SX Exhibit 001 DP

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

In the Matter of:	)	
NOTICE AND RECORDKEEPING FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE	)	**Docket No. RM 2005-2**

DECLARATION OF BARRY M. MASSARSKY

I, BARRY M. MASSARSKY, declare:

1. I am President of Barry M. Massarsky Consulting, Inc., an economic consulting firm that provides advisory consulting services to a host of music industry clients relating to music licensing and royalty earnings. I have held this position since 1992, when I founded the firm.

2. As President of Barry M. Massarsky Consulting, I specialize in performing economic analysis, with a particular emphasis on the valuation of licenses to perform copyrighted works. For example, I serve as an economic consultant to the performing rights organization SESAC, in which capacity I have developed state-of-the-art survey and distribution concepts in the Latina radio music field.

3. I have consulted for many copyright owners with interests in the digital music field. I have advised SoundExchange since its inception and, prior to that, the Recording Industry Association of America, Inc. ("RIAA") in its performance of the responsibilities now assumed by SoundExchange.

4. I have testified in Copyright Arbitration Royalty Panel ("CARP") proceedings and provided economic counsel on digital music license initiatives to SoundExchange, RIAA, SESAC, Zomba and BMG. In addition, my firm supports both the RIAA and Motion Picture Association of America ("MPAA") in peer-to-peer (P2P) file sharing litigation.

5. The cases in which I have testified or served as an expert include *United States v. American Soc. of Composers, Authors and Publishers*, 981 F. Supp. 199 (S.D.N.Y. 1997); *Determination of Statutory License Rates and Terms for Certain Digital Subscription Transmissions of Sound Recordings*, Docket No. 96-5 CARP DSTRA, Copyright Office, Library of Congress; *Zomba Recording Corp. v. MP3.Com, Inc.*, Nos. 00 Civ. 6831 and 00 Civ. 6833, 2001 WL 770926 (S.D.N.Y. Jul 10, 2001); *Major Bob Music v. MP3.Com, Inc.*, No. 1:01-cv-04036-JSR (S.D.N.Y. 2001); *Country Road Music v. MP3.Com, Inc.*, No. 1:02-cv-08006-JSR (S.D.N.Y. 2003); *Fonomusic, Inc. v. MP3.com, Inc.*, No. 1:02-cv-08617-JSR (S.D.N.Y. 2003); *Arista Records Inc. v. Launch Media, Inc.*, No. 1:01-cv-04450-RO (S.D.N.Y. 2004); and *Motown Record Co., L.P. v. iMesh.Com, Inc.*, No. 03 Civ. 7339, 2004 WL 503720 (S.D.N.Y. Mar 12, 2004).

6. Before I started my consulting firm, I worked for the American Society of Composers, Authors and Publishers ("ASCAP"), the world's largest performing rights organization, from 1981 to 1992. I started at ASCAP as an Economist and in 1987 was promoted to Senior Economist. At ASCAP, I coordinated the services of ASCAP's outside survey consultants and helped to design, analyze, review, and apply ASCAP's survey results.

7. Between 1977 and 1979, I worked as an economic consultant to the U.S. Department of Justice, conducting economic analyses pertinent to the federal government's antitrust suit against IBM.

8. I received my Bachelor of Arts, *cum laude*, from Boston University in 1977 and a Masters of Business Administration from Cornell University in 1981.

9. I have authored "The Operating Dynamics behind ASCAP, BMI and SESAC, the U.S. Performing Rights Societies," which appeared in *Technological Strategies for Protecting Intellectual Property in the Networked Multimedia Environment*, Vol. 1, Issue 1, 217-25 (January 1994).

Analysis

10. I understand that the Copyright Royalty Board has asked "Could a system of webcast sampling, analogous to the sampling performed by performing rights societies in the context of broadcasting, meet the record-of-use requirements of 17 U.S.C. § 114(f)(4)(A) and 112(e)(4)?" I have been asked to help answer that question by comparing a sample analysis of a statutory licensee's reports of use with the full census reporting provided by the licensee in order to determine the difference, if any, between the performances that would be captured using a sample versus full census reporting.

11. For this analysis, I considered the sound recordings performed under the 17 U.S.C. § 114 license during a ninety-day period by a webcaster that plays a wide variety of music, spanning multiple music genres and a diversity of artists and titles within each genre, which in my experience is typical of many webcasters. This webcaster provides SoundExchange with quarterly reports of use that identify sound recordings the webcaster performed during the quarter, *i.e.*, census reports of use.[1]

12. I identified a recent census report of use from the webcaster. The report covers the three-month period January 1 to March 31, 2005 (hereinafter "Census Period").

13. To obtain samples from that census report of use, I considered the sampling periods that ASCAP would likely rely upon under its experimental Internet licenses. For Internet radio, ASCAP prescribes a sample of at least one week per quarter (three months) for webcasters that pay $10,000 or more to ASCAP annually, and a sample of the first three days of each quarter for webcasters that pay less than $10,000 to ASCAP annually. *See* ASCAP Experimental Licensing Agreement for Internet Sites & Services, Release 5.0, § 9(g), available at http://www.ascap.com/weblicense/release5.0.pdf. I also understand that some webcasters in this proceeding have advocated for sample periods of one or three days per year.

[1] I have been instructed not to disclose the identity of the webcaster absent an order from the Copyright Royalty Board.

14. Based upon the ASCAP sampling method and the comments of other commenting parties, I examined the percentage of sound recordings performed during the Census Period that were captured in (a) a sample period of one day of the Census Period, (b) a sample period of the first three days of the Census Period, (c) a sample period of three non-consecutive days of the Census Period, and (d) a sample period of seven days of the Census Period.

15. To randomly determine the starting dates of the sample periods, Analyst Elon Altman in my office, at my direction, utilized a computer randomization program on Microsoft Excel. Using the RANDBETWEEN function, the program randomly selected numbers that corresponded to the starting dates of the sample periods within the first quarter of 2005. The sample periods that resulted from the computerized randomization are as follows:

- One day, January 31, 2005
- Three non-consecutive days, January 6, January 18, and February 20, 2005
- One week, January 5-11, 2005

I also identified the first three consecutive days of the Census Period January 1-3, 2005 as an additional sample period.

Comparison of Data from Full Census Period with Data from Sample Periods

16. At my direction, SoundExchange Licensing and Repertoire Specialist Jonathan Sowers loaded the sound recording performance data in the webcaster's full census report — title of sound recording, name of artist, name of record label — into a Microsoft Access database as a data set.[2] Mr. Sowers then wrote queries that instructed Access to sort the data by artist, label, and sound recording, and to display the total number of each artist's and each label's sound recordings performed during the period.[3]

[2] Mr. Sowers loaded the data "as is," and SoundExchange did not undertake to "clean up" the data, i.e., to correct for misspellings, duplicates and the like.

[3] Mr. Sowers, rather than an employee of my firm, performed these tasks because SoundExchange maintains possession and control of the webcaster's report of use.

17. At my direction, Mr. Sowers wrote queries that instructed Access to extract data sets corresponding to each of the sample periods from the Census Period data set. Once the sample periods were extracted, Mr. Sowers programmed Access to perform the same function on the data for each sample period that it performed on the data for the full Census Period, *viz.*, to sort the data by artist and label and to display the total number of each artist's and label's sound recordings performed during the period.

18. Again at my direction, Mr. Sowers wrote queries that instructed Access to compare the data for each sample period to the Census Period data in order to calculate (a) the percentage of record labels whose sound recordings were actually performed in the Census Period but who were omitted from each sample period, (b) the percentage of artists whose sound recordings were actually performed in the Census Period but who were omitted from each sample period, and (c) the percentage of artists selected in each sampling period who would be over- or under-paid royalties in comparison to the royalty allocation they would receive if royalties were allocated for the entire Census Period. The results are displayed in an Excel spreadsheet that I have attached to this Declaration as Exhibit 1.

Record Labels and Artists Omitted From Samples

19. As displayed in the spreadsheet, the one-day sample period omitted two-thirds (66.99%) of the record labels whose sound recordings were performed during the Census Period, and captured only one-third (33.01%) of the record labels whose sound recordings were performed during the Census Period.

20. The one-day sample period omitted more than two-thirds (70.13%) of the recording artists whose sound recordings were performed during the Census Period, and captured only 29.87% of the recording artists whose sound recordings were performed during the Census Period. The one-day sample period for the Census Period would result in over 22,000 artists not receiving any royalties.

21. The sample period of the first three days of the Census Period omitted 45.88% of the record labels whose sound recordings were performed during the Census Period, and captured only 54.12% of the record labels whose sound recordings were performed during the Census Period.

22. The sample period of the first three days of the Census Period omitted 48.16% of the recording artists whose sound recordings were performed during the Census Period, and captured only 51.84% of the recording artists whose sound recordings were performed during the Census Period. This three-day sample period would result in over 15,000 artists not receiving any royalties.

23. The three non-consecutive-day sample period omitted nearly half (45.25%) of the record labels whose sound recordings were performed during the Census Period, and captured only 54.75% of the record labels whose sound recordings were performed during the Census Period.

24. The three non-consecutive-day sample period omitted an even greater percentage of recording artists whose sound recordings were performed during the Census Period (47.92%), and captured only 52.08% of the recording artists whose sound recordings were performed during the Census Period. As with the sample from the first three days of the Census Period, this sample would still result in over 15,000 artists not receiving any royalties.

25. The seven-day sample period omitted 29.71% of the record labels whose sound recordings were performed during the Census Period, and captured only 70.29% of the record labels whose sound recordings were performed during the Census Period.

26. The seven-day sample period omitted an even greater percentage of recording artists whose sound recordings were performed during the Census Period (31.33%), and captured only 68.67% of the recording artists whose sound recordings were performed during the Census Period. Even the seven-day sample period would result in nearly 10,000 artists not being paid any royalties.

27. The Census Period necessarily captured 100% of the artists and 100% of the labels whose sound recordings were performed during the sample period.

28. Mr. Sowers prepared two Excel graphs that chart the results displayed in the spreadsheet. The graphs are attached as Exhibits 1 and 2 to this Declaration. The first graph shows the change in the percentage of record labels captured from the Census Period through the various sample periods. The second graph shows the change in the percentage of recording artists captured from the Census Period through the various sample periods.

Artists Who Would Be Underpaid

29. As one moves from allocating royalties on a census basis to a sample basis, a greater percentage of labels and artists will be overpaid royalties vis-à-vis the allocation they would have received through census allocation. This is basic math. As fewer people share in a constant sum of royalties, their relative shares are likely to increase. However, the number of unpaid labels and artists also increases as one moves away from census reporting, so the further one moves away from census reporting and allocation the greater the deviation from the relative shares the parties should have received based upon the actual usage of sound recordings under statutory license. Sample reporting will increase the number of completely unpaid artists and overcompensate the few artists who receive royalties.

30. As displayed in Exhibit 1, using the one-day sample period would result in 20.44% of recording artists whose works were actually performed being underpaid.[4]

31. Using the sample period of the first three days of the Census Period would result in 33.75% of those recording artists being underpaid.

32. Using the three non-consecutive-day sample period would result in 36.26% of those recording artists being underpaid.

[4] The percentage of artists who would be underpaid does not include the artists who would not be paid at all because they were not included in the sample. *See* Ex. A, note.

33. Using the seven-day sample period of would result in 38.45% of those recording artists being underpaid.

Conclusions

34. I am not surprised that the sample periods failed to identify many unique labels and artists whose works were actually performed during the Census Period. In webcast streaming of sound recordings, variability is very high. Services operating under the section 114 statutory license are permitted to perform any sound recording lawfully released in the United States, which necessarily means that their playlists can be extraordinarily broad. And webcaster playlists in fact tend to be far broader than those of terrestrial radio stations. This wider pattern of programming frustrates accurate sampling because samples such as those I have analyzed above do not adequately represent the universe from which they are drawn.

35. Sampling of the type outlined above would, in my opinion, result in large numbers of labels — and, in particular, artists — being underpaid or not paid at all. In my opinion, a census of sound recording digital performance data, rather than sampling analogous to that of ASCAP, is necessary to accurately identify the copyright owners and artists whose sound recordings have been performed and are entitled to royalties under the statutory license.

36. Simply because performing rights organizations such as ASCAP accept sample reporting does not necessarily mean that such reporting is statistically valid for allocating the royalties payable by services operating under the section 114 statutory license. An essential concern with any sampling theory is the variability of observed units within the population frame. A sample must adequately mirror the universe from which it is drawn. In the case of statutory webcasting, where variability is so high, a sample is unlikely to mirror the universe from which the recordings are drawn.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of August, 2005, in Washington, D.C.

Barry M. Massarsky

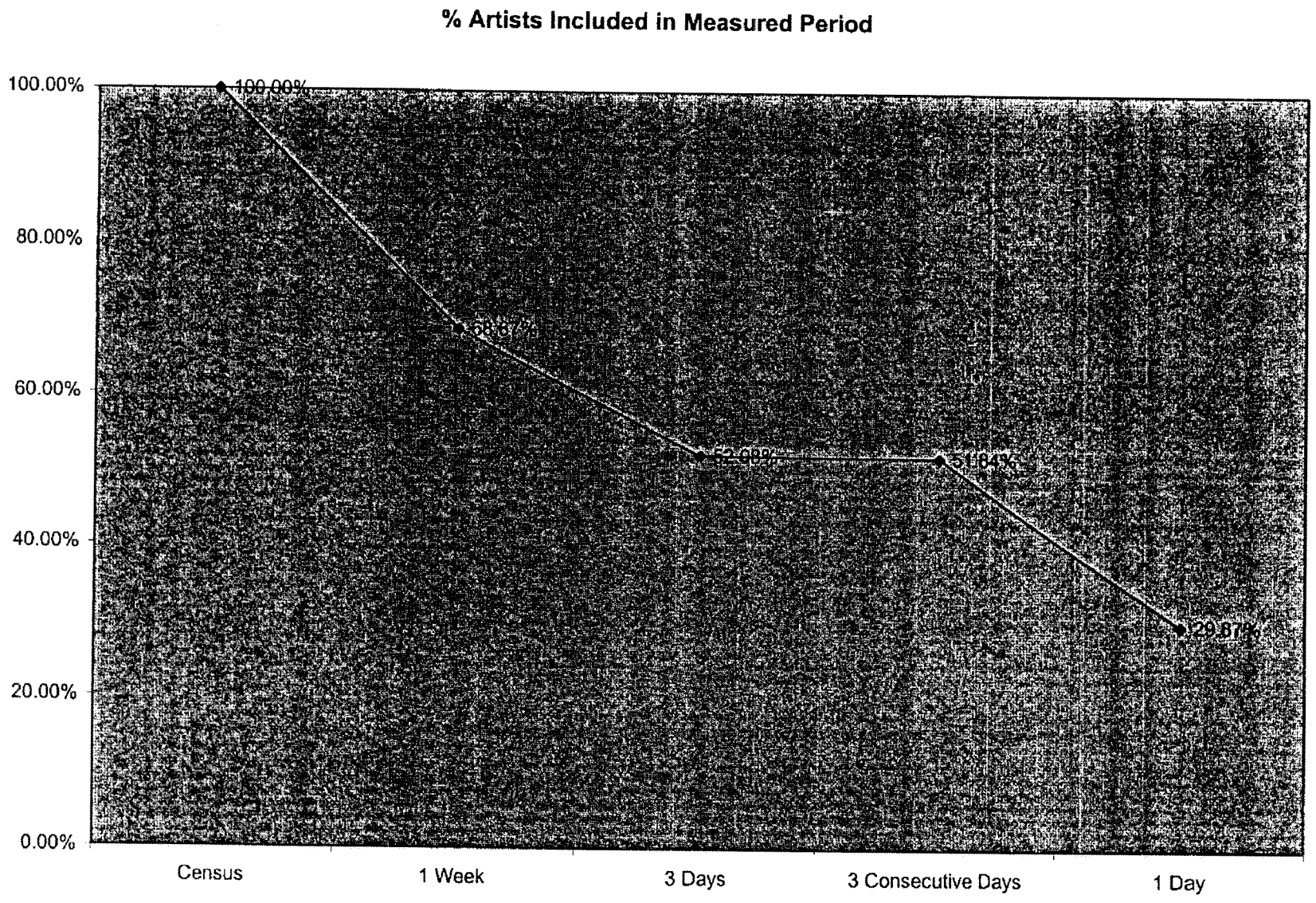
Artists

Measured Period	Dates	Artists	Artists Dropped	% Artists Included	% Artists Dropped	% of Artists Underpaid**	% of Artists Overpaid**
Census	01/01/05 - 03/31/05	31,713	-	100.00%	0.00%	0.00%	0.00%
1 Day	1/31/2005	9,474	22,239	29.87%	70.13%	20.44%	79.56%
3 Consecutive Days	1/1/05-1/3/05	16,441	15,272	51.84%	48.16%	33.75%	66.25%
3 Days	1/6/05, 1/18/05, 2/20/05	16,516	15,197	52.08%	47.92%	36.26%	63.74%
1 Week	1/5/05-1/11/05	21,778	9,935	68.67%	31.33%	38.45%	61.55%

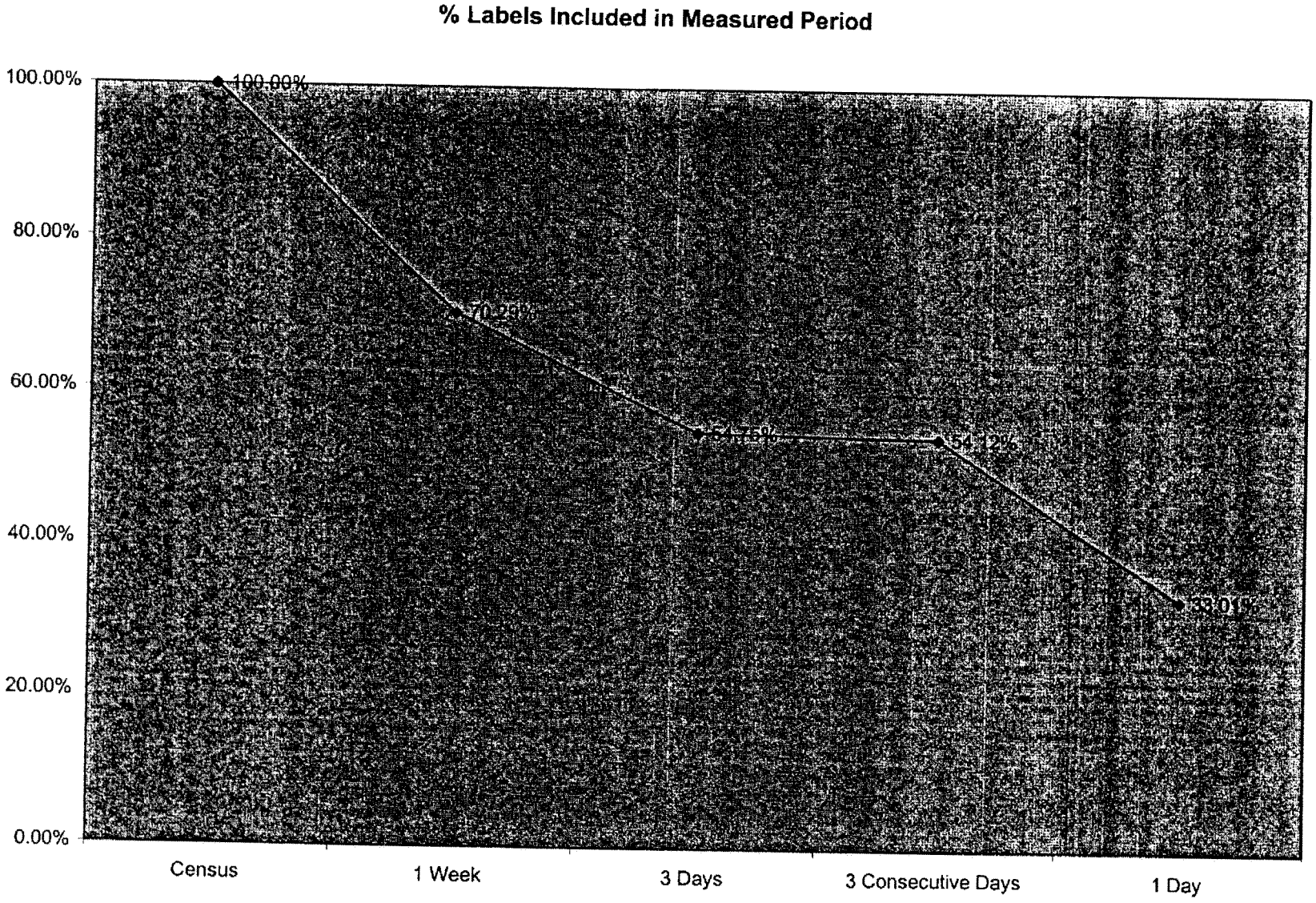
Labels

Measured Period	Dates	Labels	Labels Dropped	% Labels Included	% Labels Dropped	% of Labels Underpaid**	% of Labels Overpaid**
Census	01/01/05 - 03/31/05	13,576	-	100.00%	0.00%	0.00%	0.00%
1 Day	1/31/2005	4,481	9,095	33.01%	66.99%	27.94%	72.06%
3 Consecutive Days	1/1/05-1/3/05	7,347	6,229	54.12%	45.88%	37.63%	62.37%
3 Days	1/6/05, 1/18/05, 2/20/05	7,433	6,143	54.75%	45.25%	43.36%	56.64%
1 Week	1/5/05-1/11/05	9,543	4,033	70.29%	29.71%	37.09%	62.91%

** Percentages of artists and labels under- or overpayed in the measured periods do not reflect those that dropped out of the survey entirely for that period.


% Artists Included in Measured Period
100.00%
80.00%
60.00%
40.00%
20.00%
0.00%
100.00%
58.87%
52.00%
51.64%
29.87%
Census
1 Week
3 Days
3 Consecutive Days
1 Day

3


% Labels Included in Measured Period
100.00%
80.00%
60.00%
40.00%
20.00%
0.00%
100.00%
70.29%
54.2%
33.01%
Census
1 Week
3 Days
3 Consecutive Days
1 Day