gave before, if there's 100
17 performance, each performance is $1.00, and
18 Madonna has one performance, and then on
19 another allocation there's $1,000, the same
20 100 performances, and her performance is
21 worth $10, that performance consolidated is
22 $11. That $11 is then split based upon the

1 statutory requirement of 50 percent to the
2 copyright owner. In the Madonna example, I
3 think it's Warner, and then 45 goes to
4 Madonna, and 5 percent goes to the non-
5 featured unions. So there's the allocation,
6 the application of the statutory split, and
7 the consolidation of all these allocations.
8 Once you've allocated, then you
9 have to figure out based on the account
10 assignment how to pay out the featured
11 artist portion, the 45 percent. So if you
12 take an artist, for example, Eric Clapton,
13 who's been a solo performer, a member of the
14 group Cream, Blind Faith, Derrick and the
15 Dominoes, and all the collaborations he's
16 done, he may have a different split on a
17 variety of performances, but we still send
18 him one check consolidating all those
19 individual allocations.
20 Q Do you report to him how each of
21 those allocations was made?
22 A Yes, we do.

1 Q At that point, are you ready to
2 cut a check?
3 A Not quite. Not quite. We make
4 sure that we've got the right tax
5 withholding applied to the distribution, and
6 then we create a banking file, which is an
7 electronic file that we transmit to our
8 banking partner, and then they process that,
9 and actually cut the checks, or effect the
10 direct deposit. While that's going on,
11 we're running our statements, which is a
12 detailed comprehensive listing of each and
13 every sound recording to whom the recipient
14 is being paid.
15 Q You've got another step that
16 comes after the allocation and distribution
17 step, which refers to adjustments. Can you
18 describe for the Board what that is?
19 A Yes. Typically, Sound Exchange
20 will see a spike in customer care calls
21 after a distribution. Each distribution
22 we're distributing to more artists, and more

1 copyright owners. Some cases, it's the
2 first payment received by a particular
3 artist or copyright owner. As they're
4 reviewing their statements, they may find
5 misallocations on their statements; in other
6 words, performances that we are paying them
7 for that aren't really their's, or we'll get
8 calls or emails from recipients that say,
9 you know, I know my recording was performed
10 on this service, and why isn't it on my
11 statement, and so the statement is our
12 product and our mechanism for communicating
13 with our artists and our copyright owners to
14 further refine the data that we've
15 distributed on. Remember that we're
16 distributing based on what the licensees
17 have reported, based on all the research and
18 perfection of the data that we can, but we
19 will inevitably get an allocation and a
20 distribution incorrect. We have this
21 sophisticated adjustment engine that permits
22 us to debit the improperly paid party, and

1 credit the party to whom we should have
2 originally made the payment.
3 And then in the next distribution
4 cycle, that adjustment is manifested or is
5 actually effected, so it's out of future
6 royalties from the improperly paid artist,
7 they pay back the credit that we've made to
8 the artist that we should have paid.
9 Q Do you sometimes hear from
10 artists saying that they shouldn't have been
11 paid?
12 A Yes. We have, on occasion, heard
13 from artists who will send a check back
14 along with a statement and say, you know,
15 I'm not that John Williams. I'm a different
16 John Williams, and by the way, I know how
17 you can reach him, and here's his contact
18 information, so that has happened by virtue
19 of, again, the incredible amount of music
20 being performed, the not common but not
21 particularly uncommon occurrence when we
22 incorrectly pay out a royalty.

1 Q At the end of this process, what
2 happens with royalties that can't be
3 distributed?
4 A Again, those royalties are held
5 in separate accounts and we continue to chip
6 away at the undistributed royalties in an
7 effort to maximize the amount of royalties
8 that we're paying through to the deserving
9 featured artists and copyright owners.
10 Q Now do the Copyright Office's
11 regulations provide for what's supposed to
12 happen to that money?
13 A Yes. The regulations say that
14 we, after three years from the time of
15 payment by the licensee, the undistributed
16 funds may be used to offset the cost of
17 administering the royalties.
18 Q And has Sound Exchange ever
19 applied that provision?
20 A No, we have not.
21 Q What has Sound Exchange decided
22 to do?

1 A We have our first three
2 distributions that under this three-year
3 rule would technically be eligible for this
4 type of release and offsetting of
5 administrative costs. Our board has twice
6 voted to delay and defer the release of
7 those funds to give Sound Exchange ample
8 time to implement its variety of artist and
9 copyright owner outreach activities to reach
10 as many as possible entitled parties to the
11 royalties. And most recently, the
12 Distribution Policy Committee has
13 recommended if a release of these funds is
14 going to occur, that we limit it to the
15 first distribution; in other words, not all
16 three distributions that otherwise would be
17 eligible will be released.
18 Q Does Sound Exchange have a goal
19 for what percentage of the royalties it
20 hopes to distribute?
21 A Yes, my staff doesn't like to
22 hear this, but 100 percent. We would like

1 to pay absolutely every penny out to every
2 artist and every copyright owner. That's an
3 ideal that I don't expect that we will ever
4 reach, but our goal by October of this year
5 is to be able to pay out 65 percent of the
6 artist royalties, and 85 percent of the
7 copyright owner royalties.
8 Q Now how does that compare to the
9 ability of other collecting societies of
10 which you're aware in terms of paying out
11 royalties?
12 A I think one good comparison is
13 SENA, which is the Dutch collecting society.
14 It took them approximately 10 years to get
15 to between a 90 and a 95 percent pay through
16 rate. Sound Exchange is in its fifth year,
17 and we expect to be at 65 percent, and are
18 quite proud of that achievement. But it's
19 important to kind of compare the two
20 organizations. I mean, SENA is paying Dutch
21 artists, and Sound Exchange is not just even
22 paying American artists, we're paying

1 artists worldwide, so the task before us is
2 far greater than that of the Dutch, but we
3 will strive to meet that mark.
4 Q I want to move on to some other
5 aspects of Sound Exchange's operations.
6 First of all, we've talked a number of times
7 about outreach. Can you talk a little bit
8 about Sound Exchange's efforts to find
9 copyright owners and performers?
10 A Yes. You know, this is a fairly
11 new entitlement, and Sound Exchange has some
12 general outreach activities that it year-in
13 and year-out undertakes, and those include
14 attendance at industry conferences and
15 events, participation on panels, speaking
16 engagements, attendance at music festivals,
17 participating in these roundtables with
18 artist groups, and then, of course, general
19 advertising, both print and we've gotten an
20 occasional story done on television about
21 us, and so we work those angles. And those
22 are kind of our general, here's what Sound

1 Exchange is. We exist. We might have money
2 for you.
3 We have some print ads that we
4 also place. For example, we had the back of
5 the ASCAP magazine for a few months that was
6 meant to reach out to those songwriters who
7 happen to be recording artists, as well, so
8 we have our general outreach. We also have
9 a number of specific outreach activities
10 that we undertake.
11 Q Can you describe the more
12 specific outreach opportunities?
13 A Yes. We have found that one of
14 the most efficient ways to find artists who
15 are entitled to these royalties is to work
16 in conjunction with other organizations
17 whose membership may overlap with our
18 artists that we are to-date unable to find
19 and pay. Those organizations include our
20 two unions, AFM and AFTRA. We've done
21 matching exercises with their membership and
22 our unpaid artists, and been able to get

1 contact information for a great many
2 featured performers by virtue of this
3 exercise. CD Baby sent out an email blast
4 to about 100,000 artists, many of whom own
5 their own copyright, so they're entitled to
6 both the featured artist portion and the
7 copyright owner portion of the sound
8 recording. Our phones rang off the hook or
9 two and a half weeks as a result of that
10 mailing, and we found many, many, many
11 artists and copyright owners through that
12 endeavor.
13 We work with the Grammy
14 organization, MARIS, and the Latin Grammys,
15 LARIS. We've done coordinated outreach
16 efforts with the Blues Foundation, the Folk
17 Alliance, all the individuals escape me at
18 this moment, but there must two dozen
19 different organizations that we've worked
20 with in our effort to find featured artists
21 and sound recording copyright owners, and
22 also let them know that we exist, this right

1 exists, and we may have royalties owed to
2 you.
3 Q Do you also work with foreign
4 collection societies on locating artists
5 overseas?
6 A Yes, we do. We have found that
7 entering into reciprocal arrangements with
8 foreign societies helps us find a great many
9 artists that are citizens of other
10 countries. For example, we have such
11 arrangements with PPL in the UK, SENA in the
12 Netherlands, Abramus in Brazil. We're
13 working with RAAP to pay through - that's
14 Ireland, we pay RAAP for Irish artists, and
15 we're working on -- we're in the process of
16 negotiating about a dozen more of these
17 reciprocals. It's our view that the local
18 society will have better reach to their
19 artists. They know who their artists are,
20 they keep up with changes of address and
21 that sort of thing, and so it's a very
22 efficient way for us to get these royalties

1 paid to those artists.
2 Q Why doesn't Sound Exchange have
3 agreements with a broader range of foreign
4 societies?
5 A Well, not all territories have
6 collecting societies. Some territories have
7 what we call emerging societies where the
8 right is relatively new, like in our
9 country, and are not yet established. And
10 we're a little circumspect with whom we
11 enter into these agreements because we
12 believe that these organizations need to be
13 similarly situated as Sound Exchange,
14 meaning the philosophy of paying through the
15 maximum amount of royalties as quickly and
16 efficiently as possible. We like the
17 organizations to have a similar status, the
18 non-profit status, or some sort of
19 government designation so that we know that
20 they are a credible organization, and we
21 have restrictions in our agreements that
22 require them to return money to us to the

1 extent that in three years they're unable to
2 pay it through to their artist.
3 Now I did kind of want to make
4 the distinction that even if we pay RAAP for
5 Irish artists, and Irish artists can
6 certainly come directly to us, and we will
7 always honor paying the artist directly.
8 This is just one more thing we can do to get
9 as much of the royalties out to the featured
10 artists and the copyright owners.
11 Q Talked a lot about Sound
12 Exchange's operations. How large is Sound
13 Exchange staff?
14 A We're 26 full-time employees, we
15 have two positions vacant at the moment, so
16 a total of 28. We also have the unpaid
17 interns that help Sound Exchange out.
18 Occasionally, we hire temporary help,
19 depending on the spikes in our workload.
20 Q What kind of skills do you look
21 for in employees at Sound Exchange to do
22 this kind of work?

1 A Well, a knowledge of music is the
2 most important skill with respect to being
3 able to do this matching research and
4 outreach. I think there's only four of us
5 on staff that aren't musicians or performing
6 artists. It's remarkable how little talent,
7 for example, I have, compared to my staff,
8 but many of them are aspiring performers.
9 You know, obviously, we have certain roles
10 that require certain skill sets, like our
11 general counsel services and so forth, but a
12 lot of this work, a lot of this process,
13 it's just never been done before in the
14 United States, and we're building it and
15 refining it as we go, and our staff is very
16 dedicated, with a deep understanding that
17 they're in the service business, that their
18 job is to get this money out as quickly,
19 efficiently, and as accurately as possible.
20 Q Does Sound Exchange calculate an
21 administrative rate?
22 A Yes, we do.

1 Q And can you describe for the
2 Board what that is?
3 A Sure. The administrative rate is
4 a percentage that reflects the cost Sound
5 Exchange has incurred compared to the amount
6 of royalties is has collected.
7 Q And what Sound Exchange's
8 administrative rate been over time?
9 A Well, in the early years it
10 hovered around the 20 percent figure. And,
11 again, that was when royalties were low, and
12 we have start-up costs. It has consistently
13 dropped each year. Last year our final
14 admin rate was a little over 7-1/2 percent,
15 and this first quarter I don't have
16 finalized financials for the first quarter,
17 but it looks like it will be south of that.
18 Q And does that figure include
19 repayment for prior proceedings to set
20 royalty rates?
21 A It includes current, but not the
22 original CARP that established the

1 webcasting rate. That proceeding is being
2 repaid through, we have a promissory note,
3 and the terms of that require us to pay the
4 difference between our actual admin rate and
5 20 percent, and that differential is used to
6 pay down that debt. At spinoff, when we
7 spun-off and became an independent
8 organization, we repaid $3 million of an
9 original $9 million debt, and based on this
10 differential, we've been able to pay down
11 the debt every year. And this year we have
12 a balance of just a little bit more than 2-
13 1/2 million dollars. And I suspect that
14 based on the royalties that we've collected
15 for the first quarter, and the containment
16 of our costs, that we will easily repay the
17 remainder of that debt based on the results
18 of 2006.
19 Q You talked about Sound Exchange's
20 admin rate. How does that compare to other
21 entities that are collecting monies for
22 public performances?

1 A It's far lower. Our 7-1/2 admin
2 rate compares to, I don't know, 14, 16
3 percent for ASCAP and BMI, so it's very low,
4 and getting lower.
5 MR. PERRELLI: Your Honor, I
6 still have a ways to go, but I actually am
7 at a breaking point. I don't know what the
8 schedule the Court intends for this
9 afternoon, if we're going to continue until
10 3:1, or if this would be a time for a break.
11 CHIEF JUDGE SLEDGE: Go ahead and
12 continue.
13 MR. PERRELLI: Okay. Thank you,
14 Your Honor.
15 BY MR. PERRELLI:
16 Q Ms. Kessler, I want to shift a
17 little, and we've covered a lot of ground
18 about collection and distribution. I want
19 to talk about how all of this might be
20 different if there are multiple designated
21 agents, all administering the same statutory
22 license. First of all, I want to ask you,

1 can you explain the distinction between a
2 statutory license and its rates and terms
3 set by the CRB, and a direct or voluntary
4 license?
5 A Yes. The statutory license is a
6 license that is one set of rights, one set
7 of terms, one set of rates that applies to
8 everybody evenly, and ultimately those rates
9 and terms will be set by this Board. And
10 compared to a direct license, which permits
11 a copyright owner to directly negotiate with
12 a service as to those rates and terms for
13 the use of their sound recordings. And this
14 could be the copyright owner themselves, or
15 through someone that they've designated to
16 negotiate that direct license.
17 Q So if a copyright owner doesn't
18 like the rates and terms that come out of
19 this proceeding, are they able to actually
20 license their content separate and apart
21 from this proceeding?
22 A Yes, the statutory license is

1 non-exclusive. We can't force anyone to
2 operate under the statutory license. Any
3 copyright owner is free to negotiate
4 directly and establish whatever rates and
5 terms are in their interest.
6 Q You talked in your written
7 testimony about a multi-tier designated
8 agent system. Can you explain what that is?
9 A The way I understand the multi-
10 tier system is there would be the concept of
11 a receiving agent, and then designated
12 agents, and so the first level would be the
13 receiving agent would receive all the
14 royalties, and the reports of use, and the
15 paperwork, and the statements of account and
16 all that sort of thing, and then they would
17 figure out how to distribute, or they would
18 administer the distribution to each of the
19 individual distributing agents for their
20 downstream distributions.
21 Q How is that different from a
22 multi-agent system?

1 A The way I understand the multi-
2 agent system to work is, anybody could be a
3 designated agent, and you could have two, or
4 ten, or a hundred of them, and you would
5 eliminate the receiving agent concept.
6 Q Now of the -- well, who would
7 decide how much to be paid to each
8 designated agent under the multi-agent
9 system?
10 A I can only presume the licensee
11 would have to figure out how to do the
12 splits in the payments to the individual
13 designated agents.
14 Q Why couldn't each designated
15 agent bill the webcasters?
16 A Well, the way it works now is we
17 don't have the information available. A
18 designated agent wouldn't have that
19 information available to them until the
20 licensee reported to them, so it's based on
21 the usage of the sound recordings. And the
22 sound recordings could be represented by the

1 same -- one sound recording could be
2 represented by multiple agents, so until you
3 get the performances, you wouldn't be able
4 to determine what the split is.
5 Q Now among the three options, the
6 single agent system, a multi-tier system, a
7 multi-agent system, which one is more
8 efficient?
9 A Oh, a single designated agent is,
10 by far, the most efficient way to administer
11 a single license, like a statutory license
12 with a single rate and a single set of
13 terms. In my view, the statutory license
14 should be administered with a single set of
15 rules, and one organization should be tasked
16 with the administration and implementation
17 of those rules.
18 Q What would the impact on overall
19 costs of distribution of royalties be from
20 having a multi-tier or a multi-agent system?
21 A They would increase tremendously.
22 Q What would the impact be on the

1 time, the promptness of distribution of
2 royalties for a multi-agent or a multi-tier
3 system?
4 A I have no doubt that in a multi-
5 agent system there will be disputes, and
6 those disputes among the agents will cause
7 delays, and some of those disputes, I don't
8 know how they would get resolved. And it
9 would ultimately impact the timely,
10 efficient, and fair distributions to all the
11 copyright owners, and all the artists who
12 are entitled to the royalty under the
13 statutory license.
14 Q Does the fact that we're talking
15 about the administration of a single
16 statutory license, rather than a set of
17 voluntary licenses, affect your thinking on
18 this?
19 A Yes. I mean, it seems common
20 sense to me that you've got one statutory
21 license, one set of terms, there's one price
22 set, there's one rate, and there should be

1 one set of rules on how that is
2 administered. In a direct license
3 situation, you could be licensing a whole
4 panoply of rights and different rates and
5 different terms for different business
6 purposes, but on behalf of that copyright
7 owner, so the alternative to the statutory
8 scheme is always direct licensing. But in a
9 statutory situation, there's no -- it seems
10 inefficient, and excessively and unnecessary
11 costly to have multiple agents.
12 Q Couldn't you have cost
13 competition among designated agents?
14 A Well, to me, cost competition is
15 really nothing more than an incentive to
16 free ride, and by that I mean, I could
17 foresee in a multi-agent system where one
18 designated agent undertakes all of these
19 costs, and all of this marketing and
20 outreach, and all of these efforts to pay
21 through royalties, and another designated
22 agent just free riding on all of the work

1 done by the other designated agent. And
2 that's with respect to whether it's the
3 costs associated with a rate setting
4 proceeding, or trying to draw down - reduce
5 the undistributed royalties, or what have
6 you.
7 Q What's the benefit of that kind
8 of free riding?
9 A Well, that the designated agent
10 who's free riding doesn't incur the costs.
11 They potentially have a lower admin rate.
12 We can't compete on price here, we can only
13 compete on costs. And in spite of all the
14 good work that the one designated agent is
15 doing, the other designated agent enjoys the
16 benefit of the cost reduction. And to the
17 extent that designated agent is a for-profit
18 company, they get to keep that.
19 Q What is the effect on the
20 incentive to do research, for example, on
21 unmatched performances in a system like
22 that?

1 A I think it creates a disincentive
2 to dedicate resources to those types of
3 activities, that it's to the benefit of the
4 free rider not to distribute royalties
5 rather than distribute them.
6 Q Going back up to the
7 demonstrative exhibit, can you explain to
8 the Board the kinds of additional costs and
9 inefficiencies that you would find in a
10 multi-agent system each step along the way?
11 A Yes. I believe that there are
12 complications, delays, and increased costs
13 throughout this series of steps that are
14 required to distribute royalties timely and
15 efficiently. I think in step one, the first
16 area of confusion will be with the licensees
17 themselves, who do they report to, who do
18 they pay, how much do they pay, how do they
19 figure out their split among the designated
20 agents. For them when they call, for
21 example, Sound Exchange, they get consistent
22 information about the statutory license,

1 about the rates and terms and what they have
2 to do to comply. Now do they have to call
3 all the designated agents to make sure that
4 they're operating under the same
5 understanding with respect to the license,
6 so I think it will be difficult for the
7 licensees, in the first instance.
8 The actual splitting of the
9 money, I'm not sure how that will occur,
10 because you would essentially have to go
11 through this entire process practically to
12 distribution, and then come back and say
13 okay, well, that results in so much money
14 going to this designated agent by virtue of
15 which artists and copyright owners are
16 represented by the individual designated
17 agents, so I'm not sure even how the
18 payments are made. And if there's some
19 approximation of how the payments are to be
20 allocated among the multiple, the two, the
21 ten, hundred designated agents, I would
22 fully expect there to be disputes about

1 shares of who gets what. I don't know how
2 those disputes get resolved, but I assure
3 you that those disputes will cause delays in
4 the distribution to copyright owners and
5 artists.
6 In addition, Sound Exchange
7 doesn't spend any significant amount of time
8 requiring compliance from its licensees so,
9 for example, someone doesn't pay on time and
10 we send them a late payment notice, if Sound
11 Exchange does that and receives a payment
12 for late fees, how is that split among the
13 designated agent? So audits and enforcement
14 is another area of how do you fairly spread
15 those costs among all the designated agents
16 to avoid this idea of free rider, where one
17 designated agent might engage in an audit on
18 the payment side of things, and resulting in
19 additional royalties to copyright owners and
20 artists, and yet the free rider agent
21 benefits from those additional royalties
22 without having done a single thing, so that

1 is with respect to payments and the logs,
2 those are some of the complications, delays
3 and additional costs that I see.
4 Q Do you see additional
5 inefficiencies and costs in the matching and
6 research aspects of the collection and
7 distribution operations?
8 A Sure I do. I mean, again, Sound
9 Exchange firmly believes that the proper
10 identification of what that sound recording
11 is, is essential to the accurate and prompt
12 payment of the royalty. We expend resources
13 both manual and automated, and we're
14 constantly refining our matching algorithm
15 and efficiency with the use of technology.
16 Another designated agent may decide you know
17 what, we're just not going to spend those
18 kinds of resources. We'd rather keep that
19 money for something else, and not process
20 the logs in the same level that Sound
21 Exchange or another designated agent might,
22 which will ultimately result in one

1 designated agent thinking the sounding
2 recording and the log is something, and
3 another designated agent saying it's
4 something else all together. And again,
5 this all leads to the improper distribution
6 of royalties, so I think just in these two
7 steps alone, there's a free rider issue, as
8 well as a different result among the
9 designated agents.
10 Q Moving to account assignment, do
11 you see additional inefficiencies and costs
12 from a multi-agent system, or a multi-tier
13 system?
14 A Yes. The account assignment, and
15 remember, that's identifying that it's
16 Fleetwood Mac, and then identifying all the
17 different versions of the group, and all the
18 different pay splits on the track. This is
19 where my head explodes. I don't know how
20 you are going to figure out account
21 assignment when you've got two or more
22 designated agents applying different policy

1 splits, or different valuations of the
2 performance. I mean, one designated agent
3 could say, you know what, drummers always
4 deserve 5 percent more than everybody else,
5 and Sound Exchange values every performer,
6 feature performer evenly, and you could end
7 up in a situation where the claim on the
8 sound recording is in excess of 100 percent.
9 And I just don't know how you work that with
10 multiple agents who are operating under a
11 single license, the point of which is to pay
12 all artists and all copyright owners fairly,
13 without respect to membership in an
14 organization, and then you get the situation
15 where rules are being established by
16 designated agents that are inconsistent with
17 one another. So I don't know how this
18 works.
19 Q Would you expect to see
20 competition among designated agents for
21 drummers or trombone players?
22 A Well, I mean, that's the extreme

1 of this. Of course, that could happen, but
2 I also see the designated agent spending
3 money just in general on marketing to
4 artists and copyright owners to have them
5 join their organization, an unnecessary
6 expense, in my view. We would much prefer
7 to spend those funds on finding actual
8 artist contact information to effect the
9 royalty, rather than competing for
10 performers to join our organization. And,
11 again, there's no differentiation between
12 members and non-members under the statutory
13 scheme.
14 Q Moving to the allocation and
15 distribution of royalties, do you see
16 additional inefficiencies and costs by a
17 multi-agent or a multi-tier system?
18 A Now that piece almost has to
19 happen first in order to make the initial
20 distribution among the designated agents, so
21 this whole thing gets out of order. But
22 let's presume we were even able to make the

1 original allocation of the royalties among
2 the agents, and now we're at the point where
3 there's an allocation and distribution. As
4 I said earlier, we do have the situation
5 where based on the reports of use from the
6 licensees, we've inadvertently paid an
7 artist or a copyright owner for something
8 that wasn't their's. Now we're in a
9 situation where you have two or, I don't
10 know, 50 or however many designated agents,
11 and we're seeing that we inadvertently paid,
12 or allocated this royalty to one of their
13 artists that they represented, versus one of
14 our's, and now you've got inter-agent
15 adjustments going on. How you ever
16 reconcile that, resolve disputes around
17 that, how the money gets reattributed
18 properly to the right designated agents, it
19 would require so much in terms of systems
20 development, accounting systems, and also,
21 some agreement among the agents, so I just
22 don't know how any of that would work.

1 Q In looking at these various
2 systems, the single agent, the multi-agent,
3 and the multi-tier system, did you look at,
4 or did you consider other models in other
5 countries or in the United States?
6 A We've looked at how other
7 countries handle the similar right to the
8 statutory license, and most countries have a
9 single entity charged with the
10 administration of the license. Even
11 countries where the copyright owner was
12 administered apart from the featured artist,
13 we're seeing mergers occur. For example, in
14 the UK, PBL which represents the copyright
15 owners, and Pamra and Aura, which represent
16 the artists, have now merged into a single
17 type line, and it's for the very reasons of
18 efficiency, to eliminate cost duplication,
19 and to better serve copyright owners and
20 artists collectively, that they have merged.
21 And another example in the UK is with the
22 Mechanical Rights Society and the Performer

1 Society, MCPS and PRS, they also merged,
2 again for efficiencies and economies of
3 scale. And when you look at countries that
4 have multiple agents, for example, Brazil,
5 which at one point had 14, it's highly
6 dysfunctional, with tremendous delays,
7 royalties never getting anywhere near the
8 entitled parties, and little by little we're
9 seeing a reduction from those 14 societies.
10 I think they're down to maybe eight now, so
11 elsewhere in the world the model when you're
12 comparing the statutory license with a
13 similar right elsewhere, it's a single
14 organization.
15 Q Did you consider ASCAP, BMI, and
16 SESAC, all of which administer public
17 performance rights for music publishing?
18 A You know, that's not an apples-
19 to-apples comparison. Sound Exchange is
20 operating under a statutory license, that's
21 what's at issue here, and its rates and
22 terms that will be decided in this

1 proceeding. ASCAP, BMI, and SESAC are more
2 akin to the direct licensing, where on
3 behalf of members, their members, and their
4 members only, negotiate in the marketplace
5 rates and terms for a variety of uses of
6 their copyrights. They engage in these
7 negotiations and rate settings independent
8 of one another, and only for their members.
9 In a statutory license, it's really
10 everybody, it's all the copyright owners,
11 it's all the artists, without distinction of
12 membership, and if a copyright owner wishes
13 to escape the statutory rates and terms,
14 they are welcome to do that through a direct
15 license. And so that this is in no way a
16 comparison and, therefore, was not a model
17 we considered.
18 Q Do your comments about the
19 additional costs and inefficiencies apply
20 whether there are two, or ten, or fifty
21 designated agents?
22 A Well, the moment a second

1 designated agent is introduced into the
2 statutory scheme, you're going to incur
3 costs in systems, revamping systems,
4 revamping business processes, retraining
5 staff, developing marketing campaigns, so
6 all the costs are introduced the minute a
7 second designated agent exists. And it only
8 increases exponentially with each and every
9 other designated agent that comes along.
10 Q Would you also envision delays in
11 the distribution of royalties?
12 A I have no doubt there will be
13 extensive delays in distributions.
14 Q Now has Sound Exchange looked at
15 the cost that would be required to modify
16 its systems for a multi-agent system?
17 A Yes, we have looked at the cost
18 of just modifying the systems, and I believe
19 it's between a quarter of a million and
20 $350,000 simply to remodel this, and that's
21 just the start, I mean, that's just a drop
22 in the bucket of the way the costs will

1 increase. That's just technology, that's
2 just this piece of the technology.
3 Q So that $250,000 does not include
4 personnel and other costs?
5 A It does not.
6 MR. PERRELLI: Your Honor, if
7 this is a time for a break, I imagine I have
8 20 minutes or so remaining.
9 CHIEF JUDGE SLEDGE: We'll recess
10 for 10 minutes.
11 MR. PERRELLI: Thank you.
12 (Whereupon, the proceedings went
13 off the record at 3:13 p.m. and went back on
14 the record at 3:28 p.m.)
15 CHIEF JUDGE SLEDGE: Thank you.
16 We'll come to order. Mr. Perrelli?
17 MR. PERRELLI: Thank you, Your
18 Honor.
19 BY MR. PERRELLI:
20 Q Ms. Kessler, just to finish up
21 the subjects that we were talking about
22 before the break, have you heard from

1 licensees about whether they would prefer to
2 pay and send reports of use to a single
3 licensee -- sorry, a single designated agent
4 or multiple designated agents?
5 A No, the licensees have repeatedly
6 stated that they want to submit payments,
7 paperwork, and reports of use to just one
8 agent.
9 Q Now, in SoundExchange's history,
10 have you experienced working in a multi-
11 agent system before?
12 A Yes. RLI was designated for the
13 '98 to '02 period, and we did have occasion
14 to attempt to work with them on one aspect
15 of the distribution services.
16 Q Can you explain that experience
17 of attempting to work with RLI?
18 A Yes. We were working under a
19 deadline where we had to post a statement of
20 account on our website and make that
21 available to licensees for the calculation
22 of their royalty obligation. And as we

1 understood, the designated agents were
2 required to work together to come up with,
3 you know, paperwork, the statements of
4 account that were jointly created.
5 And so in the first instance, it
6 was difficult to get the meeting with RLI's
7 principals to even begin the conversation.
8 And, again, we were working under a
9 deadline, so time was of the essence. We --
10 you know, finally after, you know, a couple
11 of tries we were able to get a meeting in
12 the form of a conference call with Ron Gertz
13 and Doug Brainin -- I think he's the CFO of
14 MRI or RLI or both of them.
15 And they clearly had not given
16 any thought to the statement of account.
17 They had little or no opinion about the
18 statement of account or how this would work.
19 They asked questions that I found irrelevant
20 to the purpose of that meeting, which was to
21 come up with a statement of account. And so
22 SoundExchange went ahead on its own and

1 designed the statement of account and posted
2 the statement of account for all licensees,
3 irrespective of, you know, how many
4 designated agents or who ultimately would be
5 administering the royalties.
6 So that experience led me to
7 believe that if on something as simple as a
8 statement of account there wasn't
9 cooperation, I couldn't imagine on the more
10 complicated issues that might arise that
11 they would be any more cooperative.
12 Q Now, in that 1998 to 2002
13 timeframe, did RLI distribute any royalties
14 under the statutory license?
15 A No, not to my knowledge. They
16 didn't come forward with -- as representing
17 any copyright owner or artist during that
18 time period.
19 Q Since that 2002 timeframe, can
20 you describe SoundExchange's experiences
21 with RLI?
22 A Yes. In the '03/'04 period where

1 the rates were ultimately pushed forward and
2 settled by the parties, RLI forced a CARP
3 based on the sole term of the designated
4 agent status. And, of course, SoundExchange
5 encountered costs in both money and time
6 preparing a case to argue our position on
7 the multi-agent scheme. And inexplicably,
8 before the proceeding commenced, RLI
9 withdrew, and, you know, SoundExchange had
10 already incurred not insignificant
11 expenditures preparing that case.
12 Q Again, since that 2002/2003
13 timeframe, have you -- what efforts have you
14 seen RLI undertake on behalf of copyright
15 owners and performers?
16 A They have done absolutely
17 nothing. In fact, they have worked contrary
18 to the interests of copyright owners and
19 artists, supporting the rates of the music
20 users, not trying to maximize the benefit to
21 copyright owners and artists. They have not
22 advocated for census reporting, which would

1 ensure the accurate and fair distribution of
2 royalties to copyright owners and artists.
3 I have seen no indication of them
4 working for copyright owners' and artists'
5 interests. And, in fact, you know, their
6 sister company, MRI, as I understand it, the
7 objective is to get the lowest possible
8 price for -- that music users have to pay
9 for copyrights.
10 MR. STEINTHAL: Your Honor, I
11 rise to object on foundation grounds to the
12 last comment, which is also unresponsive to
13 the question itself.
14 MR. FREUNDLICH: I raise the same
15 exact objection. There was no foundation.
16 She is speculating about what MRI does or
17 doesn't do.
18 MR. PERRELLI: I'm happy to ask
19 her questions about what MRI does or doesn't
20 do, and to lay the foundation for that
21 question.
22 CHIEF JUDGE SLEDGE: You don't

1 resist their motion.
2 MR. PERRELLI: I'm not going to
3 resist their motion. I'm happy to ask a
4 couple of questions.
5 CHIEF JUDGE SLEDGE: Objection
6 sustained.
7 BY MR. PERRELLI:
8 Q Ms. Kessler, are you aware of
9 what MRI's business is?
10 A To an extent, yes.
11 Q Okay. What is the extent of your
12 knowledge?
13 A They represent music users with
14 respect to musical works, and the objective
15 is to get the lowest possible price that
16 they have to --
17 MR. STEINTHAL: You Honor, I
18 again move to strike. There's no foundation
19 for her testimony as to what MRI's objective
20 is.
21 MR. FREUNDLICH: Same objection.
22 She is completely speculating.

1 CHIEF JUDGE SLEDGE: So the
2 objection is that "their objective is" as
3 opposed to "I observed that they."
4 MR. STEINTHAL: Right. I don't
5 believe she has established a foundation for
6 commenting on what MRI's business is or what
7 its objective is.
8 CHIEF JUDGE SLEDGE: Sustained.
9 MR. PERRELLI: I'm just going to
10 move on, Your Honor.
11 CHIEF JUDGE SLEDGE: All right.
12 BY MR. PERRELLI:
13 Q Ms. Kessler, at the end of your
14 written testimony there are a number of
15 terms -- issues discussed, specific areas,
16 specific terms issues. Why is SoundExchange
17 proposing changes to a number of terms in
18 the statutory license?
19 A We have found that, through our
20 experience in administering the license,
21 that there are some things that we propose
22 be changed, in some cases tweaks or in some

1 cases terms that we would like changed or --
2 in order for us to fulfill our mission of
3 the prompt and efficient distribution of
4 royalties.
5 I believe that, you know, a lot
6 of these were established before there was
7 an agent in the role of administering the
8 royalty and the license, and so there are
9 just some things that we believe should be
10 adjusted in order, you know, to facilitate
11 the prompt distribution of royalties.
12 Q Among the recommendations that
13 you make are some changes to issues related
14 to late payment. Can you describe those for
15 the Board?
16 A Sure. Right now there's -- when
17 a licensee pays late, there is a nominal
18 late fee that is required on the amount of
19 royalties paid. And, you know, it's a low
20 amount and we would hope for something that
21 would give us more teeth and more -- and
22 incentivize licensees to pay their royalties

1 on time.

2 You know, the prompt payment of

3 royalties is the first step in a prompt

4 distribution. And so, you know, at the low

5 amount of interest that they're paying on

6 their late fee, in conjunction with the only

7 other remedy available to us, which would

8 likely be a copyright infringement suit, we

9 had hoped that there would be something in

10 between where penalty and interest could be

11 applied to the late payment of royalties.

12 Q And has SoundExchange indeed had

13 problems with late payments?

14 A Yes, we've had problems with both

15 non-payment and late payment that have gone

16 on for weeks, months, years. And so

17 particularly where there are licensees who

18 are paying just minimum fees or small

19 amounts, it's not likely going to be the

20 economic decision of the copyright owners to

21 bring an infringement action, yet those

22 licensees continue to enjoy the use of the

1 sound recordings on their services.
2 Q Have you also had problems with
3 late or failure to submit statements of
4 account and reports of use?
5 A Yes. This is a problem for
6 SoundExchange. There's no penalty, there's
7 no late fee assigned to the non-compliance
8 of submitting paperwork. And so, again, but
9 for a copyright infringement action, I don't
10 know of any way that we can, you know,
11 encourage or incentivize licensees to submit
12 their paperwork timely and as required by
13 the regs.
14 Q Has SoundExchange had problems
15 under the current confidentiality
16 regulations that govern the statutory
17 license?
18 A Yes. There are a couple of
19 specific areas where the confidentiality
20 clause causes SoundExchange some difficulty
21 and frustration. You know, the first is
22 with respect to the audit provision. You

1 know, our Board is comprised of copyright
2 owners and artists, and we're unable, under
3 the current terms, to share the results of
4 an audit with copyright owners.
5 And so unless we get permission
6 from the licensee that we've audited, we're
7 unable to share information from the audit
8 report that would allow them to make the
9 appropriate next step business decisions of
10 how to proceed, you know, based on the
11 royalties at stake as determined by the
12 audit process.
13 We're also unable to share
14 payment history of a particular licensee
15 with our copyright owners. Remember that
16 our copyright owners are sitting on our
17 Board. Our Board approves, you know,
18 financial and programmatic, you know,
19 activities of SoundExchange, and so we're
20 only permitted to share with them in the
21 aggregate our receipts, but not with respect
22 to any particular licensee.

1 This is particularly problematic
2 with respect to copyright owners trying to
3 determine if there are other things that
4 they want to engage in with respect to, you
5 know, a potential infringement or non-
6 compliance by the licensee. Without being
7 able to share that information, they are
8 unable to make those business decisions.
9 Q What information can you share
10 with copyright owners about a particular
11 licensee that's, say, delinquent in payment?
12 A What we can say -- you know, that
13 they have a history of paying on time or not
14 paying on time, but not the amount of money
15 at risk.
16 Q Why do the copyright owners want
17 that information?
18 A Because one of the factors in
19 determining what next actions to take is,
20 you know, the cost of, you know, engaging in
21 copyright infringement action makes sense
22 against the amount of royalties that may be

1 collected.

2 Q You also make some proposals

3 about audit provisions. Can you explain the

4 audits that SoundExchange currently

5 conducts?

6 A Yes. We have conducted two

7 audits of the pre-existing services, and we

8 have noticed about a dozen audits that we

9 intend to conduct this year.

10 Q And without going into specific

11 details about what you found in any

12 particular audit, can you explain generally

13 what you find in these audits?

14 A Well, what we find primarily is

15 that it's very -- it's impossible to share

16 the results of the audit with our Board or

17 with our appropriate committees because of

18 the confidentiality issues. And so it makes

19 it difficult for us to go to the next step

20 in resolving issues identified in the audit.

21 MR. PERRELLI: I believe, Your

22 Honor, I think we will -- I will conclude

1 the examination of Ms. Kessler and leave the
2 rest of the specific details to her written
3 testimony. Thank you, Your Honor.
4 CHIEF JUDGE SLEDGE: Thank you.
5 You're not next, Mr. Freundlich.
6 MR. FREUNDLICH: Okay, Your
7 Honor. Can I just ask a quick question? I
8 didn't catch the last words that he -- that
9 you said. Leave the rest of the details --
10 I just didn't hear what you said.
11 CHIEF JUDGE SLEDGE: For her
12 written -- for her written statement.
13 MR. FREUNDLICH: Oh, okay. I'd
14 like to ask to go next, but if it's Your
15 Honor's preference that I don't, then I'll
16 stand back.
17 CHIEF JUDGE SLEDGE: Based on our
18 rotation that has been established, you're
19 pretty near the end of the line.
20 MR. FREUNDLICH: All right.
21 CHIEF JUDGE SLEDGE: Mr.
22 Steinthal?

1 MS. ABLIN: Your Honor?
2 CHIEF JUDGE SLEDGE: Yes, ma'am.
3 MS. ABLIN: If I may, before we
4 move into the cross examinations, I'd just
5 like to ask for some clarification on one
6 thing. I understood Your Honor's ruling
7 earlier today about Ms. Kessler talking
8 about census versus sample that sample --
9 I'm sorry. I understood Your Honor's ruling
10 earlier today about Ms. Kessler talking
11 about -- testifying about census versus
12 sample reporting -- I just wanted to clarify
13 whether the denial of that motion also
14 applied to the exhibits, which I don't
15 believe I squarely raised, but I would like
16 to do so now just to, again, receive further
17 clarification.
18 Exhibits 414 through 418 were a
19 set of pleadings that had been filed in
20 various recordkeeping proceedings that
21 lawyers, I believe, from the Recording
22 Industry Association of America, and then

1 SoundExchange had filed, signed by their
2 counsel, that dealt with various
3 recordkeeping issues that they have proposed
4 to admit through Ms. Kessler's testimony.
5 I just would, again, squarely
6 move to -- or, you know, seek clarification
7 whether you have also denied moving to
8 strike those and just point out that if
9 those stay in evidence -- and perhaps this
10 is just going to be the unfortunate result
11 -- certainly the parties on this side would
12 feel compelled, if there's record evidence
13 on recordkeeping issues handled elsewhere
14 that's admitted into the record, you know,
15 in the upcoming rebuttal phase, we're going
16 to feel compelled to put those same
17 submissions in if, you know, Exhibits 414
18 through 418 stay.
19 So if you could just clarify,
20 Your Honor, if those -- if my motion to
21 strike those exhibits was denied, and, you
22 know, we can act accordingly in the next

1 phase.

2 CHIEF JUDGE SLEDGE: Ms. Ablin,

3 that's not a proper form to address that

4 issue, in an oral motion in the middle of

5 the testimony, so you'll present that in

6 writing or in more -- consistent with the

7 regulations on dealing with the provisions

8 of a written statement.

9 MS. ABLIN: Okay. We will do

10 that, Your Honor, in the written submission.

11 CHIEF JUDGE SLEDGE: Thank you.

12 MS. ABLIN: Thank you.

13 CROSS EXAMINATION

14 BY MR. STEINTHAL:

15 Q Good afternoon, Ms. Kessler.

16 A Good afternoon.

17 Q You mentioned at the beginning of

18 your testimony that there were some 570

19 webcasters I think that you said that were

20 making payments, is that right?

21 A That's correct.

22 Q Is it correct that more than 90

1 percent of the webcasting royalties come
2 from less than 10 of those webcasters?
3 A I don't know if it's -- it's 10.
4 You know, it could be as many as 15 or 20,
5 but it's not 10.
6 Q Okay. The 570 webcasters that
7 are making payments, do they include the
8 simulcasters or radio signals?
9 A Yes, they do.
10 Q Do you know roughly how many of
11 those 570 are engaged in simulcasting as
12 opposed to non-simulcast webcasting?
13 A Well, it's difficult to ascertain
14 from that number, because, again, the
15 broadcast simulcasters would be counted once
16 as a broadcast group, but they would
17 represent quite a large number of stations.
18 So I don't have that figure for you.
19 Q But in terms of that 570, roughly
20 how many are entities that are engaged in
21 simulcasting?
22 A I don't know the answer to that.

1 Q Is it over half?
2 A I wouldn't expect so, no.
3 Q And you mentioned that there were
4 difficulties in reporting or that there was
5 bad reporting from your perspective. Can
6 you draw any conclusions as to what
7 categories of companies have been the
8 greatest violators in your view, compared to
9 others?
10 A No, I can't. I never quantified
11 the data in that regard. We load logs and
12 for efficiencies consolidate those
13 performances irrespective of licensee for
14 the purposes of the identification and the
15 account assignment. So there was never any
16 operational reason to examine the data in
17 that regard.
18 I will tell you that it has not
19 been my experience that one licensee is a
20 particularly bad actor or a bad data
21 reporter over another. I think that, you
22 know, each log has its issues, and, you

1 know, each log is dealt with by staff in the
2 manner that I described earlier.
3 Q Are there specific objections you
4 have with the reporting made by the DiMA
5 companies?
6 A I'm not sure --
7 Q I'll be more specific, so that --
8 in particular, Microsoft and AOL and Yahoo
9 and Live365 that are testifying in this case
10 for DiMA?
11 A I don't understand the question.
12 That they've objected about the reporting or
13 --
14 Q No, no.
15 A -- that I have objections or
16 SoundExchange has objections --
17 Q Right. That SoundExchange --
18 A -- to the way they're reporting?
19 Q -- had specific objections with
20 the manner of reporting by those four
21 companies.
22 A Well, remember that there aren't

1 any regulations in place with respect to the
2 format and delivery of those reports of use.
3 As a result, those webcasters who
4 voluntarily report, the reports are coming
5 in inconsistently. But I would expect that
6 once the regulations are promulgated that
7 SoundExchange would work with their
8 licensees -- your DiMA companies -- to work
9 through those issues.
10 Q And when you talk about the
11 regulations being promulgated, through what
12 process does that happen? It's a process
13 different than this proceeding, correct?
14 A Well, prior to CARP reform, the
15 process was through a notice in
16 recordkeeping proceedings.
17 Q Right. And is it your
18 understanding that the notice in
19 recordkeeping proceeding process still goes
20 on with respect to matters that have been
21 subject to those kinds of proceedings
22 before?

1 A I understand that terms are under
2 the auspices of this Board, and I don't know
3 the -- where the notice in recordkeeping
4 will be determined.
5 Q Okay. And by that, you mean
6 where -- the issues relating to
7 recordkeeping and reporting?
8 A Correct.
9 Q I just want to ask you some
10 questions about the terms portion of your
11 testimony, which start at page 24, and as to
12 which Mr. Perrelli just asked you a few
13 questions towards the end of your
14 examination.
15 A Thank you. I'm sorry. You said
16 page?
17 Q It starts at page 24. Section 3
18 of your written testimony is modifications
19 needed to license terms. And you only spent
20 a little bit of time on your oral testimony
21 on that subject, and there are certain
22 questions I wanted to ask about that.

1 First of all, the importance of
2 census reporting, which starts at page --
3 starts on page 25 of your written testimony,
4 and you did testify a bit about that this
5 afternoon. Is it your testimony, Ms.
6 Kessler, that no sample can be accurate for
7 purposes of providing SoundExchange with
8 ample information to distribute royalties
9 collected?
10 A No. My testimony is that I have
11 never seen any evidence by any of the
12 licensees that prove that a sample results
13 in the proper allocation and distribution of
14 royalties. That wouldn't disenfranchise
15 certain artists or copyright owners.
16 Q Well, you're familiar with the
17 fact that internationally it's common, is it
18 not, in particular for radio, for
19 collections by collecting societies to be
20 distributed on a sample basis, correct?
21 A I'm not aware if that's common.
22 I do know that over the years other

1 organizations that distribute royalties are
2 moving to census reporting that is conducted
3 through technology, you know, monitoring
4 services of each and every performance.
5 Q But are you familiar with the
6 fact that, for example, in broadcast radio
7 the general practice of collecting societies
8 has been to distribute based on a sample and
9 not a census?
10 A Well, no, I understand that ASCAP
11 and BMI have been monitoring radio stations
12 for quite some time now through their joint
13 ventures with technology services companies
14 like Media Guide to -- and those are census
15 collection. I mean, they collect all the
16 data. And one of the purposes for that is
17 to distribute royalties.
18 Q Is it your testimony that they
19 actually distribute for broadcast radio
20 based on a census rather than a sample at
21 this point?
22 A I don't know if they are or

1 they're not. I know that the -- one of the
2 chief purposes of investing in this joint
3 venture was to collect the broadcast
4 performance information.
5 Q And while I would certainly agree
6 with you that a census is better than a
7 sample in terms of getting more information,
8 is it correct that samples can be created
9 that are generally accurate barometers of
10 the greater use being made of a given media?
11 A Well, since all that information
12 is in the possession of your clients and the
13 broadcasters, I would like to see that
14 analysis done on that census reporting
15 applying various samples to see if there is
16 a mathematical and scientific and
17 statistical way. I have never seen any
18 evidence, and to the contrary
19 SoundExchange's own analysis reveals, you
20 know, that based on information reported by
21 certain webcasters to SoundExchange's sample
22 does not remotely result in the fair

1 distribution of royalties to artists and
2 copyright owners.
3 Q Other than that one snapshot that
4 you looked at, are you aware of any other
5 tests of samples that have been done of
6 webcaster performances under the statutory
7 license to see how accurate a sample could
8 be?
9 A I'm unaware, and I'm unaware of
10 any evidence put in by your clients in any
11 notice and recordkeeping proceeding that
12 would prove your supposition that sample is
13 appropriate.
14 Q I'm not supposing anything. I'm
15 just asking you some questions, okay?
16 A Well --
17 Q Now, in Section B, starting on
18 page 25 of your testimony, it deals with
19 your request that the terms state that the
20 failure to pay royalties when required,
21 followed by payment of a late fee, does not
22 preclude a copyright infringement claim. So

1 is it your testimony, then, that you want
2 the regs or the law to explicitly state that
3 non-payment of a statutory fee could result
4 in copyright infringement penalties to the
5 entity that didn't pay on time?
6 A Penalties?
7 Q Copyright infringement penalties.
8 A Is your question about my written
9 testimony?
10 Q Yes.
11 A Can I take a moment and --
12 Q Sure.
13 (Pause.)
14 A Can you repeat your question,
15 please?
16 Q I first want to find out what the
17 proposal is. Is the proposal that if a
18 statutory licensee doesn't pay on time that
19 you want the statute to read, or the regs to
20 read, that a statutory licensee can be
21 liable for copyright infringement for having
22 failed to pay its statutory royalties?

1 A The objective of this request to
2 change to the term is so that a persistently
3 delinquent licensee who doesn't pay on time
4 and, in fact, could go months and, you know,
5 in one case years of not paying their
6 statutory obligation had simply, by paying
7 those royalties and getting those up to date
8 and paying the attendant late fee, does not
9 absolve them from a potential copyright
10 infringement action.
11 Q So you -- well, let me ask it
12 this way. Do you have any basis that you're
13 aware of for legislating that the failure to
14 pay a licensee fee during a time period when
15 someone is operating under a statutory
16 license could render that entity liable for
17 copyright infringement during that time
18 period?
19 A I'm not an attorney, but my
20 understanding is that failure to comply to
21 the rates, the payment of the royalty
22 obligation and the terms, would expose a

1 licensee to a potential copyright
2 infringement action.
3 Q Did you have any basis for
4 proposing what is set forth in Section B of
5 your testimony in terms of support from any
6 other medium or any other statutory license
7 regime?
8 A Well, again, you know, this
9 requested change in the term is just to
10 clarify that simply by making the payment
11 and paying the late fees does not absolve
12 you or -- or inhibit a copyright owner from
13 bringing an infringement case, simply
14 because you ultimately, after many months or
15 however long of non-payment, you know,
16 finally paid your royalties and late fees.
17 That's all this is saying.
18 Q I understand what you're saying
19 it's saying. My question was: did you have
20 any basis, in other statutory licenses or
21 any other support, for the request to change
22 the terms being made in this aspect of your

1 testimony?
2 A You know, I think this is clear
3 in -- I don't remember -- maybe the -- with
4 respect to the PES. I'm not sure. But it's
5 not done in a vacuum. This is not a new
6 term.
7 Q But you don't cite PES, meaning
8 the pre-existing services, statutory
9 license?
10 A Well, it's not cited in the
11 testimony, no.
12 Q And are you familiar with the
13 fact that copyright infringement penalties
14 are pretty draconian, up to $150,000 per
15 infringement, if it's wilful? Are you
16 familiar with that?
17 A Well, I wouldn't agree that they
18 are draconian. I would agree that they are
19 not insubstantial.
20 Q Well, hypothetically, if a
21 licensee owed $150 for a given license
22 period, and it could be rendered liable for

1 just one infringement at $150,000, wouldn't
2 you believe that to be fairly draconian
3 relative to the amount of royalties due?
4 A No, I do not believe that.
5 CHIEF JUDGE SLEDGE: It would be
6 a big incentive.
7 MR. STEINTHAL: Excuse me?
8 CHIEF JUDGE SLEDGE: It would be
9 a big incentive.
10 (Laughter.)
11 MR. STEINTHAL: That's for sure.
12 BY MR. STEINTHAL:
13 Q Now, aren't there other less
14 draconian ways to arrive at the same result
15 that you'd like to get, meaning
16 incentivizing people to pay on time?
17 A I think that there are a
18 combination of changes that could be made
19 that would incentivize licensees to pay on
20 time. I do not, however, believe that if a
21 licensee doesn't pay on time, and doesn't
22 pay their late fees or otherwise comply with

1 the various aspects of the statutory
2 license, that a copyright owner -- again,
3 this isn't my decision, it would be the
4 copyright owners' decision -- if they chose
5 to pursue a copyright infringement action,
6 that's completely up to them.
7 Q Well, let me ask you this. Did
8 you consider, for example, whether to solve
9 the very problem you're talking about, which
10 is having to sue people for not making
11 payments on time -- did you consider, for
12 example, whether if the regulations were
13 amended to provide that in any action
14 brought by SoundExchange to collect for non-
15 payment SoundExchange would be entitled to
16 the attorney's fees incurred as part of any
17 such effort, might be another way of making
18 sure that SoundExchange is not out of pocket
19 for having to pursue late payers?
20 A I don't disagree that there are
21 ways in which SoundExchange could -- or the
22 regulations or the terms could be written to

1 incentivize folks to pay on time and to
2 submit the appropriate paperwork, and I've
3 made a number of suggestions in my testimony
4 of how that would happen. But it's not
5 SoundExchange's copyright. You know, we're
6 administering the license, and if a
7 copyright owner feels that non-compliance
8 with the terms of the license, you know,
9 warrants a copyright infringement action
10 they should absolutely be entitled to do so.
11 And one doesn't impact the other.
12 Q Then, why do you need to change
13 the rest? If your position is that a
14 copyright owner has the right anyway, why do
15 we have to saddle the regs with explicit
16 language of the nature that you're seeking?
17 A To make it clear.
18 Q So apparently it's not that
19 clear, is it?
20 A I wouldn't be requesting a change
21 in my testimony if it were crystal clear.
22 Q Okay. So it's not clear that an

1 entity that doesn't pay a statutory license
2 fee is liable for infringement simply for
3 failing to pay, correct?
4 A Again, failure to comply with the
5 statutory license -- it's my understanding,
6 as a non-lawyer, that a copyright owner does
7 have the avenue of bringing a copyright
8 infringement action.
9 Q But that was the very thing that
10 you just said was unclear, which is why you
11 wanted to clarify it, right?
12 A No. I wanted to make clear that
13 by simply finally making your payments
14 didn't absolve you of the -- or protect you
15 from a potential copyright infringement
16 action is what I said.
17 Q I guess that just puzzles me,
18 then, as to why you need the change in the
19 regulation.
20 Let me have you turn to page 27
21 where you talk about the interest penalty.
22 And is it true -- I mean, I'm just reading

1 from your testimony here on pages 27 to 29
2 -- that you seek a change in the regs to
3 increase the late payment fee from .75
4 percent to 2-1/2 percent per month, right?
5 A That's correct.
6 Q So if I get that right, that's 30
7 percent per annum?
8 A I trust your calculation.
9 Q Do you know of any other
10 collecting society that has late payment
11 fees as high as 30 percent per annum?
12 A Well, I think the point here is
13 that, you know, we want to disincentivize a
14 licensee from waiting and waiting and just
15 paying this nominal amount. And if they're
16 similar to the IRS that charges penalties
17 and interest when taxes aren't received,
18 that that would incentivize licensees to pay
19 on time.
20 Q Do you view SoundExchange as
21 operating essentially like the IRS?
22 A I do not, nor would I want to

1 undertake that massive undertaking. But I'm
2 using that as an example of, you know, the
3 concept of some sort of graduated or
4 escalating penalty for lengthy and repeated
5 non-payment of royalties that inhibit
6 SoundExchange's ability from making the
7 timely distributions that it is charged to
8 make.
9 Q Well, wouldn't a better analogy
10 be to whatever the late payment fees are
11 that are prevalent with collecting societies
12 in the United States and elsewhere?
13 A I don't know what those late fees
14 are, and I haven't really given thought to
15 whether those would be, you know, applicable
16 or not.
17 Q So where did --
18 A I was trying to --
19 Q I'm sorry. Where did the 2-1/2
20 percent come from, then?
21 A In my testimony I'm trying to
22 solve an administrative problem that we have

1 seen where licensees for months and months
2 aren't paying their royalties, or repeatedly
3 they do not pay their royalties on time.
4 And I can only surmise that having a rate of
5 .75 percent isn't a very big problem for
6 them if they continue to pay late.
7 And this is a suggestion of what
8 may give some teeth to the requirement --
9 and, I mean, it's the requirement in the
10 first instance -- to pay on time.
11 Q I understand that. I'm not here
12 to defend deadbeats. I'm here to try to
13 make sure that whatever the regs are that
14 are ultimately rendered are fair. Okay? Do
15 you know of any collecting society that
16 comes near a 30 percent annual rate for late
17 payments?
18 A I don't know if it would be near
19 or not, because I don't know what their late
20 fee percentages are.
21 Q Is it the fact that the number
22 just came out of SoundExchange's desire to

1 make sure that people pay on time, so let's
2 pick a high number, that they don't want to
3 have to pay as a late fee, without any
4 consideration of comparable late fees
5 existing in other collecting society
6 arrangements?
7 A Can you repeat the question?
8 Q Let me rephrase it this way. Is
9 it true that the number that was taken here
10 was taken without consideration of any other
11 comparable collecting society late fee
12 arrangements, the 2-1/2 percent per month?
13 A You know, I -- the number was
14 reflective of what credit card companies
15 charge when you don't pay on time, and it
16 was something that we felt was a substantial
17 enough late fee to disincentivize licensees
18 from paying late. That's where it came
19 from.
20 Q And when you talked before about
21 a graduated late fee for people that are
22 recalcitrant, this proposal isn't a

1 graduated late fee, is it? It's just a --
2 basically changing the late fee to 2-1/2
3 percent per month or 30 percent per annum,
4 is that right?
5 A Let me take a second to look at
6 this, please.
7 (Pause.)
8 Well, when I talked about the
9 graduated late fee, I was really referring
10 to the second paragraph on page 28, with
11 respect to the grace period, and then late
12 fees would be doubled.
13 Q Doubled on top of --
14 A Yes.
15 Q -- the 2-1/2 percent --
16 A So that's the --
17 Q -- per month or --
18 A -- graduated.
19 Q Right. Let's turn to page 29, if
20 you will. When you talk about penalties
21 should also apply for services that fail to
22 submit completed statements of account and

1 reports of use. Let me ask you this: did
2 you consider how one would resolve
3 situations where entities might not have
4 every bit of information on a SoundExchange
5 reporting form and what the implications
6 would be if they were subject to late
7 payment fees for failure to provide
8 information that doesn't exist?
9 A Well, my job is to consider how
10 SoundExchange distributes royalties timely,
11 efficiently, transparently, and accurately.
12 And so in order to get the royalties out on
13 time, we absolutely need a completed and
14 accurate statement of account. That's the
15 first step in this entire process and will
16 result in delays in distributions otherwise.
17 So what I considered was what
18 might be an approach to solve the problem of
19 missing statement of accounts or -- or
20 incomplete statements of account. And, you
21 know, there's a 45-day window after the end
22 of the month where the statements of account

1 can be prepared, and that seems ample time
2 to collect the information on the statement
3 of account -- a statement of account, by the
4 way, which the licensee opted to take.
5 So if they were unable to report
6 and comply with that, then perhaps the
7 statutory license wasn't the way for them to
8 go.
9 Q Well, we don't even have, as you
10 said at the beginning, final reporting and
11 recordkeeping regulations, right?
12 A That's on the reports of use, not
13 on the statement of account information.
14 Q But on the reports of use -- your
15 proposal here applies to both statements of
16 account and reports of use, right?
17 A Yes.
18 Q So you're proposing that there be
19 late payment penalties for incomplete
20 reporting for reports that we don't even
21 know what they're going to be, and whether,
22 for example, a given reporting obligation

1 would be applicable to every individual
2 licensee, right?
3 A So that was a multi-part
4 question, and I -- I'll try to address --
5 address it. You know, there is an
6 obligation for a licensee to report the use
7 of the sound recording to the copyright
8 owner. That is their obligation. The
9 mechanism for doing that is through the
10 reports of use. Reports of use have been in
11 operation with the pre-existing services for
12 a long period of time, and, you know, so the
13 -- you know, the idea that reports of use
14 are something brand new and unknown just
15 really isn't the case.
16 The piece of the notice in
17 recordkeeping that's outstanding is not what
18 data elements should be reported, and it's
19 what format should the file be in, and how
20 do you physically deliver that file or
21 electronically deliver that file to
22 SoundExchange. So maybe I'm not answering

1 your question.
2 Q Well, for example -- let me ask
3 it this way. I'll do it in little bits and
4 pieces.
5 A Thank you.
6 Q If we go to what an ISRC code is
7 -- would you tell the Panel what an ISRC
8 code is?
9 A Yes, I know what an ISRC code is.
10 Q What is it?
11 A It's the International Sound
12 Recording Code, which uniquely identifies a
13 sound recording.
14 Q And doesn't SoundExchange want
15 licensees to report the ISRC code with
16 respect to all of their transmissions?
17 A Yes, we do.
18 Q And isn't it true that it doesn't
19 exist with respect to all of the sound
20 recordings?
21 A Isn't it true that it doesn't
22 exist with all the sound recordings.

1 Q There isn't an ISRC available to
2 every webcaster for each sound recording
3 that it transmits, is there?
4 A Well, I know that at least for
5 the last 16 or so years ISRCs have been
6 assigned to new releases. I mean, that's
7 quite a bit of catalog. But we're not
8 asking for ISRC to the exclusion of other
9 information. If you read the reporting
10 requirements, you know, licensees have the
11 option of reporting the ISRC or the
12 marketing label on the album or some other
13 combination of fields.
14 So it's not -- it's not a
15 requirement. It's an either/or situation.
16 To the extent that you have it, it's a great
17 bit of information for us to have. If you
18 don't, then go ahead and report these other
19 elements.
20 Q But in a situation where you're
21 proposing that a report that's not
22 "complete" when so many fields of

1 information are being requested, could
2 render a licensee liable for late payment
3 penalties when they've done their best
4 efforts to comply, isn't that a bit penal
5 when the issue of what is complete or not
6 complete may depend on the eyes of the
7 beholder?
8 A I don't believe completion of the
9 file is remotely unknown. I think the
10 regulations are quite clear that if you're
11 going to report the ISRC you need not report
12 other fields. If you report the other
13 fields, you need not report the ISRC. A
14 computer program can examine that file and
15 ascertain, to the extent on a record-by-
16 record basis, what is complete and what
17 isn't, what has adhered to the reporting
18 requirements and what has not.
19 And, no, I do not think that it's
20 unreasonable to expect a licensee to comply
21 with, you know, the terms of the statutory
22 license when they get the tremendous benefit

1 of using copyright owner and artist sound
2 recordings. So I think they should report
3 and report timely and completely in order
4 for us to get through this entire process
5 and distribute the royalties.
6 Q And I'm not suggesting otherwise.
7 However, when a licensee is reporting, as
8 you said, hundreds of thousands of
9 performances of sound recordings during a
10 given reporting period, have you or have you
11 not seen situations where the licensee feels
12 that it has reported completely, and
13 SoundExchange feels that there are a couple
14 of things missing?
15 A Well, first, you know, the
16 regulations aren't final. So, you know,
17 currently while webcasters are required to
18 retain the information, they aren't yet
19 required to deliver those reports of use to
20 SoundExchange.
21 Secondly, you know, I'm not
22 really understanding your characterization

1 of reporting. I mean, first of all, you
2 know, I believe I have all the fields right,
3 but it's title of the sound recording, it's
4 the artist, it's the marketing label and
5 album, or the ISRC, and then the number of
6 performances in your transmission category
7 and some other elements about the licensee.
8 But with respect to identifying a
9 sound recording, it's a handful -- truly a
10 handful of fields. That is not unreasonable
11 when the sound recording and the information
12 about the sound recording and the act of
13 transmitting that sound recording is in the
14 possession of the licensee.
15 Q Isn't it true, Ms. Kessler, that
16 the basis of the information that the
17 licensee has is directly from the record
18 companies that provide it with the sound
19 recordings for purposes of airing?
20 A I'm not sure how webcasters
21 obtain the product from which they stream.
22 I don't know if they're getting it directly

1 from the record company or through a third
2 party, like a Loudeye. I don't know where
3 your clients are getting either the sound
4 recordings or the information.
5 Q So do you have any basis for
6 testifying that every one of those fields is
7 information that the webcasters have for
8 every one of the sound recordings that they
9 stream?
10 A You know, at the risk of
11 repeating myself, it's not that all five
12 fields are required. It's some combination
13 of them that are required. And the purpose
14 of it is to identify the sound recordings,
15 so we can pay it out. And if you don't
16 provide it to us, where will SoundExchange
17 -- SoundExchange won't know --
18 Q The suggestion is not --
19 A -- the information --
20 Q -- that you not get these
21 reports, ma'am. The suggestion is not that
22 at all. The question is whether, when you

1 have a proposal, that because a report in
2 your judgment is not complete, even though a
3 licensee has endeavored to provide
4 information in response to a reporting
5 obligation, that if there is this dispute
6 between SoundExchange and a licensee over
7 the completeness of their report, they
8 should be rendered liable for late payments
9 when they have endeavored to comply but
10 there is a dispute as to the completeness of
11 it.
12 A Well --
13 Q Is it your position that there
14 should be a late payment fee in that
15 circumstance?
16 A I firmly believe that a late
17 payment should be in place when a service
18 simply doesn't send us any report of use.
19 You know, SoundExchange's experience has
20 been -- as I've explained in this process,
21 we get misreported information, poorly
22 reported information, all the time. And we

1 expend a lot of resources to clean up those
2 -- those records of use in order to get our
3 job done and distribute the royalties.
4 If after all of this we still
5 don't know what the sound recording is
6 because one of your clients is reporting
7 Bach as the featured artist and -- or
8 various as the featured artist or something
9 like that -- we have no remedy to require
10 you, or we have no resource of funds to go
11 out and do something else, apart from
12 depleting the statutory royalties that are
13 going to copyright owners and artists.
14 The intent of this is to
15 disincentivize sloppy recording and the
16 untimely delivery of reports of use.
17 Q Is it your position that a good
18 faith effort to report, that nonetheless
19 yields not as much information as
20 SoundExchange would like, should render a
21 licensee liable for late payment fees?
22 A Well, let me answer it this way.

1 SoundExchange has demonstrated its
2 willingness to work with licensees on the
3 reporting issues. We have, and we will, and
4 we do. But to the extent that there is
5 repeated behavior of not making any attempt
6 to rectify issues identified in trying to
7 process those reports of use, I think, yes,
8 there should be a penalty of -- you know,
9 short of a copyright infringement action for
10 that repeated type of behavior.
11 But in the first instance, not
12 reporting -- you know, not even sending a
13 log in at all should definitely -- there
14 should definitely be a penalty for that. It
15 delays our entire process when we don't
16 receive logs on time.
17 Q You didn't answer my question.
18 In the instance where there is a good faith
19 effort to report -- I didn't say a recurring
20 problem, which is what you answered -- in
21 the instance of a good faith effort to
22 comply with the reporting obligations, and a

1 disagreement or dispute between
2 SoundExchange and the licensee as to whether
3 the information provided is complete, is it
4 your position that SoundExchange in that
5 situation should get a late payment fee?
6 A I think that SoundExchange -- and
7 I did answer this, and I said that to the
8 extent SoundExchange works with the
9 licensee, and when you see improvement in
10 the reporting, and we work together to try
11 to rectify the problems, then there is no
12 problem.
13 But to the extent that there is,
14 you know, no effort being made to report the
15 very basic five fields, not even -- some
16 combination of that information, in order
17 for us to definitively know what sound
18 recording was transmitted, yes, I think that
19 a penalty should be applied.
20 Q So when you said in your answer
21 that you didn't think there was a problem
22 when there's a good faith effort to comply

1 and an exchange of information between
2 SoundExchange and the licensee, I gather
3 when you said there was no problem that your
4 position is there's no need for a late fee
5 for that particular circumstance.
6 A I would say that when we work
7 with licensees and they demonstrate a
8 willingness and an improvement that
9 SoundExchange -- this is on a case-by-case
10 basis, and I don't have the particulars in
11 front of me, but it -- you know, it should
12 be our -- you know, we would have the option
13 of waiving those late fees. But not to have
14 them in the first instance would give us
15 absolutely no ability to require accurate
16 and timely reporting.
17 Q Well, isn't another way of
18 dealing with it to make clear that good
19 faith efforts to comply on a non-recurring
20 basis don't yield a payment -- a late
21 payment obligation as distinguished from
22 your request to have it across the board,

1 and the ability of SoundExchange and its
2 discretion to waive?
3 A I think that's an alternative,
4 but I prefer my recommendation.
5 Q Well, I'm sure you would.
6 CHIEF JUDGE SLEDGE: I'm somewhat
7 puzzled by your questions focusing more on a
8 fault issue. Isn't the issue who is in the
9 best position to provide information in
10 order to have an efficient system as opposed
11 to fault?
12 MR. STEINTHAL: Well, Your Honor,
13 I think that there is a -- this whole issue
14 of the terms is one that is full of data
15 issues and the like.
16 CHIEF JUDGE SLEDGE: Right.
17 MR. STEINTHAL: It's not just a
18 question of fault. In other words, our
19 objections here -- and we didn't have notice
20 of these proposed terms until SoundExchange
21 filed its case. And to the extent we have
22 any concerns about these terms, we will deal

1 with them in our rebuttal case. What I
2 wanted to do in this cross is just simply,
3 on certain of the issues that I know our
4 clients have some concerns about, ask
5 questions as to what the bases are and what
6 the limits are of the proposals.
7 So, for example, in this
8 instance, Your Honor, it's simply a question
9 of I don't dispute the notion that repeat
10 offenders that either don't pay or don't
11 report in a good faith, accurate manner
12 should be subject to some term provisions,
13 whatever they may ultimately be.
14 But one of the things that I have
15 trouble with in reading these terms is its
16 over-precautionary in favor of SoundExchange
17 approach. So, for example, there is a lot
18 of data here. The witness is talking about
19 the fields. We're talking about hundreds of
20 thousands of sound recordings. It is not
21 uniform.
22 The data that the webcasters get,

1 as you'll hear, is not uniform. Some of
2 them are old sound recordings where there is
3 no ISRC number. The data we get is -- you
4 know, we rely on the sound recording
5 providers that give it to us or what's in
6 the actual album or the CD that we, you
7 know, digitize to put on the server to get
8 that information.
9 So the universe of information
10 isn't perfect. And I'm simply trying to ask
11 questions, so that we can ultimately get to
12 a world in which good faith efforts to
13 report, which may not be exactly what the
14 licensors wanted to have, don't render
15 somebody responsible for financial
16 penalties. I'm not here to argue in favor
17 of deadbeats, as I said before.
18 CHIEF JUDGE SLEDGE: Right. But
19 my -- my question deals with -- because I
20 would think that the focus is on who is in
21 the best position to provide the
22 information, and perhaps some incentives are

1 required on one part or the other as part of
2 the terms in order to encourage people to do
3 that. But --
4 MR. STEINTHAL: But we're only in
5 the position --
6 CHIEF JUDGE SLEDGE: I hear you
7 all talking about who is at fault, and that
8 just doesn't seem very important.
9 MR. STEINTHAL: Well, this seems
10 to be -- their proposal seems to be a no-
11 fault situation, where if the data isn't
12 complete you get penalized. And if we don't
13 have the data, and we have no way of getting
14 better data than what we have, then that, in
15 our view, is an unfair system.
16 CHIEF JUDGE SLEDGE: But if
17 you're determined to be the one in the best
18 position to provide the data, then the fact
19 that you don't have the data is no excuse.
20 MR. STEINTHAL: Well, again, Your
21 Honor, the question is: do you require of a
22 licensee -- a statutory licensee to report

1 data that may not exist?
2 CHIEF JUDGE SLEDGE: Which
3 wouldn't be a very good regulation.
4 MR. STEINTHAL: No, it wouldn't
5 be.
6 CHIEF JUDGE SLEDGE: Yes.
7 MR. STEINTHAL: And that's our
8 concern.
9 CHIEF JUDGE SLEDGE: Right.
10 MR. STEINTHAL: And to have a no-
11 fault situation where completeness is
12 required, otherwise you have a late payment
13 fee, and if we don't have the information in
14 the first place -- and that's the nature of
15 the question. We will deal with these in
16 more detail.
17 CHIEF JUDGE SLEDGE: If the
18 system requires data that doesn't exist,
19 then the system needs changing.
20 MR. STEINTHAL: Exactly.
21 CHIEF JUDGE SLEDGE: Okay. Thank
22 you.

1 BY MR. STEINTHAL:
2 Q Now, there's a provision in your
3 proposed terms regarding audits. And am I
4 correct that the proposal is that
5 SoundExchange be permitted to audit
6 licensees with its own staff rather than
7 requiring independent outside auditors doing
8 the auditing of the licensees?
9 A If you don't mind, if you could
10 give me a page reference, so that I --
11 Q I believe it's in Section F
12 starting on page 35.
13 A Thank you. And I'm afraid I'm
14 going to have to ask you to repeat the
15 question.
16 Q Well, my question is whether the
17 SoundExchange position is that SoundExchange
18 ought to be able to conduct the audit with
19 its own staff rather than use an outside
20 independent auditor to do the auditing
21 function.
22 A Well, let me answer your question

1 this way. SoundExchange is confronted with
2 a situation where audits rather than being
3 financial in nature are data and analytic or
4 technical in nature. And so we are
5 wondering if there should not be a
6 clarification as to what an independent
7 auditor is.
8 And to the extent that
9 SoundExchange has the technical capability
10 of doing the data analytics, you know, our
11 -- the question is: what makes an auditor
12 independent or not? I believe that's what
13 we're getting at here.
14 Q Well, isn't the -- in the past,
15 under statutory licenses, hasn't
16 SoundExchange or its predecessor been
17 required when conducting audits to do
18 independent audits with outside auditors?
19 A Isn't SoundExchange required --
20 Q Or its predecessor, RIAA, when it
21 was doing --
22 A To engage an outside auditor.

1 The way I understand the regulation that's
2 in place right now is that an independent
3 auditor is to conduct the examination.
4 Q And in suggesting that
5 SoundExchange be able to do that itself
6 without requiring an independent auditor,
7 what's the basis for seeking to change a
8 system that requires outside independent
9 auditors to one where SoundExchange can
10 conduct the audits with their in-house
11 people? Or is that just something that
12 SoundExchange would like and it has put it
13 in the regs as something it would like?
14 A I'm just reading again.
15 (Pause.)
16 Where is this language that
17 you're referring to?
18 Q It -- I'm not sure where this
19 specific language is, but it's the subject
20 of what you're testifying to.
21 A I just want to make sure I
22 respond.

1 JUDGE WISNIEWSKI: You might try
2 point 5 on pages 38 and 39.
3 THE WITNESS: Thank you, Your
4 Honor.
5 MR. STEINTHAL: I thank you as
6 well.
7 THE WITNESS: You know, this
8 discussion is really about what does
9 independence mean. I mean, that's -- we've
10 come cross auditors who own copyrights, and
11 the question is, you know, does that
12 disqualify them under the independence
13 factor, because they own copyrights, as
14 opposed to independence from the licensor.
15 BY MR. STEINTHAL:
16 Q Well, then, is it your testimony
17 that SoundExchange is not seeking to be able
18 to conduct the audits, whether they be
19 technical or financial, through their own
20 in-house people?
21 A Well, I think to the extent that
22 SoundExchange develops technology that can

1 examine the server logs in a cost effective
2 manner that we should -- we would like to be
3 able to conduct those types of technical
4 data analytic audits.
5 Q And are you familiar with any
6 precedent and other statutory license
7 schemes that permits the licensor to conduct
8 audits through their own in-house staff
9 rather than through independent outside
10 auditors?
11 A Well, remember, you know --
12 Q Just yes or no would be fine.
13 A Well, I can't -- I can't just
14 answer yes or no. I can say that, you know,
15 SoundExchange doesn't own any copyrights.
16 We're administering a license. It's
17 copyright owners who own -- own -- and
18 they're not exactly licensing their content.
19 A statutory license is being taken by virtue
20 of it being established by the government.
21 So, you know, no, to answer your question,
22 I'm not aware of what you're referring to,

1 but I just wanted to make clear that we're
2 not the licensor. We're administrating the
3 statutory license.
4 Q And my question is simply whether
5 you are familiar with any other statutory
6 license scheme where the licensor or its
7 administrator is permitted to conduct the
8 audits through their own in-house staff as
9 distinguished from relying on outside
10 independent auditors?
11 A I'm not familiar with how other
12 statutory licensees conduct their audits.
13 Q And to be clear, is it
14 SoundExchange's proposal that just the
15 technical audits be able to be conducted by
16 their in-house staff or technical and
17 financial as well?
18 A Just the examination of the
19 server logs, the technical audits where
20 we're looking at the numbers of performances
21 reported on the statements of account.
22 Q So you're not seeking to have a

1 system in which the financial audits, to the
2 extent they're conducted, of a licensee be
3 conducted by anyone other than an outside
4 independent auditor?
5 A I had not contemplated that, no.
6 Q And there are outside independent
7 technical auditors, are there not, including
8 Mr. Bernstein's company, which is currently
9 under contract by SoundExchange to conduct
10 audits of the very licensees in this
11 proceeding?
12 A Royalty Review Council is one
13 auditor that we identified who may have the
14 capability of doing these types of audits.
15 We've identified him in our notices of
16 intent to audit.
17 Q And to be clear, that's in
18 relation to notices that were sent by
19 SoundExchange to, among others, AOL and
20 Yahoo and Microsoft and Live365, in
21 connection with a prior license period?
22 A That's correct.

1 Q Okay. Now, there's another
2 provision that you propose in relation to
3 the audits, which is on pages 39 to 40,
4 where you propose a change in the -- what
5 I'll call the error threshold for which
6 penalties are imposed where you basically
7 propose that the current 10 percent leeway
8 be changed to 5 percent, is that right?
9 A Yes.
10 Q And just to be clear, currently
11 under the regs, if an audit reveals a
12 differential of less than 10 percent, then
13 SoundExchange pays for the cost of the
14 audit. But if the differential is greater
15 than -- is 10 percent or greater, then the
16 licensee has to pay for the cost of the
17 audit. Is that what your --
18 A That's my understanding, yes.
19 Q And you propose to change that 10
20 percent to 5 percent, correct?
21 A That's correct.
22 Q Do you have any basis in other

1 statutory licenses for changing that 10
2 percent to 5 percent?
3 A No. The basis for this change is
4 that this could essentially result in a 10
5 percent discount to the licensee. It's that
6 for, you know, the audit period they could
7 underreport, you know, and not hit this 10
8 percent threshold and never have -- be
9 required to reimburse SoundExchange for the
10 cost of the audit. And it just seems like
11 an incentive to underreport, and it should
12 be tightened.
13 Q Do you have any evidence --
14 A It's a practical solution to a
15 problem that we have identified.
16 Q Do you have any evidence under
17 the current statutory license of licensees
18 deliberately underreporting by 9 percent?
19 A Do you mean with respect to
20 webcasters?
21 Q Yes.
22 A We haven't conducted the audits

1 yet.
2 Q So when you talk in paragraph 7
3 about -- at the bottom of page 39 you say,
4 "At a 10 percent threshold, services could
5 have an incentive to underpay by 9 percent,
6 knowing that the only likely consequence is
7 an obligation to pay the underpayment,
8 excluding for the moment the possibility of
9 an infringement action," that's just a
10 hypothetical assumption on your part,
11 because you've got no evidence that under
12 the current system people are actually
13 deliberately underreporting at 9 percent,
14 right?
15 A We have not conducted the audit,
16 so I have no results to examine.
17 Q And have you undertaken before in
18 making this proposal to look at other
19 collecting society arrangements to see what
20 the prevalent practice, if any, is with
21 respect to where there is a cost shift for
22 the cost of an audit in terms of

1 underreporting?
2 A No, I did not.
3 Q Did you look at any other
4 benchmarks to justify the change from 10 to
5 5 percent?
6 A No, I did not.
7 Q Take a look on page 42 and
8 Section I, the section on transmissions of
9 recordings of comedic performances. What's
10 the basis for this change?
11 A Again, it's a clarification that
12 a sound recording consisting of spoken word
13 is also compensable under the statutory
14 license as opposed to musical content.
15 Q Is it SoundExchange's position
16 that under the prior license comedic
17 performances are not required to be paid
18 for, and this is a change to -- to elaborate
19 upon the existing performances, subject to
20 license?
21 A SoundExchange believes comedic
22 performances are compensable, but we wanted

1 to make it absolutely clear in the event
2 that there might be some confusion with
3 respect to what licensees were required to
4 pay.
5 Q Have there been any disputes
6 between licensees and SoundExchange over the
7 issue of comedic performances?
8 A I wouldn't characterize it as a
9 dispute. I would characterize it as a
10 reporting issue that they were unaware that
11 they might have to report performances on
12 their spoken word channels, and that, in
13 fact, yes, they should and they are
14 compensable.
15 MR. STEINTHAL: No further
16 questions, Your Honor.
17 CHIEF JUDGE SLEDGE: Let me just
18 follow up on that last question. Is there
19 any difference between comedic reporting --
20 recordings versus any spoken word
21 recordings, or is that just --
22 THE WITNESS: This was one

1 specific clarification that we requested.
2 And to the extent that, you know, spoken
3 word booked as a sound recording -- it seems
4 to me it should be compensable as well.
5 CHIEF JUDGE SLEDGE: Thank you.
6 Okay.
7 CROSS EXAMINATION
8 BY MS. ABLIN:
9 Q Good afternoon, Ms. Kessler.
10 A Good afternoon.
11 Q It's good to see you again. I'd
12 like to start by asking you about a
13 statement or -- that you made on page 2 of
14 your testimony. Actually, let's go straight
15 to page 16, shorten this a little bit. Go
16 to page 16. That's the more direct
17 statement.
18 A Yes.
19 Q And I believe that back in
20 October 31st or thereabouts when direct
21 cases were due, you testified that
22 SoundExchange had allocated more than 55

1 million in royalties.
2 A Yes.
3 Q And just so we have all the
4 figures down, what is that number today?
5 A As of the distribution we're
6 conducting right now, that's nearly 70
7 million.
8 Q And that's out of how much in
9 royalties that's been collected?
10 A This distribution represents two
11 quarters of -- am I permitted to say this?
12 MR. PERRELLI: I'm not sure I
13 know the answer to -- to the extent the
14 witness is going to get into restricted
15 testimony about a particular licensee or
16 licensee payments, it may require us to go
17 into closed session.
18 CHIEF JUDGE SLEDGE: What
19 restricted testimony?
20 MR. PERRELLI: Well, I don't
21 believe she has any restricted testimony in
22 her direct testimony, but it's -- as I

1 understand from the witness' hesitance, she
2 may feel that the question requires her to
3 reveal some restricted information.
4 CHIEF JUDGE SLEDGE: Well, you'll
5 have to be more specific before you're
6 persuasive.
7 MR. PERRELLI: I'm not sure I can
8 be more specific, since I don't -- to the
9 extent that the question is seeking
10 information about specific payments by
11 specific licensees, that is information that
12 is -- has been treated as restricted under
13 the protective order, and this is
14 specifically confidential under the
15 regulations.
16 So to the extent that the
17 question seeks that information, and Ms.
18 Kessler was about to provide that
19 information, that information should be
20 restricted, and I think pursuant to the
21 regulations needs to be treated as
22 restricted.

1 CHIEF JUDGE SLEDGE: What
2 regulation?
3 MR. PERRELLI: It's 261 -- or --
4 sir, I believe it's the PES. If it relates
5 to the PES, it's 262 -- 261. And if we're
6 talking about --
7 CHIEF JUDGE SLEDGE: I'm sorry.
8 I didn't understand -- with your
9 interchange, I didn't understand your
10 answer.
11 MR. PERRELLI: If it relates to
12 the pre-existing subscription service, it's
13 36 CFR 261. If it relates to the satellite
14 digital audio radio services, that relates
15 to the prior -- a private agreement, which
16 is subject to the confidentiality provisions
17 within that agreement and has been treated
18 as restricted in this proceeding.
19 It may make sense for Ms. Ablin
20 to ascertain from the witness what types of
21 information she is seeking to elicit, so
22 that we can identify most appropriately the

1 basis for the restriction.
2 CHIEF JUDGE SLEDGE: You're
3 saying that under the regs 361 --
4 MR. PERRELLI: 261. I'm sorry,
5 Your Honor.
6 CHIEF JUDGE SLEDGE: -- 261 for
7 pre-existing.
8 MR. PERRELLI: Yes, sir.
9 CHIEF JUDGE SLEDGE: And 262 for
10 satellite?
11 MR. PERRELLI: For satellite,
12 that is the subject of a private agreement
13 --
14 CHIEF JUDGE SLEDGE: Private
15 agreement --
16 MR. PERRELLI: Which has
17 confidentiality provisions in it that
18 restrict that information.
19 CHIEF JUDGE SLEDGE: That's not
20 the question nor the answer that has been
21 given, so please proceed, Ms. Ablin.
22 MS. ABLIN: Thank you, Your

1 Honor.
2 BY MS. ABLIN:
3 Q And how much of -- I believe my
4 question right before the little break was
5 how much -- you had said that nearly 70
6 million in royalties had been allocated.
7 How much had been collected? That's
8 70 million that has been allocated out of
9 what bigger number?
10 A Oh, the total collected to date?
11 I don't know what that number is. What I
12 can say is that the distributions have taken
13 us through collections on the PES and the
14 SDARS through the end of 2005. Remember,
15 the webcasters haven't been required to
16 report because of the outstanding
17 regulations on format delivery and -- file
18 format and delivery specifications. So
19 without the logs we can't distribute those
20 royalties, and I just don't have that figure
21 off the top of my head.
22 Q Okay. So for the --

1 A So we've distributed royalties
2 collected through Q1 of 2004 for the
3 webcasters, and through the end of 2005 for
4 the PES and the SDARS.
5 Q Okay. Well, let's start with the
6 webcasters, the money that you have
7 distributed through Q1 2004. How much total
8 webcaster money, through that quarter, has
9 been collected? Putting aside what happened
10 after Q1 2004.
11 A I have innumerable reports that
12 say all this. Off the top of my head
13 sitting here in this moment, I can't recall
14 what the exact number of -- of what we've
15 distributed. I know that for the '98 to '02
16 period it was in excess of $10 million, but
17 I'd have to refer to my distribution reports
18 to be able to answer your question with
19 accuracy.
20 Q I guess what I'm trying to get at
21 is, out of the money, approximately -- out
22 of the money that has been collected through

1 Q1 2004 where you do have a basis for paying
2 it out, what percent of that money has been
3 distributed versus the percent that is
4 sitting in an account because you haven't
5 been able to find, for example, the
6 copyright owner that it needs to go to?
7 CHIEF JUDGE SLEDGE: I couldn't
8 hear your question.
9 MS. ABLIN: I'm sorry. I can try
10 to repeat all of that again.
11 BY MS. ABLIN:
12 Q I'm trying to get at how much --
13 of the total money that has come in, how
14 much of the -- for webcasters, through Q1
15 2004, how much of that money has been
16 distributed versus the money that has not
17 been distributed, for whatever reason, it
18 has either not been allocated or it is
19 sitting in an escrow account, because you
20 don't know how to allocate it?
21 A So with respect to the copyright
22 owners' share of the royalty, 85 percent of

1 the money has been paid through to the
2 copyright owner, and 15 percent is
3 unidentifiable, either because of our issue
4 with the sound recording or our issue of
5 locating the copyright owner that we should
6 pay.
7 Q For copyright owners, what about
8 the artist money?
9 A On the artist side, we're at
10 about a 60 percent pay-through rate to
11 featured artists, and we expect to hit the
12 65 percent pay-through rate by October.
13 Q October of this year.
14 A Yes.
15 Q And can you -- I know you can't
16 give a number with precision without looking
17 at reports, but can you just give a ballpark
18 of how much money we're talking about that
19 has come in, just to your best recollection?
20 A Well, if we take the 70 million
21 that we've allocated and approximate, you
22 know, between the artists and the copyright

1 owners, whatever that blended percentage is
2 paid through, that would result in what we
3 have been able to not only allocate but pay
4 through. So I think that blended rate must
5 be what is -- 35 and 15, it's, you know, 60
6 percent or whatever it happens to be.
7 Q Let me just make sure I'm on the
8 same page with you.
9 A Yes.
10 Q The 70 million -- because I don't
11 know that I am -- the 70 million that has
12 been allocated, has that amount also been
13 distributed, or has it just --
14 A Yes.
15 Q -- been allocated?
16 A Yes. No, we allocate and
17 distribute --
18 Q Okay.
19 A -- at the same time.
20 Q So when you testify that a
21 certain amount of money has been allocated,
22 it has also been distributed?

1 A No. The distinction is that the
2 allocation has occurred, and the
3 distribution from the sound recording to the
4 accounts has occurred but may not have
5 resulted in an actual payment due to the
6 lack of address information or identify of
7 the artist or copyright owner to pay. So we
8 distributed the funds to the sound recording
9 level. It just hasn't necessarily resulted
10 in a check to a recipient.
11 And those percentages that I was
12 describing to you, the 65 percent pay-
13 through or the 85 percent pay-through is
14 what we have been able to successfully
15 allocate and distribute in the form of a
16 payment. The remaining percentage is what
17 is in our unidentified escrowed accounts
18 waiting identification.
19 Q Okay. I'll leave that. Not
20 quite sure, but I'll have to -- I'll go
21 back.
22 A And if you're asking, you know,

1 what is collected versus what is allocated,
2 we're -- we've allocated through 2005 for
3 two of -- the PES and the SDARS. But due to
4 this lack of reporting on the webcasters, we
5 have only been able to distribute through Q1
6 of 2004.
7 Q And then, how does the amount of
8 money sitting in what I think -- I believe
9 you testified was called a suspense account,
10 how does that amount of money relate to what
11 is allocated?
12 A That is what has been allocated
13 but not paid out, so --
14 Q Okay. And about what percentage
15 of the total royalties collected for
16 webcasters is sitting in an expense account
17 -- a suspense account, rather?
18 A It's that similar percentage --
19 Q Okay.
20 A -- and spread across all our
21 royalty streams. Thirty-five percent of the
22 artist entitlement and 15 percent of the

1 copyright owners has yet to be distributed
2 in the form of a payment to those entitled
3 parties.
4 Q Okay. If you could -- I guess
5 you are on page 16 of your testimony still,
6 correct? And you said there that you
7 projected that SoundExchange's
8 administrative costs, exclusive of expenses
9 incurred in participating in proceedings
10 such as this one, at the time you projected
11 a figure of 12-1/2 percent as of October
12 2005.
13 A Yes.
14 Q Now, I thought I heard you say a
15 couple of hours ago that the actual number
16 was 7-1/2 percent?
17 A A little bit more than 7-1/2
18 percent for 2005. That's correct.
19 Q And did you ever provide -- did
20 you provide documents to your counsel that
21 showed the basis for this number? Because I
22 don't see -- obviously, it's a recent

1 number. It didn't appear in your written
2 direct statement.
3 A We will provide documents -- I
4 mean, I have documents, obviously, that
5 calculate the administrative rate and the
6 factors that go into it, and that I provided
7 to counsel -- I mean, I'm assuming I
8 provided that report to counsel, but -- I
9 think that I did.
10 Q Okay.
11 A But not the 7-1/2 percent,
12 because we just closed our books for '05.
13 So the 12-1/2 was based on a budget
14 projection, and in actuality the admin rate
15 was a little north of 7-1/2 percent after we
16 closed our books for 2005.
17 Q And the books closed on what
18 date?
19 A Recently. We just had our
20 accountants take a look at them and certify
21 them, and we're about to be audited for that
22 2005 period.

1 Q Now, in the 7-1/2 percent rate,
2 were legal fees -- I think you said legal
3 fees, for example, for this proceeding are
4 included in -- for the current proceedings,
5 I'm not talking about the past CARP
6 proceedings, are --
7 A Well, any legal fees, whether it
8 was this proceeding or some other licensing
9 activity, your general legal is included in
10 the 7-1/2 percent, except the CARP
11 repayment. The CARP repayment that we're
12 making is based on the differential between
13 our actual admin rate last year of a little
14 more than 7-1/2 percent and a 20 percent
15 cap.
16 Q So your 2006 projections, then,
17 do they take account of -- for example, if
18 current legal proceedings are now going to
19 be included in the administrative rate on a
20 going-forward basis, did the 2006 estimate
21 account for, for example, the legal fees
22 getting incurred right now in this room, in

1 this proceeding?
2 A We estimated just some amount for
3 the purposes of coming up with the admin
4 rate. And remember that the cost of the
5 proceeding is for a five-year license
6 period. So under accounting procedures you
7 would capitalize those costs over the term
8 of the license.
9 So with respect to the expression
10 of the admin rate, we're taking one-fifth of
11 our estimated cost for each year of the
12 license.
13 Q But you are, in fact, including
14 the one-fifth in there.
15 A It is in there, yes.
16 Q Okay. I'd like to hand you a
17 document in a minute here, which is going to
18 be marked as Services Exhibit 134.
19 (Whereupon, the above-
20 referred to document was
21 marked as Services
22 Exhibit No. 134 for

1 identification.)
2 Actually, before I do this, I'll
3 just direct you to your witness statement
4 again where you say on page 16, for
5 comparison purposes when you're, again,
6 discussing your admin rate, that you believe
7 the administrative costs for ASCAP and BMI
8 are typically around 16 percent of total
9 revenue.
10 A Yes.
11 Q I just wanted to -- we're going
12 to explore that statement a little bit. And
13 I'm going to hand you a document that we
14 received in discovery from your counsel.
15 It's Bates numbered SX74113 to 114. It's a
16 -- actually, why don't you describe this
17 press release for us, Ms. Kessler. Are you
18 familiar with this? Have you seen this
19 press release?
20 A No. I'll have to -- may I first
21 read it?
22 Q Certainly.

1 (Pause.)
2 Have you finished reading --
3 A I have.
4 Q -- the press release? I will
5 represent to you that this was produced by
6 your counsel as a document that supported
7 the statement that you made in your witness
8 statement concerning the administrative
9 expenses. Have you ever seen this document
10 before today?
11 A I believe I have read this
12 before.
13 Q You have read this document.
14 Okay. And could you describe the document?
15 A It's a description of BMI and its
16 reporting for the '04/'05 fiscal period.
17 It's collections, it's costs, and it's
18 describing the year that it had.
19 Q And just for the record, the
20 document is dated September 12, 2005?
21 A Yes, it is.
22 Q It's covering the fiscal year

1 spanning the 2004/2005 timeframe?
2 A I'm not sure what BMI's fiscal
3 year is.
4 Q Well, at least the document says
5 that on the -- in the first sentence it's
6 covering whatever they call "fiscal
7 '04/'05." It's reporting a rate over a
8 period of -- let's back up. The document is
9 reporting revenues over a period of time
10 that they are describing as fiscal
11 2004/2005.
12 A Yes. But, again, I don't know if
13 --
14 Q Sure.
15 A -- fiscal year 2005 ends in
16 January of '05 or September of '05.
17 Q Well, that's fine.
18 A I don't know what 12-month period
19 they are describing here.
20 Q But in any event, the revenues
21 that BMI posted for the period of time were
22 728 million?

1 A Yes, according to this press
2 release.
3 Q And they also state that BMI's
4 royalty distribution out of those -- that
5 revenue pool to BMI affiliated songwriters,
6 composers, and publishers was over 623
7 million for the time period?
8 A That's what this document says.
9 Q And it states that BMI's
10 operational expenses as a percentage of
11 revenues were 14.2 percent?
12 A That's correct. That's what this
13 says.
14 Q So in other words, the amount
15 that BMI did not distribute, I take it,
16 would be the difference between the revenues
17 that they received and the money that was
18 actually paid out, right?
19 A You'll have to ask them. I don't
20 know what their undistributed royalties
21 consist of.
22 Q Okay. Well, at a minimum, the

1 press release says that their operating
2 costs were 14.2 percent of their revenues,
3 correct?
4 A That's what this press release
5 says, yes.
6 Q Okay. And if you just simply
7 perform the calculation of taking the money
8 that they -- that BMI reports in here as
9 having been collected, and you divide into
10 that the money that they actually paid out
11 -- and, actually, I'd like you to do that
12 for us. I brought a calculator.
13 A I'll accept your characterization
14 that the difference between the 700 million
15 and the 623 million is what they incurred in
16 their admin cost. Is that what -- how you
17 --
18 Q Okay. Which is -- I was just
19 trying -- right, and that number comes out
20 to be approximately what they report as 14
21 --
22 A Fourteen percent. Okay. I

1 accept that.
2 Q Okay. Fair enough. Now, BMI,
3 just like SoundExchange, that performance
4 rights organization engages in license
5 negotiations on behalf of its affiliated
6 songwriters and publishers, and what-not?
7 A BMI, on behalf of its members,
8 and their members only, negotiates the
9 rates. That's right.
10 Q And BMI also participates in
11 rate-setting proceedings -- well, let me
12 back up. BMI operates pursuant to a consent
13 decree, correct?
14 A I understand that BMI operates
15 under a consent decree, yes.
16 Q And there is a rate court that
17 has been established to litigate fee
18 disputes when BMI is not able to reach
19 agreement with potential licensees over
20 funds?
21 A When BMI is unsuccessful in its
22 negotiations, which I don't even know the

1 last time that happened, then they would be
2 subject to a rate-setting procedure.
3 Q You're not aware of the BMI/Music
4 Choice, for example, rate court proceedings?
5 A I don't -- no, I'm not.
6 Q In any event, BMI, when they
7 don't reach agreement, they do participate
8 in these rate court proceedings. And the
9 purpose of those is to set a rate.
10 A My understanding is that, absent
11 a negotiated deal, they are subject to a
12 rate-setting procedure, yes.
13 Q And BMI also, on behalf of its
14 members, or perhaps with the participation
15 of its members, also engages in direct
16 enforcement actions or copyright
17 infringement actions on behalf of its
18 members, correct?
19 A I would assume that BMI enforces
20 its license and engages in compliance
21 activity, although I certainly can't speak
22 to what, if anything, they do. I would

1 assume that BMI does those things.
2 Q You know, if BMI engages in --
3 and all of those activities are activities
4 that SoundExchange engages in, correct? Or
5 let's back up.
6 A Go ahead and ask the question.
7 Q SoundExchange, like BMI, engages
8 in license negotiations.
9 A No, no. SoundExchange is nothing
10 like BMI. We are not a membership
11 organization. We have to pay -- we pay
12 copyright owners and artists, whether they
13 are members or not of SoundExchange. So
14 we're not a membership organization. We're
15 not remotely like BMI in that respect.
16 You know, BMI, in my view, is
17 engaged in more of a direct licensing type
18 of a situation, where SoundExchange is
19 operating under a statutory license. I
20 think those things are completely different,
21 and so I wouldn't agree with you that
22 SoundExchange and BMI operate the same way.

1 Q Well, no, that's actually not
2 what my question was. I simply asked
3 whether SoundExchange, like BMI, engaged in
4 the activity of license negotiations. BMI,
5 in fact, negotiates licenses and
6 SoundExchange negotiates licenses.
7 A If you oversimplify it, that's
8 the case. But, again, the license that
9 we're involved with, which is a statutory
10 license and the license that BMI is
11 negotiating, which is akin to a direct
12 license, are just different. But licensing
13 occurs, if that's what you're asking.
14 Q Yes, that is, and --
15 A Licensing occurs.
16 Q And so BMI -- all I'm trying to
17 get at is BMI incurs costs in negotiating
18 licenses.
19 A I assume that they do, yes.
20 Q Okay. Just like SoundExchange
21 incurs costs in negotiating licenses.
22 A Oh, we incur costs with respect

1 to licensing, yes.
2 Q Now, I believe you testified that
3 for 2005, although your stated
4 administrative rate was a little over 7-1/2
5 percent, the actual deduction was 20
6 percent, because there's still this
7 outstanding CARP repayment figure that has
8 not been repaid. And so the monies that are
9 actually being deducted for administrative
10 expenses by SoundExchange total 20 percent
11 of collections for 2005?
12 A That's correct. But remember
13 that the 7-1/2 percent is the cost of
14 actually operating SoundExchange. And that
15 pursuant to a promissory note for the
16 repayment of some startup costs with respect
17 to the rate-setting for Webcaster I are
18 being repaid over time through these
19 royalties.
20 Q Right. But for the year 2005,
21 the activities that we're talking about that
22 are included in the CARP repayment rate are

1 the same types of activities -- namely,
2 participating in a rate-setting proceeding
3 -- that BMI engages in as part of its
4 operations.
5 A Well, the way in which the rate
6 was established for Webcasting I is not, as
7 I understand it, the way BMI's rates are
8 set. But if what you're saying is that the
9 differential between actual operating costs
10 and the 20 percent is what we are required
11 to pay down the promissory note for the
12 startup arbitration cost, that's correct.
13 But that was from a prior period. That's
14 not the current -- a current cost to
15 SoundExchange.
16 Q But it's --
17 A This is repayment of startup
18 costs.
19 Q Just looking at the year 2005,
20 though, in fact, SoundExchange took a 20
21 percent deduction.
22 A SoundExchange took a little more

1 than 7-1/2 percent to cover operations, and
2 the differential between the 20 percent and
3 the 7-1/2 percent was used to repay the
4 debt. That's the way I characterize it.
5 Q So the total deduction from both
6 of those sources was 20 percent.
7 A Twenty percent.
8 Q For 2005.
9 A For 2005.
10 Q And according to this press
11 release, BMI's deduction was 14.2 percent,
12 correct?
13 A According to this press release,
14 yes, their admin rate is 14.2 percent.
15 Q So actually, for 2005, BMI
16 deducted a lesser percentage from its
17 revenues received as SoundExchange -- than
18 SoundExchange did, correct?
19 A See, I think that you're
20 incorrect in how you're characterizing this
21 admin rate. When we talk about the 20
22 percent, it's on certain royalty streams.

1 Other royalty streams are -- the 7-1/2
2 percent are applied. So blended across our
3 various royalties, the admin rate is not 20
4 percent.
5 I believe that this number that
6 BMI is reporting is, if you broke it down
7 into various licenses that they administer
8 and enforce, that sort of thing, some would
9 be in excess of the 14 percent, and some
10 would be below, you know, would be around
11 this 14.2 percent.
12 But this number is not well
13 described to the extent of, what is it
14 really costing them to enforce in their
15 clubs, and this number may be artificially
16 reduced from -- you know, from royalties
17 that we're receiving. And so that's why I
18 want to be very clear in how we describe
19 SoundExchange's admin rate. That on certain
20 royalty streams, the way you're describing
21 it the admin rate is 20 percent simply
22 because of the repayment of this debt.

1 But the actual cost of operation,
2 which is what I think this percentage
3 reflects, or is the comparable to
4 SoundExchange's number, is 7-1/2 percent.
5 Q Let's talk about the webcasting
6 stream, though. I take it that the
7 webcasting CARP royalties -- or CARP
8 expenses, rather, have not yet been repaid.
9 A From the CARP I, Webcast I --
10 Q Yes.
11 A -- CARP proceeding, we owe a
12 balance of $2-1/2 million for those costs.
13 Q So the deduction in
14 administrative expenses to the webcasting --
15 in the webcasting stream of royalties was,
16 in fact, 20 percent.
17 A That was 20 percent, but our
18 blended admin rate is not 20 percent, which
19 is what -- I think this admin rate that
20 they're reporting is a blended admin rate
21 across licenses. Do you understand what I'm
22 trying -- you know, I'm trying to, you know,

1 understand what this number is across all
2 their royalties, which is what I think they
3 are reporting and what SoundExchange reports
4 across all of its royalties.
5 Q When you refer to -- when you say
6 "blended admin rate," though, the 7-1/2
7 percent number, as I understood your
8 testimony, was not a blended rate. That was
9 your actual operating cost? It did not
10 include the CARP repayment?
11 A That's right.
12 Q So what would --
13 A That's right.
14 Q Do you know what the blended rate
15 is?
16 A I actually don't have that report
17 in front of me, so, no, but it's not 20
18 percent.
19 Q But the webcaster deduction was,
20 in fact, 20 percent.
21 A The webcaster deduction for that
22 license is 20 percent, and the difference

1 between actual cost and the 20 percent is
2 used to repay the bank.
3 CHIEF JUDGE SLEDGE: Ms. Ablin,
4 could I clarify confusion that I have from
5 that last answer? Do I understand correctly
6 that they have been no distributions on
7 webcasting since first quarter 2004?
8 THE WITNESS: Yes.
9 CHIEF JUDGE SLEDGE: So how can
10 there be a deduction of 20 percent in
11 distributions in 2005 if you've made no
12 distributions?
13 THE WITNESS: Well, that's an
14 excellent question. So we don't take our
15 admin rate at the moment; the money goes
16 through this entire cycle. We're permitted
17 to deduct the cost of operating
18 SoundExchange from the royalties received.
19 So at the moment of distribution,
20 we know that costs for any particular period
21 -- in this example 7-1/2 percent -- that's
22 what we -- that's when we book the admin

1 rate for accounting purposes. But in order
2 to operate SoundExchange, we need the admin
3 rate, you know, on a cash basis to pay for
4 the costs of operating SoundExchange.
5 So, and I know this is a little
6 complicated, it confuses our auditors all
7 the time, but the booking of the admin rate
8 and the taking of the admin rate aren't the
9 same thing.
10 CHIEF JUDGE SLEDGE: Thank you.
11 THE WITNESS: You're welcome.
12 MS. ABLIN: Your Honor, I note
13 the time, and I'm about to move into another
14 area. Perhaps it might be --
15 CHIEF JUDGE SLEDGE: That's a
16 good suggestion. Thank you. We'll recess
17 -- Mr. Handzo, did you have --
18 MR. HANDZO: No, I'm sorry. I
19 just wanted to alert the Board that what
20 we're going to do is pick up with Mr.
21 Kenswill tomorrow, because of scheduling
22 issues. So we'll bring Ms. Kessler back

1 after that.
2 CHIEF JUDGE SLEDGE: That's
3 understood.
4 MS. ABLIN: And if I might
5 clarify, because it obviously involves me,
6 will Ms. Kessler -- is she scheduled to
7 appear at the end of Mr. Kenswill's
8 testimony or --
9 CHIEF JUDGE SLEDGE: That's what
10 he went over this morning.
11 MS. ABLIN: I'm sorry. I must
12 not have been here.
13 MR. HANDZO: Yes, she is. I
14 mean, I think our assumptions have been that
15 Mr. Kenswill is likely to go all day, but --
16 CHIEF JUDGE SLEDGE: We don't
17 need this on the record. You all can have
18 that conversation. All right. We'll recess
19 until 9:30 in the morning.
20 (Whereupon, at 5:11 p.m., the
21 proceedings were adjourned, to reconvene at
22 9:30 a.m., the following day.)

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

In the matter of:	
The Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2005-1 CRB DTRA
(Webcasting Rate Adjustment Proceeding)	

Volume 16

Room LM-414
Library of Congress
First and Independence Ave,, S.E.
Washington, D.C. 20540

Thursday,
June 8, 2006

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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2 (9:34 a.m.)

3 CHIEF JUDGE SLEDGE: Mr.

4 Perrelli?

5 MR. PERRELLI: Yes, sir. We are

6 prepared to resume with Ms. Kessler.

7 CHIEF JUDGE SLEDGE: All right.

8 Thank you.

9 Ms. Kessler, I remind you that

10 you're under oath.

11 THE WITNESS: Thank you.

12 WHEREUPON,

13 BARRIE KESSLER

14 was recalled as a witness and, having been

15 previously duly sworn, resumed the witness

16 stand, was further examined and testified as

17 follows:

18 CROSS EXAMINATION (cont'd)

19 BY MS. ABLIN:

20 Q Good morning, Ms. Kessler.

21 A Good morning.

22 Q First, I'd like to revisit just a

1 couple of the issues that we touched upon on
2 Tuesday, just for a few questions here.
3 A Would you mind speaking up a
4 little, please?
5 Q I'm sorry. Yes. I'd like to go
6 back and touch on a couple of questions that
7 relate to our conversation last Tuesday. Do
8 you recall when we talked about
9 SoundExchange's allocation -- and I believe
10 you testified that they had allocated
11 approximately 70 million to date?
12 A That's correct.
13 Q And I just -- I don't believe I
14 ascertained how much of the total royalties
15 they had collected to date. Could you give
16 me your best approximation, as the Chief
17 Operating Officer, of that number?
18 A Yes. Remember that we're unable
19 to distribute webcasting royalties as a
20 result of awaiting the regulations with
21 respect to format and delivery. And I
22 believe those amounts are about $10 million

1 for that period. In addition, we have not
2 distributed the first quarter distributions
3 for 2006, which is approximately $15
4 million.
5 So remember that we allocate and
6 distribute in arrears, because we're
7 awaiting reports of use and the payments,
8 and so forth. So that's my best estimate.
9 Q So the total amount collected to
10 date is still the number I'm trying to get
11 at, which I take it has got to be a number
12 in excess of $70 million.
13 A That's correct. It would be the
14 $70 million plus the 25 that I just
15 identified.
16 Q So $95 million.
17 A Approximately.
18 Q Okay.
19 A Is my best recollection.
20 Q Sure, sure. We won't hold you to
21 specific dollar amounts. Just to give us a
22 ballpark.

1 And then, I also don't believe I
2 got from you how much money has actually
3 been paid out to date across all statutory
4 licensees, the money coming in from all
5 statutory licensees getting paid out.
6 A Yes. Of the 70 million
7 allocated, which is the only way I can
8 express the pay-through rate, if you assume
9 about 45 percent goes to the featured
10 artist, we're paying for almost 65 percent
11 of that money. Of the copyright owner's
12 share, which would be 50 percent of that
13 money, we're paying through about 85 percent
14 of that money.
15 The undistributed royalties are a
16 result of the inability to identify the
17 sound recording with certainty, or being
18 unable to identify or locate a copyright
19 owner or a featured artist. Or it's a
20 result of not having payment information in
21 which to actually cut a check to a copyright
22 owner or a featured artist.

1 So the first quarter royalties
2 for 2006 have not been allocated or
3 distributed, and then of the 70 million that
4 we have allocated, that's the pay-through.
5 Q And what about the five percent
6 that goes to the unions?
7 A That goes direct to them. That's
8 fully paid through.
9 Q Okay. Thank you.
10 Now, we also talked for quite a
11 while on CARP repayments. I'm sure you
12 recall that testimony. I just wanted to
13 ascertain from you -- are there any other
14 CARP proceedings, besides the prior
15 webcaster proceedings, for which
16 SoundExchange was repaying CARP fees in
17 2005?
18 A CARP fees?
19 Q In what SoundExchange has called
20 CARP repayment -- the CARP repayment costs,
21 the initial $9 million.
22 A The $9 million was all from the

1 PES and Webcasting I CARP proceeding.
2 That's it.
3 Q Okay. And the only CARP
4 proceeding that was still getting repaid in
5 2005 was the webcaster proceeding?
6 A The PES and the webcasting
7 proceeding.
8 Q Okay.
9 A That's correct.
10 Q And is the preexisting
11 subscription services CARP repayment
12 complete, or will there be a repayment on
13 that category of services for 2006?
14 A It's combined with the
15 webcasting, so the CARP repayment includes
16 both -- both -- you know, both licenses,
17 both the PES and the webcasting.
18 Q Okay. And then, I'm sure you
19 also recall our discussion Tuesday about
20 BMI's administrative or operating costs, and
21 we talked at some length about those costs
22 vis-a-vis SoundExchange's costs. Do you

1 recall that testimony?
2 A Yes, I do.
3 Q And in your written testimony, I
4 believe also in your oral direct testimony,
5 you drew a comparison between the two
6 operating expenses of SoundExchange on the
7 one hand and ASCAP and BMI on the other. Is
8 that right?
9 A Yes.
10 Q And we went through some
11 activities that BMI engages in as part of
12 its operations. Do you remember that
13 testimony?
14 A I remember you describing what
15 those activities were.
16 Q And do you remember, for example,
17 affirming that BMI participates in rate
18 court proceedings -- for example --
19 A I understand that BMI
20 participates. I have no way of knowing if
21 those costs are reflected in the admin rate
22 expressed in that document you showed me,

1 however.
2 Q Well, how else would BMI fund
3 rate court proceedings, if not from their
4 royalties?
5 A I have no idea.
6 Q Okay. Fair enough. And one
7 activity we did not touch upon I think with
8 BMI is statutory license rate-setting
9 proceedings. And I believe you testified
10 that BMI is not participating in this rate-
11 setting proceeding under Section 114. But
12 it is true, is it not, that BMI participates
13 in other statutory license proceedings?
14 A I'm not sure what rate settings
15 they participate in.
16 Q Well, are you aware, for example,
17 that there is a Section 118 statutory
18 license that covers non-commercial
19 broadcasting?
20 A I know there's a Section 118. I
21 wouldn't begin -- I couldn't begin to
22 explain what 118 covers.

1 Q Are you aware at least that
2 Section 118 concerns musical work public
3 performances?
4 A Honestly, I'm not sure what the
5 118 does.
6 Q Okay.
7 A I'm not -- you know, I'm in the
8 114 and the 112 world, so --
9 Q Okay. Well, at a minimum that's
10 a proceeding that SoundExchange does not
11 participate in.
12 A That I can say.
13 Q Okay.
14 A We are not participating in that.
15 Q Are you familiar with the Section
16 118 jukebox license, statutory license?
17 A No, I am not.
18 Q Are you familiar with any other
19 statutory licenses besides the 112 and 114?
20 A I know a little about the 115,
21 but not much.
22 Q But no others, okay. Now, you

1 also testified that -- about ASCAP's
2 administrative costs. We've been mostly
3 focusing on BMI up until now. Is that
4 correct, that you -- you did, in fact,
5 testify in your written statement about
6 ASCAP's operating expenses in addition to --
7 A Yes.
8 Q -- BMI's.
9 A Yes.
10 Q And I believe you gave a 16
11 percent estimate of their operating expenses
12 in your written statement?
13 A Yes, I did.
14 Q What did you base that number on
15 for ASCAP?
16 A Just my knowledge and experience
17 in what others state that the admin rate for
18 ASCAP is.
19 Q Did you do any independent
20 checking on ASCAP's website, or did you call
21 anyone at ASCAP to --
22 A I looked on ASCAP's website and

1 don't recall if there was a figure on there
2 or not. But I did look on their website,
3 yes.
4 Q Well, let's take a look at --
5 we're going to take a look at a document
6 here that's being marked as Services Exhibit
7 151. I'll give you a moment to review it.
8 (Whereupon, the above-
9 referred to document was
10 marked as Services
11 Exhibit No. 151 for
12 identification.)
13 Are you finished? Okay. And,
14 Ms. Kessler, I will represent to you that
15 this is a document that was -- it was
16 printed off ASCAP's website on June 5, 2006.
17 And could you tell us the date of this
18 document and the title of the document, or
19 the title of the release?
20 A The date I see is March 13, 2006,
21 ASCAP Adapts to Rapidly-Changing Music
22 Market and Reports Record Revenues, Royalty

1 Payments, for the Year 2005.
2 Q And in this document, ASCAP
3 reports its operating expenses at 12-1/2
4 percent, is that correct?
5 A Yes, that's what it says.
6 Q And like BMI -- let me rephrase.
7 ASCAP engages in the same types of
8 activities as BMI by and large, does it not?
9 A That's my understanding.
10 Q Okay. And, in fact, ASCAP also
11 participates in, for example, tape surveys
12 to survey radio station performances, is
13 that correct? That would be another
14 activity undertaken by ASCAP?
15 A I don't know if they are still
16 doing that. I know that they at one time
17 did that. But with their joint venture with
18 Media Guide, they are doing full monitoring
19 of broadcast stations. So I'm not sure if
20 they're still engaged in that activity or
21 not.
22 Q Okay. Ms. Kessler, I'm about to

1 hand you another document, actually, that is
2 going to be marked as Services Exhibit 152.
3 And while the exhibit is getting marked, I
4 will represent to you that this is going to
5 -- that this memo --
6 (Whereupon, the above-
7 referred to document was
8 marked as Services
9 Exhibit No. 152 for
10 identification.)
11 A I'm sorry. I can't really hear
12 you.
13 Q I'm sorry. I will represent to
14 you that this document was also printed off
15 ASCAP's website on June 7, 2006. And if you
16 could just take a look at the radio
17 description in the middle of the page there,
18 and then I'll ask you a question or two
19 about that.
20 A Okay.
21 Q Now, this is a document that's --
22 at the top of the page it's described as

1 about ASCAP identifying performances,
2 correct?
3 A Yes.
4 Q And in the radio section in the
5 middle of the page ASCAP, as of June 7th,
6 still publishes on its website that it
7 conducts tape surveys of actual broadcasts,
8 correct?
9 A Okay, yes.
10 Q Okay. I'm going to switch gears
11 for a minute now, and we're going to talk
12 about some of the terms that you are
13 proposing to be changed. If you could turn
14 to pages 39 and 40 of your testimony.
15 A Yes.
16 Q And one of the terms that you
17 propose to be changed is the audit
18 underpayment term. You propose that the
19 cost for the audit be flipped to the
20 licensee at a five percent underpayment in
21 lieu of the current 10 percent underpayment,
22 correct?

1 A Yes.
2 Q And are you aware that the 10
3 percent cost flipping underpayment term was
4 a term agreed to by all of the parties,
5 including the Recording Industry Association
6 of America, for the license period 1998 to
7 2002?
8 A I know that that is a term. I'm
9 not sure that -- I don't recall if it was
10 negotiated or agreed upon or -- I don't know
11 how it came to be, but I understand that the
12 five percent is the -- I'm sorry, the 10
13 percent threshold is the number in the term.
14 Q Ms. Kessler, when were you first
15 hired as SoundExchange's Chief Operating
16 Officer?
17 A I was promoted in the summer of
18 2001.
19 Q And at the time, SoundExchange
20 was an unincorporated division of the
21 Recording Industry Association of America?
22 A That's correct.

1 Q So when the terms were being
2 discussed in the CARP proceeding that
3 occurred in 2001 covering the period 1998
4 through 2002, did you have any input into
5 what those terms would be? Did RIAA's
6 counsel consult you at all concerning the
7 terms?
8 MR. PERRELLI: I'm going to
9 object to the extent that this is starting
10 to get into communications with counsel
11 about that proceeding.
12 CHIEF JUDGE SLEDGE: In addition,
13 Ms. Ablin, let me ask, why is it relevant
14 what somebody agreed to in -- prior to 1998
15 as to what we're doing in 2006?
16 MS. ABLIN: Your Honor, just to
17 -- I was just trying to establish that the
18 terms that are in place now were -- were
19 terms that at least at one point in time
20 SoundExchange was willing to accept.
21 CHIEF JUDGE SLEDGE: Why is that
22 relevant?

1 MS. ABLIN: Well, I think it is
2 relevant that -- if a party at one point in
3 time is willing to accept terms, and if
4 there has been no material change in
5 circumstances since that time --
6 CHIEF JUDGE SLEDGE: Do you think
7 it's conceivable that you can show that
8 there's no change -- material change of
9 circumstances from 1998 to 2006?
10 MS. ABLIN: I think with some of
11 the terms I can, yes, Your Honor, including
12 this one. And if you'll permit me to ask
13 one or two more questions. And if it
14 doesn't work, I can move on.
15 CHIEF JUDGE SLEDGE: The
16 objection is sustained.
17 MS. ABLIN: Well, Your Honor, I
18 understood the objection to be getting into
19 attorney-client privilege material.
20 CHIEF JUDGE SLEDGE: That's
21 correct.
22 MS. ABLIN: Okay. Okay. So I'll

1 rephrase my question.
2 BY MS. ABLIN:
3 Q Did you participate at all in
4 setting the terms or in -- yes, in setting
5 the terms for the 1998 to 2002 proceeding?
6 A Did I participate? My job is to
7 implement the license, the administration of
8 the license, the terms of it. And to the
9 extent that -- I don't recall if -- you
10 know, my involvement in those rates and
11 terms, but my job is to implement those
12 terms, you know, and to establish the
13 guidelines for staff and the computer
14 systems to interpret those terms correctly.
15 Q Okay. So you just don't recall
16 one way or the other if --
17 A I wouldn't have been asked -- I
18 just -- I'm not a copyright owner. I run
19 the operations of the organization, and my
20 role is to give input as to the
21 administrability of terms, not what they
22 ought to be.

1 Q Ms. Kessler, I'm going to hand
2 you a document that has been marked as
3 Services Exhibit 153. I'm going to see if
4 this document refreshes your recollection at
5 all.
6 (Whereupon, the above-
7 referred to document was
8 marked as Services
9 Exhibit No. 153 for
10 identification.)
11 I will represent to you that this
12 is a document entitled Request to Enter the
13 Party's Proposed Terms Into the Record, and
14 the date at the top of the document is
15 December 20, 2001. If you could turn to the
16 second page of the document. Do you see at
17 the top of the page it's been signed by
18 Michelle Woods from Arnold & Porter?
19 A Yes.
20 Q Who is Michelle Woods?
21 A She is an attorney with Arnold &
22 Porter who worked on the first CARP.

1 Q And so she represented
2 SoundExchange as part of RIAA during the
3 1992 to -- 1998, rather, to 2002 proceeding?
4 A Yes.
5 Q And do you see on -- if you flip
6 back to page 1, the second paragraph. Do
7 you see on here the language that says,
8 "After a long and detailed settlement
9 negotiation, the parties have reached
10 agreement on all but one of the proposed
11 terms. That issue concerns the appointment
12 of an agent to receive and distribute
13 royalties." And then, going on to the third
14 sentence, "The parties, therefore, request
15 that the agreed-upon terms attached hereto
16 as Exhibit A be admitted into evidence." Do
17 you see --
18 A Yes, that's what it says.
19 Q Have you ever seen this document
20 before today?
21 A Probably.
22 Q Can you flip to Attachment A of

1 the document?
2 A Yes.
3 Q And if you could turn to page 7,
4 and Section 5G on that page, do you see
5 there that one of the terms that RIAA and
6 many other parties agreed to was a 10
7 percent cost of living provision?
8 A A one percent --
9 Q A 10 percent threshold for
10 flipping the costs of the audit at which --
11 let me back up. It's a 10 percent threshold
12 -- underpayment threshold past which the
13 costs for conducting an audit flip --
14 A Yes.
15 Q -- from -- okay. Flip to the
16 licensee --
17 A Yes.
18 Q -- being audited. Okay. And I
19 believe you testified on Tuesday that
20 SoundExchange has not conducted -- not yet
21 conducted any audits of any webcasters --
22 A That's correct.

1 Q -- in this proceeding. So you
2 don't know whether any webcasters have, in
3 fact, underpaid by any amount.
4 A I wouldn't be able to without an
5 audit.
6 Q Okay. Are you aware that
7 SoundExchange again voluntarily agreed to
8 extend this 10 percent term for the
9 2003/2004 license period?
10 A I understand that SoundExchange
11 agreed to the whole package that was
12 extended for the '03/'04 period.
13 Q Including this term?
14 A This term wasn't there.
15 Q Okay. Ms. Kessler, if you could
16 turn to page 26 of your testimony.
17 Actually, before we do that, I wanted to ask
18 you, have you seen Attachment A -- going
19 back to this agreed-upon terms document we
20 were discussing, you said that you had seen
21 this document before. Have you seen
22 Attachment A?

1 MR. PERRELLI: I'll object.
2 You're mischaracterizing the witness'
3 testimony. Her only answer on the document
4 was probably -- whether she had seen it
5 before was "probably." She didn't confirm
6 whether she had seen it or not.
7 CHIEF JUDGE SLEDGE: Sustained.
8 MS. ABLIN: I'll rephrase.
9 BY MS. ABLIN:
10 Q Ms. Kessler, have you seen this
11 document before? Let me ask that again.
12 A Likely that I have seen this
13 attachment.
14 Q Have you seen Attachment A
15 before?
16 A It is likely, it is probable that
17 I saw it -- this attachment, yes.
18 Q Do you recall whether you had any
19 input into the creation of Attachment A?
20 A Again, my job is to implement
21 terms and --
22 Q But my question was: do you

1 recall whether you have had input into this
2 document?
3 A It's unlikely that I would,
4 because my job is to implement the terms and
5 ascertain the administrability of the terms,
6 not what the terms would have been.
7 Q So it's unlikely you had input
8 into this document.
9 A That's right.
10 Q Okay. Now, if you could turn to
11 page 26 of your testimony. And on that page
12 you make a request of the Board to adopt
13 regulations that state that a licensee that
14 fails to make royalty payments on a timely
15 basis may be subject to liability for
16 infringement in addition to late fees, is
17 that correct?
18 A Yes.
19 Q Now, I just want to explore that
20 statement with you a little bit, just to
21 make sure I understand fully your position
22 on that request. Is it your position that

1 copyright owners should have a right to sue
2 a licensee for infringement if a licensee
3 is, for example, 30 days late in paying its
4 license fees?
5 A I think that decision is up to
6 the copyright owners.
7 Q So they should have the right to
8 sue for infringement?
9 A Again, I think the decision is
10 not mine to make. It's up to the copyright
11 owner to decide if a 30-day late payment
12 rises to the level of a copyright
13 infringement action.
14 Q But your position is that it
15 should be up to the copyright owners to
16 decide that.
17 A Yes.
18 Q And they should have the rights
19 under the regulations in the first instance.
20 A I'm not sure I understand that
21 question.
22 Q It's your position that the

1 copyright owners should have that right to
2 decide whether to sue for infringement.
3 A I think it is their decision to
4 make.
5 Q And they should have that right
6 --
7 CHIEF JUDGE SLEDGE: Ms. Kessler,
8 you're not answering the question.
9 THE WITNESS: Then I must --
10 CHIEF JUDGE SLEDGE: Please
11 listen to the question and answer it.
12 BY MS. ABLIN:
13 Q Are you asserting that the
14 copyright owners should have the right to
15 sue for infringement if a licensee is 30
16 days late in making payments?
17 A If that is their decision, yes,
18 they should have the right to sue, if they
19 feel that that non-compliance warrants a
20 copyright infringement action, yes.
21 Q And would that still be your
22 position for a licensee that's, say, one day

1 late in making payments?
2 A I can't imagine that a copyright
3 owner would make that decision, but, again,
4 if -- if they wanted to sue under that
5 situation, they should be entitled to sue
6 under that situation.
7 Q Okay. I'm just trying to
8 understand what your position is.
9 A One day, 30 days, you know.
10 Q Okay. And would that also be
11 your position irrespective of the amount in
12 fees by which a licensee is late? For
13 example, if a licensee is late in paying,
14 say, $10.
15 A This is theoretic. Again, I
16 can't imagine in a business situation a
17 copyright owner under those circumstances
18 would sue. But I think that they should be
19 permitted to, if they so desire.
20 Q Okay. So in other words, just to
21 sum up this last string of questions, your
22 position is that a copyright owner should

1 have the right to sue for infringement if
2 literally a licensee is a day late and a
3 dollar short.
4 A If you want to characterize it
5 that way, you can. That's not what I said.
6 I think in a real business situation that
7 wouldn't occur, but it is their right to sue
8 for copyright infringement if they feel that
9 a licensee is, you know, not complying with
10 the statutory license. So yes.
11 Q Okay. And would that also be
12 your position if SoundExchange had accepted
13 payment of the full fee plus the late fee
14 and deposited it?
15 A Just say that one more time,
16 please.
17 Q Yes. Would your position remain
18 the same even if the licensee had paid in
19 full the license fees due plus the late fee,
20 and SoundExchange had cashed the check or
21 deposited the check?
22 A Yes.

1 Q Okay. If you could turn to --
2 you're almost there -- pages 27 to 29. I
3 think that's in the vicinity of where you
4 are. Now, there I believe you've asked for
5 an increase in the late payment interest
6 rate from .75 percent per month to 2.5
7 percent per month?
8 A That's correct.
9 Q Okay. And I believe you
10 discussed with Mr. Steinthal on Tuesday that
11 on an annual basis 2.5 percent a month is 30
12 percent -- 30 percent interest per annum?
13 A I accepted his calculation, yes.
14 Q Okay. Well, in fact 2-1/2 times
15 12 is 30.
16 A Okay.
17 Q Okay. And, of course, that
18 calculation would just be of simple
19 interest. Are you seeking compound interest
20 or simple interest?
21 A I think SoundExchange would be
22 pleased with compound interest, but would

1 likely take not compounded interest.
2 Q Okay. Are you aware that the .75
3 percent a month interest term was also a
4 term that was agreed upon in 2001 to cover
5 the period '98 to 2002 by the recording
6 industry?
7 A I understand that that was a term
8 in that agreement, yes.
9 Q And you understand also that that
10 term was then extended by agreement to apply
11 to the 2003/2004 license period as well?
12 A Yes, along with all the other
13 terms.
14 Q Okay. Are you aware that some
15 states have usury laws that limit the
16 maximum amount of interest that can be
17 charged?
18 A No. I assume that they do, but I
19 don't know for certain that they do. But --
20 Q Okay. So in coming up with the
21 30 percent interest request for the late fee
22 amount, did you do any analysis of what

1 those usury laws might say and how they
2 might limit interest rates for their -- in
3 their state?
4 A No, I did not.
5 Q Okay. So you're not aware of
6 whether an annual interest rate of 30
7 percent would exceed any state's usury law.
8 A No, I am not.
9 Q Okay. Okay. Now, in addition to
10 the 30 percent annual interest rate that
11 you're seeking, you've also requested I
12 believe that the late fee amount would
13 double every five days that the amount
14 remains unpaid -- and please correct me if I
15 get this wrong -- in excess of 20 days after
16 the postmarked date on a demand letter from
17 SoundExchange? I refer you to page 28 of
18 your testimony.
19 A Yes, that the -- after the 20-day
20 period the late fee should be doubled every
21 five days.
22 Q Okay. Let's walk through an

1 example of this request, just to make sure I
2 understand your position here. We've
3 already established that if a service is
4 late in paying royalties the initial
5 interest rate that you've sought would be 30
6 percent --
7 A Yes.
8 Q -- per year. And then, suppose
9 that SoundExchange sends a demand letter and
10 the service would -- pays royalties let's
11 say 46 days after the postmark on the demand
12 letter -- 46 days. So I take it that that
13 service would get a 20-day grace period --
14 A Yes.
15 Q -- and then after -- the fifth
16 day after the 20 days -- so in other words
17 the 25th day after the postmark of the
18 demand letter, the late fee amount would
19 double.
20 A Yes, every five days.
21 Q Okay. So on the 25th day the 30
22 percent per year interest rate would double

1 to 60 percent per year.
2 A I don't know if the math works
3 like that, but -- I mean, it's clear from
4 my statement that the amount of late fees
5 should double.
6 Q Okay. Well, and in fact, two --
7 if you take two percent of $100, that's $2,
8 correct?
9 A Right.
10 Q And if you double the two
11 percent, you come up with four percent.
12 A That's correct.
13 Q And four percent of $100 is $4.
14 A Yes.
15 Q Four is double two, four percent
16 is double two percent, correct?
17 A Yes, that's correct.
18 Q Okay. So then, that means that
19 on day 30, which is an additional five days
20 after day 25, the 60 percent would double to
21 120 percent.
22 A The $4 would double to $8, yes.

1 Q And on day 35, the 120 percent
2 would double to 240 percent?
3 A The $8 would go to $16.
4 Q On day 40, just to -- I'm trying
5 to get us to the 46 days I posited. On day
6 40, 240 percent would double to 480 percent?
7 A I'm not sure how you're doing
8 your math. It's fairly simple. The amount
9 of late fees owed would double every five
10 days. So, you know, 2 to 4 to 8 to 16 to
11 32, and so on, yes.
12 Q And that means that the annual
13 percent would also double? If the absolute
14 amount doubles, that's equivalent to the
15 percent rate -- the percent --
16 A The way you're describing it,
17 that seems right. But I don't know.
18 Q Well, we can all go back and
19 check it, and I'm sure your counsel will
20 tell me if I'm wrong in his submission. So
21 on day 40 we're up to 480 percent, day 45,
22 the 480 percent would then double to 960

1 percent, correct?
2 A That's quite a disincentive to
3 pay late, isn't it?
4 Q Yes, it is. And so now we're at
5 day 46, so that service is paying the
6 equivalent of a 960 percent interest rate.
7 JUDGE WISNIEWSKI: Excuse me, Ms.
8 Ablin. Are you suggesting that that's the
9 APR?
10 MS. ABLIN: Yes.
11 JUDGE WISNIEWSKI: You might want
12 to check your math. Okay. Well, we will do
13 that, Your Honor.
14 BY MS. ABLIN:
15 Q And you've also testified that
16 you want the same increase in late fees,
17 whether it's doubling the amount or doubling
18 the interest rate, however you want to look
19 at it. Those late fees would apply even to
20 a service that has paid on time if they have
21 an error, for example, in their statement of
22 account?

1 A If the statement of account or
2 the performance logs are delinquent or
3 incomplete, and SoundExchange is, therefore,
4 unable to timely distribute royalties, I
5 think that they should be penalized for it.
6 And this is the metric we're using for that
7 interest and penalty, yes.
8 Q So if a service has left out a
9 piece of -- one bit of information from a
10 statement of account, your position would be
11 that SoundExchange has the right to assess
12 the late fees at the levels we've just been
13 discussing?
14 A That is not what SoundExchange
15 does. SoundExchange works with its
16 licensees to help them through the statement
17 of account process, so that it is -- the
18 objective is to have it accurate and
19 complete, so that we can conduct our
20 distributions timely. And I can't imagine
21 that SoundExchange wouldn't go back to a
22 licensee and say, you know, "You left out

1 this calculation," or "did you" -- you know,
2 "You haven't sent us a statement of account
3 at all."
4 And in a situation where that
5 behavior is persistent, I think we'd need
6 something apart from copyright infringement
7 action to give us some teeth and some
8 incentive -- and to incentivize the
9 licensees to comply with the terms of a
10 license that they took.
11 Q But in the first instance,
12 though, your position as a theoretical
13 matter is that SoundExchange should have the
14 right -- irrespective of what happens in the
15 real world, SoundExchange should have the
16 legal right to charge these late fees, if a
17 statement of account is incomplete.
18 A You're asking me to answer a
19 question in a theoretic sense that I know
20 with SoundExchange would not happen. But if
21 you want to take it to that extreme and that
22 level of absurdity, the answer would be yes.

1 But that's not what would happen with
2 SoundExchange.
3 Q Okay. And it's not what would
4 happen, because that wouldn't be reasonable
5 for SoundExchange to do that, would it?
6 A It wouldn't happen, because
7 SoundExchange -- SoundExchange's objective
8 is to get the money to the featured artists
9 and the copyright owners. And the only way
10 we can do that is to obtain information
11 that's in possession by the licensees. And
12 if we don't get it timely, then our artists
13 and our copyright owners suffer the
14 consequences.
15 Q Now, you testified just a few
16 minutes ago I believe that even if
17 SoundExchange has accepted payment in full
18 from a licensee that was late, along with
19 the late fee, and deposited that money, they
20 should still -- SoundExchange -- the
21 copyright owners should still have the right
22 to sue for infringement?

1 A The request is to make it clear
2 in the terms that simply by finally paying
3 your royalties and meeting your late fee
4 obligation does not release you from a
5 copyright infringement action. That's what
6 we're requesting.
7 Q And I believe on -- and I'm
8 referring to page 41 of your testimony, if
9 you'd like to take a look at it. I believe
10 that you've stated that the contrary
11 argument that --
12 A I'm sorry. 41?
13 Q Yes, I believe it's 41. I
14 believe you stated on that page that the
15 contrary argument that copyright owners will
16 have waived the right to argue that the
17 service is making transmissions not eligible
18 for statutory licensing. Therefore, they
19 would be entitled to sue -- would not be
20 entitled to sue has "no legal merit."
21 A Just give me a moment. I'm not
22 seeing that language.

1 Q Sure.
2 A So are you referring to the
3 sentence that says, "The copyright owners
4 and performers represented by SoundExchange
5 have waived the right to argue that the
6 service is making transmissions not eligible
7 for the statutory license"?
8 Q Yes. And then, the following
9 sentence where you say, "I believe this
10 argument has no legal merit."
11 A Yes. But it does call for
12 clarification. That's what we're seeking.
13 Q Right. Well, I just want to
14 focus on your "no legal merit" statement.
15 You don't hold a law degree, do you?
16 A No, I don't.
17 Q Maybe that's a blessing. You
18 wouldn't spend so much time in proceedings
19 such as this. Have you ever attended law
20 school?
21 A No, I have not.
22 Q Have you ever taken any legal

1 courses?
2 A Yes, I have.
3 Q Taught -- well, let me finish my
4 question. Have you ever taken any legal
5 courses that would have taught that that
6 specific position that you testified to has
7 no legal merit?
8 A No.
9 Q Okay. Okay. If you could turn
10 to page 30 of your testimony. Now, here you
11 include a request that licensees' statements
12 of account should be made public?
13 A That's right.
14 Q Okay. Let's talk about this
15 request for a few minutes. Again, I take it
16 you're aware that the confidentiality terms
17 currently in place were, again, part of the
18 package of terms that was agreed to for the
19 '98 to 2002 proceeding, and then agreed to
20 again for the 2003/2004 proceeding by the
21 recording industry.
22 A Yes.

1 CHIEF JUDGE SLEDGE: Ms. Ablin,
2 you continue to return to that, and you've
3 never established any basis on which any of
4 that is relevant.
5 MS. ABLIN: Okay. Well, we'll --
6 CHIEF JUDGE SLEDGE: This is
7 about the fourth time that you've gone into
8 it now.
9 MS. ABLIN: Well, Your Honor, I
10 believe it is relevant if at one point a
11 party agrees to a term and there are no
12 material --
13 CHIEF JUDGE SLEDGE: You've never
14 shown us any relevance, so we're waiting for
15 that.
16 MS. ABLIN: Well, going back to
17 the audit provision, for example, Your
18 Honor, with the cost -- if there has been --
19 I believe the burden is on the party seeking
20 a change in the term to demonstrate that
21 there has been a material change in
22 circumstances that would justify the change

1 from something that they had agreed to.
2 CHIEF JUDGE SLEDGE: Now, why do
3 you say that?
4 MS. ABLIN: That the burden would
5 be on them to seek a change? Otherwise,
6 they would have to demonstrate good cause
7 for something that has been agreed to.
8 CHIEF JUDGE SLEDGE: Why do you
9 say that?
10 MS. ABLIN: I think it's self-
11 evident. But if it's not, then we can --
12 CHIEF JUDGE SLEDGE: Do you mean
13 if somebody makes an agreement one year, and
14 five years later they make another
15 agreement, the fact that they made a prior
16 agreement, they've got to explain why
17 they're taking a different position?
18 MS. ABLIN: Your Honor, I think
19 that it's, at a minimum, relevant to the
20 current argument that a term change is
21 sought, and, you know, how relevant it is
22 would go more to the weight of that

1 position. In any event, I will refrain from
2 making this point any more and move on.
3 CHIEF JUDGE SLEDGE: Nobody has
4 objected, so I just -- I've still been
5 waiting on you to clarify why any of that is
6 relevant. That's why I asked.
7 MS. ABLIN: Okay. We'll save
8 that for briefing.
9 CHIEF JUDGE SLEDGE: All right.
10 MR. STEINTHAL: Your Honor, if I
11 may on that point --
12 MS. ABLIN: No, Mr. Steinthal,
13 we'll go ahead with Ms. Ablin.
14 MR. STEINTHAL: Okay.
15 BY MS. ABLIN:
16 Q Okay. Going back to the
17 confidential information terms that we've
18 been discussing, one of the reasons that you
19 give for why copyright owners should have
20 access to information relating to statements
21 of accounts -- let me back up. You list a
22 number of reasons in your written testimony

1 I believe as to why you're seeking this
2 change.
3 A Yes, that's correct.
4 Q And one of those reasons that you
5 give is that you believe that copyright
6 owners should have it, so they can decide
7 whether to sue for copyright infringement,
8 is that correct?
9 A I think that copyright owners are
10 entitled to know how much a licensee has
11 paid or paid late or their payment history
12 with respect to non-payment, so that they
13 can make the business decision and move
14 forward with some future action, including
15 copyright infringement action, yes.
16 Q Well, it's true, is it not, that
17 the current regulations already allow
18 SoundExchange to disclosure the identities
19 of services that have obtained licenses and
20 whether or not -- licenses under Section 112
21 or 114, and whether or not those services
22 are current in their obligations to pay

1 minimum fees and submit statements of
2 account?
3 A That's true, but not the amount.
4 And that's a critical element when you're
5 making a decision whether to proceed with a
6 lawsuit.
7 Q But at a minimum, SoundExchange
8 is able to disclose those licensees that are
9 delinquent.
10 A At the very minimum.
11 Q Copyright owners, Ms. Kessler,
12 are always free to track music use on
13 various services themselves, aren't they?
14 A Well, I'm not sure how a
15 copyright owner could track music usage
16 without an audit or being able to review the
17 reporting of SoundExchange --
18 Q Well, at a minimum, a copyright
19 owner would be able to find out from
20 SoundExchange who in fact is delinquent,
21 correct?
22 A That's correct.

1 Q And then, they would be able to,
2 just as anyone in the general public is able
3 to, go online and listen to the webcast and
4 see if their music is being played, correct?
5 A Well, for anything presently
6 being performed, not necessarily things that
7 have happened in the past or in the future
8 when they are unable to listen.
9 Q Sure. But to get a sense of the
10 extent to which their music is being played
11 on that service, to get a rough sense, they
12 could in fact listen online to the service
13 itself.
14 A They could listen, but remember
15 the webcasters are playing such a breadth
16 and depth of music that, you know, it's
17 conceivable that it would take, you know, 24
18 hours for them to hear something that they
19 owned, particularly if they're a small
20 copyright owner or an artist who owns their
21 own masters. So while, yes, that's one way
22 to gather the information, it's not a

1 particularly good way.
2 Q When you were formulating this
3 request that SoundExchange be permitted to
4 disclose this type of information to
5 copyright owners, were you aware that ASCAP
6 radio -- that the ASCAP radio broadcaster
7 license agreement requires ASCAP to treat
8 similar information from radio station
9 licensees as confidential and forbids ASCAP
10 from disclosing that to its members?
11 A I hadn't -- I did not know that.
12 Q So you didn't research or compare
13 with any of the license agreements that
14 ASCAP has done.
15 A I didn't look at ASCAP. My job
16 was to address SoundExchange's needs.
17 Q Okay. So you also wouldn't have
18 looked at any BMI license agreements to see
19 what their confidentiality provisions would
20 look like.
21 A No, I did not look at BMI.
22 Q Now, another reason you give in

1 support of your request to -- for a change
2 to the confidentiality terms is to enable
3 copyright owners to include royalty
4 estimates in their revenue projections. Is
5 that correct?
6 A That's correct.
7 Q Now, putting aside the question
8 for the moment of whether it's appropriate
9 under the regulations to use licensee data
10 for independent business reasons other than
11 royalty collection and distribution, we're
12 putting that issue aside, copyright owners
13 already are able to see royalty payment
14 information in aggregate form across all
15 licensees, so long as no individual licensee
16 is identifiable?
17 A That's correct.
18 Q And receiving that type of
19 aggregated royalty information would enable
20 copyright owners to estimate incoming
21 royalties for the purposes of including them
22 in their revenue projections, wouldn't it?

1 A Reviewing the history would give
2 someone a basis for projecting future
3 royalties, yes.
4 Q Okay. And another reason that
5 you gave, I believe -- we're still on page
6 31 of your testimony -- for a change to this
7 term is that copyright owners need payment
8 information when they are negotiating
9 collectively with licensees. Is that
10 correct?
11 A That's correct.
12 Q I take it you were talking about
13 negotiations under the statutory licenses at
14 issue here --
15 A That's correct.
16 Q -- when you made that statement.
17 And so those negotiations, as I believe you
18 testified on direct, would lead to statutory
19 rates that would apply to everyone within
20 the category of service for the license
21 being negotiated?
22 A That's correct.

1 Q And so, again, copyright owners
2 are able to see aggregated information
3 across various categories of licensees under
4 the current regulations, is that right?
5 A They are able to see the license
6 royalties in the aggregate. But when you're
7 in the negotiating period and negotiating
8 with such a vast array of groups,
9 individually and not collectively, in order
10 for them to make good decisions and informed
11 decisions, they need to know with more
12 specificity the receipts.
13 Q But SoundExchange doesn't
14 typically negotiate with individual
15 licensees one by one, do they? Their job is
16 to establish statutory rates that would
17 apply to categories of licensees, is that
18 true?
19 A Can you repeat that?
20 Q SoundExchange does not engage in
21 license negotiations with individual
22 services, individual licenses for a

1 particular service, as opposed to licenses
2 that would apply more generally across a
3 group of similarly situated licensees.
4 A Yes. SoundExchange would be
5 involved in negotiations with groups of
6 licensees, such as the participants that are
7 here today.
8 Q Now, you're aware that both
9 SoundExchange and DiMA have proposed, as one
10 of their -- at least one of their license
11 metrics, a percentage of revenue fee metric
12 in this proceeding?
13 A I'm aware that DiMA -- I'm sorry.
14 I just want to make sure I --
15 Q I'll break that into two pieces.
16 A Thank you.
17 Q Are you aware that SoundExchange,
18 your company, has -- your organization,
19 rather, has proposed rates in this
20 proceeding that include a rate based on a
21 percentage of the service's revenues?
22 A That's correct.

1 Q And are you also aware that DiMA
2 has proposed in this proceeding a rate based
3 on the service's percentage of revenues?
4 A I believe that's true, yes.
5 Q So under your proposal to change
6 the confidentiality provisions so that
7 copyright owners can see information related
8 to statements of account, that would enable
9 copyright owners to see individual services'
10 revenue data, would it not, if a revenue fee
11 metric is adopted?
12 A That's correct.
13 Q Okay. We are going to switch
14 gears now. We're done with the terms. Now,
15 if you could turn to page 2 of your
16 testimony. And I just wanted to focus on
17 one of your statements there. You say that
18 you believe there are hundreds of services
19 from whom SoundExchange collects statutory
20 royalties, correct, on this page?
21 A Yes.
22 Q And if I remember correctly, I

1 believe that you stated that the number of
2 services paying royalties was on the order
3 of -- correct me if I'm wrong -- 570?
4 A That's correct.
5 Q Okay. Now, you're aware that
6 there was a CARP proceeding, because we've
7 talked about it on several occasions, that
8 was convened in 2001 to establish rates for
9 the 1998 to 2002 period?
10 A That's correct.
11 Q And rates were set through that
12 CARP proceeding process and approved by the
13 Librarian of Congress as a result of that
14 proceeding?
15 A Yes, I am.
16 Q And then, you're also aware that
17 those rates were extended by agreement, with
18 a few tweaks here and there, but largely
19 unchanged through 2003/2004, that period?
20 A Yes, the rates were pushed
21 forward.
22 Q Now, those rates that were set

1 through the CARP process, those are not the
2 only rates under which services pay
3 royalties to SoundExchange, are they?
4 A That's correct.
5 Q In fact, some services pay under
6 alternative agreements that were negotiated
7 pursuant to the Small Webcasters Settlement
8 Act?
9 A That's correct.
10 Q And that act resulted in
11 agreements that apply to both commercial
12 services and non-commercial services?
13 A That's correct.
14 Q And you're also aware that RIAA
15 and NPR negotiated a separate license
16 agreement?
17 A For the -- which period?
18 Q For the '98 to at least I believe
19 the 2004 period?
20 A That's correct.
21 Q And so some webcasters have paid
22 royalties to SoundExchange through that

1 agreement, the NPR agreement.
2 A That's correct.
3 Q Now, just to get a better sense
4 of who we're talking about here, I'm going
5 to show you a document that we've marked as
6 Services Exhibit 154. And I will represent
7 to you this is a document we received after
8 the close of business the eve of your
9 testimony on Tuesday.
10 I should also point out at this
11 time that the document I handed out has been
12 marked as restricted. And I'm about to ask
13 some questions about this document and
14 wanted to give counsel for SoundExchange the
15 opportunity to move -- to go into closed
16 session.
17 (Whereupon, the above-
18 referred to document was
19 marked as Services
20 Exhibit No. 154 for
21 identification.)
22 MR. PERRELLI: If you'll give me

1 just a moment to review.
2 MS. ABLIN: Certainly.
3 MR. PERRELLI: I know there was
4 some restricted information, but it was
5 redacted off that document. And so we may
6 not need -- I don't believe -- I think the
7 restricted information was licensee
8 information, a particular licensee on the
9 second page. So, actually, I don't believe
10 we need to go into restricted session.
11 BY MS. ABLIN:
12 Q Now, this document was Bates
13 numbered before it was produced to us as
14 pages, just for the record, SoundExchange
15 114258 through 261, and it's titled Receipt
16 and Enforcement Effectiveness Tracking. Ms.
17 Kessler, are you familiar with this
18 document?
19 A Yes, I am.
20 Q Can you describe the document for
21 us?
22 A Yes. As the title describes,

1 this is an analysis of the receipts and the
2 effectiveness of some of our enforcement and
3 compliance activities, which includes
4 minimum fee analysis, total receipts
5 analysis, payment receipt date analysis, as
6 well as a series of other analyses which
7 breaks the licensees into various
8 categories.
9 Q Did you play a role in the
10 creation of this document?
11 A No, I did not.
12 Q Do you know who did?
13 A Yes, I do.
14 Q Who is that?
15 A That would be our legal
16 department, under the direction of Gary
17 Greenstein.
18 Q Did you review the document
19 before it was produced to us to verify
20 whether it was accurate?
21 A I reviewed the document before it
22 was produced, yes.

1 Q And can the figures on here be
2 trusted to be accurate?
3 A Yes, they can.
4 Q Now, if you could turn to page
5 SX114260? I believe it's the third page of
6 this document. Now, I believe you just
7 testified that this page and the following
8 page list various categories of services,
9 and it also lists the number of each
10 services -- the number of such services in
11 each category that paid royalties at any
12 time during the listed year.
13 A That's correct.
14 Q And 2005 is the most recent year
15 reflected on this chart for which license
16 fees have been -- are in place, is that
17 correct?
18 A Yes. This license expired in
19 2005, but there is an ongoing requirement to
20 pay under the current rates for 2006.
21 Q Sure. But I'm just trying to get
22 at the fact that no rates are in place yet.

1 Regardless of the payment obligation, there
2 are no rates in place for 2006.
3 A That's correct.
4 Q Okay. So let's look at the data
5 in the 2005 column, then. And I see -- the
6 first category listed on here is commercial
7 webcasters, is that correct? And you list
8 248 services that were commercial
9 webcasters?
10 A Yes.
11 Q And those commercial webcasters
12 would have paid under the rates set through
13 the CARP proceeding that were then extended
14 through 2003/2004?
15 A That's correct.
16 Q And then, I should say later
17 extended by statute through 2005?
18 A Yes.
19 Q And then, the next category on
20 this document contains information about new
21 subscription services.
22 A That's correct.

1 Q And the new subscription services
2 listed -- there are 20 such new subscription
3 services listed, is that correct?
4 A That's correct.
5 Q And those services also would
6 have paid under the CARP rates -- for ease
7 of reference, I'm going to call the rates --
8 the rates that were set in the '98 to 2002
9 proceeding, and then extended all the way
10 through 2005, I'll refer to those as CARP
11 rates. Is that acceptable?
12 A That's acceptable.
13 Q Okay. So the new subscription
14 services listed here, would they all have
15 paid under the CARP rates?
16 A Yes.
17 Q Okay. And then, the third
18 category there, could you explain what
19 services would be included there, even
20 though it's a null set?
21 A These are the eligible non-
22 subscription services, and I'm not sure what

1 the NSTS stands for. But the ENTS are the
2 eligible non-transmission services.
3 Q Could it possibly be --
4 A Non-commercial perhaps.
5 Q Could it possibly be new
6 subscription transmission services?
7 A Oh, yes. New subscription
8 transmission services, yes.
9 Q And would the -- if there were
10 any services listed in the 2005 category,
11 those services would also pay pursuant to
12 the CARP rates?
13 A That's correct.
14 Q Okay. Moving on to the fourth
15 category, which is labeled SWSA Commercial,
16 there are 26 such services listed in the
17 SWSA Commercial category?
18 A There are 26 services in the SWSA
19 category, Swissa (phonetic) Commercial.
20 Q Swissa (phonetic), okay. I'll
21 refer to -- Swissa (phonetic) is a term that
22 you use to denote SWSA.

1 A Internally, that's what we call
2 SWSA.
3 Q Okay. I'll try to refer to that
4 as Swissa (phonetic) myself.
5 A And those 26 SWSA commercial
6 services, I take it, would have paid under
7 the SWSA small commercial rates that were
8 established pursuant to the SWSA?
9 Q You're correct. Which again,
10 just so the record is clear, SWSA denotes
11 the Small Webcasters Settlement Act,
12 correct?
13 A Correct.
14 Q And then, moving on to the next
15 category, in 2005 there are 68 services
16 listed in the category called SWSA Non-Comm?
17 A That's correct.
18 Q Now, the services in that
19 category I take it would be non-commercial
20 services other than non-commercial
21 educational entities that would have paid
22 under SWSA rates?

1 A I believe so. That's correct.
2 Q And moving on to the next
3 category, which is SWSA educational, there
4 were 203 such services listed in that
5 category?
6 A Yes. According to this report,
7 203 SWSA educational services, yes.
8 Q And those services would have
9 paid under the SWSA non-commercial
10 educational entity rates, is that correct?
11 A That's correct.
12 Q And finally, we have as the last
13 category the Non-SWSA Non-Comm category.
14 And I note 13 such services for 2005, is
15 that right?
16 A Correct.
17 Q And those services, I take it,
18 would have paid under the non-commercial
19 CARP rates, is that correct?
20 A The non-commercial CARP rates,
21 not the SWSA rates. That's correct.
22 MS. ABLIN: Okay. Your Honor,

1 I'd like to offer this Exhibit 154 into
2 evidence.
3 CHIEF JUDGE SLEDGE: Any
4 objection to Exhibit 154?
5 MR. PERRELLI: No objection.
6 CHIEF JUDGE SLEDGE: Without
7 objection, it is admitted.
8 (Whereupon, the above-
9 referred to document,
10 previously marked as
11 Services Exhibit No. 154
12 for identification, was
13 admitted into evidence.)
14 THE WITNESS: Your Honors, may I
15 ask when we might be having a break?
16 CHIEF JUDGE SLEDGE: We normally
17 stop a little bit after 11:00. Do you want
18 to stop now?
19 THE WITNESS: No, no. I was just
20 wondering.
21 BY MS. ABLIN:
22 Q Just to be clear, then, Ms.

1 Kessler, if we add up the number of services
2 for 2005, I came up with the number 578,
3 which largely aligns with your 570 number
4 that you provided earlier. I'm happy to
5 have you verify the 578, or if you can
6 accept that, we can --
7 A I'll accept that.
8 Q -- go through the math if you'd
9 like. Okay. And another question about
10 this document -- I don't see a category
11 listed for NPR stations. Are they reflected
12 in this document?
13 A I would imagine they are in one
14 of the other categories under which they
15 fit. But I'm not sure, because like you I
16 don't see the breakdown of the individual
17 licensees.
18 Q All right. But NPR stations
19 don't pay pursuant to CARP rates, do they?
20 A Well, absent a rate or absent a
21 negotiation or a settlement with NPR, they
22 need to be paying under one of the existing

1 rates, right?
2 Q Okay. Let me rephrase the
3 question. We established earlier that there
4 is an NPR agreement in place, correct?
5 A Yes. I'm not sure when that
6 agreement expired. And to the extent that
7 it expired prior to --
8 Q Oh, I see.
9 A -- then they would have to be
10 paying under an alternate rate. But, again,
11 I just -- it just escapes me sitting here
12 today which rate they're paying under.
13 Q Okay. For at least the -- the
14 NPR agreement was in place in 2004, correct?
15 A I think it went for -- at least
16 from '98 to '04, but I don't recall what
17 happened after that.
18 Q Okay. So those NPR stations that
19 were -- that are licensed and paying
20 royalties pursuant to the NPR agreement, are
21 they reflected anywhere in this document for
22 2004?

1 A Again, I'm assuming they are, but
2 absent a detailed listing of all licensees I
3 can't say for certain.
4 Q Okay. Just so we're clear on the
5 math on this document, just a couple of
6 other questions before we leave it. Just so
7 we have a count of the services for 2004, I
8 take it we would get the count listed in
9 this document again by adding up the various
10 categories of services and coming up with a
11 number, is that correct?
12 A Yes, I would imagine that the
13 math in -- the 420 equals the individual
14 categories, yes.
15 Q I'm sorry. The math in the?
16 A In the column 2004, where it says
17 number of services that paid royalties at
18 any time during the year, the 420 figure.
19 Q Yes. Okay. At this point, Ms.
20 Kessler, I'd just like to see if you can
21 help me clear up some honest confusion
22 between a couple of documents we received in

1 discovery, so I'm going to hand out a
2 document. It has previously been marked as
3 Services Exhibit 98.
4 And I note that this document is
5 marked restricted. When it came up before,
6 I know we went into closed session, so I
7 will hand a copy to your counsel and allow
8 him the opportunity to so move at this time,
9 if he chooses.
10 MR. PERRELLI: I'm going to allow
11 Ms. Ablin to ask a question about it, and
12 then I'll make an appropriate motion.
13 BY MS. ABLIN:
14 Q I will represent to you, Ms.
15 Kessler, that this document was produced to
16 us by your counsel as support from an
17 assertion in Mr. Simpson's witness statement
18 concerning the number of services paying
19 royalties and the amounts paid by them for
20 the year 2004.
21 And I will also represent to you
22 that when I asked -- attempted to ask him

1 about this document, he said that, despite
2 the fact that it supported a statement in
3 his testimony, that you would be the person
4 more familiar with the document. Have you
5 seen this document before?
6 A I don't know if I have.
7 Q Could you take a look at the
8 document and tell us -- describe the
9 document for us?
10 A It appears to be a listing of
11 services' parent name, the amount -- some
12 amount, I'm assuming it's royalties, and it
13 looks to be perhaps what is a percentage --
14 I don't know -- of some sort, perhaps the
15 total. I don't know without doing the math.
16 But that's what it looks like to me.
17 Q And at least according to the
18 document, if you flip to the last page of
19 it, there are three lines there that says
20 total webcaster payments for 2004, and it
21 lists a figure of just under 9.7 million.
22 A Yes.

1 Q And it says that the top 10
2 webcaster payments for 2004 comprised 8.95
3 million, give or take?
4 A That's what it says, yes.
5 Q And the percentage of royalty
6 payments represented by the top 10
7 webcasters it lists as 92.4 percent?
8 A For 2004, yes.
9 Q For 2004, yes.
10 A That's what it says.
11 Q Do you know who -- I guess I'm
12 still puzzled at -- do you know who within
13 SoundExchange would have prepared this
14 document?
15 A It possibly came out of our
16 Royalty Administration Department or it was
17 created at the direction of our general
18 counsel for compliance purposes or some
19 other licensee-specific purpose.
20 Q Do you recognize the formats in
21 the document as a document that was
22 generated by someone at SoundExchange?

1 A Well, it's clearly an Excel
2 spreadsheet.
3 Q But do you recognize it to be
4 information that would have come -- would
5 have been generated by SoundExchange?
6 A Well, certainly, the information
7 contained in here appears to be information
8 from our database of licensees and parents
9 as this document describes. So I'm assuming
10 it -- you know, it came from a SoundExchange
11 source.
12 Q Can the document be relied upon
13 to be accurate in the numbers?
14 A These numbers look like numbers
15 I've seen in other documents, so I would say
16 yes.
17 Q I take it SoundExchange would
18 attempt in documents it's generating to be
19 accurate.
20 A Absolutely. Of course we would.
21 Q Okay. Well, my question -- and
22 this truly is just a matter I was confused

1 about. If you look at the left-hand column
2 here, you see the handwritten notations
3 which I will represent to you are from me,
4 just the 10, 20, 30, 40, the numbers on
5 here. I was just trying to obtain a count
6 of the services, and I came up with 309.
7 And I was just confused as to the difference
8 between the 309 listed on this document
9 versus the 420 or so listed on the document
10 we've just been looking at.
11 A Well, if you note, that column
12 heading is parent name. And a parent may be
13 paying and reporting for multiple services,
14 multiple broadcast stations, that sort of
15 thing. So that's one possibility for the
16 difference in the figure.
17 Q Is that the only possibility that
18 sitting here today you can think of?
19 A You know, I'm not sure when this
20 list was prepared. But it's possible
21 licensees paid late for this period and we
22 didn't receive the payments until 2005 but

1 attributed them to 2004. So, you know, this
2 information is just more current -- is
3 likely more current than this, depending,
4 again, when this information was prepared.
5 MS. ABLIN: Okay. Your Honor, I
6 would offer Services Exhibit 98 into
7 evidence.
8 CHIEF JUDGE SLEDGE: Any
9 objection to Exhibit 98?
10 MR. PERRELLI: No objection, Your
11 Honor.
12 CHIEF JUDGE SLEDGE: Exhibit 98
13 is admitted.
14 (Whereupon, the above-
15 referred to document,
16 previously marked as
17 Services Exhibit No. 98
18 for identification, was
19 admitted into evidence.)
20 JUDGE WISNIEWSKI: Just for
21 purposes of clarity in the record, Ms.
22 Kessler, when you say that this document's

1 figures are more up to date -- I forget how
2 you characterized it -- could you identify
3 which document you're --
4 THE WITNESS: Oh, I'm sorry.
5 Yes, I would assume that the exhibit marked
6 154 is more up to -- is likely more up to
7 date than Exhibit 98.
8 JUDGE WISNIEWSKI: Okay. Thank
9 you.
10 THE WITNESS: You're welcome.
11 BY MS. ABLIN:
12 Q While we're on the subject, Ms.
13 Kessler, of services -- making counts of
14 services making royalty payments, I'm about
15 to show you another document that's getting
16 marked as Services Exhibit 155.
17 MR. PERRELLI: Your Honor, I
18 neglected on Services 98 to ask that it be
19 admitted into the record on a restricted
20 basis. The document includes licensee-by-
21 licensee payments for the year 2004, so
22 individual licensees and individual

1 payments. The discussion -- the question
2 and answer -- was all public, but the
3 document itself is required to be
4 confidential under -- pursuant to the
5 regulations, 37 CFR 261. So I move to have
6 the document admitted on a restricted basis.
7 MR. MALONE: Your Honor, please,
8 may I be heard on that?
9 CHIEF JUDGE SLEDGE: Just a
10 moment. Ms. Ablin?
11 MS. ABLIN: I have no objection.
12 CHIEF JUDGE SLEDGE: Yes, sir.
13 Mr. Malone?
14 MR. MALONE: It seems to me that
15 the case then has been made only for
16 restricting that part of the document which
17 has names of licensees. So I would suggest
18 as a more appropriate and less restrictive
19 alternative that only the names of the
20 licensees be restricted, which would leave
21 us to address the numbers apart from the
22 names of the licensees in the open.

1 CHIEF JUDGE SLEDGE: How can that
2 be accomplished, Mr. Malone?
3 MR. MALONE: Well, simply that
4 the restrictive order extends beyond the
5 record, in the sense that it says who may
6 have the -- I take it the information.
7 CHIEF JUDGE SLEDGE: The exhibit
8 is what is being offered.
9 MR. MALONE: Right. But I think
10 that restrictions on the use of the exhibit,
11 and what I think should -- is more
12 appropriate under the circumstances, that
13 the use of the non-confidential information
14 be permitted under the terms of the order,
15 even though the document itself, without
16 that blanked out, could not be.
17 CHIEF JUDGE SLEDGE: I'm sorry.
18 I still don't understand. How could that be
19 accomplished?
20 MR. MALONE: Well, I'm not asking
21 the Board to do anything. What I am asking
22 is simply that there be no restriction on

1 the use of the non-confidential portions of
2 the document. And that's counsel's
3 responsibility, as is in the case with any
4 restricted document.
5 CHIEF JUDGE SLEDGE: I don't
6 think we have the ability to -- I don't
7 think there is an ability under the
8 protective order to apply the protective
9 order to the portion of an exhibit and not
10 provide the other portions of the exhibit.
11 I think you are -- I'm suggesting you're
12 asking a physical impossibility.
13 MR. MALONE: At the risk of
14 trying your patience, the --
15 CHIEF JUDGE SLEDGE: I've ordered
16 the patience.
17 (Laughter.)
18 MR. MALONE: Yes, Your Honor. It
19 seems to me that the order does two
20 different things. One, it says that you may
21 not disclose a document to an unauthorized
22 person. It also I think prevents counsel

1 from simply orally reading the document to
2 an unauthorized person.
3 What I am saying is that to the
4 extent the reading of the document is
5 confined to non-confidential information, I
6 think that should be permitted under the
7 order that has been entered. And I would
8 like it clear from the fact that we have now
9 established that parts of the document
10 contain confidential information, and
11 severable parts of the document do not.
12 Counsel is at liberty to disclose the non-
13 confidential information to unauthorized
14 persons.
15 JUDGE ROBERTS: Mr. Malone, if we
16 were to do that for this document, how does
17 that impact the other documents that have
18 been admitted into evidence, many of which
19 are subject to the protective order?
20 MR. MALONE: At this point at
21 least, I don't think you're establishing a
22 precedent beyond this particular document as

1 to which the question has been raised. So
2 far as I'm aware, the question has not been
3 raised to any of the other documents to
4 which you refer.
5 CHIEF JUDGE SLEDGE: We are
6 simply not able to enforce a modification of
7 the protective order that is in place for
8 each exhibit. And our -- you are completely
9 free, of course, to take information from
10 this that you think is not subject to the
11 protective order and use that. But that
12 would be subject to your part when you get
13 to cross examination.
14 MR. MALONE: Thank you.
15 CHIEF JUDGE SLEDGE: The
16 objection is overruled. The motion is
17 granted.
18 BY MS. ABLIN:
19 Q Ms. Kessler, I'm now going to
20 hand you a document that has been marked as
21 Services Exhibit 155. And I will represent
22 to you that this is an interrogatory

1 response that we received from your counsel
2 in the course of this proceeding, and it's
3 specifically Interrogatory Response Number
4 9. And before I --
5 (Whereupon, the above-
6 referred to document was
7 marked as Services
8 Exhibit No. 155 for
9 identification.)
10 A Okay.
11 Q I'm sorry. Before I --
12 A I'm not a lawyer, so this is --
13 what do you -- is there a number 9 I'm
14 supposed to be looking for?
15 Q No. I was just stating for the
16 record that this, in fact, is
17 SoundExchange's ninth interrogatory
18 response, as reflected on the second page of
19 the document.
20 A Okay. Gotcha.
21 Q And before I move on, I will note
22 that there was an attachment, Attachment 1,

1 produced in conjunction with this
2 interrogatory response that contains
3 information that SoundExchange has
4 designated as restricted. And, again, I
5 will pause to allow SoundExchange counsel to
6 move -- to go into closed session if it so
7 chooses.
8 MR. PERRELLI: Once again, Your
9 Honor, I'll wait for a question and answer
10 to see if it leads to restricted
11 information.
12 BY MS. ABLIN:
13 Q I would like to focus your
14 attention, Ms. Kessler, specifically on the
15 attachment to this document. Could you
16 please take a look at the attachment? And
17 after you've had a chance to review it, if
18 you could describe it for us.
19 A It appears to be a listing of
20 services, licensees, and their parent, and
21 unfortunately this copy has -- you know, the
22 heading names aren't so clear. It's a

1 little difficult to read, but it has their
2 -- what type they are, the amount, which I
3 assume is a royalty payment amount, looks
4 like perhaps that says -- my eyes aren't as
5 good as they used to be -- station letters
6 or -- and then various amounts throughout --
7 from 19 -- I think that's an 8, 1998,
8 through 2005.
9 Q Are you familiar with this
10 document?
11 A I'm familiar with these types of
12 documents, yes.
13 Q And this one, in particular, sets
14 forth a list of non-commercial services,
15 specifically, and the payments they have
16 made to SoundExchange for the time period
17 you described, is that correct?
18 A The legend includes non-
19 commercial SWSAs, yes, it appears to be.
20 Q Were you involved in the
21 preparation of the document?
22 A I don't recall.

1 Q Did you oversee those who did
2 prepare it?
3 A I have overseen similar types of
4 things, but this particular document I'm not
5 certain. But we generate this type of stuff
6 within SoundExchange.
7 Q Okay. And do you believe the
8 information in the document to be accurate?
9 A Yes, I do.
10 Q And just so it's clear to
11 everyone here, could you just explain the
12 simulcast column on the left-hand side? I
13 see true and false as the two possible
14 options listed in that column. What does
15 that denote?
16 A That's our way to differentiate
17 between a broadcast radio station
18 simulcasting over the web compared to a
19 licensee who is what we call internet only.
20 They are only transmitting over the web,
21 they don't have a terrestrial counterpart.
22 Q Okay.

1 A So true would mean that they are
2 a simulcaster, broadcast simulcaster.
3 Q And, again, just so it's clear
4 for the record, in the legend at the top,
5 the service categories listed in the
6 document include, for example, the -- well,
7 actually, let's look at the fourth column of
8 the document. Let's start there. You see
9 there's a big grouping of services that have
10 been categorized as NCPB services, and those
11 will be, according to the legend, non-SWSA,
12 non-commercial public broadcast services.
13 A That's correct, yes.
14 Q So those would be services, I
15 take it, paying under the CARP, the non-
16 commercial CARP rates?
17 A I would assume so, yes.
18 Q And then, the next category was
19 to -- going down the column 4 is NCW?
20 A I'm sorry. The non-commercial
21 CARP rates include in your definition the
22 NPR agreement, correct?

1 Q Not in my definition.
2 A Not in your definition. So, yes,
3 I'm not -- I'm not sure if these are NPR
4 stations or these are non-commercials paying
5 under the CARP rate.
6 Q Okay. So --
7 A I just don't remember what this
8 category means.
9 Q So the NCPB category would either
10 be, then, I guess services paying under the
11 non-commercial CARP rates or possibly
12 services paying under the NPR agreement.
13 A It may be, yes.
14 Q Possibly, okay.
15 A I just can't say for certain.
16 Q Okay. And then, moving on to the
17 next category, which is NCW --
18 A Yes.
19 Q -- those services denote,
20 according to the legend, non-commercial
21 services paying under the Small Webcasters
22 Settlement Act of 2002?

1 A Yes.
2 Q And I take it those would be all
3 SWSA and non-commercial webcasters except
4 for SWSA non-commercial educational
5 entities?
6 A Yes.
7 Q Okay. And then, flipping through
8 the pages until we hit another category
9 listed, we come a few pages down to NEE --
10 A Yes.
11 Q -- as a category. And those
12 services would be the non-commercial
13 educational entities paying pursuant to the
14 SWSA rates.
15 A That's right.
16 MS. ABLIN: I would like to offer
17 Services Exhibit 155 into evidence.
18 CHIEF JUDGE SLEDGE: Any
19 objection to 155?
20 MR. PERRELLI: Your Honor, I have
21 no objection. We would only ask, Your Honor
22 -- move, Your Honor, that it be subject to

1 the protective order for the same reason as
2 the prior document we discussed, which it is
3 a document that has licensee by licensee and
4 specific payment information, and it should
5 be protected as confidential under the
6 regulations.
7 CHIEF JUDGE SLEDGE: This is
8 undecipherable to me. Where are you
9 referring to licensee-by-licensee specific
10 information?
11 MR. PERRELLI: I apologize. This
12 is the attachment, Attachment 1, which is a
13 spreadsheet which has individual stations
14 and their payments on a year-by-year basis.
15 CHIEF JUDGE SLEDGE: Where are
16 the payments?
17 MR. PERRELLI: They are on the
18 right-hand side of the spreadsheet under
19 columns for individual years.
20 CHIEF JUDGE SLEDGE: The columns
21 that are blacked out?
22 MR. PERRELLI: I don't think

1 they're -- they are shaded, and, therefore,
2 difficult to read, but those are -- I
3 believe they read, at least the last eight
4 columns, read 1998, '99, 2000, 2001, and so
5 on.
6 CHIEF JUDGE SLEDGE: The payments
7 of what is what I'm -- I haven't heard yet
8 what you're --
9 MR. PERRELLI: I apologize, Your
10 Honor. Payments of royalties to
11 SoundExchange.
12 CHIEF JUDGE SLEDGE: And where do
13 you see that that -- these are payments of
14 royalties to SoundExchange?
15 MR. PERRELLI: I believe that is
16 clear from the question, the interrogatory
17 question, which is Interrogatory Number 9,
18 and the answer thereto. This attachment is
19 a response to that question, Interrogatory
20 Number 9.
21 CHIEF JUDGE SLEDGE: Any
22 objection to the application of the

1 protective order to Exhibit 155?
2 (No response.)
3 No objection. The motion is
4 granted.
5 Any objection to the admission of
6 Exhibit 155?
7 MR. PERRELLI: No objection, Your
8 Honor.
9 CHIEF JUDGE SLEDGE: Without
10 objection, the exhibit is admitted.
11 (Whereupon, the above-
12 referred to document,
13 previously marked as
14 Services Exhibit No. 155
15 for identification, was
16 admitted into evidence.)
17 THE WITNESS: Your Honor, would
18 it be possible to request a break now?
19 CHIEF JUDGE SLEDGE: We'll recess
20 for 10 minutes.
21 (Whereupon, the proceedings in
22 the foregoing matter went off the

1 record at 11:06 a.m. and went
2 back on the record at 11:19 a.m.)
3 CHIEF JUDGE SLEDGE: On the
4 record.
5 BY MS. ABLIN:
6 Q Ms. Kessler, are you aware that
7 record labels frequently or at least
8 sometimes provide terrestrial radio stations
9 with free CDs in the hopes of obtaining air
10 play for those particular recordings?
11 A I'm aware they provide product to
12 the stations. I'm not sure what the intent
13 behind it is.
14 Q Okay. Are you aware that labels
15 sometimes provide product to radio stations
16 in advance of the commercial release date of
17 a particular sound recording?
18 A I've heard that that happens,
19 yes.
20 Q Are you aware that the copies of
21 those sound recordings or products provided
22 sometimes only contain information

1 concerning the title of a sound recording
2 and the featured artist?
3 A I've heard that as well, yes.
4 Q Now you referred, I believe --
5 Let me direct you to page 25 of your
6 testimony and you refer there to
7 SoundExchange's longstanding request for
8 census reporting.
9 A Yes.
10 Q And of course, sample versus
11 census reporting is an issue that's already
12 been addressed at length in a separate
13 record-keeping rulemaking proceeding. Is
14 that correct?
15 A Notice in record-keeping, there's
16 been extensive discussion of this. Yes.
17 Q Are you aware that as ASCAP and
18 BMI only require sample reporting of
19 terrestrial radio stations?
20 A I know that in the past they've
21 relied on samples for their distributions,
22 but I'm also aware that they monitor 24/7

1 comprehensively terrestrial radio stations
2 currently.
3 Q But the activity of monitoring
4 though is an activity that ASCAP and BMI
5 undertake. Correct?
6 A That's correct.
7 Q It's not an activity that the
8 radio stations are required to do. Correct?
9 A I know the radio stations don't
10 do that and that ASCAP and BMI undertake
11 that activity. Yes.
12 Q Okay. And as for the radio
13 stations themselves, ASCAP and BMI do not
14 require them to submit census reporting. Is
15 that true?
16 A I believe so, but I'm not exactly
17 sure of what requirements ASCAP and BMI have
18 with respect to reporting.
19 MS. ABLIN: Okay. Well, let me
20 show you a document then that has been
21 marked as Services Exhibit 156 that I will
22 represent is a document printed off BMI's

1 website on June 7, 2006.
2 (Whereupon, the above-
3 referred to document was
4 marked as Services
5 Exhibit No. 156 for
6 identification.)
7 THE WITNESS: Okay.
8 MS. ABLIN: And just if you could
9 let me when you're finished reviewing the
10 document. Are you finished? Okay.
11 BY MS. ABLIN:
12 Q Ma'am, this document is titled
13 "Royalty Information: U.S. Radio Royalties."
14 Correct?
15 A That's correct.
16 Q And if I could direct your
17 attention to the paragraph in the middle of
18 the page on the first page entitled -- It's
19 immediately after the heading, "Commercial
20 Radio." It states there that "BMI uses
21 information provided by its commercial radio
22 station licensees to determine performances.

1 All licensed stations are requested to log
2 performances for a three-day period each
3 year with different stations logging each
4 day of the year. This sample is unfactored
5 to create a statistically reliable
6 projection of all future performances on all
7 commercial music format radio stations
8 throughout the country." Is that correct?
9 A That's what it says, yes.
10 Q So at according to this BMI
11 document, they require samples from radio
12 stations of music use for only three days
13 per year.
14 MR. PERRELLI: Your Honor, I'm
15 going to object to this. The witness is
16 reading a document that she's seen for the
17 first time and hasn't indicated she knows
18 what it is and for her to say this is what
19 BMI does I think is an improper use of this
20 document. If she wants to ask Ms. Kessler
21 what she knows or doesn't know, I think she
22 can do it. Simply reading from the document

1 I don't think makes it evidence.
2 CHIEF JUDGE SLEDGE: Ms. Ablin.
3 MS. ABLIN: I'll rephrase the
4 question.
5 CHIEF JUDGE SLEDGE: All right.
6 BY MS. ABLIN:
7 Q Ms. Kessler, are you aware in
8 fact of what BMI's sample versus census
9 music use reporting requirement is for
10 commercial radio stations?
11 A As I said, I know that ASCAP and
12 BMI have relied on samples in the past, but
13 they also have technology ventures with
14 companies that are doing comprehensive
15 monitoring. To the extent that they are
16 using that for their royalties, I don't
17 know.
18 Q But I guess that wasn't exactly
19 my question. My question is are you aware
20 of what BMI requires radio stations to
21 report.
22 A Apart from reading this document,

1 I wasn't aware of this three-day situation.
2 Q Okay. Are you aware of what
3 ASCAP requires radio stations to report?
4 A I believe that at one point again
5 they required a sample. I forget how many
6 hours sitting here today, but also they have
7 their Media Guide which does comprehensive
8 24/7 monitoring of terrestrial radio
9 stations.
10 Q Right, but again that's not an
11 activity that radio stations are required to
12 undertake. Correct?
13 A No, they are doing the
14 monitoring. So --
15 Q ASCAP is doing the monitoring.
16 A ASCAP is doing the monitoring.
17 That's correct.
18 Q Are you aware that the Section
19 118 regulations governing noncommercial
20 public broadcasters require samples for only
21 one week a year?
22 A No, I'm not aware of that.

1 Q Now do you recall in your
2 testimony I believe on Tuesday during your
3 direct examination that you stated, I
4 believe, that SoundExchange analyzed a
5 sample of census reporting supplied by a
6 webcaster to determine how many artists were
7 captured in the sample?
8 A We conducted -- Yes, that was my
9 testimony.
10 Q When was that analysis conducted?
11 A It was probably we did that third
12 quarter last year perhaps.
13 Q And just for the record, what
14 months were included in that quarter?
15 A Of the analysis?
16 Q Oh, I'm sorry. That's when you
17 conducted the analysis.
18 A Yes.
19 Q The third quarter and that would
20 have been in the time frame of which three
21 months?
22 A You know, September, October,

1 November time frame probably.
2 Q Okay. And who conducted the
3 analysis specifically?
4 A SoundExchange conducted the
5 analysis.
6 Q Who within SoundExchange worked
7 on this project?
8 A Jonathan Sowers, Christine Patton
9 conducted the analysis at my direct,
10 supervision and review.
11 Q So SoundExchange employees in
12 other words conducted the analysis.
13 A That's correct.
14 Q And what was the census period
15 covered in the analysis?
16 A It was a three month period. I
17 believe it was the first quarter of 2005 if
18 I'm not mistaken.
19 Q And just so it's clear, would the
20 first quarter 2005 refer to the last three
21 calendar months of 2004 or are you talking
22 calendar quarters?

1 A No. January, February, March
2 2005.
3 Q Okay.
4 A I believe.
5 Q So the census period was the
6 first three months of 2005 was the census.
7 Correct?
8 A I believe so, yes.
9 Q And what was the sample that you
10 analyzed?
11 A We examined two conservative
12 seven day periods.
13 Q And do you recall which seven day
14 periods within the quarter you analyzed?
15 A I know they were randomly
16 generated, but I don't recall specifically
17 which two conservative seven day periods
18 were identified.
19 Q And how many webcasters did you
20 analyze in this study?
21 A One.
22 Q Which webcaster was that?

1 A XM.
2 Q How did you decide to analyze,
3 which one to analyze? How did you settle
4 upon XM?
5 A Well, they're the only ones
6 reporting census data to SoundExchange.
7 Remember that there are no regulations
8 promulgated for the webcasters and so we
9 could only rely on information that was
10 voluntarily reported and the interim
11 regulations state that webcasters are only
12 required to submit two seven conservative
13 day periods throughout a calendar quarter.
14 And so the fact that we had one webcaster
15 who was voluntarily reporting in the first
16 instance and secondly, providing census
17 data, they were the logical candidate to
18 conduct the study because obviously you
19 can't do a sample if you don't have census
20 reporting.
21 Q Were there other webcasters for
22 which you had data that you considered

1 analyzing?
2 A No.
3 Q And XM transmits a number of
4 channels, does it not?
5 A Yes, they do.
6 Q Do you know about how many?
7 A I don't recall, no.
8 Q Did you analyze all of XM's
9 channels?
10 A Yes, we did.
11 Q Do you know how many genres of
12 music XM transmits?
13 A No, I don't.
14 Q But in any event, did you analyze
15 all of the genres how many ever there are
16 that XM transmits?
17 A Yes.
18 JUDGE ROBERTS: Ms. Kessler, XM
19 is voluntarily offering this information I
20 presume because they were already providing
21 information for their satellite services.
22 Is that right?

1 THE WITNESS: That's correct.
2 BY MS. ABLIN:
3 Q I know you stated that the two
4 seven day periods, two conservative seven
5 day periods, were randomly generated. Could
6 you describe how the random generation
7 process worked?
8 A Yes, there's a function in Excel
9 called Random or Random Number or something
10 like that and so based on all the available
11 days Excel randomly generated the first day
12 of the first seven day period and another
13 one for the second. It's a function in
14 Excel.
15 Q Did you analyze any other
16 quarters besides the one quarter, the first
17 quarter of 2005?
18 A No, we did not.
19 Q You just analyzed one quarter.
20 A That's correct.
21 Q What were the confidence limits
22 on the percent of artists that you stated

1 were not picked up in the sample?
2 A I'm not sure what you mean by
3 confidence level. We simply looked at those
4 that were included in the sample and those
5 that weren't included in the sample and
6 that's how we determined being a percentage
7 of all artists compared to those that were
8 missed.
9 Q Did you perform any sort of
10 statistical analysis on the result or you
11 just simply ran a count of X songs appeared
12 in the sample versus why songs appeared in
13 the census?
14 A The analysis we looked again are
15 of those artists that were performed during
16 the three-month period compared to those
17 that were picked up by the sample and what
18 the difference was. That's what we
19 examined.
20 Q And I guess what I'm getting at
21 is did you perform any sort of statistical
22 analysis apart from what you just described.

1 A We did what I described. We
2 compared what was in the census to what was
3 missed in the sample, what was in the sample
4 and how the artists who were in the sample
5 were either over compensated or under
6 compensated for their performances of sound
7 recordings.
8 Q So beyond that, you didn't
9 perform any sort of -- Beyond what you just
10 described, you performed no other sort of
11 analysis.
12 A No, the analysis I described is
13 what we conducted.
14 Q Now XM is not a radio
15 simulcaster, are they?
16 A No, they are not.
17 Q Did you perform any sample versus
18 census analyses on any radio simulcasters?
19 A We have no data from radio
20 simulcasters. So we were unable to do so.
21 That information is in the possession of the
22 radio stations and to the extent they would

1 conduct that analysis, I would be interested
2 to see those results.
3 Q So I take it that's a no.
4 A No.
5 Q So your analysis consisted then,
6 just to recap, of a single webcaster, that
7 is XM, for a single two weeks or two
8 conservative seven day periods during a
9 single calendar quarter. Correct?
10 A Correct.
11 Q Now as a mathematician and data
12 analyst, you would agree, would you not,
13 that the larger a sample the more accurate
14 it becomes?
15 A Well, I'm either a statistician
16 or a mathematician. I have analyzed data
17 extensively and obviously the more you
18 analyze things the more you'll see a trend.
19 But we analyzed the data we had available to
20 us.
21 Q And in considering the size of
22 the sample, you don't typically consider the

1 data from just one source, do you, but from
2 all sampled sources?
3 A I would love to work with the
4 broadcasters and the webcasters to examine
5 the data and see if there is something
6 beyond census reporting that would result in
7 the equitable distribution of royalties, but
8 I don't have that information. So I'm
9 unable to do so, but I would love to have a
10 much larger size of data to examine. Yes.
11 Q Did your written direct testimony
12 discuss this analysis at all?
13 A Through I think incorporation of
14 all my comments and SoundExchange's comments
15 with respect to notice and recordkeeping,
16 yes.
17 Q So the analysis that was
18 performed in the first quarter of 2005 is
19 ste forth in one of the exhibits that was
20 submitted.
21 A I think that's right or it was a
22 prior study that we did.

1 Q I'm sorry. Could you repeat
2 that?
3 A It was either the study that I
4 described that was in my notice, in
5 SoundExchange's notice and recordkeeping
6 comments or a prior analysis.
7 Q And that's something that's been
8 submitted in this proceeding as evidence?
9 A Yes, by incorporation, those
10 documents are exhibits -
11 Q Could you point me to the
12 document?
13 (Discussion off the microphone.)
14 BY MS. ABLIN:
15 Q Ms. Kessler, if I could just
16 interrupt you for one minute? Did you state
17 earlier that you performed this analysis in
18 October or November of 2005?
19 A Yes, I believe we conducted the
20 analysis in the third quarter of `05, yes.
21 Q Which would be October, November
22 and December of `05?

1 A Third quarter would be July,
2 August, September.
3 Q July, August, September.
4 A Yes, sorry about that.
5 Q Okay.
6 (Discussion off microphone.)
7 MR. PERRELLI: Your Honor, I
8 think it will speed things along if I can
9 identify the section, assist the witness
10 rather than having her page through many
11 exhibits.
12 CHIEF JUDGE SLEDGE: I'm afraid
13 that's not permitted, Mr. Perrelli.
14 MR. PERRELLI: Fair enough, Your
15 Honor. Thank you.
16 THE WITNESS: So I think it's
17 Exhibit 418DP page 13 where the discussion
18 of sample reporting takes place and since
19 the exhibits to this document aren't in this
20 book I'm not sure of the study is
21 incorporated with this document. There may
22 be a reference in an earlier discussion

1 however. I'm unable to locate it --
2 (Discussion off microphone.)
3 BY MS. ABLIN:
4 Q Ms. Kessler, did you prepare a
5 study plan before conducting the analysis
6 outlining what the purpose of the analysis
7 would be?
8 A Yes.
9 Q And is that provided in one of
10 the exhibits that we received?
11 A I don't know.
12 Q In any event, a minute ago you
13 were not able to find the study or documents
14 related to the study.
15 A Yes, I haven't been able to find
16 it yet.
17 Q Did you keep a record of the
18 techniques you used to analyze the data?
19 A Yes, we did.
20 Q Is that included in any of the
21 exhibits?
22 A I don't know.

1 Q You were not able to find it a
2 minute ago in any event.
3 A That's correct.
4 MS. ABLIN: I have no further
5 questions.
6 THE WITNESS: I might have found
7 it. It appears that on page nine -
8 CHIEF JUDGE SLEDGE: Just a
9 moment. Are there any questions by NPR?
10 MS. BROWN: Yes.
11 CROSS EXAMINATION (NPR)
12 BY MS. BROWN:
13 Q Good morning, Ms. Kessler.
14 A Good morning.
15 Q My name is Kris Brown and I
16 represent National Public Radio. I just
17 have a few questions for you to clarify some
18 of the documents that Ms. Ablin asked you
19 about. If you could turn first to Services
20 Exhibit 154. It's the full page printout
21 that was just produced. If you turn to page
22 three of that exhibit that's marked

1 SX0114260.
2 A Yes.
3 Q Under the column ENTS NSTS
4 analysis.
5 A Yes.
6 Q I see that two services are
7 listed there for 2004.
8 A Yes.
9 Q Do you know which two services
10 those were?
11 A No.
12 Q Okay. And you'll see in 2005
13 that that number is reduced to zero.
14 A Yes.
15 Q Do you know if those two services
16 under 2004 and ENTS NSTS were moved to
17 another category?
18 A They likely were but I'm not
19 sure.
20 Q Do you know which category they
21 were moved to?
22 A No, I don't.

1 Q If you turn to the next page
2 marked SX114261 under category NONSWSA
3 NONCOM analysis.
4 A Yes.
5 Q I believe in response and clarify
6 me if I'm incorrect to Ms. Ablin's question,
7 you said that you thought NPR and CPB funded
8 station were reflected in this category.
9 A I said I didn't know which
10 category they might be reflected in. I
11 think that's what I said.
12 Q So is it your belief that NPR and
13 CPB funded stations are reflected somewhere
14 in this document?
15 A I don't know if they're reflected
16 in this document or not.
17 Q What is your basis for your
18 belief that they may be reflected in the
19 NONSWSA NONCOM analysis?
20 A Well, to the extent that their
21 license agreement expired and again I'm not
22 sure what year they expired they would

1 likely have to pay under one of the existing
2 CARP rates which would be or the SWSA rates
3 which are the ones presented here.
4 Q Are you aware that there are
5 approximately 799 CPB funded and NPR member
6 stations?
7 A I know there are hundreds of NPR
8 stations, yes.
9 Q And here in this category under
10 NONSWSA NONCOM analysis for 2004, there are
11 14 services listed. Is that correct?
12 A That's correct.
13 Q And that's less than 799.
14 A Yes, it is.
15 Q And for 2005, there are 13
16 services listed. Is that correct?
17 A That's correct.
18 Q And that's less than 799.
19 A Yes, it is.
20 Q And for 2006, there are seven
21 services listed. Is that correct?
22 A That's correct.

1 Q And that's less than 799.
2 A It is and to the extent that NPR
3 was reported as broadcast group with all of
4 its hundreds of stations then they might be
5 represented as one in one of those numbers.
6 Q Do you generally receive reports
7 from all NPR member stations or at least
8 those that are performing webcasting?
9 A What type of reports?
10 Q Reports as required by
11 SoundExchange in terms of webcasting by NMP
12 member organizations.
13 A Again often broadcast groups
14 report, they pay with a single check and
15 their statements of account are supposed to
16 indicate all the individual stations
17 broadcasting, but they often neglect to do
18 so.
19 Q And to the extent that you had
20 received a lump sum payment from NPR, do you
21 think that would be reflected on this chart
22 here?

1 A To the extent -- Well, the lump
2 sum payment I believe was for 1998 through
3 2002 but again I'm not sure when that
4 license expired. So to the extent that it
5 extended to 2004, it may be reflected in
6 there. I simply can't say.
7 Q Okay. I'd like to draw your
8 attention to Services Exhibit 155 and if you
9 would turn to Tab 1. Again this is just to
10 clarify Ms. Ablin's question and correct me
11 if I misheard you, but I think that you said
12 that you thought that NPR and CPB funded
13 stations were reflected in the category
14 that's denoted on this chart as NCPB or
15 NONSWSA NONCOMMERCIAL public broadcasts.
16 A Yes, I said that they may be. I
17 didn't know.
18 Q And looking on page one which
19 I'll represent to you is the only page that
20 contains the notation for NCPB according to
21 this category, under that if you look a few
22 lines down ComedyCentral.com is listed

1 there. Can you tell me why that's included
2 in the NCPB category?
3 A No, I can't.
4 Q And to your knowledge, is Comedy
5 Central an NPR or CPB funded station?
6 A I don't know.
7 Q And you'll look going down,
8 several of these stations are listed with
9 the parent name Moody Broadcasting Network.
10 A Yes.
11 Q And to your knowledge are any of
12 the stations with the parent Moody
13 Broadcasting Network part of NPR or CPB?
14 A I don't know.
15 Q And I'll represent to you that
16 for the category NCPB there are 42 stations
17 listed on this chart.
18 A I'm sorry. Repeat that.
19 Q There are 42 stations listed on
20 this chart.
21 A Categorized as NCPB?
22 Q NCPB. I'll represent that to you

1 and that's far less than the 799 NPR and CPB
2 member stations. Is that correct?
3 A It's far less than the 700 figure
4 you quoted me, yes.
5 MS. BROWN: May I have one
6 moment, Your Honor? No further questions.
7 CHIEF JUDGE SLEDGE: Mr.
8 Freundlich, any questions?
9 MR. FREUNDLICH: Yes, Your Honor.
10 CROSS EXAMINATION (ROYALTY LOGIC)
11 BY MR. FREUNDLICH:
12 Q Good morning, Ms. Kessler. I'm
13 Ken Freundlich of Royalty Logic, Inc.
14 A Good morning.
15 Q I have a few questions for you.
16 In listening to your testimony over these
17 past two days, is it fair to say that you
18 oppose Royalty Logic's attempt to get DARPA
19 which we refer to as Direct Accounting
20 Royalties Payment and Auditing directly from
21 the licensees as the same basis as
22 SoundExchange does because you think

1 competition would create inefficiencies?
2 A So that's a complicated statement
3 that you made. Let me characterize it this
4 way. SoundExchange believes that under a
5 single license with a single set of rates
6 and terms that there should be one set of
7 rules and those one set of rules should be
8 administered by one organization. To the
9 extent that a copyright owner or a licensee
10 for that matter wishes to engage in a direct
11 deal and conduct direct licensing, of course
12 they are welcome to do so. The statutory
13 license is nonexclusive and in that
14 situation, if the copyright owner or the
15 licensee wanted to identify an agent to do
16 that on their behalf, they are welcome to do
17 so.
18 Q I appreciate you reconstituting
19 my question, but my question was do you
20 think that competition would create
21 inefficiencies.
22 A I think that competition in a

1 statutory framework leads to free ridership
2 and it's inefficient and overall costs right
3 across all copyright owners and all artists
4 would increase.
5 Q So is that a yes to that
6 question?
7 A Yes, it would introduce cost
8 inefficiencies.
9 Q Okay, and what about those
10 artists and copyright holders that do not
11 want to be affiliated with RIAA and
12 SoundExchange that want their own
13 representation? What about those people?
14 A Copyright owners are free to
15 engage in direct licensing and could have
16 any representation they so desired.
17 Q So they can direct license but
18 they can't appoint another agent to do their
19 business on the same basis as SoundExchange.
20 Is that your testimony?
21 A My testimony is that we're the
22 sole designated agent right now and we

1 represent members and nonmembers alike, all
2 copyright owners and artists entitled to
3 payment under the statutory license, but
4 anyone who wants to engage in direct
5 licensing may do.
6 Q But doesn't the law, Ms. Kessler,
7 give nonmembers of SoundExchange the choice
8 to designate their own agents?
9 A There is the concept of common
10 agents somewhere in the law, but it's not
11 clear if they're acting in the capacity of a
12 designated agent or simply a common agent
13 which would represent that artist or
14 copyright owner subsequent to the
15 distribution from SoundExchange.
16 Q I know you're drawing a
17 distinction between designated agents and
18 common agents, but my question would be
19 would that choice that the law gives that
20 you just referred to be meaningful if a
21 nonmember of SoundExchange was not paid the
22 same amount of money for the same

1 performance as a member of SoundExchange.
2 MR. PERRELLI: I'm going to
3 object to the extent that he's trying to
4 characterize the law and ask a nonlawyer to
5 provide some form of interpretation.
6 CHIEF JUDGE SLEDGE: Please
7 rephrase, Mr. Freundlich.
8 MR. FREUNDLICH: Okay.
9 BY MR. FREUNDLICH:
10 Q Would it be fair for a Royalty
11 Logic member to receive payments on a
12 different basis, a different amount, for the
13 same performances as a member of
14 SoundExchange, Ms. Kessler?
15 A Again, SoundExchange is not a
16 membership organization. We do not
17 discriminate between members and nonmembers.
18 But should a collection of members of an
19 organization wish to differentiate the value
20 of those performances I would imagine that
21 they could.
22 Q But only after SoundExchange

1 processed and took their own administrative
2 costs out of the payments. Isn't that
3 correct?
4 A In the event that they are a
5 common agent receiving royalties from
6 SoundExchange, yes. Their downstream
7 distribution, I'm assuming that with the
8 agreement of the membership they could apply
9 any rules they so chose.
10 Q Right, and the performances would
11 not be valued, get the same amount of money,
12 as the ones that went through SoundExchange
13 to SoundExchange payees.
14 A SoundExchange doesn't
15 differentiate among members or nonmembers.
16 All performances are valued equally and it's
17 a question of their rotation or listenership
18 that one performance will earn more money
19 than another.
20 Q Ms. Kessler, isn't direct
21 accounting reporting payment and auditing
22 from the licensees the only way that a non

1 SoundExchange payee can assure that they get
2 the same amount for the same performances as
3 a SoundExchange payee?
4 A I'm not sure I understand the
5 question.
6 Q Well, if Royalty Logic, for
7 example, was not getting direct accounting
8 royalties payment and auditing rights from
9 the licensees, how could they assure that
10 their members would get payments on the same
11 basis as a SoundExchange person?
12 A Again, I'm not sure what you're
13 asking. I mean SoundExchange reports in
14 great detail to every recipient of royalties
15 exactly what they're being paid
16 SoundExchange for and as far as I
17 understand, a copyright owner or artist as
18 an audit rep to SoundExchange and certainly
19 could examine our allocations and
20 distributions. Our system is completely
21 transparent and doesn't differentiate in any
22 way.

1 Q So the copyright owners would get
2 to audit SoundExchange. That's what you're
3 saying.
4 A They can audit SoundExchange. I
5 believe that's right.
6 Q So Royalty Logic would be in the
7 same position. They would have to audit
8 SoundExchange in order to see what the
9 payments were that came in from the
10 licensees.
11 A No, again, we're not permitted to
12 show individual licensee payments. We're
13 only allowed to do so in the aggregate.
14 That aggregate figure is displayed on the
15 statement so they know precisely what the
16 pool of money is that's being allocated and
17 distributed. From there, they see their
18 individual performances as a copyright owner
19 or as an artist and what performance was
20 valued and then they see their statutory
21 split applied to that.
22 Q So the Royalty Logic people

1 wouldn't get the same information as the
2 SoundExchange people then. Is that correct?
3 A If Royalty Logic is a common
4 agent on behalf of a copyright owner or an
5 artist, they would get the same information
6 that any other recipient of royalties from
7 SoundExchange would get.
8 Q From SoundExchange, but they
9 wouldn't get the same information that
10 SoundExchange got from the licensees, would
11 they?
12 A They would not get the reports of
13 use or the individual payment information
14 that SoundExchange gets. That's correct.
15 Q So non SoundExchange payees, the
16 members of Royalty Logic, are going to be
17 forced then under your interpretation to
18 rely on the SoundExchange Recording Industry
19 of America (RIAA) auditing for your
20 decisions of when you're going to audit, how
21 you're going to audit, the licensees.
22 A You know SoundExchange has an

1 audit with respect to the licensees and
2 we've asked that copyright owners, any
3 copyright owner, have the same right to
4 audit. It may be collectively. There may
5 be a business reason to audit services or
6 not audit other services that we don't think
7 we should stand in the shoes of each and
8 every copyright owner with respect to that
9 audit right and we've requested that any
10 copyright owner be permitted to audit a
11 service.
12 Q To audit the licensees.
13 A Correct.
14 Q And would that include RLI?
15 A To the extent that RLI is a
16 copyright owner which I don't think they
17 are.
18 Q So it wouldn't include RLI if
19 they were designated as an agent for their
20 members.
21 A Well, again this is theoretic but
22 if RLI is a designated agent by this board,

1 then they would be operating under some set
2 of rules that I would assume includes an
3 audit right.
4 Q And what if RLI were a common
5 agent?
6 A To the extent RLI is a common
7 agent representing copyright owners those
8 copyright owners have an audit, should have
9 an audit right to the licensees.
10 Q But RLI would not under your
11 interpretation?
12 A You're drawing a distinction. If
13 they are representing a group of copyright
14 owners who wish to audit a service, then
15 whether it's the RLI conducting the audit or
16 the copyright owner giving permission to RLI
17 to conduct the audit, I'm not sure how that
18 would work since we don't have regulation or
19 rules around that.
20 Q Ms. Kessler, do you think that
21 Royalty Logic's members would compromise
22 their right to choose a collective based on

1 SoundExchange's notion of what's efficient
2 and what's not efficient?
3 A Repeat the question please.
4 Q Do you think that a Royalty Logic
5 member would compromise its right to choose
6 whichever collective it wanted to affiliate
7 with based on your company's notions of
8 efficiency?
9 A I think --
10 MR. PERRELLI: Your Honor, I'm
11 going to object to asking her to guess
12 what's in the mind of the Royalty Logic
13 members with her, I guess, the premise of
14 this question.
15 CHIEF JUDGE SLEDGE: Mr.
16 Freundlich.
17 MR. FREUNDLICH: I'll rephrase
18 the question.
19 BY MR. FREUNDLICH:
20 Q Do you think it's fair to make
21 Royalty Logic members and non members of
22 SoundExchange or non payees of SoundExchange

1 compromise their right to choose based on
2 SoundExchange's notion of what's efficient
3 and what's not?
4 A You know I tried to make this
5 clear that I think under a statutory license
6 with a single right and a single set of
7 rates and terms that there should be a
8 single set of rules and that those rules are
9 best administered by a single agent who like
10 SoundExchange represents copyright owners
11 and artists. They're on our board of
12 directors. They participate in our various
13 committees and that is the appropriate place
14 for the administration of this statutory
15 royalty.
16 Q But haven't the Royalty Logic
17 members in fact demonstrated what they think
18 about SoundExchange's decision making by
19 affiliating with Royalty Logic because
20 they've not had a good experience with the
21 RIAA and the major labels in the past?
22 MR. PERRELLI: I object again. I

1 don't know how she could possibly testify
2 about whatever experience Mr. Freundlich is
3 representing.
4 CHIEF JUDGE SLEDGE: Sustain.
5 BY MR. FREUNDLICH:
6 Q I want to go back to the other
7 question which you still haven't answered,
8 Mr. Kessler. Do you think it's fair that
9 Royalty Logic members should have to not
10 have a right to choose which collective they
11 want to do their bidding with respect to
12 these royalties and take it through
13 SoundExchange?
14 A You know again a copyright owner
15 has the right to engage in direct licensing
16 and determine what they feel is fair outside
17 of the statutory license. Once a statutory
18 license is in place, however, I think this
19 is across all copyright owners and all
20 artists and services can take that license.
21 So if you're operating in a statutory
22 framework, again I feel a single

1 organization better serves that collective
2 community for both efficiencies and cost
3 saving reasons.
4 Q You keep referring to the
5 efficiencies, Ms. Kessler, but isn't this
6 really about choice?
7 A In a statutory license, I'm not
8 sure what choice you have. Again, if you
9 want choice, you may direct license. Under
10 statutory license, the price is set, the
11 terms are set, the ways in which you can
12 exploit those sound recordings is set. So
13 there is not choice in that situation. The
14 choice exists outside of that license.
15 Q Are the methods of payments to
16 your copyright holders set?
17 A The method of payments to our
18 copyright owners and artists are mandated by
19 statutory splits and further with respect to
20 the payees' schedules by the recipients
21 themselves.
22 Q I'm not talking about the

1 amounts. Are the frequency of payments set
2 or is that something the SoundExchange board
3 decides?
4 A As far -- No, there is no term
5 with respect to a requirement with the
6 frequency of distributions that
7 SoundExchange conducts quarterly with
8 respect to allocations of new royalties and
9 more frequently with distributions of
10 checks.
11 Q But that's a decision that
12 SoundExchange makes. Correct?
13 A That is a decision that
14 SoundExchange makes in conjunction, well,
15 with the approval and direction of its
16 committees and it's board of directors
17 comprised equally of copyright owners and
18 artists.
19 Q But it's not comprised of any
20 Royalty Logic members, is it?
21 A To my knowledge, Royalty Logic is
22 not a copyright owner and to the extent they

1 have members, I'm not sure who they are. So
2 I can't --
3 Q But you're not aware that any of
4 your committees and board of directors are
5 populated by any Royalty Logic members.
6 A No, I'm not aware of that.
7 Q And in terms of the auditing, are
8 the auditing policies of SoundExchange also
9 set by its board?
10 A Well, the auditing provisions are
11 set forth either in the statute or in
12 regulations. So that's where those are set.
13 Q Are you talking about the
14 auditing rights of the -- The frequency with
15 which you're going to conduct audits is set
16 by the regulations?
17 A No, the regs or the terms are
18 silent with respect to frequency. It does
19 establish the right however.
20 Q So you set your own audit
21 policies then, SoundExchange does.
22 A Again with the input direction

1 and oversight of our board, yes.
2 Q Right, but there are not RLI
3 members on that board to your knowledge, are
4 there, Ms. Kessler?
5 A That's correct.
6 Q Okay. Now you described in some
7 detail in your direct written statement as
8 well as in earlier testimony, the manner in
9 which you receive payment logs, I guess you
10 refer to those as statements of accounts,
11 from webcasters and how they are logged in
12 and processed by SoundExchange. Correct?
13 A Yes.
14 Q Ms. Kessler, is this receipt and
15 logging of statements by SoundExchange
16 anything different than what any data
17 processing entity would have to do with
18 that material like ASCAP or BMI or Harry
19 Fox?
20 A I can't speak to how they process
21 paperwork. I can speak to how SoundExchange
22 deals with its statements of accounts,

1 payments and reports of use.
2 Q But wouldn't you say that having
3 logs occasionally failed to conform with
4 format and delivery specs in the job of
5 matching and research to assure correct
6 association of copyright owners and
7 performers with performance is something
8 that a data processing entity like
9 SoundExchange has to do to perform its
10 function?
11 A You know SoundExchange has
12 undertaken a number of activities with a
13 level of thoroughness and comprehensiveness
14 in order to ensure that royalties are
15 received by absolutely everyone entitled to
16 them and to the extent that SoundExchange
17 has gone through this very broad process of
18 making sure that sound recordings are
19 identified accurately and that we conduct
20 all the necessary outreach to pay out as
21 much of the royalties as we possibly can,
22 that is something that SoundExchange in its

1 philosophy has undertaken. What other
2 collecting societies or similarly situated
3 organizations do, I just can't speak to.
4 Q But aren't all these things that
5 SoundExchange has undertaken in fact common,
6 everyday functions of the business of
7 copyright research and royalty accounting?
8 A Again, I think that depending on
9 a company's membership, their profit motive,
10 their other activities, may trade off one
11 thing for another. SoundExchange is simply
12 administering a single license with single
13 terms and doing that as fairly,
14 transparently and efficiently as possible.
15 So I can't speak to the business decisions
16 or where resources are expended in other
17 organizations.
18 Q And you're administering those
19 licenses based on in part on the regulations
20 and in part on the decisions of
21 SoundExchange's board and all those
22 committees you described.

1 A You know we're heavily regulated
2 and we adhere to those regulations and to
3 the extent that the regulations or the terms
4 are silent or unclear on issues we engage
5 our copyright owner and artist community
6 with input and guidance on the most
7 efficient and transparent way to implement
8 those policies. So it is with the very
9 people who are receiving the benefit of the
10 royalty distributions that are making the
11 decisions of what to do with those
12 royalties.
13 Q But none of those very people
14 include members from Royalty Logic to your
15 knowledge, do they?
16 A No, they don't.
17 Q Now in your direct statement and
18 in some of your testimony, you state that
19 millions of performances that SoundExchange
20 logs in are principally from the preexisting
21 subscription services and satellite
22 services. Do you remember making that

1 statement, Ms. Kessler?
2 A Yes.
3 Q And these would include Muzak,
4 Music Choice, DMX, XM and Cirius. Is that
5 right?
6 A That's correct.
7 Q So processing information from
8 these five services constitutes the lion
9 share of your experience at SoundExchange.
10 Would that be correct, Ms. Kessler?
11 A The lion share with respect to
12 processing performances or in general?
13 Q Right, processing performances.
14 A Yes, that's correct.
15 Q So your system essentially
16 receives the bulk of its data from these
17 five sources. Is that correct?
18 A That's correct.
19 Q And each of these five companies
20 has very sophisticated play lists and data
21 presentation in your requested format, don't
22 they?

1 A Sophisticated? I think it's the
2 minimum necessary to get to the point where
3 you can fairly and efficiently distribute
4 royalties. I'm not sure quite sure how
5 sophisticated it makes it though.
6 Q But your testimony in this case
7 just so we can be clear is based on reports
8 primarily received from these five companies
9 and conjecture with respect to the rest who
10 are not reporting because there are no rules
11 in place for the formats of those reports.
12 A Well, there are interim
13 regulations in place with respect to the
14 data elements and other information that the
15 services will likely be required to report.
16 So we are not in the dark with respect to
17 the data content. What we are in the dark
18 about is what file format and by what
19 mechanism those reports are delivered to
20 SoundExchange.
21 Q And are you aware, Mr. Kessler,
22 that for example MRI processes reports from

1 over 300 different local television stations
2 each with their own or slightly different
3 formats of data presentation?
4 A I'm unaware of what data
5 ingestion MRI conducts.
6 Q And that the television use, the
7 MRI reports, are generally excerpts of
8 songs, three second cues, five second
9 background cues which are even more
10 difficult to match than those that you've
11 described at SoundExchange.
12 A First, I couldn't speak to the
13 difficulty of the matching, but I can't
14 speak to what MRI ingests as I've stated.
15 Q Now on page 14 of your written, I
16 don't think you have to go there, but you
17 refer something called the "theory of
18 certain entities." Is that so, Ms. Kessler?
19 It's on page 14 if you want to take a look.
20 It's the second full paragraph.
21 A Page 14?
22 Q Where you say -- I'll read it

1 into the record for clarity here. You're
2 saying "Distributions could be formal or
3 complicated if the members of a band were
4 represented by different agents with one
5 member of the band represented by one
6 collective and all remaining members
7 represented by SoundExchange. Under the
8 theory of certain entities, the members paid
9 through SoundExchange receive less than the
10 members paid through another entity due to
11 the possibility of others free riding on
12 SoundExchange's investments without having
13 to share the cost of these investments and
14 if there were multiple collectives, then the
15 difficulties associated with allocating
16 royalties and deducting costs could be
17 exacerbated as explained in more detail."
18 Do you remember that statement? Is that a
19 true statement?
20 A Yes.
21 Q So is it your testimony that if
22 there are multiple collectives the system of

1 collection and payment of royalties would
2 more inefficient and complicated?
3 A If there are multiple agents,
4 it's my view that the cost would be
5 increased, delays would increase and it
6 would be far more difficult to distribute
7 royalties, yes.
8 Q So is it your belief, Ms.
9 Kessler, that a system with any checks and
10 balances to SoundExchange is cost structure
11 and investment is more efficient?
12 A SoundExchange has extensive
13 checks on its costs and expenditures because
14 of its board oversight. I mean again the
15 recipients of the royalties are on our board
16 and on our committees and they are the ones
17 that review our budget, approve our
18 programs, have twice deferred the taking of
19 the undistributed royalties to reduce
20 SoundExchange's costs to give us an
21 opportunity to reach more and more copyright
22 owners and artists who deserve the

1 royalties. So I disagree with your
2 characterization that SoundExchange's
3 expenditure of funds goes unchecked in some
4 way.
5 Q But it's -
6 A That's not the case.
7 Q So you're describing checks and
8 balances then that are internal to
9 SoundExchange. Correct?
10 A By its committees and its board,
11 yes.
12 Q But there aren't any Royalty
13 Logic members on those committees or board,
14 are there, Ms. Kessler?
15 A No, there is not.
16 Q Isn't it true, Ms. Kessler, that
17 the board of SoundExchange does not
18 represent all copyright holders and
19 performers?
20 A Well, SoundExchange's board
21 consists of nine copyright owners. So it -
22 Q But that's not my question. My

1 question is isn't it true, Ms. Kessler, that
2 the board of SoundExchange does not
3 represent all copyright holders and
4 performers.
5 A SoundExchange represents members
6 and nonmembers. So to that extent,
7 SoundExchange does represent all copyright
8 owners who aren't direct licensing outside
9 of the statutory license.
10 Q But aren't there in fact many
11 independent labels and artists that are
12 members of Royalty Logic that are not
13 represented by SoundExchange?
14 A I don't know who they are.
15 Q But hypothetically, if there are
16 some, is it your testimony that
17 SoundExchange still represents them even
18 though they don't want to be represented by
19 SoundExchange?
20 A SoundExchange pays all copyright
21 owners regardless of membership in
22 SoundExchange.

1 Q And sets policies as you
2 described before based on information they
3 received from persons other than the Royalty
4 Logic members?
5 A SoundExchange sets its programs
6 and its policies and its budget based on
7 approval by its board of directors, yes.
8 Q But you agree, Ms. Kessler, don't
9 you, that all artists and performers deserve
10 a say in how their dollars are spent by
11 their collective?
12 A In a perfect world, every
13 statutory recipient would be involved in and
14 participate. But there are tens of
15 thousands of featured artists, some of whom
16 are groups, and have group members of three
17 or four or five people. There are thousands
18 of copyright owners here in the United
19 States and around the globe. There are many
20 artists who own their own masters and in my
21 view and the decision lies with this board
22 of what organization is going to be charged

1 with the humbling task of fairly
2 distributing these royalties to those
3 entitled parties.
4 Q So are you advocating, Ms.
5 Kessler, denying Royalty Logic's members and
6 others a say in how their chosen collective
7 spends their money and how their payments
8 are calculated?
9 A I can't speak to what those
10 members decide or not. It's up to them.
11 Q But you're saying they don't have
12 a choice.
13 A I'm saying again at the risk of
14 repeating myself that in a statutory
15 framework it makes more sense to have a
16 single agent administering a set of rules
17 that apply to all copyright owners and
18 artists who are within the statutory
19 framework and those that don't like it may
20 direct license outside of it. That's what
21 I'm saying.
22 Q Are you familiar with artists

1 known as Dr. Dre and Metallica?
2 A Yes, I am.
3 Q And that they sold million of
4 records over the past roughly 10, 15 years.
5 A Yes, I am.
6 Q Okay. So you're saying that Dr.
7 Dre and Metallica for example shouldn't be
8 entitle to a choice in their collectives and
9 receive royalties on the same exact basis as
10 a SoundExchange member for equivalent
11 performances?
12 A I'm saying that Dr. Dre and
13 Metallica receive their royalties on the
14 same basis as anybody else who received
15 royalties from SoundExchange and I'm not
16 denying Metallica their say. We would
17 welcome them to participate on our advisory
18 committees and we have artists' seats on our
19 board and we would welcome their
20 participation.
21 Q But that would be involuntary
22 though because Dr. Dre and Metallica and

1 others do not want to be affiliated with
2 SoundExchange and the Recording Industry of
3 America.
4 A I'm not sure --
5 MR. PERRELLI: Objection, Your
6 Honor.
7 CHIEF JUDGE SLEDGE: Sustained.
8 BY MR. FREUNDLICH:
9 Q Isn't it true, Ms. Kessler, that
10 if SoundExchange is acting as the
11 monopolistic funnel through which all
12 royalties flow that an non SoundExchange
13 member would receive less than a
14 SoundExchange member for the same exact
15 performance?
16 MR. PERRELLI: I'm going to
17 object one on simply just arguing with the
18 witness and making statements too. I think
19 she has answered the question over and over
20 again that talks about copyright owners and
21 performers whether they're members or not
22 and how they are paid.

1 CHIEF JUDGE SLEDGE: Mr.
2 Freundlich.
3 MR. FREUNDLICH: I'll try to
4 rephrase the question.
5 CHIEF JUDGE SLEDGE: Rather than
6 rephrase, can you not go over the same
7 things you've covered many times.
8 MR. FREUNDLICH: Fair enough,
9 Your Honor.
10 BY MR. FREUNDLICH:
11 Q Now, Ms. Kessler, you've
12 presented to us samples of statements of
13 account from SoundExchange to its members.
14 Correct? We have some of those that are
15 attached to your testimony. We have seen
16 those.
17 A SoundExchange statements to its
18 recipients?
19 Q Right. To its members.
20 A Yes.
21 Q Now do these statements show the
22 recipient of funds from SoundExchange, how

1 the calculations were arrived at? For
2 example, what costs were first deducted from
3 the gross receipts?
4 A I'm not sure if the admin rate is
5 on the statements. The total amount of
6 royalties collected are and then the
7 payments made to recipients is what is
8 displayed, not the admin rate.
9 Q Not the admin rate or any other
10 information about cost deductions. Isn't
11 that correct, Ms. Kessler?
12 A In our annual reports, all of
13 that is fully expressed.
14 Q But it's not on the any of the
15 reports to the artist, is it, to the members
16 I should say? Sorry.
17 A Well, again we send statements to
18 members and nonmembers and as I said, the
19 admin rate is not on the statement, but it's
20 elsewhere within SoundExchange's public
21 information.
22 Q Could you tell me which exhibit

1 it is that you're looking at there for that
2 information?
3 A Do you mean where the admin rate
4 is -
5 Q Yes, well, you just looked at
6 some portions of the exhibits that -
7 A Yes, 252 is a statement from
8 SoundExchange.
9 Q Now you say though, Ms. Kessler,
10 that one of the goals of SoundExchange is to
11 create a fair system of royalty payment and
12 allocation. Isn't that correct?
13 A Yes.
14 Q So how can a member determine
15 that SoundExchange is being fair if the
16 statement's giving so little information
17 about how SoundExchange is arriving at the
18 net payment to them?
19 A Again SoundExchange posts an
20 annual report on its website so that artists
21 and copyright owners, the general public,
22 whomever, can examine what our costs are and

1 what our effective admin rate is.
2 Q And how do you tell the members
3 about the fact that in order to find out
4 what costs are being deducted they have to
5 go to the SoundExchange website?
6 A Well, if they inquire at
7 SoundExchange a staff member will certainly
8 tell them what the admin rate is and what
9 the link is where they can see the annual
10 report.
11 Q So then if they don't make a
12 phone call to your customer service person
13 asking the question, they have no way of
14 finding that out, do they?
15 A They can find out. I mean it's
16 not hidden what SoundExchange admin rate is.
17 It's on our website. So they're welcome to
18 come and see that.
19 Q Right, but if they don't ask for
20 the information how are they going to know
21 that they could go to the website?
22 A I don't know how they would know.

1 Q Is it fair that you haven't
2 communicated that to them as part of their
3 statements?
4 A No -- Well, if you're saying is
5 the admin rate absent from the statement,
6 yes, it is and it's an excellent suggestion.
7 Q And on the website, is there
8 information with respect to each member's
9 statement as to how much of an overall cost
10 has been deducted off of their statements?
11 A Well, every copyright owner and
12 artist is subject to a single admin rate.
13 Again in a statutory license, it seems to be
14 fair to me that all recipients of the
15 statutory royalty share equally in the costs
16 of administration unless of course the
17 licensees want to pay for the administration
18 and statutory license.
19 Q And none of the members have any
20 independent way of knowing, for example,
21 that that $9 million that the RIAA lent to
22 SoundExchange to start itself, the startup

1 costs, are being deducted from their
2 royalties, do they?
3 A No, it's evident from the annual
4 report on our website what the CARP
5 repayment is. We've never attempted to not
6 discuss the CARP repayment.
7 Q But again just to be clear, the
8 only way that a member can find out about
9 this CARP repayment again is to go on the
10 website. Right?
11 A Yes, I think I've answered that.
12 Q Okay. Thank you. But isn't it
13 true, Ms. Kessler, that in order for the
14 system to really be transparent and
15 auditable by its members that statements
16 would have to be more detailed?
17 A Again, if you look at the
18 statements, they are quite detailed with
19 respect to the list of sound recordings but
20 I'll certainly take back the idea of putting
21 the admin rate on each statement. The
22 problems is that there's an admin rate that

1 differs from royalty stream to royalty
2 stream. So it's going to further complicate
3 the statements, but I think it's a great
4 idea.
5 Q Right, but until you heard that
6 idea from me, had anybody at SoundExchange
7 considered putting that amount of
8 information on the statements so they could
9 be more transparent?
10 A Not to my recollection.
11 Q And how complicated would that be
12 to provide that information on a statement?
13 A I don't know. I'll have to ask
14 our Development Team how difficult it will
15 be.
16 MR. FREUNDLICH: Your Honor, we
17 have until 12:45 p.m. today. Is that the
18 timing?
19 CHIEF JUDGE SLEDGE: Yes, you're
20 right.
21 MR. FREUNDLICH: Okay.
22 BY MR. FREUNDLICH:

1 Q Now on page 16 of your written
2 testimony, you make the statement that there
3 have been nine royalty distributions to
4 date. I just want to make clear. Has there
5 been another one since then?
6 A There have been several, yes.
7 Q So how many royalty distributions
8 have there been to date?
9 A I think we're up to -- We skipped
10 No. 13. We didn't skip a distribution, but
11 we didn't incorporate 13 as a distribution.
12 I think we're up to 16 now. Can you tell me
13 what page it is on?
14 Q It was 16 at the top. I think --
15 Yes, the very first line.
16 A Yes, we're up to, I think, 14 or
17 16.
18 Q Is there any reason why there
19 couldn't be more frequent payments to
20 members, maybe on a monthly basis?
21 A Again we're examining
22 distributions and increasing the frequency

1 from quarterly to perhaps every six weeks or
2 monthly in order to expedite the receipt of
3 royalties to feature performers who
4 previously we were unable to find that we
5 have located or that they've come forward,
6 but these are business decisions and with
7 respect to cost containment any given
8 distribution is not an expense free
9 activity. So we try to balance the costs of
10 those distributions with the frequency of
11 those distributions. But certainly as the
12 royalties have grown over the years, we have
13 increased those distributions and
14 demonstrated that to our artists and
15 copyright owners that we have increased the
16 frequency.
17 Q Let's turn to the unallocated
18 money. You testified that there's a bulk of
19 money that is remaining in an unallocated
20 escrow account. Is that correct?
21 A There is a percentage of
22 undistributed royalties that are accounted

1 for that we're unable to pay the copyright
2 owners and artists as of this day, yes.
3 Q And that would be the 35 percent
4 for the artists and the 15 percent for the
5 copyright holders.
6 A That's correct.
7 Q That's the flip side of what you
8 say could be paid through.
9 A That's correct.
10 Q Okay. And is that -- I've come
11 up with a rough figure of what I think that
12 is. I just want you to let me know if
13 that's in the ball park of $16 million.
14 Does that sound correct?
15 A That sounds high to me but it is
16 millions of dollars.
17 Q Is it more than $10 million?
18 A Yes, probably.
19 Q Is it more than $15 million?
20 A I don't think so. We're
21 analyzing all of that right now. So I can't
22 say with specificity.

1 Q Now you also testified that the
2 SoundExchange board voted or recommended
3 that SoundExchange hold over that
4 unallocated amount for more than the three
5 years that the statute allows. Is that
6 correct?
7 A Well, to be clear, the regulation
8 permits the reduction of costs of
9 administration by the undistributed funds
10 three years after the date of payment by the
11 service and SoundExchange's board has twice
12 delayed the use of those funds to offset
13 costs to permit SoundExchange ample
14 opportunity to ramp up its undistributed
15 funds strategies to reach the maximum number
16 of copyright owners and artists as possible.
17 Q Is there any idea, as of in
18 discussions, as to when in fact those moneys
19 will be applied to reduction of costs of
20 administration of funds?
21 A Yes, there has. There is a board
22 meeting in a couple of weeks where I believe

1 that decision will be made, but the policy
2 committee recently came to a recommendation
3 that will be presented to the board that
4 only the undistributed funds with respect to
5 SoundExchange's very first distribution of
6 over five years ago be subject to this type
7 of release and offsetting of costs. So it's
8 a fraction of the figure that you stated.
9 Q Do you anticipate that they're
10 going to roll that in over time then, just
11 starting way back then and rolling forward.
12 Is that what's been discussed?
13 A The recommended policy is to
14 stagger that and again at each stage,
15 reviewing the progress that SoundExchange
16 has made with respect to pay-through rate to
17 determine when the appropriate time is to
18 make that release.
19 Q Doesn't this current system with
20 the three-year recoup, with the permission
21 to recoup costs of administration after
22 three years, or as extended by the policies,

1 doesn't that create an incentive for
2 SoundExchange not to locate unidentified
3 artists so that they can apply the money at
4 some point to the recoupment of costs?
5 A On the contrary, if our copyright
6 owners and artists as represented our board
7 wanted to get that money somehow to offset
8 costs then they wouldn't have extended the
9 release of those funds nor would they as a
10 matter of course fund activities and
11 programs that SoundExchange recommends to
12 reduce that figure. So I think that by
13 virtue of the ownership of SoundExchange,
14 again the copyright owners and artists who
15 are entitled to these royalties, they have
16 demonstrated their commitment to reducing
17 that pay-through rate.
18 In addition, I think other
19 societies around the world recognize that
20 commitment of SoundExchange by entering into
21 reciprocal payment arrangements with
22 SoundExchange. They have the same

1 philosophy as SoundExchange with respect to
2 paying through absolutely as much as
3 possible.
4 Q Are those societies helping
5 SoundExchange to identify some of the
6 unallocated recipients?
7 A Yes, they are.
8 Q And wouldn't an additional
9 collective in this situation help to
10 identify even more of those unallocated
11 recipients?
12 A If you're referring to would RLI
13 help, I have no idea if their motives would
14 be such that they would want to reduce the
15 undistributed royalties. RLI is a for-
16 profit company and it gives me pause to
17 think they may participate in that way.
18 Q Ms. Kessler, you are aware, are
19 you not, that the DiMA Companies and RLI
20 have entered into an agreement for DiMA to
21 provide RLI with direct accounting reporting
22 payment and auditing?

1 A I understand that there is some
2 arrangement that RLI or MRI and DiMA have.
3 I have no idea with respect to the
4 particulars.
5 Q It's RLI, isn't it? It's not
6 MRI.
7 A Again, I'm not sure what the
8 particulars are.
9 Q Have you seen the agreement?
10 A No, I have not.
11 Q Were you aware of this agreement
12 when you made the statement on page 17 of
13 your written statement that "webcasters
14 object to having to report to more than one
15 collective"?
16 A No, I was not.
17 Q So that statement is false now.
18 Correct, Ms. Kessler?
19 MR. PERRELLI: I'm going object,
20 Your Honor.
21 CHIEF JUDGE SLEDGE: Basis?
22 MR. PERRELLI: Objection. He's

1 trying to characterize it as a false
2 statement based on something that she
3 doesn't know and he hasn't been able to put
4 before her related to an agreement. He just
5 simply is purporting to exist.
6 CHIEF JUDGE SLEDGE: Objection is
7 overruled.
8 THE WITNESS: Can you repeat the
9 question please.
10 BY MR. FREUNDLICH:
11 Q So your statement on page 17 that
12 "webcasters object to having to report to
13 more than one collective" is not false.
14 Isn't that correct, Ms. Kessler?
15 A Without being able to see what
16 the agreement is to see what, if any,
17 reporting is required under that with
18 respect to any aspect of that agreement, I
19 certainly can't say if this statement in my
20 testimony is inconsistent that time has
21 passed. At the time I made this statement,
22 it was absolutely true and today I would say

1 it is still true absent any evidence that it
2 is not.
3 Q Okay. And you say that the
4 overwhelming majority of copyright owners
5 and performers oppose such a system, a
6 system with more than one collective. Is
7 that also correct, Ms. Kessler?
8 A Yes.
9 Q Did this overwhelming majority
10 that you described even know that there was
11 a choice?
12 A I would say that this
13 overwhelming majority are receiving payments
14 from SoundExchange, reports from
15 SoundExchange and they are with
16 SoundExchange and we receive so many
17 positive feedback from our artists and
18 copyright owners that we're reporting
19 transparently with respect to their sound
20 recordings and how they're being exploited
21 by these services. So I think that they're
22 exercising their opinion by staying with

1 SoundExchange and their feedback to
2 SoundExchange.
3 Q Are you saying that your reports
4 to your payees are transparent when they
5 don't include any information whatsoever
6 about costs deducted from the gross
7 royalties?
8 A I am saying that SoundExchange's
9 statement are transparent and comprehensive.
10 Q Transparent in what respect?
11 A With respect to the sound
12 recordings for which they are receiving
13 royalty payments.
14 Q But not transparent with respect
15 to the costs that you're deducting from the
16 moneys that you're getting for those sound
17 recordings.
18 A We discussed this. Our admin
19 rate is on our website. It's a great
20 suggestion to put that on the statements
21 and when I go back, I will certainly make
22 that recommendation.

1 Q But as they exist right now, the
2 statements are very transparent, are they?
3 A I am saying that they are
4 transparent.
5 Q Isn't it true, Ms. Kessler, that
6 the settlement for the periods following
7 Webcaster 1 had SoundExchange agreeing to
8 extend the then existing rates only if the
9 webcasters would agree that SoundExchange
10 was the sole collective entitled to receive
11 royalties?
12 A I know that the rates and terms
13 for that period were extended. It was
14 likely done considering many factors, one of
15 which was that.
16 Q So SoundExchange insisted that
17 they would be the only collective. Right?
18 A As I said, that was one of the
19 terms with respect to that agreement moving
20 forward.
21 Q Now you're familiar, are you not,
22 with Mr. Simson's occasional postings

1 talking about RLI and the fact that there is
2 a competitor afoot for this function?
3 A What do you mean by "postings"?
4 Q On the website, occasionally Mr.
5 Simson writes a point of view on the website
6 and he's described on the website I gather
7 for the SoundExchange payees to look at the
8 fact that RLI exists and that there's
9 competition. Right?
10 A He has probably mentioned RLI in
11 our newsletter.
12 Q So you acknowledge on the one
13 hand SoundExchange acknowledges that there
14 is marketplace competition, but now you're
15 sitting here trying to eliminate that
16 competition through the regulatory process.
17 A I don't know how many times I can
18 say this. It's my belief that in a
19 statutory framework where there is no price
20 competition that this competition that
21 you're describing leads to increased costs,
22 delays in distributions, confusion in the

1 marketplace with respect to what rules are
2 being implemented. It will lead to
3 confusion with licensees, who they pay, how
4 they report, where they're getting their
5 information of walking through the statutory
6 requirements and so that is my testimony.
7 Q So that's your opinion then, Ms.
8 Kessler. Right?
9 A No, that is --
10 Q Is it based on any empirical
11 studies that you've done?
12 A It is based on my knowledge and
13 experience of the daunting task of
14 distributing royalties to tens of thousands
15 of artists and many, many hundreds of
16 copyright owners and administering a
17 statutory royalty where all of the
18 information we've received is in the hands
19 of the licensees and to wade through those
20 massive amounts of information to effect the
21 prompt and efficient distribution of
22 royalties to those entitled parties. That's

1 what my comments and testimony are based on.
2 Q Now, Ms. Kessler, it is true
3 though that at SoundExchange you created a
4 system that does not accommodate multiple
5 agents. Isn't that correct?
6 A My testimony is that it would
7 cost roughly $250,000 to $350,000 to modify
8 it so that it could address at least what
9 we've been able to identify are the massive
10 complications of a multi-agent system.
11 Q Right. But you created a system,
12 did you not, that didn't accommodate
13 multiple agents? Right?
14 A Yes, our system was created to
15 administer based on the business rules that
16 were established at the time.
17 Q On business rules established by
18 the SoundExchange board?
19 A By the regulation, by the
20 license, by the terms in the license, by the
21 statutory mandated splits and by other such
22 information, for example, requirements of

1 the IRS and that sort of thing.
2 Q So it's your testimony then that
3 SoundExchange is using its funds, moneys
4 that it intends to recoup against royalty
5 statements to build a system to create a
6 national monopoly for itself without
7 competition.
8 A That is so not my testimony.
9 Q Okay. Well, isn't it a fact that
10 SoundExchange is using its members' funds to
11 build such a system to create a national
12 monopoly for itself without competition?
13 A No, it is not.
14 Q Well, isn't that the effect of
15 what you're doing by eliminating all other
16 agents including my client from this playing
17 field?
18 A No, it is not.
19 Q So are you saying that my client
20 can compete on the same basis as
21 SoundExchange then?
22 A I'm saying that your client can

1 engage in direct licensing to the extent
2 that he can summon up copyright owners
3 selecting RLI to engage in that direct
4 licensing. That's what I'm saying.
5 Q So based on that statement, why
6 are you objecting then to this board giving
7 Royalty Logic the same rights and
8 obligations as SoundExchange has for direct
9 auditing, reporting, payment and accounting
10 directly from the licensees?
11 A Because under a statutory
12 framework where there is a single set of
13 rates and a single set of terms, there
14 should be a single set of rules and those
15 rules should be administered by an
16 organization that overwhelmingly represents
17 copyright owners and artists or an
18 organization that makes no distinction based
19 on membership, that is a nonprofit and
20 engaged in activities that promote the fair
21 and efficient distribution of royalties.
22 So it is the decision of this

1 board if they feel that a multi-agent system
2 would better serve copyright owners and
3 artists. But my testimony is that it would
4 only increase those costs. It would be a
5 disservice to copyright owners and artists
6 and that in a statutory framework cost
7 competition is nothing more than an
8 incentive to free ride.
9 Q Well, you testified, I think,
10 earlier, correct me if I'm wrong, that if
11 the copyright holders that, I want to
12 designate Royalty Logic, that Royalty Logic
13 can make direct licenses and achieve what
14 their goal is essentially to get direct
15 payments from the licensees. Is that
16 correct?
17 A It would completely bypass the
18 statutory license by engaging in direct
19 licensing. That's correct.
20 Q So they can't do that under the
21 statute.
22 A Again it's a statutory license.

1 There is a single rate. There is a single
2 set of terms. If copyright owners want
3 different rates and different terms, they
4 are welcome to go outside of the statute and
5 engage in direct licensing.
6 Q You are aware of Section 111,
7 that the statutory license contains Section
8 111.
9 A I know very little of 111. I
10 know there is a Section 111.
11 Q Are you aware that in that
12 section Congress provided for the collection
13 of moneys by the Copyright Office and a
14 process by which copyright owners could
15 receive their moneys as allocated in a CRB
16 proceeding, for example?
17 A I'm not aware of what 111 says.
18 Q Do you contend, Ms. Kessler, that
19 the collection of statutory royalties in
20 Sections 112 and 114 is a natural monopoly,
21 that it must be served by just one
22 collective and that this collective should

1 be SoundExchange?

2 A I am saying that it is more

3 efficient. It reduces cost for a single

4 designated agent to administer a statutory

5 royalty with a single set of rates and a

6 single set of terms. Yes, that's what I'm

7 saying.

8 Q Wouldn't it be more fair to those

9 that have not designated SoundExchange to

10 perhaps a neutral third party body that is

11 not the Recording Industry of America's

12 child to receive those royalties and then

13 pay them out on an equal basis to all of the

14 copyright owners?

15 A SoundExchange does pay out to

16 copyright owners and artists on an equal

17 basis. We make no differentiation between

18 membership and non membership. We have been

19 spun off from the RIAA since September of

20 2003. We are independent of the RIAA and at

21 the risk of repeating myself, I do believe

22 that SoundExchange fairly and efficiently

1 represents the administrative needs of
2 copyright owners and artists under the 112
3 and the 114.
4 Q Now on page 18 of your written,
5 you say that "a multi-agent system is
6 inconsistent with the concept of efficient
7 licensing." That is your testimony. I
8 think you said that before. Is that
9 correct?
10 A Yes.
11 Q Now are you suggesting that
12 ASCAP's fees would not be lower if BMI did
13 not exist?
14 A You know I don't think ASCAP, BMI
15 and SESAC is an apples-to-apples comparison
16 to what we're discussing today. But by
17 virtue of having multiple PROs engaged in
18 essentially the identical activities
19 necessarily duplicates or triplicates costs.
20 Q So you don't think that ASCAP's
21 fees are lower because of the competition
22 with BMI.

1 A I think that they spend more
2 money on marketing than they otherwise would
3 need to spend, duplication of systems that
4 they otherwise might need to, but again
5 they're not even remotely the same types of
6 organizations or operating under the same
7 framework that we are.
8 Q But ASCAP has 20 million members
9 and processes data in and out just like
10 SoundExchange does, doesn't it?
11 A They are members of that
12 organization, yes.
13 Q ASCAP is?
14 A Those 20 however many. I don't
15 know what the number of ASCAP's membership
16 is or BMI's membership, but again, they're
17 membership organizations.
18 Q Okay. So ASCAP has payees.
19 Let's call them payees for the moment.
20 Doesn't ASCAP process data coming in from
21 broadcasters and put out data going out to
22 copyright owners just like SoundExchange

1 does?
2 A Yes, they do.
3 Q Okay, and doesn't having more
4 than one collective in the PRO arena
5 actually keep ASCAP and BMI honest with each
6 other?
7 A Again what I'm saying is that
8 when two organizations are undertaking the
9 same sets of activities that they are
10 necessarily duplicating those costs. That
11 they may have other business reasons or
12 their members prefer one organization over
13 another for something apart from the
14 administrative aspect of the license. They
15 have that choice. We're talking about the
16 administration of the single license.
17 Q Are you aware of the practice,
18 Ms. Kessler, in some bands for instance to
19 affiliate two of the band members with BMI
20 and two of them with ASCAP to see which
21 statement gives them the most funds?
22 A I'm not aware of that.

1 Q Would it surprise you if that
2 practice existed?
3 A I don't know that I'm
4 particularly surprised, no.
5 Q Would it surprise you further
6 that in many cases the numbers are not the
7 same?
8 A I don't know that answer to that.
9 Q So for the same performances that
10 are reported by ASCAP and BMI, they come out
11 with different amounts for payments.
12 A Perhaps if they had census
13 reporting that wouldn't be the case.
14 Q Okay. On page 18, you also state
15 that "the purpose of the royalty collection
16 process is to make prompt, efficient and
17 fair payments to copyright owners and
18 performers with a minimum of expense." Is
19 that correct?
20 A Yes.
21 Q And this is in fact what it says
22 in The Federal Register as well. Correct?

1 A I'm not sure that The Federal
2 Register says.
3 Q But it's what SoundExchange's
4 policy seeks to effectuate.
5 A Absolutely.
6 Q So if the purpose of the system
7 is to make payments to the copyright owners
8 and performers with a minimum of expense,
9 isn't it true that owners and performers
10 would benefit from another agent with
11 systems that they have in place leverage to
12 prevent excessive costs from having to be
13 borne by its members?
14 MR. PERRELLI: Your Honor, I
15 think I'm going to object. It's been asked
16 and answered. I think we've been over this
17 quite a bit.
18 CHIEF JUDGE SLEDGE: Mr.
19 Freundlich.
20 MR. FREUNDLICH: I think it's a
21 different question. I'm talking about now
22 the systems that one collective may have in

1 place over another. I don't have anything
2 further on this particular point, but I
3 don't see why that question -
4 CHIEF JUDGE SLEDGE: All right.
5 Overruled.
6 THE WITNESS: Can you repeat the
7 question please.
8 BY MR. FREUNDLICH:
9 Q If the purpose of the system is
10 to make payments to the owners and
11 performers with a minimum of expense, isn't
12 it true that owners and performers would
13 benefit from another agent with systems that
14 are already in place to leverage to prevent
15 excessive costs from having to be borne by
16 its members?
17 A Again if you have two or ten or
18 hundred designated agents all developing
19 systems, maintaining systems, extending
20 systems that the overall cost to the group
21 of copyright owners and artists who are
22 entitled to the payments under the statutory

1 license would increase. There would not be
2 a cost savings there.
3 Q Ms. Kessler, how many parties are
4 here seeking to become or get status on an
5 equal basis with SoundExchange? Are there
6 two, ten or 100?
7 A There is one.
8 Q Okay.
9 A But that doesn't preclude many
10 more from coming forward.
11 Q Right, but there's only one here
12 today before this board.
13 A Right. One here today. That's
14 correct.
15 Q And what if the alternative
16 collective for example would offer advances,
17 guarantees or other methods of financing to
18 its copyright owners and performers of the
19 royalty streams under 112 and 144? Wouldn't
20 that be a fair choice to offer to those
21 copyright owners and performers?
22 A So you mentioned advances? And

1 what else?
2 Q Advances, guarantees or other
3 methods of financing.
4 A You know it's contrary to -- In
5 the statutory license, there is a set pot of
6 money. If you're advancing money to a
7 particular artist or a particular copyright
8 owner, you're taking it away from other
9 copyright owners and artists. I don't see
10 how that fair or transparent or efficient.
11 Q That's assuming that all the
12 money comes from a zero sum, isn't it?
13 A But again, SoundExchange's role
14 here is to administer the statutory license.
15 So again, it's one license, one set of
16 rules, one pot of money.
17 Q But the rules haven't been set
18 with respect to how you're going to treat
19 your copyright owners with respect to giving
20 advances, guarantees or other methods.
21 That's just a policy of the SoundExchange
22 board. Correct?

1 A Well, you may not differentiate
2 between members and nonmembers and
3 SoundExchange does not differentiate within
4 its members the value of their performances,
5 no.
6 MR. FREUNDLICH: Would this be a
7 good time?
8 CHIEF JUDGE SLEDGE: Well, is it
9 a good time for you to conclude your
10 examination?
11 MR. FREUNDLICH: No, I have
12 probably another half hour.
13 CHIEF JUDGE SLEDGE: We will
14 recess until 3:00 p.m. Off the record.
15 (Whereupon, at 12:45 p.m., the
16 above-entitled matter recessed to reconvene
17 at 3:00 p.m. the same day.)
18 MR. FREUNDLICH: Your Honor, I
19 have revisited my 30 minute estimate. I
20 think it's going to be quite a bit shorter.
21 CHIEF JUDGE SLEDGE: Well, that's
22 good news. Thank you.

1 MR. FREUNDLICH: I knew you'd
2 like to hear that.
3 CHIEF JUDGE SLEDGE: Not personal
4 to you, but from anyone.
5 MR. FREUNDLICH: I understand.
6 BY MR. FREUNDLICH:
7 Q You testified, Ms. Kessler, about
8 the fact that Royalty Logic members can
9 directly license if they so choose not to
10 deal with the licenses that Sound Exchange
11 is procuring. Is that correct? Is that how
12 I understand your testimony this morning?
13 A Not that we procure, the
14 licensees take the license. It's really the
15 license we're administering.
16 Q But your testimony was that the
17 Royalty Logic people could go directly to do
18 that, as well.
19 A Yes. That's correct.
20 Q So what you're really saying then
21 is that a disaffected Sound Exchange member
22 who might choose to go to RLI, their only

1 choice is to go to RLI to do a voluntary
2 license, which means they would have to
3 forego the statutory license?
4 A The rates and terms that they
5 determine are in their benefit could be the
6 statutory rates and terms, or something all
7 together different.
8 Q So they could potentially enter
9 into statutory licenses, but not have any of
10 the same regulations apply to them that
11 Sound Exchange does. Is that what you're
12 saying?
13 A I'm saying that a direct license
14 can have any rates and terms that the
15 parties negotiate.
16 Q But if it turns out that that's
17 statutory, wouldn't it be more efficient to
18 just have everybody on the same playing
19 field?
20 A You know, again, the statutory
21 license should be governed by one set of
22 rules. And one organization is best suited

1 to do that to eliminate duplicative costs
2 and all the other efficiency reasons I
3 stated before. So to the extent a copyright
4 owner wants to bypass that structure for
5 whatever reason, they certainly can do so.
6 Q Now do you say that -- are you
7 contending here that Sound Exchange should
8 be the sole agent for voluntary licensing,
9 as well?
10 A No, I'm not saying that.
11 Q Is Sound Exchange doing any
12 voluntary licensing?
13 A Sound Exchange has some payment
14 reciprocals with foreign societies.
15 Q How about the SDARS agreement, is
16 that a voluntary license?
17 A It is a voluntary license.
18 Q So there could potentially be
19 other situations where Sound Exchange is
20 making voluntary deals as opposed to the
21 statutory deals.
22 A Well, yes. Sound Exchange is

1 administering that license, and it's with
2 respect to the members of Sound Exchange.
3 Q So then you would agree, would
4 you not, that under your system here, that
5 an RLI member in order to receive direct
6 payments on statutory licenses, as opposed
7 to payments through the Sound Exchange
8 funnel would have to have two agents, one
9 for statutory licensings, which would be
10 Sound Exchange, and one for the voluntary
11 licenses, which would be RLI?
12 A Again, if a copyright owner
13 wanted a single agent for both purposes,
14 they could direct license.
15 Q But my hypothetical is that there
16 are, and we know that there are because
17 Royalty Logic is here and has members
18 representing to you that. If you're saying
19 that Royalty Logic should go and get the
20 voluntary licenses, then isn't the system
21 that you're positing that a member of
22 Royalty Logic needs to have two separate

1 agents, one for the voluntary license and
2 one for the statutory license?
3 A Well, that copyright owner could
4 still receive payment through Sound Exchange
5 for the statutory license. That's true.
6 Q And would that be fair and
7 efficient to those members, that they'd have
8 to go through both collectives?
9 A Again, the fairness and the
10 efficiency is really on behalf of all
11 copyright owners and all featured
12 performers, as well as the non-featured, so
13 we're really looking at a collective group,
14 not any one individual because they still
15 have the direct license right if they want
16 to do something else.
17 Q How many copyright owners and
18 performers do you think would opt for such a
19 complicated system, to have one agent for
20 the voluntary and one agent for the
21 statutory?
22 A That's a hypothetical. I have no

1 way of knowing what the answer to that is.
2 Q But isn't this whole event here
3 Sound Exchange's attempt to keep Royalty
4 Logic off of this playing field on an equal
5 basis really just an effort to create a
6 monopoly in the statutory area so that you
7 can gain an advantage in the marketplace
8 overall for statutory and voluntary
9 licensing?
10 A No, it is not.
11 MR. FREUNDLICH: I don't have
12 anything further.
13 CHIEF JUDGE SLEDGE: Mr. Malone.
14 MR. MALONE: Thank you, Your
15 Honor. Good afternoon, Ms. Kessler.
16 THE WITNESS: Good afternoon.
17 MR. MALONE: I'm Bill Malone,
18 representing some of the college
19 broadcasters and webcasters.
20 CROSS EXAMINATION
21 BY MR. MALONE:
22 Q In your testimony in the written

1 form, and then on the stand in the past
2 couple of days, you've put, I think, a good
3 deal of emphasis on the word "efficiency."
4 In fact, as look I look at page 2 of your
5 written testimony of the paragraph, the
6 second sentence of the paragraph at the
7 bottom of the page, you speak of
8 "facilitating the receipt and distribution
9 of the royalties in the most efficient
10 manner possible." And I take it -- well,
11 let me ask this. In this context, how do
12 you define, how do you measure efficiency?
13 A Oh, I think there's a number of
14 ways you can measure efficiency. I think
15 it's cost containment, it's the numbers of
16 copyright owners and artists an entity is
17 representing and paying. I think it's how
18 quickly - in Sound Exchange's case, how
19 quickly we developed our royalty
20 distribution and began distributing. I
21 think it's measured by the frequency and the
22 increase in frequency with which you

1 distribute the royalties. I think it can be
2 measured by the throughput of Sound Exchange
3 staff with respect to setting up accounts,
4 the accuracy of those accounts. I think it
5 can be measured by the acceptance in the
6 world of PROs. Sound Exchange is a partner
7 with organizations such as PPL, RAAP, SENA,
8 and so on, so I think it would be measured
9 by quite a lot of factors, which I'm sure I
10 haven't identified all of those. But
11 certainly, it is measured by the speed with
12 which, and at the minimum cost that you're
13 able to fulfill the obligations of
14 administering the royalty.
15 Q You referred to, I think,
16 administrative costs or administrative
17 ratio. Relate that to efficiency, please.
18 A I think that's an expression of
19 the costs the organization incurs compared
20 to the royalties that it collects and
21 distributes.
22 Q And this is the percentage that,

1 I think with justifiable pride, you
2 mentioned had fallen from what - 18-20
3 percent to 7-1/2 percent?
4 A That's correct.
5 Q So there are actually two
6 numerical terms that go into the calculation
7 of that ratio, one are the revenues, and the
8 other are the expenses.
9 A It's the royalties and the cost,
10 yes.
11 Q Okay. Thank you. And so one can
12 improve the efficiency ratio by increasing
13 the amount of revenue per dollar costs that
14 you incur.
15 A That's correct.
16 Q Well, let's look at page 10, and
17 the paragraph in the middle of page 10 talks
18 about the threshold for distributing
19 royalties to a payee of $10. Can you relate
20 that for me to the administrative ratio?
21 A I don't know what that questions
22 means.

1 Q All right. Let me ask it this
2 way. You say here that, you say rather than
3 distribute smaller amounts and incur
4 significant additional transaction costs,
5 you wait until there's $10 to pay out, at
6 which point that's distributed. Explain to
7 me how that contributes to the efficiency.
8 A Sure. With every distribution
9 there are transactional costs, including
10 preparation of data, staff time, and then
11 the physical act of producing a distribution
12 in the form of paper, checks, postage,
13 customer care, all those types of things.
14 The $10 threshold was established because
15 that's when the IRS requires that you issue
16 a 1099, and so that seemed like a good
17 number. It wasn't as large as, for example,
18 RLI's $100 figure, but it was a number that
19 was based by a government agency, and we
20 were able to eliminate certain incremental
21 and transactional costs, and feel that a $10
22 amount wasn't so unreasonable or even

1 objectionable to an artist or a copyright
2 owner.
3 Q I'm persuaded. Now that's on the
4 distribution side. Does the same principle
5 apply on the income side?
6 A We don't receive royalty payments
7 that are that small, and I don't think that
8 you can really compare the two, because the
9 royalties received are really the value for
10 the use of all of the music that's
11 available, that's commercially released, so
12 there's a value to that. I'm not sure what
13 you're asking. If you're asking would we
14 not process a payment of $10 or less?
15 Q Well, let's sneak up on it a
16 little bit this way. There is a cost in
17 processing a payment to you.
18 A Yes, of course.
19 Q And if that cost is very large in
20 relation to the amount of the payment that's
21 being booked, then your administrative
22 ratio, at least for that part of the

1 business goes to hell, doesn't it?
2 A Well, I think that's a strong
3 term, but I think that you could have high
4 transaction costs when the transaction
5 dollar value is smaller, I think as a
6 general rule.
7 Q Percentage-wise.
8 A Okay.
9 Q So that would -- to the extent
10 that the administrative ratio measures
11 efficiency like that's going to be tracked
12 from the favorable administrative ratio.
13 A Yes, but there are so few
14 situations where you would parse out the
15 work of administering a royalty to a task-
16 by-task basis. You look at all the tasks
17 involved with collection and distribution of
18 royalties, and you base your decisions on
19 the overall efficiency, not just one piece,
20 because certainly, we spend more time and
21 money on certain aspects than others.
22 Q Well, let's focus for a moment at

1 least, please, on payment size. If your
2 sole objective is to improve efficiency,
3 which translates into the administrative
4 ratio, you're going to try to minimize the
5 number of payments that have a high cost in
6 relation to the amount times our payment,
7 receipts. You're going to try to minimize
8 the number of transactions in which the
9 receipts are small in relation to the cost.
10 A Well, remember, too, that with
11 each payment, there's a cost associated with
12 it, so you have to balance first the point
13 at which the cost of conducting the
14 transaction exceeds the benefit. And so
15 there is that, but certainly -- and also
16 because of the breadth of content that's
17 being performed on the services, we have
18 occasion where performances are in fractions
19 of pennies, so it makes no sense to
20 distribute every single performance that has
21 earned a royalty when it could potentially
22 be less than a penny, and so we chose the

1 $10 threshold for the reasons I described
2 earlier.
3 Q In a sense, these two things
4 somewhat relate. That is, if you have
5 reports, statements of account I guess you'd
6 call them, and remittances coming in that
7 are small and represent a few listeners, a
8 few hours, whatever the measure is, and
9 that, in turn, leads to small distributable
10 amounts, and you put a cap or a floor,
11 rather, on the distributable amount, why,
12 there's going to be some payments coming in
13 that are just going to get absorbed by the
14 system because you know from the outset that
15 they're never going to show up on the
16 distributions.
17 A I don't know that I can agree
18 with that statement.
19 Q Well, if you have remitters,
20 users, who are using, shall we say unpopular
21 musical works, for want of a better term,
22 they're not going to be remitting very much

1 money, and the works, because they're
2 unpopular, are not going to have very much
3 money in the pool. And if that money is
4 less than $10, the remittance goes to no
5 end.
6 A Well, again - I mean, if you look
7 at this on a licensee-by-licensee basis, a
8 licensee paying a $500 minimum fee may
9 result in a performance value of fractions
10 of pennies. But when you have hundreds and
11 hundreds of these types of services, and you
12 add those pennies up, you end up with a
13 check in excess of $10 and you will be paid.
14 Q Only, however, if there's an
15 overlap in the works being played.
16 A Yes. It would require that those
17 sound recordings are played across multiple
18 services.
19 Q Now there have been two exhibits
20 that you've discussed this morning, Services
21 Exhibit 155, which I think we call a
22 receipts log/payment report.

1 A You're referring to the Exhibit 1
2 on --
3 Q The Attachment 1, yes.
4 A Yes.
5 Q And then there's Exhibit 98,
6 which is a list of receipts by, I guess, 309
7 remitters.
8 A Yes.
9 Q And the Services Exhibit 98
10 appears to be confined to 2004.
11 A Yes.
12 Q All right. So relate what's on
13 Services Exhibit 155 for 2004, and what's on
14 Services Exhibit 98 for 2004.
15 A So there's -- I haven't compared
16 these service-by-service, or parent-by-
17 parent, so I can't do a complete overlap,
18 but I would assume that the parent name on
19 Exhibit 98 and the parent name on Exhibit
20 155, that there would be an overlap for a
21 column that is named 2004.
22 Q Well, except for the fact that

1 the population of 98 covers commercial
2 services of some size.
3 A I'm sorry?
4 Q All right. For example, Yahoo
5 seems to be your big remitter on Exhibit 98,
6 and I don't think one finds Yahoo on Exhibit
7 155.
8 A Well, maybe they're under Launch.
9 I don't know. I'd have to look. So Yahoo -
10 let's see, parent, Yahoo. I don't see an
11 entry for Yahoo.
12 Q Well, in point of fact, on 155,
13 you don't see any entries for the large
14 commercial webcasters at all.
15 A Okay.
16 Q So they've been screened out.
17 A Well, I don't know they've been
18 screened out. Maybe that wasn't the intent
19 for this --
20 Q I think you're right.
21 Absolutely.
22 A Yes, I don't know.

1 Q But within the overlap of
2 populations then, the numbers should be, in
3 general terms, about the same for the
4 webcasters who are listed in 155.
5 A Yes. I think that would be
6 right.
7 Q Now there was some uncertainty in
8 your testimony in answer to questions from
9 both Ms. Ablin and Ms. Brown as to where NPR
10 stood. And you alluded to a couple of the
11 aspects of what I understand to be the
12 contractual arrangement between Sound
13 Exchange and NPR, or RIAA, as the case may
14 have been.
15 MR. MALONE: And I'm going to ask
16 to mark Services Exhibit 157, which is a
17 document of roughly 15 pages, Bates numbered
18 SX00585154-SX0085169, which is marked
19 "Restricted".
20 (Whereupon, Services
21 Exhibit No. 157 was
22 marked for

1 identification.)
2 MR. MALONE: And it, I think I
3 may say safely, that it is the webcasting
4 performance and ephemeral license agreement
5 dated November 13th, 2001 between Sound
6 Exchange and NPR and Corporation for Public
7 Broadcasting.
8 MR. PERRELLI: Your Honor, at
9 this point, I'd like to enter an objection.
10 This is -- this license agreement is subject
11 to an express provision prohibiting its
12 disclosure, provision 5.2 of the agreement,
13 which expressly prohibits the introduction
14 or use by any person, including the parties
15 and any public radio station, with respect
16 to the rates, terms, or reporting
17 obligations to be established for the making
18 of ephemeral phono records or the digital
19 audio transmission of sound recordings under
20 17 USC Section 112 and 114, et cetera.
21 That provisions applies, and we
22 think precludes any use of this agreement in

1 this proceeding, whether attempt to
2 introduce it into evidence or ask Ms.
3 Kessler about it. I would note that the
4 same agreement, which was entered into prior
5 to the decision of the Webcaster-1 CARP was
6 also excluded by them, and not used by them
7 in any way, shape, or form, as part of their
8 deliberations.
9 CHIEF JUDGE SLEDGE: Who is this
10 agreement with?
11 MR. PERRELLI: It's between, at
12 that time, when Sound Exchange was an
13 unincorporated division of the Recording
14 Industry Association of America and National
15 Public Radio, the corporation, National
16 Public Radio and the Corporation for Public
17 Broadcasting.
18 CHIEF JUDGE SLEDGE: Which does
19 not include Harvard Radio.
20 MR. PERRELLI: That's correct,
21 Your Honor. So the person offering it is
22 not a party to this agreement and,

1 therefore, not bound by the terms of the
2 agreement.
3 MR. PERRELLI: The argument I'm
4 making, I think, is not that Mr. Malone or
5 his clients are contractually bound, but
6 that agreements such as this - this is the
7 identical issue to the issue raised in our
8 motion on the SDARS agreement, which I know
9 is pending before the Board. And I wanted
10 to interpose that objection, and to the
11 extent that the Court wants us to file
12 something short to include use of this
13 agreement, or introduction of this agreement
14 in this proceeding on the same grounds, we
15 can do that, or I'm happy to have it simply
16 be added as part of an oral motion.
17 CHIEF JUDGE SLEDGE: Restate the
18 last phrase again.
19 MR. PERRELLI: I apologize, Your
20 Honor. We're happy to provide a written
21 motion to the Court if you would like us to
22 file a written motion, which argues that

1 this agreement, for the same reasons that
2 the SDARS agreement cannot be introduced
3 into evidence in this proceeding. But I am
4 making an oral motion at this time.
5 CHIEF JUDGE SLEDGE: All right.
6 We'll accept this issue as part of the
7 pending issue on the SDARS agreements. And
8 as I recall, and you all help me with this,
9 what we've done with those is proceed
10 subject to a motion to strike pending the
11 exclusion of those agreements.
12 MR. PERRELLI: That's correct,
13 Your Honor. Thank you.
14 CHIEF JUDGE SLEDGE: All right.
15 MR. MALONE: In the event that --
16
17 MR. PERRELLI: Pardon me, Your
18 Honor. Assuming you're going to go into
19 questioning on this - I'll let you ask the
20 question before I move to go into restricted
21 session.
22 MR. MALONE: In the event then,

1 Your Honor, that the Board should rule
2 against provisional allowance of the
3 exhibit, then I would want to move to strike
4 the testimony of the witness that
5 contradicts the terms of the agreement as
6 set forth in the exhibit.
7 CHIEF JUDGE SLEDGE: In the event
8 that the Board grants the motion to strike?
9 MR. MALONE: In the event that
10 the Board grants the motion to exclude or
11 grants the objection, however you wish to
12 put it, then I think that I would like to,
13 nonetheless, move to strike the answers of
14 the witness that are inconsistent with the
15 excluded exhibit.
16 CHIEF JUDGE SLEDGE: Ms. Ablin,
17 remind me. Didn't I tell you on a similar
18 motion that that was not the proper form to
19 raise that issue?
20 MS. ABLIN: Yes, that's correct,
21 Your Honor.
22 CHIEF JUDGE SLEDGE: Just as long

1 as I'm consistent, that's not the proper
2 form to raise that issue.
3 MR. MALONE: Thank you, Your
4 Honor.
5 BY MR. MALONE:
6 Q You have the contract in front of
7 you, and I direct your attention to
8 Paragraph 3.1. And the question is, does it
9 have a provision for a lump sum payment?
10 MR. PERRELLI: Your Honor, at
11 this time, I would move to go into
12 restricted session. The document was marked
13 "Restricted". It's also subject to a
14 confidentiality provision in Section 5.1
15 concerning disclosure of this information
16 and requires treatment of it as confidential
17 information.
18 CHIEF JUDGE SLEDGE: That
19 involves parties that aren't at issue now.
20 MR. PERRELLI: Well, Your Honor,
21 I think for purposes of the record, I think
22 this has to remain a restricted document

1 subject to the protective order.
2 CHIEF JUDGE SLEDGE: It does not.
3 You have to meet your burden of proof to
4 establish that it fits within the protective
5 order before it's restricted.
6 MR. PERRELLI: Well, Your Honor,
7 I think this is a contract between two
8 parties, both of whom are in this room, who
9 elected to make it confidential by its
10 terms, similar to license agreements
11 between, for example, record companies and
12 licensees, which I think have been treated
13 as restricted, and those confidentiality
14 provisions have been upheld, or have been
15 honored for prior witnesses. I think the
16 same provisions and the same rules would
17 apply here, as well.
18 CHIEF JUDGE SLEDGE: That
19 argument is not persuasive, Mr. Perrelli.
20 Do you have any other argument?
21 MR. PERRELLI: The specific
22 question that Mr. Malone is asking relates

1 to a specific term, the financial term of
2 this agreement, and I think that we have, I
3 think fairly consistently with respect to
4 such questions, included those in restricted
5 session when we're talking about a license
6 agreement, a voluntary license agreement,
7 that includes a provision compelling
8 confidentiality.
9 CHIEF JUDGE SLEDGE: On which
10 paragraph did you ask, Mr. Malone?
11 MR. MALONE: I asked with respect
12 to Paragraph 3.1.
13 CHIEF JUDGE SLEDGE: 3.1.
14 MR. MALONE: And the question I
15 asked --
16 CHIEF JUDGE SLEDGE: I remember
17 the question.
18 MR. MALONE: Okay. And that
19 relates to the answer the witness had
20 previously given so that I don't think with
21 that question I have gone beyond where we've
22 been before.

1 CHIEF JUDGE SLEDGE: Mr. Malone,
2 do you intend to disclose the number in
3 Paragraph --
4 MR. MALONE: That would be my
5 next question, Your Honor.
6 CHIEF JUDGE SLEDGE: Any
7 objection to applying the protective order
8 to the specific term contained in Paragraph
9 3.1 of Exhibit 157? No objection, motion is
10 granted.
11 (Whereupon, the proceedings went
12 into Closed Session.)
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1 MR. MALONE: I would like to mark
2 as 158, Mr. Reporter, 158.
3 COURT REPORTER: Yes.
4 (Whereupon, Services
5 Exhibit No. 158 was
6 marked for
7 identification.)
8 MR. MALONE: And this is a two-
9 page document being Bates numbered
10 SX0075778a and Bates number SX00757778b.
11 And it's headed "Sound Exchange Financial
12 Statement Inception Through Calendar 2005."
13 BY MR. MALONE:
14 Q And I'll ask the witness if she
15 is familiar with this financial statement.
16 A Yes, I am.
17 Q And am I correct that the first
18 page, that is (a) is devoted to expenses?
19 A That is correct.
20 Q And then the second page - I'm
21 sorry - the second page is split, so again,
22 looking at the first section of the

1 statement above the first appearance of the
2 word "redacted", that also deals with
3 expenses.
4 A That's correct.
5 Q All right. Then the remainder of
6 page (b) deals with royalties collected or
7 revenues.
8 A Royalties and interest, that's
9 correct.
10 Q Will you please clarify the
11 notation on page (b) that appears for
12 several entries, "RECON."
13 A Yes. That was simply a
14 verification of the math done in a prior
15 section of the spreadsheet.
16 Q Of this spreadsheet or of another
17 spreadsheet, or one of which this was part?
18 A Of this spreadsheet.
19 Q Of this spreadsheet. So the word
20 stands for reconcile?
21 A Reconciliation.
22 Q Reconciliation. All right. I

1 think then the information I seek is
2 contained solely on the (b) page. And in
3 terms of the administrative ratio, is it
4 simply a matter of dividing the, for
5 example, for fiscal 2004, again, dividing
6 the 15,860,587 on the line total revenues
7 reconciliation with the line seven or eight
8 lines above which is marked total expenses
9 reconciliation, to divide the bottom number
10 into the higher number, the upper number,
11 and get something that approximates the
12 administrative ratio?
13 A The administrative rate is
14 calculated by taking the costs, less the
15 interest received as the numerator, and the
16 denominator would be the total royalties
17 received.
18 Q All right. You're going to have
19 to help me a little bit, find these figures.
20 The total expenses are 2,936,550 less the
21 offset of 228,111?
22 A Correct.

1 Q And then the revenues that we're
2 using as the divisor is here in the line
3 marked "total revenues" of the 15,860,587?
4 A That 15 million total royalty is
5 corrected, the 15,632,000. It has the
6 interest --
7 Q All right. I understand. Thank
8 you. Now returning to the revenue side in
9 Services Exhibit 98, which is the 2004
10 itemized receipts, and don't answer before
11 counsel has an opportunity to object,
12 because I'm not quite sure where we are
13 here, but I'd like to -- you suggested, I
14 think, in your testimony this morning some
15 uncertainty as to the last column that --
16 the last full column which starts with a
17 number somewhere in excess of $25 million.
18 A I'm looking at Exhibit 98.
19 Q Yes. And I'm looking at the
20 first line of that and trying to identify
21 the column that I'm attempting to address.
22 A The sum of amount, you're looking

1 at the dollar value?
2 Q Well, I'm looking one over in the
3 percentages.
4 A The percentage, yes.
5 Q Yes. All right. And then look
6 at the fragmentary column, which is
7 percentages that's on the far right.
8 A Yes.
9 Q And would you agree that the
10 number in the far right column is simply a
11 cumulation of the percentages in the column
12 to the immediate left up to that point?
13 A That looks right, yes.
14 Q All right. And so that one would
15 say that if you got down to the 20th entry
16 here as identified by the numbers at the
17 extreme left of the chart --
18 A Yes.
19 Q -- you have picked up 97.0212
20 percent of the total revenues, license fees
21 for 2004.
22 A That's what the percentage

1 appears to be displaying, yes.
2 Q All right. Now turn over,
3 please, to the fifth page which is
4 SX0073698, and the line that's marked 270.
5 A Yes.
6 Q And I would, subject to
7 objection, would ask you to state the number
8 that's on the far right of that line,
9 percentage.
10 A .0028 percent.
11 Q And do I understand the chart
12 correctly in the sense that what we're
13 saying is that that particular remitter
14 contributed towards the total 2004 license
15 revenues 0.0028 percent of the total.
16 A That's what I believe that
17 percentage does reflect, yes.
18 Q And so trying to sum up here a
19 little bit, the amount of revenues left
20 after line 20 is 3 percent of the total
21 webcaster payments for 2004.
22 A Yes.

1 Q And that's divided among 289
2 remitters.
3 A Approximately.
4 Q So it gets pretty thin down
5 there, doesn't it?
6 A It adds up.
7 Q Now I'd like to talk about that
8 portion of your testimony here which deals
9 with recommendations and the matter for
10 penalties or increase in penalties for
11 incomplete reports, which I guess you call
12 statements of account.
13 A Okay.
14 Q And you told us --
15 CHIEF JUDGE SLEDGE: Mr. Malone,
16 we've reviewed that three times now on cross
17 examination. I hope that you'll focus on
18 things that may be not have been covered
19 three times before.
20 MR. MALONE: Your Honor, I can
21 almost warrant that.
22 CHIEF JUDGE SLEDGE: Thank you.

1 MR. MALONE: I don't think we've
2 seen anything like this before.
3 CHIEF JUDGE SLEDGE: That got
4 everybody's interest.
5 MR. MALONE: It was intended to,
6 159.
7 (Whereupon, Services
8 Exhibit No. 159 was
9 marked for
10 identification.)
11 BY MR. MALONE:
12 Q I have marked as Services Exhibit
13 159 four pages of photocopies of what
14 appears to be an album or a recording. The
15 first page appears to be a picture of the
16 album cover, and I note in the upper right-
17 hand corner what appears to be a retail
18 price label. And this is for the new
19 exciting album called "AstroLaunch." And I
20 ask you to note immediately to the left of
21 the top of the L on the first page a number
22 which I make out as ES751, and I also call

1 your attention to the legend at the upper
2 right-hand corner, which refers to the
3 Estrus, E-S-T-R-U-S Manufacturing Company.
4 Turning to the second page, this
5 appears to be the backside of the album. It
6 also bears the number in the upper right-
7 hand corner of ES751, and what do you take
8 the description in the upper left-hand
9 corner of the back of that cover to be?
10 A You mean where it says "A Side -
11 B Side"?
12 Q Yes.
13 A Two sides to whatever --
14 Q Is inside.
15 A -- this is.
16 Q And would you interpret that as
17 there being two separate works, in your
18 parlance, on each side?
19 A We wouldn't call those works.
20 Q Songs?
21 A They could be two disks, or two
22 sides of a media.

1 Q Well, now --
2 A I'm sorry. Are you referring to
3 "A Side" and "B Side"?
4 Q Yes.
5 A Yes, two sides of a physical
6 media.
7 Q So you would admit in your
8 experience the possibility that there's an A
9 record and a B record?
10 A There's an A side over there, and
11 then there's a B side.
12 Q But it's what, as a layman, I
13 would call one record.
14 A Well, yes, on an LP. But on a CD
15 it might be two CDs --
16 Q I see.
17 A -- referred to as Side A and Side
18 B.
19 Q I see. All right. But there --
20 CHIEF JUDGE SLEDGE: I'm sorry.
21 That's strange, you can have a two-sided CD?
22 THE WITNESS: No, that's what I'm

1 saying, it would be two different disks.
2 CHIEF JUDGE SLEDGE: Two
3 different disks.
4 THE WITNESS: Yes.
5 CHIEF JUDGE SLEDGE: Okay. I
6 didn't think I'd ever heard of that.
7 BY MR. MALONE:
8 Q And can you infer that we're
9 talking about two different songs or works,
10 whatever your terminology is on A, and on B,
11 whatever it may be?
12 A I don't know what's on Side A and
13 Side B. I don't know if it's a single sound
14 recording, or multiple tracks.
15 Q I see. In other words, you don't
16 identify "Philip K. Dick" in the Pet Section
17 of the Walmart as one song, and "The Man
18 From Uncle" as being the second song?
19 A It may be, it could be.
20 Q Believe me, this is closer to
21 your generation than it is to my generation.
22 A I think you under-estimate my

1 age.
2 Q That's never dangerous. Now,
3 let's look at page 3, and are you able to
4 perceive whether there are one or two, or
5 some different number of bands on side 2?
6 A I --
7 MR. PERRELLI: Your Honor, I'm
8 going to object. He hasn't established that
9 she's ever seen this, and to ask her to try
10 to interpret the number of bands on this
11 document, I don't see how the witness could
12 do that.
13 CHIEF JUDGE SLEDGE: Number of
14 what?
15 MR. MALONE: Bands.
16 CHIEF JUDGE SLEDGE: Bands?
17 MR. MALONE: Yes. There's a
18 space between bands, so that if there are
19 six songs on a side in an LP, there will be
20 six visible breaks.
21 CHIEF JUDGE SLEDGE: Can you see
22 that?

1 MR. MALONE: I think I can.
2 CHIEF JUDGE SLEDGE: I can't see
3 that.
4 MR. MALONE: Well, I can
5 understand that. The light is a little
6 better here. But the witness in answer to
7 the objection, Your Honor --
8 CHIEF JUDGE SLEDGE: The
9 objection is overruled.
10 MR. MALONE: Thank you.
11 BY MR. MALONE:
12 Q And, similarly, page 4 appears --
13
14 CHIEF JUDGE SLEDGE: Do you want
15 an answer to your question?
16 MR. MALONE: Well, yes.
17 BY MR. MALONE:
18 Q Can you discern that?
19 A No.
20 Q No. All right. And I would, as
21 to page 4, I would ask the same question.
22 A I can't tell.

1 Q Now, with reference then to your
2 testimony Tuesday afternoon, does it look at
3 all probable to you based on your experience
4 in the music industry, which you've told us
5 that a large percentage of your staff has,
6 that the ISRC, would you translate for me,
7 please?
8 A ISRC, the International Sound
9 Recording Code.
10 Q All right. Is it probable as to
11 this particular disk, which appears to be
12 seven inches vinyl, that the SRIC is there?
13 A I don't know what this is. I
14 don't know if there's an ISRC on it or not.
15 If this is an LP that was released before a
16 certain time, it's unlikely it would be on
17 there, but I don't know what this is.
18 Q All right. Then you testified
19 that in default of a code embedded on the
20 record, that the licensee would be required
21 to provide certain other data elements in
22 order to allow you to identify the bands on

1 the record. Which of the - I think you
2 mentioned five - and which of the five do
3 you find on this record album in this
4 record?
5 A I don't know if this is the
6 complete packaging for this product or not.
7 I have no way of knowing if all the
8 information is here, so I don't know what
9 this is.
10 Q Well, if you will assume, please,
11 for the purpose of my question that it is
12 the complete package of ES751 as it was sold
13 retail.
14 MR. PERRELLI: Your Honor, I'm
15 going to object. I think he's just asking
16 her to read from a document that she's never
17 seen before and can't identify.
18 CHIEF JUDGE SLEDGE: Overruled.
19 THE WITNESS: Can you repeat your
20 question?
21 BY MR. MALONE:
22 Q Of the elements that you say that

1 the licensee should resort to in default of
2 the embedded code, how many of those
3 elements, or which of those elements do you
4 find from the exhibit?
5 A Well, these are a little bit of
6 an assumption because I'm looking at this in
7 a vacuum --
8 CHIEF JUDGE SLEDGE: No, wait a
9 minute. A minute ago you said -- you asked
10 the same question, but you asked her to
11 assume that this was the entire package, the
12 entire retail package.
13 MR. MALONE: Yes. Thank you,
14 Your Honor. Under that assumption. I mean,
15 you've got it.
16 THE WITNESS: So Estrus could be
17 a company, a marketing label that put it
18 out, AstroLaunch would be the name of the
19 artist, the tracks on Side A are "Philip A.
20 Dick in The Pet Section of Walmart", and
21 there's probably another track called "The
22 Man From Uncle", and Side B there are

1 "Transmissions from Venus 94", which would
2 be the title of the song, and "Time Bomb
3 (The Avengers 6)" would be the title of
4 another song, so marketing label, artist,
5 title. I'm not sure which is the album, and
6 let me just read all this other text. Yes,
7 because when you read this it says
8 "Transmission from Venus 94", which has 94
9 after it because it is a `94 version of a
10 `93 song, so I'm assuming that's the track
11 title. So those are the fields that I would
12 likely identify in this.
13 Q All right. And what would you
14 demand in addition in order to not charge
15 the webcaster with an incomplete report?
16 A Well, again, the regulations ask
17 for in addition to the name of the licensee
18 and the transmission category and the
19 program title, artist, album, and marketing
20 label, or ISRC, which you have, so this is
21 complete.
22 Q And unambiguous.

1 A And unambiguous.
2 Q You're absolutely certain about
3 what you're drawing from this album.
4 A Well, I'm not the service that
5 selected this track to put in my playlist,
6 so if I had the benefit of that, this might
7 be perfectly obvious to me who is what,
8 because they selected to put that in their
9 playlist.
10 Q But not having the benefit of
11 that, you're not totally certain.
12 A I'm not totally certain, no.
13 MR. MALONE: All right. I'm going
14 to mark for identification Services Exhibit
15 160.
16 (Whereupon, Services
17 Exhibit No. 160 was
18 marked for
19 identification.)
20 BY MR. MALONE:
21 Q The document has three pages,
22 which I will represent the first page is the

1 cover of a Jason Molina album, the second
2 page is one side of a 45 rpm disk, and the
3 third page is the other side of that same 45
4 rpm disk. And I am informed looking at page
5 2, I am informed that the Magnolia Electric
6 Company is the name of Mr. Molina's band,
7 and the small printing on the circumference
8 of the label at the center of the side of
9 the disk that's on page 3 I read as the
10 Chucklet Magazine located at P.O. Box 2514
11 in Athens, Georgia, which I guess fits with
12 Magnolia, from that part of the country.
13 And I would ask you, again, as to this
14 exhibit, if I correctly described it,
15 whether you think the 45 rpm disk has the
16 code embedded in it?
17 MR. PERRELLI: I'm going to
18 object, Your Honor, to the extent if Mr.
19 Malone, as he did before, wants to make a
20 representation that we should assume that
21 this is the entire packaging and the entire
22 material, as he did before. Otherwise, I

1 would object to ask her to just simply make
2 a guess as to what is or what is not in the
3 packaging of this record.
4 CHIEF JUDGE SLEDGE: Sustained.
5 BY MR. MALONE:
6 Q For the purposes of my next
7 question, or that question, would you please
8 assume that this is the complete product as
9 sold in retail distribution channels. And
10 my question then, subject to that
11 assumption, is, is it likely that the code
12 is embedded in this 45 rpm record?
13 A I have no way of knowing if the
14 ISRC code is embedded without reading it
15 with an ISRC reader. Again, if I had more
16 information, I could make a more informed
17 guess.
18 Q How far are you able to go with
19 what you have in front of you in identifying
20 the default elements, in default of the
21 code?
22 A The required data elements in the

1 interim regulations require ISRC or album
2 name and a marketing label, so I think the
3 information from here we could probably
4 discern that.
5 Q May I try you as to each of those
6 elements, please?
7 A Jason Molina is the artist, "No
8 Moon on the Water" is the track title, or
9 "In the Human World" is the track title,
10 Magnolia Electric Company might be the
11 marketing label or the name of the album, I
12 can't tell from this.
13 Q You would exclude the possibility
14 that it's the name of the band.
15 A I would say Jason Molina is the
16 featured artist. I'm guessing. "In the
17 Human World", I think Jason Molina is the
18 featured artist, and the Magnolia Electric
19 Company is the marketing label.
20 Q I'm sorry. And is?
21 A I would guess that Jason Molina
22 is the featured artist, and Magnolia

1 Electric Company is the name of the company,
2 but I'm not familiar with this recording.
3 MR. MALONE: I think that
4 concludes my questions for the witness. Oh,
5 Your Honor, please, I have, I think, three
6 exhibits hanging there that I would like to
7 move into evidence. I would like to move
8 into evidence subject to the pending
9 objection, the NPR contract.
10 CHIEF JUDGE SLEDGE: What exhibit
11 numbers?
12 MR. MALONE: 157, Your Honor.
13 CHIEF JUDGE SLEDGE: All right.
14 That's already --
15 MR. MALONE: I'd like to --
16 CHIEF JUDGE SLEDGE: Just a
17 moment. We've got a motion pending.
18 MR. MALONE: I'm sorry.
19 MR. PERRELLI: Your Honor, we
20 would object to the admission for the same
21 grounds of our motion to strike, so we would
22 request any ruling of the Court on that

1 exhibit to be subject to that motion, and
2 also would request that, as required by the
3 terms, that it be subject to the protective
4 order, if it is entered into evidence, be
5 subject to the protective order.
6 CHIEF JUDGE SLEDGE: Motion to
7 admit is taken under advisement.
8 MR. MALONE: I'd like to move the
9 admission of the Exhibit pertaining to the
10 financial statement which was 158.
11 CHIEF JUDGE SLEDGE: Any
12 objection to Exhibit 158?
13 MR. PERRELLI: No objection, Your
14 Honor.
15 CHIEF JUDGE SLEDGE: Exhibit 158
16 is admitted.
17 (Whereupon, Services
18 Exhibit 158 was
19 admitted.)
20 MR. MALONE: I'd like to move the
21 admission of Services Exhibit 159.
22 CHIEF JUDGE SLEDGE: On what

1 basis?

2 MR. MALONE: On the basis that

3 the conduct of the witness on the stand in

4 terms of answering the presence or absence

5 of the alternate elements showed, I think,

6 grave difficulty, and I think that is a

7 reasonable proxy for what a program director

8 would face when up against making out a

9 report, such as Sound Exchange requires, and

10 threatens to penalize for incompleteness.

11 CHIEF JUDGE SLEDGE: Mr. Malone,

12 I didn't hear you answer my question. On

13 what basis can this exhibit be admitted?

14 MR. MALONE: I think it should be

15 admitted, Your Honor, in that it is a

16 demonstrative exhibit, if you will, in the

17 sense that the witness --

18 CHIEF JUDGE SLEDGE:

19 Demonstrative exhibit summarizes evidence.

20 MR. MALONE: Well, it also

21 demonstrates in a more literal sense of the

22 term the practical difficulty that her

1 proposal would impose on the licensees. And
2 I don't think that you can fully interpret
3 her reaction on the stand without the
4 exhibit in front of you.
5 CHIEF JUDGE SLEDGE: That may be
6 a proper use of something that has been
7 admitted, but I still haven't heard you say
8 what basis there is to admit this exhibit.
9 MR. MALONE: This exhibit is the
10 exterior of the kind of works that Sound
11 Exchange's license covers.
12 CHIEF JUDGE SLEDGE: Is there any
13 evidence on that?
14 MR. MALONE: I can ask the
15 witness that.
16 CHIEF JUDGE SLEDGE: She's not
17 familiar with it. She's already said that.
18 Maybe I'm going too far. All right.
19 Anything else?
20 MR. MALONE: No, Your Honor.
21 CHIEF JUDGE SLEDGE: All right.
22 In response to Exhibit 159?

1 MR. PERRELLI: Your Honor, I
2 would object. The witness has never seen
3 the exhibit, can't make any statements or
4 representations about the actual -- a series
5 of questions based on assumptions, but not
6 on what the document is. She couldn't
7 identify it, and there's no basis for any
8 testimony about the voracity of anything
9 that, or of Mr. Malone's representations of
10 that.
11 CHIEF JUDGE SLEDGE: Any further,
12 Mr. Malone?
13 MR. MALONE: Well, I would like
14 to respond to the terms of the objection, in
15 that it's not being offered for the voracity
16 of the content. It's being offered to
17 illuminate the difficulty that Sound
18 Exchange seeks to impose on its licensees.
19 And I think the point is that she had before
20 her on the stand everything that a program
21 director would have had for him when he was
22 filling out the report.

1 CHIEF JUDGE SLEDGE: No, there's
2 no evidence of that.
3 MR. MALONE: No, I suppose not,
4 but there are certain things I think that
5 would be obvious to someone in the industry,
6 as she says she is, and I don't think
7 there's any doubt there as to what the
8 practical problem is.
9 CHIEF JUDGE SLEDGE: The
10 objection is sustained.
11 MR. MALONE: Well, I will offer,
12 also, Exhibit 160, which is subject to the
13 same objection.
14 CHIEF JUDGE SLEDGE: Any
15 objection to the offer of 160?
16 MR. PERRELLI: Same objection,
17 Your Honor; no foundation.
18 MR. MALONE: Then, if I may, Your
19 Honor, I will bring in a live witness when
20 my time comes to -- CHIEF JUDGE SLEDGE:
21 Based on the objection, the objection is
22 sustained.

1 MR. MALONE: Thanks.
2 CHIEF JUDGE SLEDGE: Mr.
3 Perrelli, any redirect?
4 MR. PERRELLI: I do, Your Honor.
5 CHIEF JUDGE SLEDGE: Go ahead.
6 MR. PERRELLI: I can continue, or
7 take a break. I'm happy to go either way.
8 CHIEF JUDGE SLEDGE: Recess ten
9 minutes.
10 MR. PERRELLI: Thank you, Your
11 Honor.
12 (Whereupon, the proceedings went
13 off the record at 4:15:05 p.m. and went back
14 on the record at 4:24:53 p.m.)
15 CHIEF JUDGE SLEDGE: Thank you.
16 We'll come to order. Mr. Perrelli.
17 MR. PERRELLI: Thank you, Your
18 Honor. Good afternoon, Ms. Kessler.
19 REDIRECT EXAMINATION
20 BY MR. PERRELLI:
21 Q During your testimony, we've
22 talked a good deal about statements of

1 account. I'd like to direct you to Exhibit
2 212 that is attached to your written direct
3 statement. My only question is I'd like you
4 to point out in this exhibit what a
5 statement of account looks like, and what
6 information is required.
7 A The statement of account
8 describes which license you're reporting
9 for, so this is for an eligible non-
10 subscription transmission service, where to
11 send payment, and the statement of account,
12 contact information, requesting the period
13 for the reporting on the statement of
14 account, the name of the entity and the
15 service name, and the URL, and in this case,
16 the numbers of performances during whatever
17 months is covered by this statement of
18 account, annual liability section, and a
19 signature page.
20 Q So how many pages is that?
21 A Three.
22 CHIEF JUDGE SLEDGE: What was the

1 one before signature?
2 THE WITNESS: The annual
3 liability.
4 BY MR. PERRELLI:
5 Q You were asked a number of
6 questions about your rate of paying through
7 to artists. Has that number improved over
8 time?
9 A Yes, it has.
10 Q And can you identify what your
11 pay through to artists was a year ago?
12 A A year ago it was approximately
13 45 percent to 50 percent.
14 Q And where is it today?
15 A About 65 percent.
16 Q Did the decision of Sound
17 Exchange's award not to distribute or not to
18 distribute to Sound Exchange royalties that
19 had been paid more than three years ago
20 affect that number?
21 A Yes. By not releasing those
22 undistributed costs to offset cost, it gave

1 us opportunity to further reduce the
2 undistributed funds.
3 Q You received some questions about
4 monitoring webcasts. Let me take a step
5 back for a minute. When we talk about a
6 performance by a webcaster, what are we
7 talking about?
8 A We're talking about the
9 transmission of a sound recording and a user
10 listening to it.
11 Q Okay. When we talk about
12 monitoring webcasts, can you identify,
13 without the assistance of webcasters, can
14 you by monitoring identify the number of
15 performances that a webcaster performs?
16 A You can only identify the sound
17 recording, but not how many people were
18 listening to it, which is part of the
19 definition of a performance by a webcaster.
20 Q Can you calculate the liability
21 of a webcaster paying on a per-performance
22 basis without information from the webcaster

1 about listeners?
2 A No, you can't.
3 Q And again, who has that data?
4 A The licensees are in possession
5 of that information.
6 Q And do you know in what form that
7 data exists?
8 A No.
9 Q You were asked some questions
10 about a sample, sampling project that Sound
11 Exchange had done. I'd like to direct your
12 attention to Exhibit 417, again, attached to
13 your written testimony, and ask you to look
14 at page 9. These are comments Sound
15 Exchange filed on August 26th, 2005, and just
16 ask if that page refreshes your
17 recollection, page 8 and 9, refreshes your
18 recollection about the sampling project that
19 was done?
20 A Yes, it does.
21 Q And can you again describe that
22 project for the Board?

1 A Yes. We conducted a sample based
2 on a random period and a system identified
3 by Barry Massarsky, and we conducted the
4 sample against census reporting that
5 identified the titles and the artists that
6 are absent in the sample in the census
7 period.
8 Q And who is Mr. Massarsky?
9 A He's an economic consultant to
10 Sound Exchange.
11 Q Okay. You were asked some
12 questions about terms from 2001. In 2001,
13 did Sound Exchange have much experience
14 administering the statutory license?
15 A No, we did not.
16 Q In 2003, how much experience did
17 Sound Exchange have in administering the
18 statutory license?
19 A Some experience.
20 Q Today, how much more experience
21 has Sound Exchange had in administering the
22 statutory license?

1 A We have massively more experience
2 with respect to administering the statutory
3 royalty.
4 Q And how did that experience
5 affect the recommendation that you made to
6 the Board with respect to the terms?
7 A It was the basis of those
8 recommendations.
9 MR. PERRELLI: Okay. I'd like to
10 mark as Sound Exchange Exhibit 1 just for
11 identification.
12 (Whereupon, SX Exhibit
13 No. 1 was marked for
14 identification.)
15 BY MR. PERRELLI:
16 Q Ms. Kessler, this is part of the
17 Copyright Office regulations concerning the
18 pre-existing subscription services.
19 CHIEF JUDGE SLEDGE: I'm puzzled
20 by your designation - Sound Exhibit 1?
21 MR. PERRELLI: We labeled our
22 original exhibits according to with Sound

1 Exchange TP001 for trial, public. We're
2 happy to change that designation. We
3 haven't had occasion to introduce exhibits
4 other than those that were with our written
5 direct testimony.
6 CHIEF JUDGE SLEDGE: This is the
7 first exhibit to --
8 MR. PERRELLI: This is our first
9 exhibit. I think, and I don't intend to
10 offer this in evidence, I merely want to
11 refresh the witness' recollection.
12 CHIEF JUDGE SLEDGE: Go ahead.
13 BY MR. PERRELLI:
14 Q Ms. Kessler, if you'll look at
15 260.2(d) which says "The licensee shall pay
16 a late fee of 1.5 percent per month, or the
17 highest lawful rate, whichever is lower",
18 does that refresh your recollection with
19 respect to the late fee owed by pre-existing
20 subscription services under the regulations
21 governing them?
22 A Yes, it does.

1 Q Now in your experience with
2 webcasters, has the .75 percent monthly late
3 fee been successful in encouraging
4 webcasters to pay on time?
5 A I don't find it to be a
6 disincentive to pay late.
7 Q With respect to the pre-existing
8 subscription services, have you found that
9 the 1.5 percent per month late fee has been
10 successful in encouraging them to pay
11 timely?
12 A No, we have chronic late-payers
13 with respect to the past.
14 Q Now, Ms. Kessler, there were a
15 number of questions you were asked about
16 confidentiality, confidentiality provisions
17 and your recommendations with respect to
18 that. Just so we're clear, what information
19 can you provide copyright owners under the
20 current terms governing the statutory
21 license that went through 2005?
22 A We can only provide royalties

1 received in the aggregate, and with respect
2 to any specific licensee, just if they are
3 current or not in their payments.
4 Q If a licensee is one month late,
5 what can you tell a copyright owner?
6 A That they're not current with
7 their payments.
8 Q If a licensee is 12 months late,
9 what can you tell a copyright owner?
10 A That the licensee is not current
11 in their payment.
12 Q If you believe a licensee is
13 underpaying by $5, what can you tell a
14 copyright owner?
15 A We can't tell them what that
16 underpayment is.
17 Q And if you believe a licensee is
18 underpaid by $100,000, what can you tell
19 them?
20 A We cannot tell them that they are
21 $100,000 short on their royalty obligation.
22 MR. PERRELLI: Okay. I'd like to

1 mark - this would be Sound Exchange TP
2 Exhibit 2, and again, only for
3 identification to refresh the witness'
4 recollection.
5 (Whereupon, SX Exhibit
6 No. 2 was marked for
7 identification.)
8 BY MR. PERRELLI:
9 Q Now, Ms. Kessler, this is, again,
10 part of the rates and terms for pre-existing
11 subscription services, Copyright Office
12 regulations. If you'll look at 260.6(f),
13 talks about the cost of verification
14 procedure, and discusses the cost shifting
15 provisions. Does that refresh your
16 recollection about the percentage rate at
17 which the costs would shift to a pre-
18 existing subscription service for
19 underpayment?
20 A Yes, it does.
21 Q And what is that?
22 A Five percent.

1 Q And is that consistent with what
2 you were recommending for this statutory
3 license?
4 A Yes, it is.
5 Q Now you were asked questions
6 about whether or not you have experience
7 with respect to auditing webcasters. Do you
8 have experience with respect to auditing
9 pre-existing subscription services?
10 A Yes, we do.
11 Q And without going into specific
12 licensees and the specific numbers, what
13 have those audits found?
14 A Significant under payments.
15 MR. PERRELLI: Your Honor, I
16 don't have anything further.
17 CHIEF JUDGE SLEDGE: Mr.
18 Steinthal, any further cross?
19 MR. STEINTHAL: No, Your Honor.
20 CHIEF JUDGE SLEDGE: Ms. Ablin,
21 any further cross?
22 MS. ABLIN: Yes, Your Honor, if I

1 could have just 30-60 seconds.
2 CHIEF JUDGE SLEDGE: Yes, ma'am.
3 RECROSS EXAMINATION
4 BY MS. ABLIN:
5 Q Ms. Kessler, Mr. Perrelli a few
6 minutes ago just showed you a couple of
7 provisions concerning the terms governing
8 the pre-existing subscription services. Do
9 you recall that?
10 A Yes.
11 Q Are you aware that certain of the
12 terms that you are seeking changes for are
13 actually terms that have been in effect with
14 respect to the pre-existing subscription
15 services?
16 A Some of the changes that Sound
17 Exchange is requesting are terms that exist
18 for the pre-existing services, yes.
19 Q Right. But some of the other
20 terms, as they currently exist in the
21 webcaster, or rather the eligible non-
22 subscription services and new subscription

1 transmission services terms, provisions,
2 exist in their current form in the pre-
3 existing subscription services' terms. Is
4 that correct?
5 A I'm not sure what those are.
6 Q Okay. Well, let's start with the
7 confidentiality provision. That's one of
8 the terms that your testimony seeks a change
9 for, the terms governing confidentiality and
10 statement of account information provided by
11 licensees.
12 A Yes.
13 MS. ABLIN: I'm going to show you
14 a document that's been marked as Services
15 Exhibit 161.
16 (Whereupon, Services
17 Exhibit No. 161 was
18 marked for
19 identification.)
20 MS. ABLIN: And if you could take
21 a look at Part D to this term. And just for
22 the record, this exhibit is 37 CFR Part

1 260.4, titled "Confidential Information and
2 Statements of Account."
3 BY MS. ABLIN:
4 Q Now, it's true, is it not, that
5 the pre-existing subscription services'
6 terms contain a confidentiality provision
7 like the current confidentiality provision
8 that's found in the webcaster terms?
9 A Yes.
10 Q And that terms restricts access
11 to the confidential information pertaining
12 to the royalty payments from going to
13 employees or officers of the sound recording
14 copyright owner or performing artist.
15 Correct?
16 A Yes, and we'll likely ask for
17 this confidentiality provision to be changed
18 when we commence the PES proceeding.
19 Q Are you aware that this term, the
20 pre-existing subscription services' term
21 has, in fact, been in place since 1998, so
22 it's been in place for eight years?

1 A 1998 or 1996?
2 Q Well, perhaps it's been in place
3 for ten years.
4 A Yes, I'm aware of when the PES
5 came into existence.
6 Q So your testimony is the term has
7 been in place for ten years?
8 A I'm not sure if this specific
9 term was a result of the extension of the
10 license, or this was in the original terms.
11 I don't know.
12 MS. ABLIN: Ms. Kessler, I'm now
13 having marked as Services Exhibit 162 the
14 terms provisions governing pre-existing
15 subscription services as they were in place
16 in 1998.
17 (Whereupon, Services
18 Exhibit No. 162 was
19 marked for
20 identification.)
21 THE WITNESS: Thank you.
22 BY MS. ABLIN:

1 Q And if you could just flip to
2 page 25414 of this document, and take a look
3 at Section 260.4(d).
4 A Yes.
5 Q So does this refresh your
6 recollection whether the confidentiality
7 provision that we've been discussing was in
8 place, in fact, since at least 1998?
9 A Yes.
10 Q With respect to the pre-existing
11 subscription services.
12 A Yes.
13 Q Are you aware that the Section
14 114 statutory license terms governing the
15 pre-existing subscription services also
16 include a term requiring that audits of both
17 statements of account and royalty payments
18 be conducted by independent auditors?
19 A That sounds familiar, yes.
20 Q And are you aware whether that
21 term has, in fact, been in place with
22 respect to pre-existing subscription

1 services since at least 1998?
2 A I think that's right.
3 Q You have the document in front of
4 you, if you would like to verify that that's
5 correct.
6 A I'd like to verify it.
7 Q Yes, let's do that.
8 CHIEF JUDGE SLEDGE: Do you want
9 to refer her to a section?
10 MS. ABLIN: Yes. It would be the
11 same page that you were on before, which was
12 25414, again Section 260.4(d)(2).
13 THE WITNESS: I'm sorry. That's
14 260?
15 MS. ABLIN: .4(d)(2).
16 THE WITNESS: .4(d)(2). Yes.
17 BY MS. ABLIN:
18 Q And that provision, in fact,
19 allows only independent and qualified
20 auditors who are not employees or officers
21 of a sound recording copyright owner or
22 performing artist to access the pre-existing

1 services confidential information.
2 A No, it says that "An independent
3 qualified auditor who is not an employee or
4 officer of the sound recording copyright
5 owner or performing artist, but is
6 authorized to act on behalf of the
7 interested copyright owner with respect to
8 the verification of the royalty payments,
9 verification of the royalty payments."
10 Q Right, which is the --
11 A Not the confidential information.
12 This is discussing the audit, yes.
13 Q Well, this is, in fact, a term
14 that talks about who can see the
15 information. Correct?
16 A Yes, that's right. Excuse me,
17 yes.
18 Q Okay. And so, in fact, this
19 provision restricts access to that
20 information to independent and qualified
21 auditors who are not employees or officers
22 of sound recording copyright owners or

1 performing artists?
2 A Yes.
3 Q And that term has been in place
4 since at least May 8th, 1998?
5 A Yes.
6 Q Now, Mr. Perrelli also asked you
7 a series of questions about the sample
8 analysis that you and I spent a little bit
9 of time talking about this morning.
10 Correct?
11 A Yes.
12 Q And I believe you testified a few
13 minutes ago with Mr. Perrelli that Barry
14 Massarsky conducted that analysis?
15 A He didn't conduct the analysis,
16 he set up the parameters for the analysis,
17 and my staff carried out the actual data
18 analysis.
19 Q And if you could look at page 9,
20 which I believe is the page Mr. Perrelli
21 directed you to, of Sound Exchange Exhibit
22 417 TP.

1 A 417?
2 Q Yes, 417.
3 A Page 9.
4 Q Page 9, yes.
5 A Yes.
6 Q And the first sentence refers to
7 a declaration of Barry Massarsky. Correct?
8 A Yes.
9 Q And I take it that that
10 declaration is where the analysis of the
11 sample that he performed was described? The
12 declaration that was attached to this
13 exhibit describes the analysis, the sample
14 analysis that he performed?
15 A The parameters that he came up
16 with, yes.
17 Q And that declaration was not, in
18 fact, included as an exhibit to this -
19 included as an attachment, rather, to this
20 exhibit?
21 A No.
22 Q Now I believe you told me that

1 the sample used in the analysis you referred
2 to earlier today was a sample consisting of
3 two seven-day periods.
4 A Two consecutive seven-day
5 periods, that's correct.
6 Q In a quarter. And again,
7 directing your attention to page 9 where you
8 are, Mr. Massarsky, according to this
9 document, conducted a sample analysis using
10 samples consisting of a one-week period, a
11 three-day period, a three non-consecutive
12 day period, and a one-day period, so he
13 conducted four separate sample analyses.
14 Correct?
15 A Yes.
16 Q But according to this document he
17 did not, in fact, conduct an analysis with
18 respect to two seven-day periods within a
19 quarter. Is that correct?
20 A That's correct.
21 Q And I believe you testified
22 during your direct testimony a couple of

1 days ago that in your analysis of the sample
2 of two seven-day periods, and I'm frankly
3 perplexed where that appears in the
4 Massarsky document, that you found that over
5 40 percent of the artists performed in the
6 census were not picked up by the sample.
7 A That's correct.
8 Q If you could turn to page 10 of
9 this document, take a look at the first full
10 paragraph. That's a paragraph providing the
11 results of Mr. Massarsky's work, is it not?
12 A The paragraph that begins, "The
13 results for the performers comparable".
14 Q Correct.
15 A Yes.
16 Q And there's nothing on this page,
17 is there, that says that over 40 percent of
18 the artists performed were missed in either
19 a one-week sample, or in a sample of two
20 seven-day periods. Is there?
21 A No, it doesn't mention the two-
22 week sample, no.

1 MS. ABLIN: I have no further
2 questions.
3 CHIEF JUDGE SLEDGE: Ms. Brown,
4 any further questions?
5 MS. BROWN: No, Your Honor.
6 CHIEF JUDGE SLEDGE: Mr.
7 Freundlich, any further questions?
8 MR. FREUNDLICH: I have no more
9 questions, Your Honor.
10 CHIEF JUDGE SLEDGE: Mr. Malone?
11 MR. MALONE: No further
12 questions, please.
13 CHIEF JUDGE SLEDGE: Mr.
14 Perrelli, anything arising from that cross
15 examination?
16 MR. PERRELLI: No, Your Honor.
17 CHIEF JUDGE SLEDGE: Anything by
18 the Court? Thank you, ma'am. You're
19 excused.
20 THE WITNESS: Thank you.
21 CHIEF JUDGE SLEDGE: Mr.
22 Perrelli, who will be your witness Monday

1 morning?

2 MR. PERRELLI: We will have

3 Michael Kushner testifying on Monday

4 morning, and he will be our last witness,

5 subject to our efforts to report to the

6 other side. I'm working on a schedule for -

7 -

8 CHIEF JUDGE SLEDGE: Do you

9 expect Mr. Kushner to take more than one

10 day?

11 MR. PERRELLI: We anticipate him

12 to last the day, but based on consultation

13 with the other side, I think we all believe

14 he will be on and off on Monday, but it will

15 be the bulk of the day.

16 CHIEF JUDGE SLEDGE: So as we

17 described earlier, then we would be in

18 recess Tuesday and start back on Wednesday

19 with Mr. Freundlich.

20 MR. FREUNDLICH: Just one

21 clarification.

22 CHIEF JUDGE SLEDGE: Yes, sir.

1 MR. FREUNDLICH: If for some
2 reason the witness doesn't conclude on
3 Monday, are we then going to start Royalty
4 Logic's case on Thursday?
5 CHIEF JUDGE SLEDGE: Yes, sir.
6 MR. FREUNDLICH: So there's
7 always going to be one full day in-between.
8 CHIEF JUDGE SLEDGE: One full day
9 in-between. We've got too much ahead of us
10 to not leave that time.
11 MR. PERRELLI: I think there's
12 incentive to have Mr. Kushner be on and off
13 on Monday, so we'll do our best.
14 CHIEF JUDGE SLEDGE: Thank you
15 very much. We'll recess until Monday at
16 9:30.
17 (Whereupon, the proceedings went
18 off the record at 4:53 p.m.)
19
20
21
22

This portion of designated testimony is Restricted in its entirety and is therefore omitted from this Public version.