Transcript of:

Date: June 19, 2007
Volume: X

Case: Adjustment of Rates for Pre-Existing Subscriptions

Neal R. Gross & Co., Inc.
Phone: 202-234-4433
Fax: 202-387-7330
Email: info@nealrgross.com
Internet: www.nealrgross.com

SX Trial Ex. 7B

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

In the matter of:	)	
	)	
Adjustment of Rates and Terms	)	Docket No.
for Preexisting Subscriptions	)	2006-1
Services,	)	CRB DSTRA
and	)	
Satellite Digital Audio Radio	)	
Services	)	
	)	

Room LM-408
Library of Congress
First and Independence Avenue, S.E.
Washington, D.C. 20540

Tuesday,
June 19, 2007

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 ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

APPEARANCES

On Behalf of SoundExchange
DAVID A. HANDZO, ESQ
MICHAEL B. DeSANCTIS, ESQ
JARED O. FREEDMAN, ESQ
THOMAS J. PERRELLI, ESQ
MARK D. SCHNEIDER, ESQ
Jenner & Block
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6060
dhandzo@jenner.com

On Behalf of XM Satellite Radio Inc.
BRUCE RICH, ESQ
JONATHAN BLOOM, ESQ
WILLIAM CRUSE, ESQ
TODD LARSON, ESQ
BRUCE S. MEYER, ESQ
RALPH MILLER, ESQ
JOHN THOMPSON, ESQ
Weil Gotshal & Manges
567 5th Avenue

New York, New York 10016
(212) 310-8238

On Behalf of Sirius Satellite Radio Inc.
BRUCE G. JOSEPH, ESQ
KARYN K. ABLIN, ESQ
MATT J. ASTLE, ESQ

JENNIFER L. ELGIN, ESQ
THOMAS W. KIRBY, ESQ
MICHAEL L. STURM, ESQ
JOHN WYSS, ESQ
Wiley Rein
1776 K Street, N.W.
Washington, D.C. 20006

(202) 719-7528
bjoseph@wileyrein.com

I-N-D-E-X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Mark Eisenberg				
By Mr. Wyss	9	17		
By Mr. DeSanctis		15		
Barrie Kessler				
By Mr. Freedman	20			
By Mr. Thompson		47		
Sean Butson				
By Mr. Schneider	119			
By Mr. Sturm		198		
Voir Dire by Mr. Sturm on page 125				

EXHIBIT NO.	DESCRIPTION	MARK	RECD
SDARS			
19	(Substituted for original)	8	
23	Eisenberg Depo Exhibit	9	
24	SDARS Payments	64	70
25	Annual Distribution Report	71	73
26	Annual Distribution Report	73	79
27	SX Financial Statement for 2005	80	81
28	Letter to Sirius re: late fees	92	93
29	Letter to XM re: late fees	92	93
30	copy of check and envelope from Sirius	97	
31	Audit report on Muzak	101	104
32	Response letter from Muzak	101	105
33	Analysts Consensus Table	205	206
SoundExchange			
55	Kessler 2006 Testimony	22	27
56	Kessler 2005 Testimony	33	34
57	Written testimony of Sean Butson	137	138
58	Blow-up of Appendix A	150	151

1 P-R-O-C-E-E-D-I-N-G-S
2 9:33 a.m.
3 CHIEF JUDGE SLEDGE: On the
4 record. Thank you. We'll come to order. My
5 Wyss.
6 MR. DeSANCTIS: Thank you, Your
7 Honor, and if we could have Mr. Eisenberg back
8 on the stand please. One housekeeping matter
9 if I may before we go to testimony, Your
10 Honor. As we informed opposing counsel last
11 night, we have a sick witness. Mr. Kushner
12 has come down with a -- I'm not sure what it
13 is. I think it's a chest infection. We
14 ordered him to the doctor yesterday. The
15 doctor ordered him home.
16 We are trying to -- We're working
17 with him to see when he may be able to come
18 down and testify. I think the safest thing is
19 to take him out of the order. He was set to
20 be the -- We have Mr. Eisenberg on now. After
21 that is Ms. Kessler. After that is Mr.
22 Butson. Mr. Kushner was going to follow Mr.

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 17

1 Q Mr. Eisenberg, is what you just
2 described preprogrammed in the same way as XM
3 and Sirius preprogrammed their programming?
4 A Yes. It's very similar. It's
5 commercial-free and it's supplied as a
6 playlist to the enduser.
7 Q And is the pre-play rate that we
8 were discussing yesterday the same for these
9 pre-programmed non on-demand streams as it is
10 for on-demand streams?
11 A Yes, it would be one penny per
12 play if it's a nonportable service and two
13 pennies per play if it's a portable service.
14 MR. DeSANCTIS: Thank you. No
15 further questions, Your Honor.
16 CHIEF JUDGE SLEDGE: Mr. Wyss.
17 MR. WYSS: I just have one follow-
18 up question, Your Honor.
19 RECROSS EXAMINATION
20 BY MR. WYSS:
21 Q Just so the record is clear, the
22 subscriber to one of these services who pays

Page 18

1 his money in which you get a percentage of has
2 full, on-demand fully interactive ability to
3 access the catalog, the entire catalog of
4 those services. Correct?
5 A Yes (Inaudible).
6 MR. WYSS: Thank you.
7 CHIEF JUDGE SLEDGE: Any questions
8 from the bench?
9 (No response.)
10 CHIEF JUDGE SLEDGE: Thank you.
11 Mr. DeSanctis.
12 (Witness exits courtroom.)
13 MR. DeSANCTIS: Your Honor, if I
14 may just inquire. I don't know if this is the
15 right time that Your Honors would like to
16 address. But there are two exhibits from
17 yesterday's testimony with Mr. Eisenberg that
18 I think were acceptable subject to being --
19 two memos from several years ago that were
20 accepted subject to being sort of tied up and
21 linked to the current circumstances and since
22 there was never a ruling on that, I would

Page 19

1 maintain my objection. Mr. Wyss isn't here.
2 So I don't think it's fair to argue this issue
3 now.
4 (Pause.)
5 CHIEF JUDGE SLEDGE: The objection
6 on the two exhibits, I overrule them.
7 (Off the record discussion.)
8 MR. DeSANCTIS: (Off microphone.)
9 Your Honor, this transcript we have is
10 appearing on the received. Does the
11 transcript -- is one that you mentioned now?
12 CHIEF JUDGE SLEDGE: No. That was
13 incorrect at the time. They were admitted
14 subject to being connected. So they were
15 admitted yesterday.
16 MR. DeSANCTIS: Then, Your Honor,
17 I would simply renew my motion that they both
18 be admitted pursuant to the protective order.
19 As we discussed, they contain rates that some
20 of which according to the testimony are still
21 current or still may be current. I believe
22 that 18 was actually admitted subject to

Page 20

1 protective order. I'm not sure the same
2 ruling was made on 19.
3 CHIEF JUDGE SLEDGE: I don't know.
4 Counsel is gone. We will not take that up
5 now.
6 MR. DeSANCTIS: Thank you, Your
7 Honor.
8 CHIEF JUDGE SLEDGE: Mr. Freedman.
9 MR. FREEDMAN: Yes, we call our
10 next witness, Your Honor, Barrie Kessler.
11 (Witness enters courtroom.)
12 WHEREUPON,
13 BARRIE KESSLER
14 was called as a witness by SoundExchange and,
15 having been first duly sworn, assumed the
16 witness stand, was examined and testified as
17 follows:
18 MR. FREEDMAN: Good morning, Ms.
19 Kessler.
20 DIRECT EXAMINATION
21 BY MR. FREEDMAN:
22 Q Could you please state your name

a21ac274-621c-43f6-8db1-bbd2189438c1

1 for the record?
2 A Yes, Barrie Kessler.
3 Q And where are you currently
4 employed?
5 A SoundExchange, Inc.
6 Q And what is your job title?
7 A I am the Chief Operating Officer.
8 Q And briefly what are your
9 responsibilities as the Chief Operating
10 Officer?
11 A All aspects of SoundExchange
12 operations report to me including membership
13 and outreach, distribution operations which
14 conduct our allocations and distributions.
15 Compliance activities report to me as do the
16 systems development and our information
17 systems.
18 Q Did you submit a written statement
19 in this case?
20 A I did.
21 MR. FREEDMAN: Your Honor, I would
22 like to show the witness what's been marked as

1 SoundExchange Trial Exhibit 55.
2 (Whereupon, the document
3 referred to was marked
4 as SoundExchange Exhibit
5 No. 55 for
6 identification.)
7 BY MR. FREEDMAN:
8 Q Ms. Kessler, do you have
9 SoundExchange Trial Exhibit 55 in front of
10 you?
11 A I do.
12 Q And if you -- Go ahead and open
13 the binder if you would. Do you recognize
14 this document?
15 A Yes, I do.
16 Q And what is it?
17 A It's my testimony in the
18 proceeding 2006.
19 Q And if you look at the back of the
20 testimony, is that your signature there?
21 A Yes, it is.
22 Q Are there also some exhibits in

1 this binder?
2 A There are exhibits in the binder,
3 yes.
4 Q Are those exhibits you submitted
5 with your testimony in this case?
6 A I did.
7 MR. FREEDMAN: Your Honor, at this
8 time, I would move the admission of
9 SoundExchange Trial Exhibit 55.
10 CHIEF JUDGE SLEDGE: Any
11 objections to Exhibit 55?
12 MR. THOMPSON: No objection.
13 MS. ABLIN: Yes, Your Honor.
14 While Sirius has no objection to the majority
15 of this exhibit, it does objection to one
16 specific part of Ms. Kessler's written direct
17 testimony and specifically, that's part four
18 which is found on pages 19 through 20.
19 It also objects to the admission
20 of Exhibit 1, SoundExchange 102-ER. Your
21 Honor, that portion of Ms. Kessler's testimony
22 is entitled the "Sirius EchoStar Service."

1 That is a service that at one point several
2 months ago was in -- The status of that
3 service was in dispute. The Copyright Office
4 as I'm sure Your Honors will remember ruled on
5 that dispute and decided that well before this
6 testimony went into evidence that service is
7 not at issue in this proceeding. It's an
8 issue in the 2005-5 proceeding. Ms. Kessler
9 at that time that she submitted her testimony
10 was aware of this and acknowledged that this
11 decision had already been made.
12 This proceeding is to set rates in
13 terms for Sirius' pre-existing SDARS Service
14 not for the EchoStar Service and testimony
15 regarding this other service and what
16 positions the parties may or may have taken,
17 what they may or may have thought about a
18 dispute that's been resolved about a service
19 that's not at issue in this proceeding are not
20 relevant here and, in fact, Ms. Kessler in her
21 testimony in this section identifies the sole
22 reason for including this section to present

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 25

1 SoundExchange's side of the story with respect
2 to this dispute that's been resolved. So we
3 believe that inclusion of these three pages
4 isn't proper along with Exhibit 102 which is
5 the correspondence that relates to this
6 resolution dispute and we would object to just
7 that portion.
8 CHIEF JUDGE SLEDGE: Mr. Freedman.
9 MR. FREEDMAN: Your Honor, we --
10 the portion of the testimony to which Ms.
11 Ablin is referring does to refer to the Sirius
12 EchoStar. At the time we submitted this
13 testimony and I would be glad to elicit
14 testimony from Ms. Kessler if you would like
15 it was unclear to us whether or not Sirius
16 would be maintaining that that service was
17 entitled to be paid as a PES and out of an
18 abundance of caution, we included that
19 testimony here. If they're conceding on the
20 record that they're not entitled to pay PES,
21 I would agree that we don't need this
22 testimony in this case.

Page 26

1 CHIEF JUDGE SLEDGE: Ms. Ablin.
2 MS. ABLIN: Your Honor, I believe
3 that the Register's decision is clear in that
4 we are not entitled to pay as pre-existing
5 subscription service for this service. It's
6 to be handled in a proceeding to set rates for
7 new types of new subscription services. So
8 that dispute has been resolved.
9 CHIEF JUDGE SLEDGE: What is
10 Sirius' position?
11 MS. ABLIN: Of course, we are
12 respecting the Copyright Office's decision in
13 this matter that the service is not a pre-
14 existing subscription service.
15 CHIEF JUDGE SLEDGE: With that
16 stipulation that Sirius accepts the
17 Registrar's decision that the EchoStar Service
18 is not part of this proceeding, the objection
19 is sustained as to Part 4 of the written
20 direct statement and Exhibit 102. If there is
21 no other objection to any other part of the
22 exhibit, then otherwise, the exhibit is

Page 27

1 admitted.
2 (The document referred
3 to having been
4 previously marked for
5 identification as
6 SoundExchange Exhibit
7 No. 55, was received in
8 evidence.)
9 MR. FREEDMAN: And Your Honor,
10 with regard to SoundExchange Exhibit 101DR
11 which is part of the admitted exhibit, I would
12 like to invoke the protective order. We have
13 something of a similar situation as to which
14 was discussed with Ms. Ablin, but regarding
15 DMX. As you may recall, DMX was previously a
16 participant in this proceeding and Ms.
17 Kesslers' testimony has a section regarding
18 DMX. They have since withdrawn.
19 Exhibit 101DR are correspondence
20 between SoundExchange and DMX that contain
21 some confidential licensee payment
22 information. SoundExchange treats that

Page 28

1 information as confidential and preserves the
2 confidentiality of that information in the
3 normal course of business. I recall that Weil
4 Gotshal represented DMX when DMX was in this
5 case. I don't know if they still do, but I
6 would want to give them the opportunity to
7 raise the protective order issue if they would
8 like and, if they're not, I guess we would
9 raise it on DMX's behalf that DMX is not
10 represented here.
11 CHIEF JUDGE SLEDGE: The statement
12 is confusing to me. I've already moved to
13 apply the protective order.
14 MR. FREEDMAN: Yes.
15 CHIEF JUDGE SLEDGE: So why is
16 this conditional comment made?
17 MR. FREEDMAN: I should have been
18 more clear, Your Honor. Excuse me. We would
19 move to invoke the protective order. I was
20 simply trying to give Weil Gotshal an
21 opportunity if they wanted to to weigh on
22 behalf of DMX and I don't know if they

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 29

1 represent them now or not.
2 CHIEF JUDGE SLEDGE: What in the
3 exhibit?
4 MR. FREEDMAN: The exhibit's
5 correspondence and it includes payment
6 information from DMX to SoundExchange. For
7 example, if you look on the first page, it
8 gives the amounts of checks that DMX sent to
9 SoundExchange.
10 CHIEF JUDGE SLEDGE: Is the checks
11 sent to SoundExchange confidential under the
12 record keeping regulations?
13 MR. FREEDMAN: I believe the
14 amounts that licensees pay, owe, Your Honor,
15 and information that would be included in
16 statements of account such as this, I believe,
17 are treated as confidential.
18 CHIEF JUDGE SLEDGE: All right.
19 Show me that.
20 MR. FREEDMAN: Your Honor, in
21 section 37 CFR 262.5.
22 CHIEF JUDGE SLEDGE: 262. 262

Page 30

1 doesn't apply to us or this proceeding.
2 MR. FREEDMAN: With regard to
3 DMX's payment, there was some dispute as to
4 whether they were paying as a PES or not but
5 what kind of service they were paying as.
6 CHIEF JUDGE SLEDGE: You missed my
7 point. 262 applies to Copyright Office. It
8 doesn't apply to Copyright Board.
9 MR. FREEDMAN: That would open the
10 basis for our treating it as confidential,
11 Your Honor.
12 CHIEF JUDGE SLEDGE: The objection
13 is denied. Sorry. The motion is denied.
14 MR. FREEDMAN: Thank you, Your
15 Honor.
16 JUDGE ROBERTS: Before you start
17 up here, Mr. Freedman, where does this leave
18 the status of Part V of your testimony, or I
19 should say, Ms. Kesslers' testimony with the
20 respect to Capstar DMA? Are you intending to
21 present that today?
22 MR. FREEDMAN: I was not intending

Page 31

1 to present that orally through Ms. Kessler.
2 We did move the admission of that here.
3 JUDGE ROBERTS: Is there a need
4 for that to be in the record?
5 MR. RICH: May I be heard, Your
6 Honor, on that?
7 JUDGE ROBERTS: Yes, Mr. Rich.
8 MR. RICH: DMX is not a party to
9 this proceeding. As Your Honors know, we
10 represented them in the briefing of the issue
11 of the proper bucket, as it were, in which
12 they belong and not differently than the
13 resolution as to Sirius, I believe, and
14 respecting the ruling of the Registrar, a
15 capstar which is now the operator of the DMX
16 Service is not acting under the assumption or
17 the premise that it's an pre-existing service.
18 I think that would similarly render moot
19 Section V of this testimony. I gather there
20 is no dispute on this point from counsel for
21 SoundExchange.
22 JUDGE ROBERTS: Is anyone moving

Page 32

1 to strike it or are you just going to leave it
2 there?
3 MR. FRIEDMAN: I don't know that
4 I'm standing to move to strike it since
5 technically DMX is not in this proceeding. I
6 think it's a matter of practical application
7 it would seem that this is superfluous to the
8 proceeding at this point. Whether it stays or
9 not is of less consequence then recognizing
10 it's not a subject of dispute between the
11 parties.
12 JUDGE ROBERTS: I guess it's up to
13 you, Mr. Freedman.
14 MR. FREEDMAN: With that
15 information from Mr. Rich, while I didn't
16 understand that to be a motion to strike it,
17 I do think his comments -- direct testimony in
18 the record. Your Honor, do you prefer that we
19 --
20 JUDGE ROBERTS: I don't have a
21 preference. I'm just wondering what you
22 intended to do with that now that Section IV

a21ac274-621c-43f6-8db1-bbd2189438c1

1 has been withdrawn from Ms. Kesslers'
2 testimony. Please proceed.
3 MR. FREEDMAN: Thank you, Your
4 Honor.
5 DIRECT EXAMINATION (Cont'd.)
6 BY MR. FREEDMAN:
7 Q Ms. Kessler, did SoundExchange
8 also designate some of the testimony that you
9 submitted from the webcasting hearing in this
10 proceeding?
11 (Off the record discussion.)
12 (Whereupon, the document
13 referred to was marked
14 as SoundExchange Exhibit
15 No. 56 for
16 identification.)
17 BY MR. FREEDMAN:
18 Q Ms. Kessler, do you have
19 SoundExchange Trial Exhibit 56 in front of
20 you?
21 A I do.
22 Q And do you recognize what this

1 document is?
2 A Yes, it's my written and oral
3 testimony in 2005-1.
4 Q And that was the webcasting case?
5 A That was the webcasting case.
6 Q Can you open it up please. The
7 first document there is just your written
8 testimony. If you look in the back, is that
9 your signature?
10 A Yes, it is.
11 MR. FREEDMAN: Your Honor, at this
12 time I would move the admission of
13 SoundExchange Trial Exhibit 56.
14 CHIEF JUDGE SLEDGE: Any objection
15 to Exhibit 56?
16 MR. THOMPSON: No objection.
17 MS. ABLIN: No objection.
18 CHIEF JUDGE SLEDGE: Without
19 objection, it's admitted.
20 (The document referred
21 to having been
22 previously marked for

1 identification as
2 SoundExchange Exhibit
3 No. 56, was received in
4 evidence.)
5 BY MR. FREEDMAN:
6 Q Ms. Kessler, could you describe
7 within general terms what SoundExchange does?
8 A Yes. SoundExchange is responsible
9 for the collection and distribution of
10 statutory royalties under the Copyright Act.
11 Q How many people work for
12 SoundExchange?
13 A Thirty full-time employees and a
14 handful of temporary employees.
15 Q And to do SoundExchange's job
16 effectively, what information does
17 SoundExchange need from the licensees?
18 A We need a variety of information
19 from the licensee and including a notice of
20 election which identified what license they're
21 operating under. We need statements of
22 account which identifies their royalty

1 obligation. We, of course, need their payment
2 and we also need their reports of views which
3 are the performances that they've performed
4 under the statutory license and that's the
5 basis for our distributions.
6 Q Is it important for SoundExchange
7 to receive accurate information?
8 A It's critical that SoundExchange
9 receive accurate and timing information so
10 that we can make timing and accurate
11 distributions.
12 Q Can you provide a sense of the
13 volume of transactions that SoundExchange
14 handles?
15 A Yes. We process nearly two
16 billion performances. We have about 120
17 million accounting transaction records in our
18 distribution system. We have over a million
19 sound recordings that we've identified. We
20 have approximately 120,000 distinct artists
21 and thousands of labels and thousands of
22 copyright owners.

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 37

1 Q Has SoundExchange's work with
2 regard to the volume of the transactions it
3 handles changed over time?
4 A Yes, it continues to grow as more
5 and more services come online. The volume of
6 performances increases. The payments have
7 increased. The number of licensee accounts
8 have increased. As services play broader,
9 wider music, we continue to see artists
10 previously not performed in those
11 performances. So we have more and more
12 artists and copyright owners who we have to
13 find and pay.
14 Q I'd like to ask you briefly about
15 SoundExchange's costs. Does SoundExchange try
16 to keep its costs down?
17 A Yes, we try to be as efficient as
18 possible while maintaining a quality of
19 service both to our copyright owners and
20 artists and maintaining accurate and efficient
21 distributions.
22 Q Do you know what SoundExchange's

Page 38

1 administrative rate was in 2006?
2 A In 2006, it was under seven
3 percent.
4 Q And in the period of years leading
5 up to 2006, has that rate tended to increase
6 or decrease over time?
7 A That rate has tended to decrease
8 over time, although we're projecting an
9 increase for 2007.
10 Q And why are you projecting an
11 increase for 2007?
12 A The reason is twofold. First, we
13 are expending more resources in our artist
14 outreach in order to get more artists paid.
15 As we develop our strategies to reduce
16 unclaimed royalties, there is cost associated
17 with that. In addition, 2007 is a year when
18 two of our rate-setting proceedings costs will
19 be amortized in that year increasing our
20 administrative rate.
21 Q Do you expect that going forward
22 the rate will continue to increase?

Page 39

1 A It's our expectation to the extent
2 that we can settle rate-setting proceedings
3 rather than litigating that our costs will
4 continue to decline.
5 Q Do you know how SoundExchange's
6 administrative rate compares to the
7 administrative rates of ASCAP and BMI and
8 SESAC?
9 A Yes. The last few years it has
10 been below what ASCAP reports on their website
11 to be their admin rate and what I understand
12 BMI's administrative rate to be. They hover
13 anywhere between 14 and 16 or 17 percent. I
14 don't know what SESAC's administrative rate
15 is.
16 Q I'd like to ask you a few
17 questions about terms. In the testimony you
18 provided in the webcasting case which has been
19 admitted here as SoundExchange Trial Exhibit
20 56, did you testify about terms issues?
21 A I did.
22 Q Do you incorporate those, the same

Page 40

1 terms testimony here?
2 A I do.
3 Q What are the primary terms issues
4 that concern SoundExchange?
5 A We have a few categories of terms
6 that are of concern. First are the late fee
7 payments both for late payments as well as
8 statements of account and reports of use. We
9 have term request changes for the audits and
10 we also have some concerns about the
11 confidentiality terms.
12 Q And is SoundExchange advocating
13 the same terms proposals that it advocated in
14 the webcasting case here?
15 A We are.
16 Q Did you submit your written
17 testimony in this case before the Judges had
18 issued their ruling in the webcasting case?
19 A I did, yes.
20 Q In the webcasting case, did the
21 Court grant SoundExchange everything it wanted
22 on the terms issues?

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 41

1 A It did not.
2 Q What is SoundExchange's view of
3 the terms ruling in the webcasting case?
4 A We very much appreciate the
5 Board's increasing the stringency of some of
6 those terms. We think it's a very important
7 step forward. Because we have not received
8 reports or payments under those new terms,
9 it's impossible to ascertain if they provide
10 the necessary disincentives for late payments
11 and late reporting. But we do think it's a
12 tremendous step in the right direction.
13 Q And is there a value to
14 SoundExchange to having consistency of terms
15 across licenses?
16 A Yes, the efficiencies in having
17 consistent terms across the licenses, but I
18 believe that should be balanced with how
19 effective those terms are. So I also that
20 having consistent terms across licenses helps
21 the licensees who may be operating under
22 different licenses. It leads to less

Page 42

1 confusion in the marketplace.
2 Q I'd like to ask you now briefly
3 about a few of the specific terms proposals
4 you've made. On page 18 of your written
5 direct testimony in this case, which is
6 SoundExchange Trial Exhibit 55.
7 A I'm sorry.
8 Q Page 18 of Exhibit 55. If you
9 look on the front cover of the binder that you
10 have there.
11 A Yes, this is 55.
12 Q Great.
13 A My written direct?
14 Q Yes.
15 A Page 18?
16 Q Yes.
17 A Yes.
18 Q You asked the judges there "to
19 make clear that any definition of revenue
20 adopted in this case apply to all revenues,
21 paid or payable." Do you see that?
22 A I do.

Page 43

1 Q Can you explain what that means?
2 A Yes. To the extent a licensee is
3 paying under a percentage of revenue, it's our
4 view that that service should base its royalty
5 payment on any revenues that would be paid or
6 payable to that service meaning if they, for
7 whatever reason, for whatever business
8 purpose, neglected to collect revenues from
9 subscriptions or late payments or anything
10 else they might have given away in exchange
11 for some other business reason or
12 consideration, that should not reduce the
13 basis upon which the royalties are based. We
14 feel that's unfair to copyright owners and
15 artists who did not agree to give those uses
16 of their music away for nothing.
17 Q Let me ask you next about late
18 fees. What is SoundExchange requesting with
19 regard to late fees?
20 A We are asking an increase in the
21 late fee percentage to 2.5 percent as we did
22 in the webcasting case. Services who are

Page 44

1 paying timely aren't obviously harmed by a
2 more stringent late fee percentage and given
3 my experience with licensee payments, we
4 continue to have services who are paying late
5 and we believe the more stringent those terms
6 are the more it will create an incentive for
7 licensees to pay timely. Absent a copyright
8 infringement action, we have no ability for
9 the service to lose the license. So the only
10 remedy we have are the late fees.
11 Q Let me ask you next about has
12 SoundExchange made a proposal regarding
13 statements of accounts and reports of use in
14 this case?
15 A Yes, we would also request that
16 late fees apply to statements of account that
17 are submitted late as well as reports of use.
18 With the reports of use, we still have about
19 80 percent of our services not submitting
20 statements of account and it results in about
21 24 percent of royalties not being able to be
22 distributed. So we have an 80/20 problem with

a21ac274-621c-43f6-8db1-bbd2189438c1

1 respect to reports of use and being able to
2 allocate and distribute royalties. We feel
3 that having late fees associated with late
4 reports of use is another way to encourage
5 services to comply with their obligations
6 under the license.
7 Q You also mentioned
8 confidentiality. What is SoundExchange's
9 proposal regarding confidentiality?
10 A SoundExchange believes very firmly
11 that copyright owners and artists should be
12 permitted to view statements of account,
13 information contained in statements of
14 account, so that they have the information
15 they need to make the decisions they need to
16 make about the content that they owned or
17 reported.
18 Q With regard to audits, does
19 SoundExchange have a proposal in this case?
20 A Yes, our proposal again is again
21 applicable to the webcasting proposal. We
22 request that audit reports be permitted to be

1 shared just as with statements of account with
2 copyright owners and artists who are charged
3 with making decisions on behalf of
4 SoundExchange to the extent they want to take
5 any further action after an audit has come up
6 with preliminary results. We also ask the
7 Board to change the percentage where the cost
8 shifting switches from SoundExchange to the
9 service from 10 percent to five percent. We
10 also ask that it's clear that an audit
11 lookback is a three-year period.
12 MR. FREEDMAN: Your Honor, may I
13 have one moment?
14 (Pause.)
15 MR. FREEDMAN: I have no further
16 questions for this witness, Your Honor.
17 CHIEF JUDGE SLEDGE: Mr. Rich.
18 MR. RICH: Your Honor, my
19 colleague, Mr. Thompson, will cross examine on
20 behalf of XM.
21 CHIEF JUDGE SLEDGE: Mr. Thompson.
22 MR. THOMPSON: Thank you, Your

1 Honor.
2 CROSS EXAMINATION
3 BY MR. THOMPSON:
4 Q Good morning, Ms. Kessler.
5 A Good morning.
6 Q I'm John Thompson and I'm going to
7 ask you some questions on behalf of XM
8 Satellite Radio whom I represent. Am I
9 correct in that SoundExchange is proposing
10 many of the same terms in this proceeding as
11 it did in the 2005-1 webcaster proceeding?
12 A Yes, we don't believe that the
13 terms should be any less strict for any
14 particular licensee.
15 Q Why you did that, as I think you
16 testified earlier, was to designate your
17 entire testimony from 2005-1 in this
18 proceeding. Correct?
19 A That's correct.
20 Q Would you do me a favor and look
21 at SoundExchange Exhibit 55? That's your
22 written direct testimony in this case in 2006-

1 1, specifically at page 17. Do you see the
2 section labeled "Modifications to Needed
3 License Terms"? Correct?
4 A I do.
5 Q And with respect to your 2005-1
6 webcaster testimony that you designated in
7 this case, the totality of your testimony in
8 this case, in 2006-1, is in that paragraph.
9 Is it not?
10 A With respect to terms?
11 Q With respect to the support for
12 those terms.
13 A Yes, we designate the webcasting
14 testimony in this section.
15 Q You didn't attach any actual
16 agreements to your testimony in this
17 proceeding, but you include many of the terms
18 you're proposing, did you?
19 A In?
20 Q In your 2006-1 testimony.
21 A No, it's incorporated through my
22 webcasting testimony.

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 49

1 Q And you didn't attach any exhibits
2 to your testimony in this proceeding to
3 support any of the terms you're proposing, did
4 you?
5 A That was part of my webcasting
6 testimony.
7 Q You also didn't attach any actual
8 agreements to your 2005-1 webcasting testimony
9 to include or to support the terms you were
10 proposing there, did you?
11 A Any agreements?
12 Q Any agreements.
13 A What do you mean by "agreements"?
14 Q Any agreements.
15 A I'm not sure I recall what, if
16 any, agreements might have been attached to my
17 testimony. This is just my written direct and
18 my oral testimony.
19 Q You don't recall having attached
20 any agreements.
21 A No.
22 Q Okay. You specifically don't have

Page 50

1 -- you don't recall having attached any record
2 label agreements entered into by
3 SoundExchange's members or any other record
4 labels to support the terms you were proposing
5 in the 2005-1 case.
6 A I would not be permitted to see
7 the record label agreements.
8 Q Okay. And you also didn't look at
9 any record label agreements to support any of
10 your proposed terms in the preparation of this
11 testimony for this proceeding. Right?
12 A Well, through my outside counsel,
13 I was made aware that our term requests are
14 consistent with the record label agreements,
15 although I have not reviewed the record label
16 agreements.
17 Q You didn't look at them yourself.
18 A I did not.
19 Q And you didn't look at any other
20 collecting society agreements, specifically
21 the Performing Rights Organization agreements
22 such as SESAC or BMI or ASCAP, in preparation

Page 51

1 of your testimony supporting the terms you're
2 proposing, did you?
3 A No, I did not look at the PRO
4 terms.
5 Q And you didn't consider proposing
6 in this testimony, the 2006-1 testimony, any
7 different terms than the ones you proposed in
8 the webcaster testimony. Is that right?
9 A I did not.
10 Q For the moment, I just want you to
11 focus on those terms that you requested in the
12 2005-1 webcasting case. With respect to
13 confidentiality statements, confidentiality of
14 statements of account, SoundExchange favors a
15 term permitting the public at large to view
16 statements. Isn't that right?
17 A Yes, we do.
18 Q And with regard to the
19 independence of auditors, SoundExchange
20 requested that the court set terms to require
21 auditors be independent of the services or the
22 licensee but not of the licensor. Is that

Page 52

1 right?
2 A That's correct.
3 Q In fact, SoundExchange actually
4 asserts that individual copyright owners and
5 performers, not just SoundExchange but the
6 copyright owners and performers, should have
7 the rights to conduct those audits of the
8 services. Correct?
9 A To the extent SoundExchange does
10 not undertake an audit, we feel that copyright
11 owners and artists should be permitted to do
12 so.
13 Q With regard to the qualification
14 of auditors, SoundExchange also took the
15 position in the webcasting proceeding that the
16 auditors conducting those verifications or
17 audits need not be CPAs. Is that right?
18 A We have found that there are
19 certain audits and certain aspects of other
20 audits that are highly technical in nature,
21 require a lot of data analysis and processing
22 and therefore they aren't a financial audit

Page 53

1 per se and we should be permitted to use
2 auditors who have the technical skills
3 necessary to conduct those.
4 Q And with regard to the late fee
5 percentage, SoundExchange is proposing here as
6 it did in the webcasting proceeding a 30
7 percent annual late fee, right, to be assessed
8 against the services for failure to make
9 payments to SoundExchange when due?
10 A We're asking for a 2.5 percent per
11 month.
12 Q And that's 30 percent per year.
13 Right?
14 A Yes.
15 Q And with regard to the doubling of
16 fees, SoundExchange is again in this
17 proceeding based upon its designated testimony
18 or your designated testimony proposing that if
19 the late fee is not paid for every five days
20 after the 20th day that it's not paid or that
21 SoundExchange sends a notification that the
22 fee be doubled. Is that right?

Page 54

1 A Yes. We want to encourage the
2 payment of the late payment and in order to do
3 that, we have requested an increase in the
4 late payment when the late payment was late.
5 Q And I think you testified earlier
6 on direct with Mr. Freedman that you respected
7 and believed that the decision by the court in
8 the webcaster proceeding 2005-1 was a good
9 one, a step in the right direction and should
10 be applied consistently. Right?
11 A My testimony is that we do believe
12 that the increase in the stringency of the
13 terms is a positive move, a step in the right
14 direction. Further, SoundExchange believes
15 there is benefit and value to having
16 consistency across licensees. But because we
17 have not been operating or receiving payments
18 under the new terms, it's difficult to assess
19 their effectiveness and so I think that there
20 is a balance between a further increase in the
21 strictness of those terms and balancing that
22 with consistency.

Page 55

1 Q Okay.
2 A So there is a balance that I think
3 can be met.
4 Q With regard to all of the
5 different terms that SoundExchange proposed
6 and we just walked through, you're aware, are
7 you not, that the court rejected
8 SoundExchange's proposal with regard to all of
9 those? Are you not?
10 A I'm aware that the board rejected
11 some of our terms, proposal, adopted others
12 and adopted some at a different percentage
13 than we had requested.
14 Q Okay. So to answer my question
15 with regard to the terms that I just reviewed
16 with you, the court rejected all of
17 SoundExchange's proposals.
18 A Can you just review those with me
19 again so I answer the question?
20 Q Sure. The confidentiality of
21 statements of account with regard to the
22 public, in general.

Page 56

1 A Correct. That's correct.
2 Q The independence of auditors,
3 independent from both the licensee and the
4 licensor.
5 A That's correct.
6 Q Yes. The qualification of
7 auditors, must be a CPA.
8 A That's correct.
9 Q That audit cost shifting was not
10 to decrease from 10 percent to five percent.
11 A That's correct.
12 Q That the late fee percentage was
13 not to be set at 30 percent.
14 A It was adopted at 1.5 percent.
15 That's correct.
16 Q But your proposal was rejected.
17 A That's correct.
18 Q And that the doubling of late fees
19 was rejected.
20 A That was rejected, yes.
21 Q Okay. I want to shift your
22 attention to another term that you talked

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 57

1 about today and that is with regard to late
2 statements of account and reports of use and
3 the late fee that you want or that
4 SoundExchange is proposing to be associated
5 with late statements of account and reports of
6 use. SoundExchange as it did in the
7 webcasting case is also proposing that these
8 late fees be applied to late statements of
9 account and reports of use. Correct?
10 A That's correct.
11 Q And you're aware that the court
12 held in the webcasting decision that
13 inconsequential good faith omissions or errors
14 should not warrant imposition of the late fee.
15 Correct?
16 A I'm aware of that, yes.
17 Q And do you or does SoundExchange
18 disagree with that decision?
19 A SoundExchange works with our
20 licensees so that they do comply and fill out
21 the statements of account accurately. We have
22 a website that walks licensees through it. We

Page 58

1 have staff that answers inquiries from
2 licensees. And so we provide a lot of
3 assistance to licensees in that regard. But
4 at the end of the day, a good faith or a bad
5 faith omission results in the same burden and
6 cost to SoundExchange and results in the same
7 potential delay in the distribution of
8 royalties to copyright owners and artists.
9 Q So is it your testimony that from
10 SoundExchange's perspective it doesn't matter,
11 it makes no difference, whether it's a good
12 faith or inconsequential omission or mistake?
13 A I think given all the support that
14 SoundExchange provides to licensees with
15 respect to how they should be completing the
16 statements of account that any errors and
17 omissions after that result in the same harm
18 to copyright owners and artists and a late fee
19 should be applied to those.
20 Q I turn your attention to page
21 seven of your written and direct testimony
22 again in this case of 2006-1, SoundExchange

Page 59

1 Exhibit 55. You refer to the method by which
2 and the process by which SoundExchange
3 allocates a service's royalty payment.
4 A Yes, I do.
5 Q Now I don't want you to take me
6 through the factors that you do in your
7 testimony. I understand that. But if you
8 would for the Court, could you please explain
9 how SoundExchange determines which royalty is
10 collected from Sirius or XM are allocated to
11 the sound recordings transmitted by those
12 services.
13 A Yes. XM and Sirius provide
14 reports of use for a specific period. They
15 likewise make payments, individual payments,
16 for those same periods. SoundExchange takes
17 the royalties received for that period and
18 allocates across the performances recorded by
19 XM or Sirius, the sound recordings that they
20 perform pursuant to the statutory license. So
21 if any particular song was played ten times
22 and there is 1,000 performance in total

Page 60

1 reported, that performance gets 10/1,000 X the
2 royalties paid. So it's a relative amount
3 that each sound recording is valued at based
4 on the payment and the reports of use.
5 Q Okay. So from your answer, it's
6 just about the number of times the song is
7 played. Correct?
8 A There is no audience measurement
9 in the reporting that we receive from the
10 SDARS services and so the songs are evaluated
11 and valued based on the number of times they
12 are performed.
13 Q And there are no other weighting
14 methods for, for instance, what channel that
15 the song may be played on, whether it's a
16 music channel or whether it's a nonmusic
17 channel. It's just the number times the songs
18 played.
19 A That's how the sound recordings
20 are reported to us and we're not permitted to
21 differentiate between sound recordings. All
22 sound recordings are treated equally.

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 61

1 Q Okay. So Led Zeppelin is accorded
2 the same rights as James Taylor. Right?
3 A Absent any audience measurement,
4 it is the only way we have to value the
5 performance. That's correct.
6 Q Right. And just want to make sure
7 this -- Turning your attention for the moment
8 with regard to the same subject to the pre-
9 existing subscription services such as Music
10 Choice, is there any difference between the
11 way SoundExchange has allocations between
12 Music Choice or services like Music Choice and
13 XM and Sirius?
14 A With respect to the pre-existing
15 services, there is no audience measurement
16 reported along with those sound recordings and
17 so they are evaluated simply on the number of
18 times they are in rotation in the playlist.
19 Q I would like to change subjects
20 with you again and refer you to page 18 of
21 your written direct testimony of 2006-1,
22 Exhibit 55, the first full paragraph there.

Page 62

1 A Yes.
2 Q You state in your testimony that
3 the definition of revenues to which the
4 royalty rate should be applied should include
5 all revenues paid or payable. I think you
6 testified about that earlier. Right?
7 A I did.
8 Q And by that, you mean that
9 SoundExchange wants to collect royalties, a
10 royalty, even on amounts of revenue regardless
11 of whether the service has actually received
12 that revenue. Correct?
13 A Yes, that's correct to the extent
14 that the service has given away free
15 subscriptions or some other good or service in
16 exchange for some other consideration. That's
17 not something the copyright owners agree to
18 and they should be compensated based on the
19 full amount of revenues that otherwise would
20 have been paid to the service.
21 Q You would include unpaid
22 subscription fees from XM's and Sirius'

Page 63

1 customers in your definition of revenues
2 payable. Right?
3 A Yes, those unpaid subscriptions
4 provide value to the service and that value
5 should be passed on to the copyright owners
6 and artists whose content is being used to
7 create that value.
8 Q And you'd include late fees
9 charged by the services to compensate them for
10 the late payments that they've received from
11 their subscribers. Right?
12 A Yes, in general. Anything that
13 the service could have collected but did not
14 for whatever business reason they so chose, it
15 should not lead to the harm of copyright
16 owners and artists who otherwise would have
17 been paid a percentage of those revenues.
18 Q So if it is -- If the contract or
19 any contract including a subscriber contract
20 permits for in their business discretion the
21 services to waive late fees because it makes
22 good sense from a customer relations'

Page 64

1 perspective to do so, you believe that those
2 ought to be included, the late fees ought to
3 be included.
4 A As the basis for the royalty
5 payment, I believe that they should be
6 included. Yes.
7 MR. THOMPSON: I beg the Court's
8 indulgence.
9 (Pause.)
10 MR. THOMPSON: Ms. Kessler, I've
11 handed you what's been identified as SDARS
12 Exhibit 24.
13 (Whereupon, the document
14 referred to was marked
15 as SDARS Exhibit No. 24
16 for identification.)
17 BY MR. THOMPSON:
18 Q Can you identify that document?
19 A It appears to be a payment report
20 of the SDARS, their payments and their late
21 fees for the period --
22 Q Is this a document that

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 65

1 SoundExchange creates in the ordinary course
2 of its business?
3 A We create documents like this in
4 the course of our business, yes.
5 Q Did you assist or supervise in the
6 creation of this document?
7 A I may have requested a report like
8 this. Staff would have prepared it for me.
9 Q But it did come from
10 SoundExchange's records. Correct?
11 A That's correct.
12 Q Do you believe that the
13 information set forth in the document is
14 accurate and complete?
15 A I do.
16 MR. THOMPSON: Your Honor, at this
17 time, we would offer SDARS Exhibit 24 into
18 evidence.
19 CHIEF JUDGE SLEDGE: Any
20 objections to the admission of Exhibit 24?
21 MR. FREEDMAN: Your Honor, I have
22 an objection just to certain information

Page 66

1 within the document if I'm understanding the
2 document correctly. On the second page of the
3 document, there appear to be amounts that are
4 payments by the SDARS to SoundExchange. The
5 amounts of those payments are subject to an
6 agreement between SoundExchange and the SDARS
7 in which they agreed to treat those as
8 confidential and not use those numbers in any
9 proceeding. So I would not object to the
10 document as a whole, but I would object to the
11 introduction of those numbers if I'm
12 understanding what those numbers are.
13 CHIEF JUDGE SLEDGE: Mr. Thompson.
14 MR. THOMPSON: Your Honor, this is
15 a document produced in response to discovery
16 requests and I guess I'm -- Which specific
17 term, I'm having difficulty understanding
18 specifically where the offending information
19 is.
20 MR. FREEDMAN: On the second page
21 of the document, Your Honor, there is a column
22 G that says "Total of Amount" and the second

Page 67

1 number in that column as well as the fourth
2 number in that column, so those are lines five
3 and seven and I suppose line eight, that's the
4 total. If I'm understanding this document
5 correctly, those appear to me to be payments
6 the SDARS made pursuant to the settlement
7 agreement the parties had. Similarly, on the
8 third page of this document, it appears to me
9 some of the same information which is the
10 SDARS payment to SoundExchange is pursuant to
11 that agreement.
12 It also extends, I'm sorry,
13 looking at the document now. On the fourth
14 page of the document, there are some scheduled
15 payments and payments for `06 and `07. It
16 appears to extend to the next page as well.
17 CHIEF JUDGE SLEDGE: Mr. Thompson.
18 MR. THOMPSON: Your Honor, if I
19 understand Mr. Freeman's objection, I disagree
20 that it discloses any of the nature of the
21 agreement. It simply states what the payments
22 were and it is a simply statement of fact

Page 68

1 included in SoundExchange's business records
2 which does not reveal the underlying nature or
3 terms of the agreement.
4 CHIEF JUDGE SLEDGE: Anything
5 further, Mr. Freedman?
6 MR. FREEDMAN: Yes, Your Honor.
7 I'm not sure that I would agree with Mr.
8 Thompson's characterization. If I'm correct
9 that those are, in fact, the amounts that the
10 SDARS agreed to pay SoundExchange under their
11 confidential agreement which they agreed not
12 to use in any proceeding including this one,
13 then I'm not sure I would agree with Mr.
14 Thompson that the nature of the agreement is
15 not being disclosed here. As I said, without
16 further questions from Ms. Kessler, I'm
17 frankly not sure if that is what those numbers
18 are, but I think that's what they are.
19 CHIEF JUDGE SLEDGE: Let --
20 MR. THOMPSON: I'm sorry. I was
21 going to offer, Your Honor, that if it would
22 resolve the problem that we would redact the

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 69

1 license fee payment numbers if that would
2 solve Mr. Freedman's issue.
3 CHIEF JUDGE SLEDGE: Statements of
4 what you will do and won't do are not at issue
5 right now. The question is whether this
6 objection to Exhibit 24 is to be sustained.
7 MR. THOMPSON: I understand.
8 CHIEF JUDGE SLEDGE: Anything
9 further?
10 MR. RICH: Your Honor, not to step
11 on anyone's line, but only because this issue
12 transcends to the immediate document and
13 evidentiary issue, I was hoping I could be
14 heard for a moment on this.
15 CHIEF JUDGE SLEDGE: All right.
16 MR. RICH: Thank you. I think
17 there is a certain inconsistency in the
18 positions being taken by counsel for
19 SoundExchange with respect to the
20 admissibility of aspects including the
21 economic terms of the agreement we're
22 referring to here. In his cross examination

Page 70

1 of Mr. Vendetti, Mr. Schneider of Jenner &
2 Block elicited specifically the question what
3 are the current levels of payments you are
4 making pursuant to that agreement and Mr.
5 Vendetti responded as requested on cross
6 examination. Mr. Ordover's testimony in this
7 case pejoratively characterizes quantitatively
8 those levels as patently inadequate or words
9 to that effect.
10 CHIEF JUDGE SLEDGE: Mr. Rich,
11 you're going much further than needed.
12 There's been no support for the objection.
13 The objection is overruled.
14 MR. RICH: Thank you.
15 CHIEF JUDGE SLEDGE: And by no
16 support, the statements by counsel of alleged
17 violations are not supported. Therefore, 24
18 is admitted.
19 (The document referred
20 to having been
21 previously marked for
22 identification as SDARS

Page 71

1 Exhibit No. 24, was
2 received in evidence.)
3 MR. THOMPSON: Thank you, Your
4 Honor.
5 (Whereupon, the document
6 referred to was marked
7 as SDARS Exhibit No. 25
8 for identification.)
9 CROSS EXAMINATION (Cont'd.)
10 BY MR. THOMPSON:
11 Q Ms. Kessler, I've just handed you
12 what's been marked as SDARS Exhibit 25. Do
13 you see that?
14 A I do.
15 Q Can you identify this document?
16 A It appears to be an annual
17 distribution report by license type for the
18 years 2001 through 2007.
19 Q Okay, and on the second page, that
20 is identified with Bates No. SE0203629.
21 A It appears to be the payments of
22 those allocations.

Page 72

1 Q Is this a document that
2 SoundExchange produces in its ordinary course
3 of business?
4 A We produce these types of reports,
5 yes.
6 Q Do you assist or supervise in the
7 creation of this document?
8 A I may have requested a document
9 such as this, yes.
10 Q It comes from SoundExchange's
11 records?
12 A Yes.
13 Q Do you believe the information set
14 forth in the document is accurate and correct?
15 A Yes, I believe it's accurate as of
16 this date. Things change all the time with
17 respect to allocations and distributions.
18 MR. THOMPSON: Your Honor, at this
19 time, we'd move for the admission of SDARS
20 Exhibit 25 into evidence.
21 CHIEF JUDGE SLEDGE: Any
22 objections of Exhibit 25?

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 73

1 MR. FREEDMAN: No, Your Honor.
2 CHIEF JUDGE SLEDGE: Without
3 objection, it's admitted.
4 (The document referred
5 to having been
6 previously marked for
7 identification as SDARS
8 Exhibit No. 25, was
9 received in evidence.)
10 MR. THOMPSON: Thank you, Your
11 Honor.
12 (Whereupon, the document
13 referred to was marked
14 as SDARS Exhibit No. 26
15 for identification.)
16 BY MR. THOMPSON:
17 Q Ms. Kessler, I've handed you
18 what's been marked as SDARS Exhibit 26. Can
19 you identify that document?
20 A It appears to be a distribution
21 report by license type for a variety of
22 periods, the payments made to artists and on

Page 74

1 page two copyright.
2 Q And this is a document that
3 SoundExchange produces in its ordinary course
4 of business. Correct?
5 A We produce reports like this, yes.
6 Q Just to be clear, I'm showing you
7 what's been Bates labeled or marked in the
8 bottom right-hand corner as SE0231174 and the
9 next page 0231175. Those are actually to be
10 read across. Correct? It's a spreadsheet.
11 That's an Excel spreadsheet.
12 A It appears to be, yes.
13 Q This came from SoundExchange's
14 records.
15 A I believe so, yes.
16 Q And you believe that the
17 information is accurate. Correct?
18 A Yes, although it's not dated. So
19 I'm not sure accurate through what date.
20 MR. THOMPSON: Your Honor, at this
21 time, we would move for the admission of SDARS
22 26 into evidence.

Page 75

1 CHIEF JUDGE SLEDGE: Any objection
2 to Exhibit 26?
3 MR. FREEDMAN: I have no
4 objection, Your Honor, although I would move
5 to mark certain of the information on the
6 second page of this document as restricted
7 under the terms of the protective order. In
8 particular, there is information about
9 SoundExchange's distributions for the four
10 major record companies. SoundExchange treats
11 that information as confidential and does not
12 share one of its member's revenue information
13 with another. I know that the record
14 companies keep their revenue information
15 confidential as among them. This is not
16 information they would share with each other
17 in the normal course of business with regard
18 to revenues from this or any other source.
19 CHIEF JUDGE SLEDGE: How does that
20 fit within the protective order?
21 MR. FREEDMAN: Your Honor, I think
22 it is competitive with sensitive information

Page 76

1 that the record companies would not want each
2 others seeing and might feel that if one
3 record company knows what another record
4 companies revenues are from a particular
5 source that might give one a competitive
6 advantage or disadvantage over another.
7 CHIEF JUDGE SLEDGE: How does the
8 perspective of a third party fit within the
9 protective order?
10 MR. FREEDMAN: I'm not sure I
11 understand your question, Your Honor.
12 CHIEF JUDGE SLEDGE: The record
13 labels are not parties to these proceedings.
14 MR. FREEDMAN: It is true that
15 they are not parties to this proceedings,
16 although they are SoundExchange's members. We
17 are here on behalf of them, of course, and
18 SoundExchange, of course, has confidential
19 information not only for them but for many
20 copyright owners and artists and certainly
21 makes every effort to treat that information
22 as confidential.

a21ac274-621c-43f6-8db1-bbd2189438c1

1 CHIEF JUDGE SLEDGE: How does the
2 protective order apply to third parties? Does
3 it apply to third parties?
4 MR. FREEDMAN: I would confer for
5 just a moment to look at it if I may. Your
6 Honor, section two of the protective order
7 which defines restricted information defines
8 it to "include information that the producing
9 party," which in this case would be
10 SoundExchange, "has reasonably determined in
11 good faith that if disclosed would either
12 competitively disadvantage the producing party
13 or provide a competitive advantage to another
14 party." In this case, I would argue, Your
15 Honor, that this is information SoundExchange
16 has determined could provide a competitive
17 advantage, in this case one of the record
18 companies over another.
19 CHIEF JUDGE SLEDGE: From hearing
20 you read that, I would think it requires a
21 competitive advantage to another party in
22 relation to the party to the proceeding. I

1 wouldn't think that the other party means
2 anybody in the world. That's the way you're
3 presenting it.
4 MR. FREEDMAN: That is, Your
5 Honor.
6 CHIEF JUDGE SLEDGE: A
7 disadvantage to another party applies to
8 anybody in the world?
9 MR. FREEDMAN: I think so, Your
10 Honor, or at least I might define it somewhere
11 in between what you've suggested which is to
12 say there are parties -- the record companies
13 are not parties to this case and certainly not
14 parties with a capital P in that respect, but
15 are certainly parties with an interest in this
16 case and are certainly parties whose
17 sensitive, commercial and business information
18 don't come up in these proceedings on a
19 routine and regular basis and I do think from
20 reading that that the protective order fairly
21 contemplates protecting their information even
22 when they are not a party to this proceeding.

1 CHIEF JUDGE SLEDGE: All right.
2 We'll recess ten minutes. Off the record.
3 (Whereupon, at 10:54 a.m., the
4 above-entitled matter recessed and reconvened
5 at 11:07 a.m. the same day.)
6 CHIEF JUDGE SLEDGE: All right.
7 Mr. Thompson, any response to the motion? I'm
8 sorry, we'll come to order.
9 MR. THOMPSON: Thank you, Your
10 Honor. We don't have any objection.
11 CHIEF JUDGE SLEDGE: Do you find
12 anywhere in the protective order that it
13 applies to third-parties?
14 MR. THOMPSON: Your Honor, I'm
15 sorry, I should have taken the opportunity at
16 the break to look, but I did not.
17 CHIEF JUDGE SLEDGE: I took
18 your's, didn't I? Without objection, the
19 motion is granted.
20 (Whereupon, SDARS
21 Exhibit No. 26 was
22 admitted.)

1 CHIEF JUDGE SLEDGE: Thank you,
2 Mr. Thompson, for letting me borrow your --
3 MR. THOMPSON: Certainly. Any
4 time, Your Honor.
5 (Whereupon, SDARS
6 Exhibit No. 27 was
7 marked for
8 identification.)
9 BY MR. THOMPSON:
10 Q Ms. Kessler, I've handed you
11 what's been marked as SDARS Exhibit 27. Can
12 you identify that document?
13 A Yes. It appears to be
14 SoundExchange's financial statements ending
15 December 31st, 2005 prepared by PDF.
16 Q Excuse me. Is this a document
17 that SoundExchange creates in its ordinary
18 course of business?
19 A Our outside auditor prepares this,
20 yes.
21 Q Okay. But is it something that
22 you assist in the preparation of?

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 81

1 A Yes, I do.
2 Q Okay. It came from
3 SoundExchange's records. Correct?
4 A It did.
5 Q And you believe it to be accurate?
6 A I do.
7 MR. THOMPSON: Your Honor, at this
8 time we'd move for the admission of SDARS
9 Exhibit 27 into evidence.
10 CHIEF JUDGE SLEDGE: Any objection
11 to Exhibit 27?
12 MR. FREEDMAN: No, Your Honor.
13 CHIEF JUDGE SLEDGE: Without
14 objection, it's admitted.
15 (Whereupon, SDARS
16 Exhibit No. 27 was
17 admitted.)
18 MR. THOMPSON: Thank you, Your
19 Honor.
20 BY MR. THOMPSON:
21 Q Ms. Kessler, returning for a
22 moment to your testimony relating to the terms

Page 82

1 that you have represented here from the 2005-1
2 Webcasting case, am I correct that you have
3 offered nothing in the way of justification,
4 more than or in addition to what you've
5 offered in 2005-1 to support those terms?
6 A We have the same reasoning behind
7 the terms that we're asking for in this
8 proceeding as we did in the webcasting
9 proceeding. That's correct.
10 Q But you've attached no additional
11 documents, or additional testimony supporting
12 it. Correct?
13 A No. And, unfortunately, we
14 haven't been able to evaluate how the new
15 terms in webcasting, how effective they're
16 going to be for my testimony here today.
17 MR. THOMPSON: No more questions,
18 Your Honor. Pass the witness.
19 CHIEF JUDGE SLEDGE: Ms. Ablin.
20 MS. ABLIN: May I proceed, Your
21 Honor?
22 CHIEF JUDGE SLEDGE: I already

Page 83

1 called on you.
2 MS. ABLIN: Thank you. Good
3 morning, Ms. Kessler.
4 THE WITNESS: Good morning.
5 BY MS. ABLIN:
6 Q I'd like to start by just asking
7 you a few follow-up questions on
8 SoundExchange's proposed late fee term. And
9 sitting here today, are you able to identify
10 any agreements that in the real world actually
11 charge a 30 percent annual interest rate?
12 A We looked at credit card companies
13 for the range of interest that they charge on
14 the cards. The .75 was simply not working for
15 SoundExchange. We had chronic late payments,
16 so we knew some multiple of that would lead to
17 incentivizing the licensee's compliance with
18 respect to timely payments.
19 Q And so did -- do I understand from
20 your testimony that you personally looked at
21 credit card agreements?
22 A I did not personally look at them.

Page 84

1 Staff would have informed me about those, and
2 also outside counsel did have access to the
3 private agreements with the record labels.
4 Q Did they inform you -- are you
5 specifically aware sitting here today -- can
6 you identify any credit card agreement
7 specifically that has a late fee at this level
8 of 30 percent?
9 A Not specifically, just generally.
10 Q I'd like you to turn to page 27
11 now in your 2005-1 webcasting written direct
12 testimony, which I believe is in the
13 SoundExchange Trial Exhibit 56.
14 A The page again?
15 Q Page 27. And I'd like to direct
16 your attention to the first paragraph of that
17 page. And you say there in the webcaster
18 proceeding that "late payments can range from
19 a few days to a few months, and that in some
20 instances, services have gone several years
21 without paying royalties." Do you see that
22 testimony?

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 85

1 A I do.
2 Q And then you say in the next
3 paragraph that you don't believe the current
4 interest rate in the webcasting proceeding at
5 the time of .75 percent a month was an
6 effective deterrent to ensure that licensees
7 pay royalties when they are due. Do you see
8 that?
9 A I see that, yes.
10 Q And so, I take it from those
11 statements that SoundExchange is seeking to
12 impose a 30 percent annual interest rate
13 because it was dissatisfied at the time it
14 submitted this webcasting testimony with the
15 timeliness of payments from licensees?
16 A We were dissatisfied with the
17 timeliness of payments by licensees, and
18 concluded that the late fee applied to those
19 late payments was not disincentive enough for
20 them to comply with their obligations under
21 the statute.
22 Q Now would it affect your proposal

Page 86

1 for an interest rate for late payments if the
2 category of licensees to whom you seek to
3 charge a 30 percent annual rate had a track
4 record of paying, let's say, within a week of
5 the due date, relatively on time?
6 A I believe that services who are
7 complying with their obligations and paying on
8 time are not harmed by a late fee percentage.
9 They, obviously, wouldn't be charged late
10 fees, so to the extent a service is compliant,
11 these terms have no impact on them. On the
12 contrary, when SoundExchange receives late
13 payments, doesn't receive a payment at all,
14 receives late paperwork, there is a burden on
15 SoundExchange to extend resources tracking
16 down those payments, those missing items, it
17 delays the verification of that information,
18 and ultimately leads to delayed distributions
19 to copyright owners and artists.
20 Q Okay. Let me try that question
21 again.
22 A Sure.

Page 87

1 Q Because I don't believe that was
2 responsive. I asked you if it would affect
3 your proposal of an interest rate if the
4 category of licensees, and remember, we're
5 talking about two services here, Sirius and
6 XM. We're setting rates and terms for pre-
7 existing satellite digital audio radio
8 services, there's two. Would it affect your
9 proposal for late payments if it were
10 established that those services had a track
11 record of paying within a few days of the due
12 date?
13 A It wouldn't, because again, I
14 believe that there's some value to the
15 consistency in terms, there's cost-savings
16 when terms are consistent across license
17 types. And I don't believe that there's any
18 reason why one particular service should have
19 any more less strict terms than another
20 category of licensees, and consistency does
21 have some value to SoundExchange.
22 Q So even if an entire category of

Page 88

1 licensees had been paying on time, or
2 relatively on time with a lower late fee than
3 30 percent annual rate, you would still,
4 nonetheless, want to impose this much more
5 stringent 30 percent rate on them. Correct?
6 A For the reasons I just described,
7 yes, I believe that one type of licensee
8 shouldn't be treated any differently than the
9 other with respect to these types of terms.
10 Q Have you and your staff --
11 CHIEF JUDGE SLEDGE: That question
12 is inconsistent with her answer. She has said
13 four or five times that late fees don't apply
14 to payers who pay on time. And your question
15 said, so you don't think that the fact that
16 people pay on time changes your late fee
17 proposal.
18 MS. ABLIN: I'm not sure I follow,
19 Your Honor. I was just trying to -- Ms.
20 Kessler said in her webcaster testimony that
21 there was a problem with timeliness of
22 payments. And, therefore, they sought an

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 89

1 increase in the late payment rate.
2 CHIEF JUDGE SLEDGE: All right.
3 MS. ABLIN: So I was just trying
4 to ask her whether it affected her proposal,
5 given that it was premised on a problem that
6 she identified in that proceeding, if the
7 services in this different proceeding had paid
8 on time.
9 CHIEF JUDGE SLEDGE: You're
10 responding much broader than my question to
11 you. You have asked her several times about
12 the basis of the late fee, and she has
13 responded each time that it does not apply to
14 those who pay timely. And then you came back
15 and said so, folks that pay timely doesn't
16 affect your rate proposal. The rate proposal
17 - the term doesn't apply to those who pay
18 timely.
19 MS. ABLIN: Well, yes. I think,
20 Your Honor, the point would simply be that, if
21 a service, in general, paid timely, but say
22 something happened, as often does in the

Page 90

1 commercial world, if they missed a payment or
2 two by a few days, then they would be subject
3 to a very punitive late fee, notwithstanding
4 a record of timeliness.
5 CHIEF JUDGE SLEDGE: And they
6 wouldn't be timely on that payment.
7 MS. ABLIN: Right. But our point
8 would just be that in that case, the late fee
9 at the level of 30 percent a year would be not
10 only commercially unreasonable, but punitive
11 to a service that did have a track record.
12 CHIEF JUDGE SLEDGE: But it would
13 only apply to the one that was late, not all
14 the others.
15 MS. ABLIN: I will not dispute
16 that. That's certainly true.
17 BY MS. ABLIN:
18 Q Have you or your staff performed
19 any analysis of how timely the extent to which
20 Sirius and XM have been timely in paying?
21 A We have prepared reports about
22 their payment history, including late

Page 91

1 payments.
2 Q And do you have -- I'm sorry.
3 A I don't know if, for the specific
4 purpose of evaluating late payments, but we do
5 create payment records.
6 Q Do you have any knowledge sitting
7 here today concerning how many days late, for
8 example, on average Sirius and XM have been in
9 paying SoundExchange?
10 A I know that both services have
11 been charged late fees at one point. I don't
12 recall the specifics.
13 Q Ms. Kessler, I'd like you to take
14 out SDARS Exhibit 24, which I believe was
15 handed up to you earlier today. And if you
16 could just look at Bates page SE 203611, as
17 well as 612.
18 A Yes.
19 Q And those pages reflect the
20 payment history for Sirius and XM for their
21 satellite digital audio radio services.
22 Correct?

Page 92

1 A Yes, it does.
2 Q And I'm now going to have handed
3 out two additional exhibits that are being
4 marked as SDARS Exhibits 28 and 29.
5 (Whereupon, SDARS
6 Exhibit Nos. 28 and 29
7 were marked for
8 identification.)
9 BY MS. ABLIN:
10 Q Ms. Kessler, I'd like you to
11 please identify Sirius Exhibit 28 for us.
12 A It is a letter to Sirius Satellite
13 Radio regarding late fees that are applicable
14 under the agreement.
15 Q And if you could please identify
16 Exhibit 29?
17 A It is a letter to XM Satellite
18 Radio regarding late fees applicable under the
19 agreement.
20 Q And I take it both of these
21 letters were sent by SoundExchange's General
22 Counsel, Gary Greenstein, at the time?

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 93

1 A That's correct.
2 MS. ABLIN: Your Honor, I would
3 offer SDARS Exhibit 28 into evidence.
4 CHIEF JUDGE SLEDGE: Any objection
5 to Exhibit 28?
6 MR. FREEDMAN: Your Honor, make I
7 just have one moment to look at it? No
8 objection, Your Honor.
9 CHIEF JUDGE SLEDGE: Without
10 objection, Exhibit 28 is admitted.
11 (Whereupon, SDARS
12 Exhibit No. 28 was
13 admitted.)
14 MS. ABLIN: I would now offer
15 Exhibit 29 into evidence.
16 CHIEF JUDGE SLEDGE: Any objection
17 to Exhibit 29?
18 MR. FREEDMAN: No objection, Your
19 Honor.
20 CHIEF JUDGE SLEDGE: Without
21 objection, Exhibit 29 is admitted.
22 (Whereupon, SDARS

Page 94

1 Exhibit No. 29 was
2 admitted.)
3 BY MS. ABLIN:
4 Q Now, Ms. Kessler, looking at the
5 three documents, the two exhibits, 28, 29, and
6 then the payment summary, which was Exhibit
7 24.
8 A Yes.
9 Q And, particularly, Exhibit 24,
10 it's true, is it not, that just looking at
11 that, that Sirius and XM have consistently
12 paid within a few days of the due date, less
13 than a week of the due date for payments?
14 A XM and Sirius are typically timely
15 with their payments, but there are occasions
16 where they have paid late.
17 Q Now just looking at those numbers,
18 I'll represent to you that we looked at them
19 and calculated an average, and the average
20 days late for Sirius, based on the payment
21 summary, is around 3-1/2 days late. And they
22 never paid more than one week late. Does that

Page 95

1 sound consistent with Exhibit 24?
2 A Yes, XM and Sirius are typically
3 compliant, and when they've been late, it has
4 not been that long. We've issued late payment
5 letters, and they have paid those late fees.
6 Q Okay. Now if you could look at
7 Exhibit 28, in particular.
8 A I'm sorry?
9 Q If you could take out Exhibit 28,
10 in particular.
11 A Yes.
12 Q Now are you aware, based on this
13 document, that SoundExchange's General Counsel
14 wrote to Sirius, as this letter states, in
15 late July 2005 seeking late fees for payments.
16 That's what that letter states. Correct?
17 A That's correct.
18 Q And those payments dated back for
19 over a year. Is that correct?
20 A Yes.
21 Q And so, all the time from 2004
22 forward, SoundExchange had been accepting

Page 96

1 payments from Sirius and cashing the checks,
2 all the while saying nothing to Sirius that
3 once in a while payments were arriving a few
4 days late. Is that correct?
5 A SoundExchange, obviously, deposits
6 checks upon receipt. The review of late fees
7 happened at some subsequent date when
8 resources permitted, and the payment was
9 received late, and so the late fees for the
10 late payment period, just the days that they
11 were late, was assessed to Sirius.
12 Q And it was assessed in July 2005
13 for payments dating back over a year.
14 A That's when this letter was
15 written, yes.
16 Q Now are you aware that Sirius is
17 mailing in its payments, and that sometimes
18 those payments had gotten held up in the mail,
19 or perhaps in SoundExchange's in-box before
20 they were marked as received by SoundExchange?
21 A I don't recall specifics around
22 Sirius' payments.

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 97

1 Q Okay. We're now going to hand out
2 a document that's being marked as SDARS
3 Exhibit 30.
4 (Whereupon, SDARS
5 Exhibit No. 30 was
6 marked for
7 identification.)
8 BY MS. ABLIN:
9 Q Now just let me know when you're
10 finished reviewing it.
11 A Yes.
12 Q Now this document includes a copy
13 of a check from Sirius that was cut for the
14 third-quarter of 2004, as well as the
15 postmarked envelope in which the check was
16 mailed. Correct?
17 A Yes.
18 Q And the payment was traveling from
19 New York to D.C. Is that correct?
20 A The postmark is New York,
21 somewhere in D.C., yes.
22 Q And just for the record, the

Page 98

1 envelope of this payment shows a postmark date
2 of June 30th, 2004. Correct?
3 A That's the postmark, that's
4 correct.
5 Q And the receipt date shown on that
6 is nearly a week later, on July 6th, 2004. Is
7 that correct?
8 A That's correct.
9 Q And this, in fact, was one of the
10 payments from 2004 that SoundExchange wrote to
11 Sirius about, and demanded late payment fees
12 for. Is that correct?
13 A That's correct.
14 Q Okay. Now just a couple of more
15 questions on late fees, and then we'll move on
16 to another topic. I believe that you
17 suggested earlier that your outside counsel
18 had informed you of the contents of label
19 agreements that were generally consistent, I
20 believe you testified, with some of the terms
21 that you had been proposing here. Is that
22 correct?

Page 99

1 A Yes. I'm aware that label
2 agreements have late fee provisions in them.
3 Q But you personally have not
4 reviewed any of those?
5 A No, I did not.
6 Q Can you even identify which label
7 agreements you are referring to?
8 A I cannot.
9 Q And they weren't attached to your
10 testimony in 2006-1. Correct?
11 A No, I would not have been the
12 sponsoring witness.
13 Q Okay. I'd now like to ask you a
14 few questions about your proposed term that
15 revenues be paid on a paid or payable basis.
16 A Yes.
17 Q And just so I understand your
18 testimony, I believe that you testified
19 earlier today that SoundExchange is claiming
20 entitlement to royalties based on revenues
21 that have not actually been collected by
22 services for whatever reason might exist in

Page 100

1 its business judgment. Is that correct?
2 A Yes. Our position is that the
3 basis for the percentage of revenues should
4 include any revenues that the service
5 otherwise would have been entitled to. For
6 whatever reason they didn't collect the full
7 amount of those revenues, our copyright owners
8 and artists should not be harmed by the choice
9 of the service not collecting those royalties,
10 I mean, those revenues.
11 Q And SoundExchange has, in fact,
12 attempted to collect royalties based on
13 uncollected revenues in the past from other
14 services. Is that correct?
15 A Through our audit experience, we
16 have found services who did not fully exploit
17 all the collections they were entitled to,
18 which because the license is based on a
19 percentage of revenue, it reduced the amount
20 of royalties that otherwise would have been
21 paid to SoundExchange.
22 Q And when you say "through our

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 101

1 audit experience", are you referring
2 specifically to audits that SoundExchange
3 conducted of Music Choice and Muzak?
4 A I am.
5 Q And Muzak and Music Choice both
6 are pre-existing subscription services that
7 were paying based on a percentage of revenues
8 received. Correct?
9 A That's correct.
10 Q Let's take a look, briefly, at one
11 of those audits. I'm now having an exhibit
12 handed out that's being marked as SDARS
13 Exhibit 31, along with an accompanying exhibit
14 on the same subject matter that's being marked
15 as SDARS Exhibit 32, which we'll hand out in
16 a moment.
17 (Whereupon, SDARS
18 Exhibit Nos. 31 and 32
19 were marked for
20 identification.)
21 JUDGE WISNIEWSKI: You accidently
22 gave me an unmarked exhibit.

Page 102

1 BY MS. ABLIN:
2 Q Ms. Kessler, could you please
3 identify SDARS Exhibit 31?
4 A Yes. It's report on Muzak by our
5 auditor, who audited the Muzak service.
6 Q And this audit report was sent by
7 SoundExchange's auditor to Gary Greenstein,
8 SoundExchange's General Counsel at the time.
9 Is that correct?
10 A Yes, that's correct.
11 MS. ABLIN: Your Honor, I would
12 offer SDARS Exhibit 31 into evidence.
13 CHIEF JUDGE SLEDGE: Any objection
14 to Exhibit 31?
15 MR. FREEDMAN: Your Honor, may I
16 just have one moment, please? Your Honor, I
17 have no objection to the admission of the
18 exhibit, although, I would move that it be
19 admitted subject to the protective order.
20 This is confidential information provided by
21 Muzak to SoundExchange. It's the kind of
22 information that SoundExchange maintains as

Page 103

1 confidential in the ordinary course of
2 business. It includes information, from
3 looking at the document, about Muzak's
4 revenues, which is to break down the revenues
5 into some categories, and this is the kind of
6 information that Muzak could be put at a
7 competitive disadvantage if its competitors
8 were to have access to this information.
9 CHIEF JUDGE SLEDGE: What role is
10 Muzak in this proceeding?
11 MR. FREEDMAN: They're, obviously,
12 not a party to this proceeding, Your Honor.
13 We may be up against the third-party issue
14 that we raised moments ago. I recognize
15 they're not a party. SoundExchange does
16 receive their information in confidence, and
17 treats it as confidential in the ordinary
18 course of business, and Muzak, I suspect, has
19 an expectation that SoundExchange will make
20 efforts to maintain that information as
21 confidential.
22 CHIEF JUDGE SLEDGE: Any response?

Page 104

1 MS. ABLIN: Your Honor, we have no
2 objection.
3 CHIEF JUDGE SLEDGE: Without
4 objection, the exhibit is admitted. Without
5 objection, the motion to apply the protective
6 order is denied.
7 (Whereupon, SDARS
8 Exhibit No. 31 was
9 admitted.)
10 BY MS. ABLIN:
11 Q Ms. Kessler, if you could please
12 look at SDARS Exhibit 32.
13 A Yes.
14 Q Now, Exhibit 32 is a response
15 letter from Muzak after it had received the
16 audit report from SoundExchange's auditor.
17 Correct?
18 A Yes, it is.
19 Q And the response letter was sent
20 to Gary Greenstein, SoundExchange's then
21 General Counsel?
22 A That's correct.

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 105

1 MS. ABLIN: Your Honor, I would
2 offer SDARS Exhibit 32 into evidence.
3 CHIEF JUDGE SLEDGE: Any objection
4 to Exhibit 32?
5 MR. FREEDMAN: No objection, Your
6 Honor; although, for the record, I would renew
7 my motion to apply the protective order for
8 the same reasons I stated a moment ago.
9 CHIEF JUDGE SLEDGE: Without
10 objection, Exhibit 32 is admitted.
11 (Whereupon, SDARS
12 Exhibit No. 32 was
13 admitted.)
14 CHIEF JUDGE SLEDGE: Any objection
15 to the motion?
16 MS. ABLIN: No, Your Honor.
17 CHIEF JUDGE SLEDGE: Without
18 objection, the motion to apply the protective
19 order, the motion is denied.
20 BY MS. ABLIN:
21 Q All right. Ms. Kessler, if you
22 could please turn to page SE 204147 in Exhibit

Page 106

1 31.
2 A The last two digits are 47?
3 Q Correct.
4 A Yes.
5 Q Now what this page reflects is
6 that SoundExchange's auditor was making a
7 claim that Muzak owed six figures in royalties
8 for what it called late charge payments,
9 EchoStar to Muzak that were uncollected by
10 Muzak. Is that correct?
11 A That's correct.
12 Q And the claim is based on the
13 notion that Muzak should have collected more
14 in late fees from EchoStar than it did. And
15 as you previously testified, SoundExchange was
16 entitled to royalties based on those
17 uncollected late fees?
18 A That's correct.
19 Q Okay. Now would SoundExchange's
20 position concerning revenues paid or payable
21 also apply to monies that are in dispute
22 between a licensee and a third-party with whom

Page 107

1 that licensee is in contract, a private
2 contractual relationship, when those disputes
3 fees had not yet been collected by the
4 licensee?
5 A You're asking me a hypothetical,
6 so I'm not sure what kinds of things may be
7 disputed. As a general matter, SoundExchange
8 believes that those revenues paid to a
9 service, or that service otherwise could
10 collect, should be the basis upon which the
11 royalty obligation to SoundExchange is based.
12 So without knowing the specifics, I couldn't
13 comment.
14 Q Okay. Well, if you could turn to
15 page SE 204144 in SDARS Exhibit 31, we'll try
16 to bring this to bed for you.
17 CHIEF JUDGE SLEDGE: What was that
18 page, again?
19 MS. ABLIN: It was SE 204144, Your
20 Honor.
21 CHIEF JUDGE SLEDGE: Ms. Kessler,
22 I'd like to understand your last answer. Your

Page 108

1 position is that payable amounts are revenue,
2 but without specifics of a dispute, you're
3 unable to respond to the question of whether
4 disputed amounts would be included in the
5 payable revenue?
6 THE WITNESS: Without
7 understanding the contractual nature between
8 the parties, I don't know how I -- I'm not an
9 attorney, but just by reading the language,
10 whether or not it's truly disputed or not, or
11 if one of the parties is just simply refusing
12 to pay. I mean, I'm not sure what the
13 specifics are.
14 CHIEF JUDGE SLEDGE: Does that
15 answer imply that the answer to the original
16 question from Ms. Ablin as to whether disputed
17 amounts between a service and a third-party
18 are included in revenue, and the SoundExchange
19 proposal would be a fact question?
20 THE WITNESS: I'm not sure what
21 you mean by a -- do you mean simply a question
22 of fact?

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 109

1 CHIEF JUDGE SLEDGE: Yes.
2 THE WITNESS: Rather than an
3 interpretation?
4 CHIEF JUDGE SLEDGE: That the
5 interpretation depends on a question of fact
6 of what the dispute is.
7 THE WITNESS: I guess, my
8 experience leads me to believe that there are
9 certain cases where a service simply is
10 waiving certain subscription fees, or late
11 fees, or things that are readily -- you can
12 compute them readily. And to the extent that
13 the parties are in dispute about something,
14 until the dispute was resolved, if it was a
15 legitimate dispute, we would have no way of
16 knowing if those royalties, or those revenues
17 should be included in the royalty. But it's
18 my experience that there are some things that
19 are clearly owed to a particular service, and
20 that that service decided to give that away,
21 should not harm our constituents.
22 CHIEF JUDGE SLEDGE: You answered

Page 110

1 my question.
2 THE WITNESS: Thank you.
3 BY MS. ABLIN:
4 Q Now, Ms. Kessler, on page SE
5 204144, we were just looking at.
6 A Yes.
7 Q Now, on that page, SoundExchange
8 was asserting a royalty claim against Muzak
9 for the differential amount of money between
10 the 15 cent payment per subscriber Muzak was
11 paid by EchoStar for English programming
12 subscribers, and the 3 cent per subscriber
13 rate that it claimed is applicable to
14 subscribers to Spanish language programming,
15 despite the fact that that amount was being
16 disputed, it was still in dispute between
17 EchoStar and Muzak. Is that correct?
18 A Give me a moment. That's correct.
19 Q And SoundExchange maintained this
20 claim, even though Muzak informed it that it
21 had never received more than the 3 cent per
22 month amount for each of those Spanish

Page 111

1 programming subscribers. Is that correct?
2 A The response from Muzak does
3 indicate that they only received the 3 cents
4 per subscriber. I'm sorry, that EchoStar only
5 paid the 3 centers per Spanish language
6 subscriber, yes.
7 Q Okay. So let's try another
8 question on this revenues paid or payable
9 term. Would SoundExchange's view of its
10 royalty entitlement under that term actually
11 enable SoundExchange to insert itself into a
12 licensee's contractual relationship with a
13 third-party to force that licensee to
14 investigate whether the third-party is paying
15 all the monies to the licensee that
16 SoundExchange believes are due?
17 A Can you ask the question again,
18 please?
19 Q Sure. I'm trying to get at
20 whether -- would your view of the term
21 "revenues paid or payable" extend to require
22 licensees to whom royalties to SoundExchange

Page 112

1 are due, would it require those licensees to
2 go investigate their private contractual
3 relationship with a third-party paying that
4 licensee money, if SoundExchange suspected
5 that not all the monies were being paid?
6 A Well, clearly, through an audit,
7 if it was determined that the service who owed
8 the royalties to SoundExchange was not
9 maximizing the revenues they otherwise could
10 have collected, that SoundExchange would make
11 a claim that the service is responsible for
12 the total royalties it otherwise could have
13 collected. We don't want to interfere with a
14 service's private agreements with other
15 parties. If they choose to give things away
16 for some other type of consideration, or they
17 feel that it's beneficial to their
18 relationship with third-parties, that's
19 completely their business. But, again, we
20 just don't feel that under a statutory license
21 it's appropriate to give our copyright owners
22 and artists' music away, and not be

a21ac274-621c-43f6-8db1-bbd2189438c1

Page 113

1 compensated for it, even though that service
2 is deriving benefit from it.
3 Q So if you could just look briefly
4 at page SE 204145.
5 A Yes.
6 Q Now on this page, SoundExchange's
7 auditor was, in fact, asserting a right to
8 force Muzak under its private contract with
9 EchoStar to go back and investigate that
10 EchoStar was actually reporting the subscriber
11 numbers correctly to EchoStar, because
12 SoundExchange suspected that there might be an
13 under-reporting?
14 A Well, SoundExchange's
15 responsibility is to its copyright owners and
16 artists, and to the extent there was
17 conflicting information about what the
18 subscribership levels reported were, of
19 course, we would exercise our audit right to
20 require that that information be made
21 available to verify the payment.
22 Q But there's actually -- the

Page 114

1 conflicting information that you're talking
2 about on this page was simply SoundExchange
3 looking at SEC filings, at overall subscriber
4 numbers that EchoStar was reporting to the
5 SEC, which included a number of programming
6 packages. Correct?
7 A That may very well be, yes.
8 Q And EchoStar, by contrast, was
9 only paying Muzak for a subset of those
10 subscribers that actually received Muzak's
11 programming. Correct?
12 A That's correct.
13 Q And so, this page reflects just a
14 suspicion that because the gap, the
15 differential between EchoStar's overall
16 subscribers, as reported to the SEC, looked to
17 be too much larger than the number of
18 subscribers that included Muzak in their
19 programming. Is that correct?
20 A Yes. I mean, that's how an audit
21 works, you investigate the financials of the
22 target, and where things appear to be

Page 115

1 inconsistent or out of line, you make a claim,
2 you probe deeper, you wait for the target's
3 response to those, and you work through the
4 issues. So yes, that's, of course, what we
5 do.
6 MS. ABLIN: Okay. May I have just
7 one moment, Your Honor?
8 CHIEF JUDGE SLEDGE: Yes.
9 MS. ABLIN: I have no further
10 questions.
11 CHIEF JUDGE SLEDGE: Mr. Freedman,
12 any redirect?
13 MR. FREEDMAN: No, Your Honor.
14 CHIEF JUDGE SLEDGE: Questions
15 from the bench?
16 JUDGE ROBERTS: I have one. Ms.
17 Kessler, if you'd turn to page 17 of your
18 testimony, please. Under Section 3,
19 "Modifications needed to license terms", you
20 state that a few of the terms found in 37 CFR
21 Part 262 must be modified for purposes of this
22 proceeding.

Page 116

1 THE WITNESS: Yes.
2 JUDGE ROBERTS: Are you aware that
3 37 CFR Part 262 does not apply to this
4 proceeding?
5 THE WITNESS: I found that out
6 today when we were discussing it earlier.
7 JUDGE ROBERTS: I hope that in
8 either rebuttal testimony or at some later
9 point in this proceeding that you take that
10 fact into account, and present us with a full
11 set of terms, rather than just a partial set
12 of terms.
13 THE WITNESS: We most certainly
14 will, Your Honor.
15 JUDGE ROBERTS: I have nothing
16 further.
17 CHIEF JUDGE SLEDGE: You only
18 found out today that the webcasting decision
19 went at length to criticize SoundExchange for
20 referring to regulations that don't apply, and
21 failing to give a complete presentation of
22 evidence on terms?

1 THE WITNESS: I'm aware with Your
2 Honors' dissatisfaction that we did not make
3 stipulations as to terms. I have been
4 recommending that we do that for this
5 proceeding. I would like the benefit of some
6 time of the webcasters paying under the new
7 terms so I can make some evaluation of how
8 effective they are; but, certainly,
9 SoundExchange is committed to presenting a
10 full set of terms under the correct statutory
11 reference. We certainly will do that, Your
12 Honor.
13 CHIEF JUDGE SLEDGE: You didn't
14 answer my question, but I guess it's okay.
15 Judge Wisniewski, any questions?
16 JUDGE ROBERTS: I have one more.
17 CHIEF JUDGE SLEDGE: Please.
18 JUDGE ROBERTS: Ms. Kessler, you
19 had asked that application of the late fee
20 payment for late reports of use.
21 THE WITNESS: Yes.
22 JUDGE ROBERTS: Do you have any

1 data that indicates the number of days or
2 instances of late submission of reports of use
3 by XM and Sirius?
4 THE WITNESS: XM and Sirius are
5 typically compliant with regard to their
6 reporting obligations under the agreement.
7 They are typically on time.
8 JUDGE ROBERTS: Thank you.
9 THE WITNESS: Okay.
10 CHIEF JUDGE SLEDGE: Thank you.
11 THE WITNESS: Thank you.
12 CHIEF JUDGE SLEDGE: All right.
13 Mr. Schneider.
14 MR. SCHNEIDER: SoundExchange
15 would like to call as its next witness, Sean
16 Butson.
17 CHIEF JUDGE SLEDGE: Mr. Butson,
18 please stand. Raise your right hand.
19 WHEREUPON,
20 SEAN BUTSON
21 was called as a witness and, after having been
22 first duly sworn, was examined and testified

1 as follows:
2 CHIEF JUDGE SLEDGE: Thank you.
3 Please be seated.
4 MR. SCHNEIDER: Good morning, Mr.
5 Butson.
6 DIRECT EXAMINATION
7 BY MR. SCHNEIDER:
8 Q Could you please state your name
9 and address for the record?
10 A Yes. Can I remove these
11 documents?
12 Q Yes.
13 A Sean Paul Butson.
14 Q And what's your address?
15 A 4000 Saw Road, Kensington,
16 Maryland.
17 Q And apart from your work on this
18 case, how are you employed?
19 A I'm in the process of starting an
20 investment company.
21 Q And would you please describe your
22 educational background for the record?

1 A I have a degree in Politics from
2 Wake Forest University, and a degree in
3 Finance from the University of Maryland, and
4 I'm a chartered financial analyst.
5 Q And would you please describe your
6 work history?
7 A After graduating from the
8 University of Maryland, I started work at
9 Nations Bank as a credit analyst underwriting
10 various debt facilities. Nations Bank
11 subsequently became Bank of America, and
12 before I left, I became a relationship
13 manager. I had my own portfolio of clients
14 that I provided various debt facilities to.
15 Subsequent to that, in 1997 I joined Legg
16 Mason as an associate analyst covering the
17 telecom industry. And in 1999, I obtained my
18 own research coverage.
19 Q And starting in 1999, what does it
20 mean to have your own research coverage?
21 A That means that I was the one
22 primarily responsible for building the

a21ac274-621c-43f6-8db1-bbd2189438

	A	B	C	D
1	***SDARS ROYALTIES RECEIVED (as of March 22, 2007)***			
2				
3	LicenseeID	Licensee Type	Service (URL)	Parent Name
4	1240	LATE FEES	XM SATELLITE RADIO INC.	XM SATELLITE RADIO INC.
5	1240	SDARS	XM SATELLITE RADIO INC.	XM SATELLITE RADIO INC.
6	1101	LATE FEES	SIRIUS SATELLITE RADIO	SIRIUS SATELLITE RADIO
7	1101	SDARS	SIRIUS SATELLITE RADIO	SIRIUS SATELLITE RADIO
8				

SDARS Ex. 24

SE 0203608

	E	F	G	H	I	J	K	L
1								
2								
3		Station Call Letters	Total of Amount	<>	1998	1999	2000	2001
4	LATE FEES		$9,625.00					
5	SDARS		$43,000,000.00					
6	LATE FEES		$11,187.50					
7	SDARS		$38,750,000.00					
8			$81,770,812.50	$0.00	$0.00	$0.00	$0.00	$0.00

SE 0203609

	M	N	O	P	Q	R
1						
2						
3	2002	2003	2004	2005	2006	2007
4				$9,625.00		
5		$1,000,000.00	$3,000,000.00	$14,000,000.00	$20,000,000.00	$5,000,000.00
6			$2,250.00	$8,937.50		
7		$1,000,000.00	$3,000,000.00	$11,000,000.00	$19,000,000.00	$4,750,000.00
8	$0.00	$2,000,000.00	$6,002,250.00	$25,018,562.50	$39,000,000.00	$9,750,000.00

SE 0203610

	A	B	C	D	E	F
1	Pay ID	Service (URL)	Licensee Type	Received Date	Amount	Comments
2	514	XM SATELLITE RADIO INC.	SDARS	01-Apr-03	$500,000.00	April 03 scheduled payment
3	612	XM SATELLITE RADIO INC.	SDARS	02-Sep-03	$500,000.00	Sept 03 scheduled payment
4	715	XM SATELLITE RADIO INC.	SDARS	02-Jan-04	$750,000.00	Jan 04 scheduled payment
5	1145	XM SATELLITE RADIO INC.	SDARS	01-Apr-04	$750,000.00	April 04 scheduled payment April 04 scheduled payment
6	1337	XM SATELLITE RADIO INC.	SDARS	01-Jul-04	$750,000.00	July 04 scheduled payment
7	1812	XM SATELLITE RADIO INC.	SDARS	01-Oct-04	$750,000.00	Oct 04 scheduled payment
8	1811	XM SATELLITE RADIO INC.	SDARS	06-Jan-05	$3,500,000.00	Jan 05 scheduled payment
9	1891	XM SATELLITE RADIO INC.	SDARS	05-Apr-05	$3,500,000.00	Apr 05 scheduled payment
10	2087	XM SATELLITE RADIO INC.	SDARS	08-Jul-05	$3,500,000.00	7/1/05 sheduled payment
11	2160	XM SATELLITE RADIO INC.	LATE FEES	10-Aug-05	$9,625.00	LATE FEES - per letter for APR & JULY 05 PAYMENTS
12	2470	XM SATELLITE RADIO INC.	SDARS	03-Oct-05	$3,500,000.00	Q4 2005
13	2577	XM SATELLITE RADIO INC.	SDARS	03-Jan-06	$5,000,000.00	1ST PAYMENT OF 2006 (SDARS)
14	3088	XM SATELLITE RADIO INC.	SDARS	03-Apr-06	$5,000,000.00	2ND PAYMENT OF 2006 (SDARS)
15	3452	XM SATELLITE RADIO INC.	SDARS	03-Jul-06	$5,000,000.00	3RD PAYMENT OF 2006 (SDARS)
16	3811	XM SATELLITE RADIO INC.	SDARS	29-Sep-06	$5,000,000.00	4TH PAYMENT OF 2006 (SDARS)
17	4883	XM SATELLITE RADIO INC.	SDARS	02-Jan-07	$5,000,000.00	1ST PAYMENT OF 2007
18	5067	XM SATELLITE RADIO INC.	SDARS	02-Apr-07	$5,000,000.00	2ND PAYMENT OF 2007

SE 0203611

	A	B	C	D	E
1	**SDARS Payments**				
2	Pay ID	Service (URL)	Licensee Type	Received Date	Amount
3	516	SIRIUS SATELLITE RADIO	SDARS	02-Apr-03	$500,000.00
4	620	SIRIUS SATELLITE RADIO	SDARS	23-Sep-03	$503,112.19
5	718	SIRIUS SATELLITE RADIO	SDARS	07-Jan-04	$750,000.00
6	1158	SIRIUS SATELLITE RADIO	SDARS	05-Apr-04	$750,000.00
7	1362	SIRIUS SATELLITE RADIO	SDARS	06-Jul-04	$762,804.20
8	1499	SIRIUS SATELLITE RADIO	SDARS	04-Oct-04	$767,778.49
9	1797	SIRIUS SATELLITE RADIO	SDARS	10-Jan-05	$2,750,000.00
10	1923	SIRIUS SATELLITE RADIO	SDARS	07-Apr-05	$2,750,000.00
11	2086	SIRIUS SATELLITE RADIO	SDARS	07-Jul-05	$2,750,000.00
12	2467	SIRIUS SATELLITE RADIO	SDARS	04-Oct-05	$2,750,000.00
13	2387	SIRIUS SATELLITE RADIO	LATE FEES	20-Oct-05	$11,187.50
14	2578	SIRIUS SATELLITE RADIO	SDARS	03-Jan-06	$4,750,000.00
15	3089	SIRIUS SATELLITE RADIO	SDARS	03-Apr-06	$4,750,000.00
16	3451	SIRIUS SATELLITE RADIO	SDARS	03-Jul-06	$4,750,000.00
17	3812	SIRIUS SATELLITE RADIO	SDARS	29-Sep-06	$4,750,000.00
18	4881	SIRIUS SATELLITE RADIO	SDARS	08-Jan-07	$4,750,000.00
19	5066	SIRIUS SATELLITE RADIO	SDARS	09-Apr-07	$4,750,000.00
20					
21	**POSSIBLE ECHOSTAR Payments**				
22	Pay ID	Service (URL)	Licensee Type	Received Date	Amount
23	2015	SIRIUS SATELLITE RADIO	Unknown	20-May-05	$813,407.08
24	2140	SIRIUS SATELLITE RADIO	Unknown	01-Aug-05	$77,888.98
25	2220	SIRIUS SATELLITE RADIO	Unknown	02-Sep-05	$78,184.91
26	2380	SIRIUS SATELLITE RADIO	Unknown	31-Oct-05	$146,487.54
27	2516	SIRIUS SATELLITE RADIO	Unknown	31-Dec-05	$78,800.37
28	2772	SIRIUS SATELLITE RADIO	Unknown	01-Feb-06	$79,093.53
29	2960	SIRIUS SATELLITE RADIO	Unknown	01-Mar-06	$110,464.55
30	2979	SIRIUS SATELLITE RADIO	Unknown	03-Mar-06	$13,154.01
31	3101	SIRIUS SATELLITE RADIO	Unknown	05-Apr-06	$13,286.29
32	3174	SIRIUS SATELLITE RADIO	Unknown	03-May-06	$13,421.93
33	3328	SIRIUS SATELLITE RADIO	Unknown	05-Jun-06	$13,568.25
34	3466	SIRIUS SATELLITE RADIO	Unknown	03-Jul-06	$13,693.16
35	3578	SIRIUS SATELLITE RADIO	Unknown	02-Aug-06	$13,817.87
36	3698	SIRIUS SATELLITE RADIO	Unknown	05-Sep-06	$13,915.24
37	3808	SIRIUS SATELLITE RADIO	Unknown	02-Oct-06	$13,998.62
38	3942	SIRIUS SATELLITE RADIO	Unknown	03-Nov-06	$14,052.50
39	4223	SIRIUS SATELLITE RADIO	Unknown	02-Jan-07	$14,334.67
40	4651	SIRIUS SATELLITE RADIO	Unknown	14-Feb-07	$14,439.16
41	4860	SIRIUS SATELLITE RADIO	Unknown	09-Mar-07	$14,522.51
42	5065	SIRIUS SATELLITE RADIO	Unknown	30-Mar-07	$14,702.06

SE 0203612

F

1
2 Comments
3 April 03 scheduled payment
4 JULY 03 & Sept scheduled SDARS payment; Need signature on July SoA
5 JAN 04 SCHEDULED PAYMENT
6 April 04 Scheduled Payment
7 APR 04 Webcasting, 7/1/04 scheduled payment
8 JULY 04 webcasting, Oct 04 scheduled payment
9 1/1/05 scheduled payment
10 4/1/05 scheduled payment
11 7/1/05 scheduled payment
12 4TH 2005 PAYMENT
13 LATE FEES
14 1ST PAYMENT OF 2006 (SDARS)
15 2ND PAYMENT OF 2006 (SDARS)
16 3RD PAYMENT OF 2006 (SDARS)
17 4TH PAYMENT OF2006 (SDARS)
18 1ST 2007 SDARS PAYMENT
19 2ND 2007 SDARS PAYMENT
20
21
22 Comments
23 2004 and 2005 Q1 including late fee; Need SoA and NSTS election
24 ECHOSTAR JUNE 05 PAYMENT - No SoA
25 ECHOSTAR JULY 05 - No SoA
26 SEPT O5 ECHOSTAR/ AUG 05 WEBCAST (NEED SoA)
27 OCT 05 ECHOSTAR - No SoA
28 DEC 05 ECHOSTAR - No SoA
29 UNKNOWN - No SoA
30 ECHOSTAR JAN 06 - No SoA
31 ECHOSTAR FEB 06 - No SoA
32 ECHOSTAR MAR 06 - No SoA
33 ECHOSTAR APR 06 - No SoA
34 ECHOSTAR MAY 06 - No SoA
35 ECOSTAR JUNE 06 - No SoA
36 ECHOSTAR JULY 06- No SoA
37 ECHOSTAR AUG 06 - No SoA
38 ECHOSTAR SEPT 06 - No SoA
39 ECHOSTAR OCT 06 - No SoA
40 ECHOSTAR NOV 06 - No SoA
41 ECHOSTAR DEC 06 - No SoA
42 MAR 07 ECHOSTAR - No SoA

SE 0203613

SoundExchange Annual Distribution Allocations by Sub-type

(as of 05-25-07)

TYPE	2001	2002	2003	2004	2005	2006	2007	Total
Business Establishment Services	$0.00	$0.00	$0.00	$0.00	$2,461,102.03	$98,715.68	$11,970.14	$2,571,787.85
Foreign Royalties	$0.00	$0.00	$0.00	$287,812.98	$837,037.66	$361,267.10	$0.00	$1,486,117.74
Satellite Ephemeral	$0.00	$0.00	$0.00	$0.00	$706,200.00	$3,070,278.94	$815,100.00	$4,591,578.94
Satellite Services	$0.00	$0.00	$0.00	$1,600,000.00	$9,727,998.67	$31,819,249.65	$8,447,400.00	$51,594,648.32
Subscription Services	$4,870,269.24	$1,657,958.03	$2,459,285.84	$4,374,674.17	$2,759,291.62	$3,866,449.14	$682,822.18	$20,670,750.23
Webcasting	$0.00	$0.00	$0.00	$5,868,041.30	$10,294,638.58	$3,502,236.79	$0.00	$19,664,916.67
Webcasting Ephemeral	$0.00	$0.00	$0.00	$566,329.82	$993,342.32	$337,935.14	$0.00	$1,897,607.28
	$4,870,269.24	**$1,657,958.03**	**$2,459,285.84**	**$12,696,858.26**	**$27,779,610.89**	**$43,056,132.44**	**$9,957,292.32**	**$102,477,407.03**

SDARS Ex. 25

SE 0203628

SoundExchange Annual Distribution Amounts
(as of 5-25-07)

Year		Payments
2001	$	3,071,362.78
2002	$	1,213,710.74
2003	$	1,656,963.08
2004	$	8,640,853.05
2005	$	20,334,292.66
2006	$	32,813,717.23
2007	$	11,037,994.37
		$78,768,893.91

SE 0203629

This exhibit is restricted in its entirety and is therefore omitted from the public version of the exhibit binders.

SoundExchange, Inc.

Financial Statements

Year Ended December 31, 2005

SDARS Ex. 27

SE 0203615

SE 0203615

Contents

Independent Auditors' Report	3
Financial Statements	
Statement of Financial Position	4
Statement of Activities	5
Statement of Cash Flows	6
Summary of Accounting Policies	7 - 9
Notes to Financial Statements	10 - 13

SE 0203616

BDO Seidman, LLP
Accountants and Consultants

7101 Wisconsin Avenue, Suite 800
Bethesda, Maryland 20814-4868
Telephone: (301) 654-4900
Fax: (301) 654-3567

Independent Auditors' Report

To the Board of Directors
SoundExchange, Inc.

We have audited the accompanying statement of financial position of **SoundExchange, Inc.** (the Organization) as of December 31, 2005, and the related statements of activities and cash flows for the year then ended. These financial statements are the responsibility of the Organization's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform our audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Organization's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of **SoundExchange, Inc.** as of December 31, 2005, and the changes in its net assets and its cash flows for the year then ended, in conformity with accounting principles generally accepted in the United States of America.

BDO Seidman, LLP

December 20, 2006
Except for Note 11 for which
the date is April 12, 2007

SE 0203617

SoundExchange, Inc.

Statement of Financial Position

December 31,	2005
Assets	
Current assets	
Cash and cash equivalents	$ 157,923
Funds held in agency (Note 2)	55,158,475
Receivables	3,934,683
Prepaid expenses and other current assets	22,791
Total current assets	59,273,872
Noncurrent assets	
Property and equipment, net (Note 3)	2,145,818
Licensing and organizational costs, net (Note 4)	2,819,056
Total noncurrent assets	4,964,874
Total assets	$ 64,238,746
Liabilities and Net Assets (Deficit)	
Current liabilities	
Accounts payable and accrued expenses	$ 713,499
Funds held in agency (Note 2)	62,660,161
Capital lease obligation, current portion (Note 6)	108,239
Total current liabilities	63,481,899
Noncurrent liabilities	
Note payable (Note 5)	4,495,219
Capital lease obligation, net of current portion	76,447
Total noncurrent liabilities	4,571,666
Total liabilities	68,053,565
Commitments and contingencies	
Unrestricted net assets (deficit)	
Unrestricted net assets - general operations	680,400
Net assets attributable to debt service (Note 7)	(4,495,219)
Total unrestricted net assets (deficit)	(3,814,819)
Total liabilities and net assets (deficit)	$ 64,238,746

See accompanying summary of accounting policies and notes to financial statements.

SE 0203618

SoundExchange, Inc.

Statement of Activities

Year ended December 31,	2005
Revenue - administrative fee	$ 6,150,696
Administrative Expenses	
Personnel costs	1,679,528
Depreciation and amortization	1,342,480
Operating expenses	1,083,048
Member services	491,567
Legal and licensing	322,148
Royalty systems	102,924
Total expenses	5,021,695
Change in unrestricted net assets	1,129,001
Unrestricted net assets (deficit), beginning of period	(4,943,820)
Unrestricted net assets (deficit), end of period	$ (3,814,819)

See accompanying summary of accounting policies and notes to financial statements.

SE 0203619

SoundExchange, Inc.

Statement of Cash Flows

Year ended December 31,	2005
Cash flows from operating activities	
Change in net assets	$ 1,129,001
Adjustments to reconcile change in net assets to net cash provided by operating activities:	
Depreciation and amortization	1,342,480
Interest imputed on note payable	300,629
(Increase) decrease in assets:	
Funds held in agency	(21,390,907)
Receivables	(1,363,274)
Prepaid expenses and other current assets	(4,256)
Licensing and organizational costs	(2,730,273)
Increase (decrease) in liabilities:	
Accounts payable and accrued expenses	155,040
Funds held in agency	24,186,247
Net cash provided by operating activities	1,624,687
Cash flows from investing activities	
Purchases of property and equipment	(407,758)
Cash used in investing activities	(407,758)
Cash flows from financing activities	
Payments on note payable	(1,129,001)
Payments on capital lease obligation	(84,976)
Cash used in investing activities	(1,213,977)
Increase in cash and cash equivalents	2,952
Cash and cash equivalents, beginning of period	154,971
Cash and cash equivalents, end of period	$ 157,923

See accompanying summary of accounting policies and notes to financial statements.

SE 0203620

Organization

SoundExchange, Inc. (the Organization) was incorporated on September 22, 2003 in the State of Delaware. It is an independent, non-profit organization exempt from taxation under Section 501(c)(6) of the Internal Revenue Code. It is governed by an 18-member Board of Directors composed of equal numbers of representatives of sound recording copyright owners and recording artists.

The Organization has been designated by the Librarian of Congress to collect royalties paid by services making reproductions and non-interactive digital audio transmissions of sound recordings pursuant to the statutory licenses set forth in Sections 112 and 114 of Title 17 of the United States Code (17 U.S.C. § 112 and 114). The Organization collects royalties from, among others, Internet-only webcasters, terrestrial radio stations simulcasting their transmissions over the Internet, satellite radio services, and services making transmissions to digital cable and satellite television subscribers (collectively "Statutory Licensees").

The royalties collected by the Organization are allocated pursuant to a formula set forth in the United States Code and distributed directly to sound recording copyright owners (50%), featured artists (45%), and an independent administrator responsible for further redistributing the royalties to non-featured vocalists (2½%) and non-featured musicians (2½%). The costs of operating the Organization are deducted, pursuant to federal law, from the royalties collected under the statutory licenses.

The Organization currently represents over 1,300 record companies, over 5,025 labels and over ten thousand artists united in receiving marketplace rates for the licensing of sound recordings in a new digital world.

Basis of Accounting

The financial statements of the Organization have been prepared on the accrual basis of accounting.

Cash and Cash Equivalents

The Organization considers all highly liquid instruments, which are to be used for current operations and which have an original maturity of three months or less, to be cash and cash equivalents.

SE 0203621

Funds Held in Agency

Funds held in agency consist of cash received by the Organization from Statutory Licensees and certain other entities collecting and paying royalties for reproductions or transmissions of sound recordings outside the United States. These royalties are due and will be distributed by the Organization to the parties entitled to receive such royalties. Funds are invested in money market instruments and short-term federal and agency bonds and are recorded at readily determinable fair values.

Receivables

Receivables consist of interest and royalties receivable. Royalties receivable consist of reproduction and performance royalties payable by services availing themselves of the statutory licenses set forth in Sections 112 and 114 of the Copyright Act and by other entities for certain reproductions and transmissions of copyrighted sound recordings made outside the United States.

Property and Equipment

Property and equipment are recorded at historical cost less accumulated depreciation and amortization. Depreciation and amortization are computed on the straight-line method over the estimated useful lives of the assets. The Organization capitalizes all expenditures for property and equipment over $500. The estimated useful lives of the assets are as follows:

Furniture and fixtures	5 years
Computer equipment	3 years
Capital leased equipment	Lesser of 3 years or life of the lease
Software	5 years

When assets are sold or otherwise disposed of, the asset and related accumulated depreciation and amortization are removed from the accounts, and any remaining gain or loss is included in operations. Repairs and maintenance are charged to expense when incurred.

Licensing and Organizational Costs

Licensing and organizational costs are expenditures incurred in the administration of the collection, distribution, and calculation of the royalties; the settlement of disputes relating to the collection and calculation of the royalties; and the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to statutory licensing including those incurred in participating in negotiations or arbitration proceedings before the Copyright Arbitration Royalty Panel (CARP) or the Copyright Royalty Board (CRB) under the statutory licenses. These costs are recoverable from future license fees pursuant to federal law.

SE 0203622

Licensing costs are recorded at cost. Costs are amortized using the straight-line method over the term of the license from two to five years.

Unrestricted Net Assets (Deficit)

Unrestricted net assets (deficit) are available for use in general operations.

Revenue Recognition

Revenue is recognized when earned. Administrative fees are reported when expenses have been incurred.

Functional Allocation of Expenses

Administrative expenses are presented based on their natural classification, as all administrative costs relate to the operation of the program.

Use of Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect certain reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenue and expenses during the reporting period. Actual results could differ from those estimates.

Financial Instruments and Credit Risk

Financial instruments which potentially subject the Organization to concentrations of credit risk consist principally of cash and cash equivalents and funds held in agency held at creditworthy financial institutions. As of December 31, 2005, the Organization was not exposed to excessive risk from uninsured cash balances due to the fact that funds held in agency are trust assets that are not subject to claim in the event of bank default and cash and cash equivalent balances are kept within limits to prevent risk of concentration.

SE 0203623

1. Tax Status

The Organization has been granted exemption by the Internal Revenue Service (IRS) from Federal income taxes under Section 501(c)(6) of the Internal Revenue Code. However, the Organization is required to report unrelated business income to the IRS and the District of Columbia. The Organization did not have any unrelated business income for the year ended December 31, 2005.

2. Funds Held in Agency

The assets available to meet the Organization's obligation to pay royalties to licensees are as follows:

December 31,	2005
Funds held in agency – asset	$ 55,158,475
Royalties receivable	3,934,683
	$ 59,093,158

December 31,	2005
Funds held in agency - liability	$ 62,660,161
Less: application of administrative rate to licenses in the future years	(3,567,003)
	$ 59,093,158

3. Property and Equipment

Property and equipment consists of the following at:

December 31,	2005
Software development	$ 4,757,210
Distribution equipment, capital lease	319,099
Furniture and fixtures	102,824
Computer equipment	23,944
	5,203,077
Less: accumulated depreciation and amortization	3,057,259
	$ 2,145,818

SE 0203624

Depreciation and amortization expense charged to operations for the year ended December 31, 2005 was $1,057,347.

4. Licensing and Organizational Costs

Licensing and organizational costs consists of the following at:

December 31,	2005
Copyright Arbitration Royalty Proceeding and Copyright Royalty Board Proceeding	$ 4,232,894
Less: accumulated amortization	1,413,838
	$ 2,819,056

Amortization expense charged to operations for the year ended December 31, 2005 was $285,133.

5. Notes Payable

On October 7, 2003, the Organization issued a promissory note to RIAA for an unsecured note of $9,000,000. The note includes an imputed interest rate of prime plus two percent. Payment terms are based on the collection of royalties under statutory licenses and cannot be determined. Any amount outstanding on the note as of March 31, 2007 will be due in full at that time. Payments amounting to $1,129,001 were made on the note during the year ended December 31, 2005. The outstanding balance on the note as of December 31, 2005 is $4,495,219.

6. Commitments

Operating Lease

The Organization has a commitment under an operating lease for office space expiring in 2006. The Organization's future minimum rental payments, by year and in the aggregate, under the operating lease for the year ending December 31, 2006 amount to $98,782.

Rent expense charged to operations for the year ended December 31, 2005 was $208,938.

SE 0203625

Capital Lease

The Organization leases computer equipment under capital leases expiring in December 2006 and April 2008. The assets and liability under the capital leases are recorded at the lower of the present value of the minimum lease payments or the fair value of the assets. Amortization of the assets under the capital leases is included in depreciation and amortization. The interest rates implicit in the lease are 6.68% and 8%.

Following is a summary of the property held under capital leases at:

December 31, 2005	
Computer equipment	$ 319,099
Less: accumulated amortization	141,062
	$ 178,037

Future minimum lease payments, by year and in the aggregate, under capital leases are as follows:

Year Ending December 31,	
2006	$ 118,691
2007	60,640
2008	20,213
Total future minimum lease payments	199,544
Less: amounts representing interest	14,858
Present value of future minimum lease payments	184,686
Current portion	108,239
Long term portion	$ 76,447

SE 0203626

7. **Unrestricted Net Assets (Deficit)** A portion of unrestricted net assets has been reserved for debt service. The deficit in unrestricted net assets resulted from costs incurred prior to separation from the Recording Industry Association of America, Inc. (RIAA). The Organization can fully recover these costs from administrative fees withheld on royalties under statutory licenses as described in Note 5. Based on an estimate of future collections, management expects that the deficit will be fully eliminated by March 31, 2007, when the note to RIAA comes due.

8. **Employee Retirement Plan** The Organization maintains a defined contribution retirement plan for eligible employees. All employees who have completed one year of service are eligible for the Plan. The Organization's contributions to the 401(k) plan are determined by the Board of Directors and based on a mix of matching and non-elective safe harbor contribution percentages of eligible employees' annual earnings. Contributions to the employee benefit plan were $55,526 for the year ended December 31, 2005.

9. **Related Party Transactions** Prior to its separate incorporation in September 2003, the Organization operated as an unincorporated division of the Recording Industry Association of America, inc. (RIAA). During the year ended December 31, 2005, the Organization leased space from RIAA under the operating lease mentioned in note 6 and made repayments on the loan to RIAA disclosed in note 5.

10. **Supplemental Disclosure of Cash Flow Information**

Cash paid during the period for interest	$ 13,501
Non cash financing activity:	
Capital lease obligation	$161,260

11. **Material Subsequent Event** The promissory note to RIAA was paid in full on March 22, 2007.

SE 0203627

soundexchange 1330 CONNECTICUT AVE, NW, SUITE 330, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

July 28, 2005

VIA FACSIMILE & CERTIFIED MAIL

Sirius Satellite Radio Inc.
1221 Avenue of the Americas, 36th Floor
New York, NY 10020
Attn: General Counsel

Re: Late Fees Applicable Under SDARS Performance and Ephemeral License Agreement
Dated March 18, 2003
Licensee ID No. 1101

To Whom It May Concern:

A review of the royalty payments from Sirius Satellite Radio Inc. ("Sirius") to SoundExchange, Inc. ("SoundExchange") pursuant to the provisions of the SDARS Performance and Ephemeral License Agreement entered into between Sirius and SoundExchange on March 18, 2003 (the "Agreement"), revealed that Sirius has failed to make five royalty payments by the deadlines specified in the Agreement.

Sections 4.2(b) and (c) of the Agreement provide that Sirius's quarterly royalty payments are due *on or before* the first day of each calendar quarter of 2004 and 2005, respectively. Only in the event that the first day of a calendar quarter falls on a weekend or holiday is payment deferred until the next business day. See Section 4.7.

Under Section 4.6 of the Agreement, "[i]f a Licensee fails to make any payment under this Agreement when due, the Licensee shall pay a late fee on any overdue amount of 0.75% per month, or the highest lawful rate, whichever is lower, from the due date until the date full payment is received by SoundExchange."

We have calculated that Sirius owes late fees totaling $10,500.00. The enclosed spreadsheet details how we arrived at this amount. Please remit a check in the amount of $10,500.00 by no later than August 17, 2005, to satisfy the late fee obligation set forth in Section 4.6 of the Agreement.

Please call me at 202.828.0126 if you have any questions.

Sincerely,

Gary R. Greenstein
General Counsel

SDARS Ex. 28

SE 0022414

CALCULATION OF LATE FEES PAYABLE BY
SIRIUS SATELLITE RADIO INC.

Service	Due date	Calendar Day	Received	Days late	Amount paid	Late fee (.75%)	Late fee per day	Total
SIRIUS	4/1/2004	Thursday	4/5/2004	4	$ 750,000.00	$ 5,625.00	$ 187.50	$ 750.00
SIRIUS	7/1/2004	Thursday	7/6/2004	5	$ 750,000.00	$ 5,625.00	$ 187.50	$ 937.50
SIRIUS	10/1/2004	Friday	10/4/2004	3	$ 750,000.00	$ 5,625.00	$ 187.50	$ 562.50
SIRIUS	4/1/2005	Friday	4/7/2005	6	$ 2,750,000.00	$ 20,625.00	$ 687.50	$ 4,125.00
SIRIUS	7/1/2005	Friday	7/7/2005	6	$ 2,750,000.00	$ 20,625.00	$ 687.50	$ 4,125.00

Total= **$ 10,500.00**

SE 0022415

soundexchange 1330 CONNECTICUT AVE, NW, SUITE 300, WASHINGTON, DC 20036
P: 202.828.0120 F: 202.833.2141
WWW.SOUNDEXCHANGE.COM

July 28, 2005

VIA FACSIMILE & CERTIFIED MAIL

XM Satellite Radio Inc.
1500 Eckington Place, NE
Washington, D.C. 20002
Attn: General Counsel

Re: Late Fees Applicable Under SDARS Performance and Ephemeral License Agreement Dated March 18, 2003
Licensee ID No. 1240

To Whom It May Concern:

A review of the royalty payments from XM Satellite Radio Inc. ("XM") to SoundExchange, Inc. ("SoundExchange") pursuant to the provisions of the SDARS Performance and Ephemeral License Agreement entered into between XM and SoundExchange on March 18, 2003 (the "Agreement"), revealed that XM has failed to make two royalty payments by the deadlines specified in the Agreement.

Section 4.1(c) of the Agreement provides that XM's quarterly royalty payments are due *on or before* the first day of each calendar quarter of 2005. Only in the event that the first day of a calendar quarter falls on a weekend or holiday is payment deferred until the next business day. See Section 4.7.

Under Section 4.6 of the Agreement, "[i]f a Licensee fails to make any payment under this Agreement when due, the Licensee shall pay a late fee on any overdue amount of 0.75% per month, or the highest lawful rate, whichever is lower, from the due date until the date full payment is received by SoundExchange."

We have calculated that XM owes late fees totaling $9,625.00. The enclosed spreadsheet details how we arrived at this amount. Please remit a check in the amount of $9,625.00 by no later than August 17, 2005, to satisfy the late fee obligation set forth in Section 4.6 of the Agreement.

Please call me at 202.828.0126 if you have any questions.

Sincerely,

Gary R. Greenstein
General Counsel

Encl.

SDARS Ex. 29

SE 0022416

SE 0022417

SE 0022417

CALCULATION OF LATE FEES PAYABLE BY
XM SATELLITE RADIO INC.

Service	Due date	Calendar Day	Received	Days late	Amount paid	Late fee (+75%)	Late fee per day	Total
XM	4/1/2005	Friday	4/5/2005	4	$ 3,500,000.00	$ 26,250.00	$ 875.00	$ 3,500.00
XM	7/1/2005	Friday	7/8/2005	7	$ 3,500,000.00	$ 26,250.00	$ 875.00	$ 6,125.00

Total= $ 9,625.00

This exhibit is restricted in its entirety and is therefore omitted from the public version of the exhibit binders.

This exhibit is restricted in its entirety and is therefore omitted from the public version of the exhibit binders.