PUBLIC VERSION

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

WRITTEN REBUTTAL STATEMENT OF SOUNDEXCHANGE, INC.

Volume 1 of 2

David A. Handzo (DC Bar 384023)
Thomas J. Perrelli (DC Bar 438929)
Mark D. Schneider (DC Bar 385989)
Michael B. DeSanctis (DC Bar 460961)
Jared O. Freedman (DC Bar 469679)
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(v) (202) 639-6000
(f) (202) 639-6066
dhandzo@jenner.com
tperrelli@jenner.com
mschneider@jenner.com
mdesanctis@jenner.com
jfreedman@jenner.com

Counsel for SoundExchange, Inc.

July 24, 2007

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

INTRODUCTORY MEMORANDUM TO THE WRITTEN REBUTTAL CASE OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, respectfully submits this Introductory Memorandum to its written rebuttal case in accordance with 37 C.F.R. § 351.4 and § 351.11. This Memorandum will describe the contents of SoundExchange's written rebuttal case and briefly summarize the testimony of its witnesses.

CONTENTS OF SOUNDEXCHANGE'S WRITTEN REBUTTAL CASE

Volume 1 contains: (A) this Introductory Memorandum; (B) SoundExchange's Amended Rate Proposal; (C) an Index of SoundExchange's Written Rebuttal Testimony; (D) an Index of the Exhibits to SoundExchange's Written Rebuttal Testimony; (E) the Declaration and Rule 11 Certification of Michael DeSanctis, attaching a redaction log, as required by Section 10 of the Protective Order in this proceeding; and (F) a Certificate of Service. Volume 1 also contains the written rebuttal testimony of SoundExchange's four witnesses, and the exhibits to SoundExchange's rebuttal case. Exhibits with the suffix "RR" ("Rebuttal Restricted") have been marked as Restricted pursuant to the Protective Order, and exhibits with the suffix "RP" ("Rebuttal Public") do not contain Restricted information.

Volume 2 contains the written rebuttal testimony and exhibits, oral rebuttal testimony, oral rebuttal cross-examination testimony, and exhibits admitted on rebuttal cross-examination of SoundExchange witness Michael Pelcovits from Docket No. 2005-1 CRB DTRA, which SoundExchange is designating in this proceeding pursuant to 37 C.F.R. § 351.4(b)(2).

Pursuant to 37 C.F.R. § 350.4(a), § 351.4, and the Copyright Royalty Board's Orders dated August 18, 2006 and September 28, 2006, SoundExchange is filing an original, five copies, and an electronic copy of the materials in Volumes 1 - 5. SoundExchange will also file public versions of its written rebuttal case pursuant to the terms of the Protective Order.

SUMMARY OF THE WRITTEN TESTIMONY OF SOUNDEXCHANGE'S REBUTTAL WITNESSES

SoundExchange's written rebuttal case includes the written testimony of the following expert and fact witnesses.

A. Expert Witnesses

Michael Pelcovits, Ph.D., submitted testimony in SoundExchange's direct case, and submits rebuttal testimony to address claims made by Dr. Tasneem Chipty on behalf of XM Satellite Radio Inc. ("XM"), Sirius Satellite Radio Inc. ("Sirius") and MTV Networks ("MTVN") (collectively, "the Services"). Dr. Pelcovits testifies that the Services' benchmarks based on musical works rates and the 2003 Pre-existing Subscription Services ("PSS") rate for the performance of sound recordings are poor benchmarks because, among other things, they are not market rates. Finally, Dr. Pelcovits provides testimony in support of SoundExchange's amended rate proposal, which responds to information contained in the Service's direct case about the structure of the market and their arrangements with the satellite and cable television providers.

B. Fact Witnesses

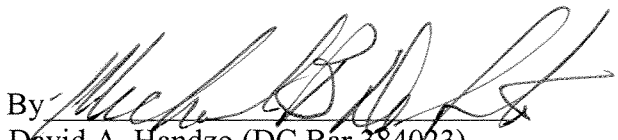
Mark Eisenberg is Senior Vice President, Business and Legal Affairs, Global Digital Business Group, at SONY BMG Music Entertainment ("SONY BMG"). In response to the Services' use of the musical works rate as a benchmark, Mr. Eisenberg explains the completely different markets and market structure of sound recordings and musical works. He provides market data concerning the higher rates that sound recording copyright owners receive, when compared to musical works copyright owners, in every market where blanket licenses for those two distinct goods are negotiated. In every case, sound recording copyrights are valued several times more highly than the musical works copyright, or the royalty structures in the different markets are so different that they defy meaningful comparison. Mr. Eisenberg also discusses the gross margin that Sony BMG makes on CD sales and the way in which that margin affects the license rates for a service that is known to substitute for CD sales.

Charles Ciongoli is Senior Vice President, Finance, for Universal Music Group, Inc. ("UMG") and has knowledge of the finances of both UMG's U.S. record label and music publishing operations. He rebuts the Services' proposed musical works benchmark. His testimony discusses the fundamental differences between the sound recording and music publishing businesses that render attempts to equate the two inapt. Whereas record companies engage in the vast majority of investment in finding and developing talent and creating, marketing, and distributing copyrighted sound recordings -- from which both record companies and musical publishers benefit -- music publishers engage in little such investment. Using actual financial data, he shows that UMG's record label operations involve much greater levels of investment and risk than Universal Publishing's music publishing operations. This market structure explains, in part, why in virtually every market sound recording copyright owners

receive significantly greater compensation than musical works copyright owners. As Mr. Ciongoli testifies, that fact reflects the relative roles of the two copyright owners in the distribution of music. Record companies take the major risks, make the vast majority of the investment, and commensurately receive higher royalty rates. By contrast, music publishers ride on the coattails of record companies and earn lower royalty rates to offset their much lower costs.

Barrie L. Kessler is Chief Operating Officer of SoundExchange. Her testimony responds to the proposed terms submitted by the Services. She testifies that with regard to late fees, confidentiality, and audits and verification of payments, SoundExchange proposes that the Court adopt terms that are substantially similar to the terms adopted in Docket No. 2005-1 CRB DTRA. She explains that consistency of terms across licenses will make SoundExchange's administration the Services' compliance with the licenses simpler and more efficient. Ms. Kessler also explains that obtaining census reporting is critical to the accurate collection and distribution of royalties, and that under the statutory license the Services' should be required to report all sound recordings played on all channels.

Respectfully submitted,



By _____
David A. Handzo (DC Bar 384023)
Thomas J. Perrelli (DC Bar 438929)
Mark D. Schneider (DC Bar 385989)
Michael B. DeSanctis (DC Bar 460961)
Jared O. Freedman (DC Bar 469679)
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(v) 202.639-6000
(f) 202.639-6066
dhandzo@jenner.com
tperrelli@jenner.com
mschneider@jenner.com
mdesanctis@jenner.com
jfreedman@jenner.com

Counsel for SoundExchange, Inc.

July 24, 2007

BEFORE THE
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

AMENDED RATE PROPOSAL OF SOUNDEXCHANGE, INC.

Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, hereby proposes the following rates for (1) the digital audio transmission of sound recordings ("the Digital Audio Service") by new subscription services for transmission by a satellite or cable television service to its residential customers ("New Television Services" or "Services") that will be operating under the statutory licenses set forth in 17 U.S.C. § 114(d)(2)(C), pursuant to 17 U.S.C. § 114(f)(2)(c); (j)(8); and (2) the making of ephemeral phonorecords necessary to facilitate transmissions by the New Television Services, 17 U.S.C. § 112(e), during the period January 1, 2006 through December 31, 2010.

The Services shall not include any services provided by these or any other companies to the extent that the activity of such companies falls within the statutory definition set out in 17 U.S.C. § 114(j)(10) or (11), or are set in other rate proceedings. Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange reserves the right to alter or amend its rate proposal prior to or at the time of submission of findings and conclusions if warranted by the record.

I. ROYALTY RATES

Each New Television Service shall pay a monthly fee ("Royalty") (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e) license for making ephemeral copies) as follows:

1) The Royalty Amount. For each month, the Royalty shall equal the greater of:

(i) 30% of all revenue paid or payable to the New Television Services from a satellite or cable television service for distribution of the Digital Audio Service to the satellite or cable television service's residential customers; or

(ii) a per month charge for each residential customer who subscribes to the underlying cable or satellite television service and receives the Digital Audio Service, as follows:

2006: $.071 (retroactive to the inception of the service)
2007: $.078
2008: $.086
2009: $.095
2010: $1.05

2) Subscriber. For purposes of the calculation of the royalty amount set out in (1) above, a "residential customer who subscribes to the underlying cable or satellite television service and receives the Digital Audio Service" means a residential customer who subscribes for all or for any part of the month, or to whom the Digital Audio Service is otherwise delivered without a fee (e.g., during a free trial period).

3) CPI Increases. Each year of the license period, beginning on January 1, 2008, the per month charges set out above shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments

are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

4) Allocation of Royalty Payments. To the extent that more than one digital audio service is providing digital audio services to the same underlying cable or satellite television service, the New Television Services subject to this statutory license will pay a proportionate share established by a ratio of the number of channels the New Television Service is offering divided by the total number of channels of digital audio services offered on the underlying cable or satellite television service.

5) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the New Television Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

6) Minimum Annual Fee. There shall be a recoupable but non-refundable minimum annual fee for each eligible New Television Service during the year of $100,000.00. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions during January but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license.

II. TERMS

SoundExchange proposes terms as described in the written direct and rebuttal statements of Barrie Kessler, including many of the terms adopted by this Court in Docket No. 2005-1 CRB DTRA, and implemented at 37 C.F.R § 380. Sound Exchange will seek

to stipulate to as many terms as possible with XM, Sirius and MTVN and, in any event, will submit a complete set of proposed terms. Pursuant to Section 351.4(a)(3), SoundExchange reserves the right to propose alternative or additional terms prior to or at the time of submission of findings and conclusions if warranted by the record.

Respectfully submitted,

David A. Handzo (DC Bar 384023)
Thomas J. Perrelli (DC Bar 438929)
Mark D. Schneider (DC Bar 385989)
Michael B. DeSanctis (DC Bar 460961)
Jared O. Freedman (DC Bar 469679)
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(tel.) 202-639-6000
(fax) 202-639-6066
dhandzo@jenner.com
tperrelli@jenner.com
mschneider@jenner.com
mdesanctis@jenner.com
jfreedman@jenner.com

Counsel for SoundExchange, Inc.

Dated: July 24, 2007

Index of Witness Statements

Tab	Witness	Title
1	Michael Pelcovits	Principal, Microeconomic Consulting & Research Associates, Inc.
2	Mark Eisenberg	Senior Vice President, Business and Legal Affairs, Global Digital Business Group, Sony BMG Music Entertainment
3	Charles Ciongoli	Executive Vice President and Chief Financial Officer, Universal Music Group North America
4	Barrie Kessler	Chief Operating Officer, SoundExchange, Inc.

Index of SoundExchange Exhibits

Restricted exhibits, which are identified by the suffix "RR," are not included in the Public Version of SoundExchange's Rebuttal Case

Exhibit No.	Sponsored By	Description
SX Exhibit 201 RR	Pelcovits	MTVN agreement with Everest Connections, LLC
SX Exhibit 202 RR	Pelcovits	MTVN agreement with Grande Communications Networks, Inc.
SX Exhibit 213 RR	Ciongoli	Universal Music Group US Only Income Statement, 1999-2006 Actuals
SX Exhibit 214 RR	Ciongoli	Universal Music Publishing Group, US - Publishing, Full Year Historical Results and Historial Overhead Expense, 1999-2006
SX Exhibit 253 RR	Eisenberg	Amendment No. 3 to Sony BMG Digital Download Sales Agreement with Sprint Spectrum L.P. (Mar. 25, 2007)
SX Exhibit 254 RR	Eisenberg	Amendment No. 4 to the Nov. 5, 2004 letter agreement between Verizon and Sony BMG (Apr. 27, 2007)
SX Exhibit 256 RR	Eisenberg	Ringtones agreement between Sony BMG and Alltel Communications, Inc. (SE 0000617 et seq.) (Nov. 7, 2006)
SX Exhibit 257 RR	Eisenberg	Ringtones agreement between Sony BMG and Helio LLC (SE 0001138 et seq.) (Dec. 22, 2006)
SX Exhibit 258 RR	Eisenberg	Video license agreement between Sony BMG and Yahoo! Inc. (SE 0005328 et seq.) (June 16, 2005)

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

DECLARATION AND RULE 11 CERTIFICATION
OF MICHAEL B. DESANCTIS

I am counsel for SoundExchange, Inc. ("SoundExchange") in Docket Nos. 2006-1 CRB DSTRA and 2005-5 CRB DTNSRA, and respectfully submit this declaration and certification pursuant to Rule 350.4(e)(1) per the terms of the Protective Order issued December 20, 2006 ("Order").

1. I have reviewed the written rebuttal statement, designated testimony, and exhibits submitted by SoundExchange in this proceeding.

2. I have also reviewed the definitions and terms provided in the Order.

3. As I discuss below, and after consultation with my clients, portions of SoundExchange's written rebuttal testimony, exhibits, and designated testimony contain information that is "Protected Material" as defined by the Order.

4. Such Protected Material includes, but is not limited to testimony and exhibits involving (a) contracts, contractual terms or contract strategy that are proprietary, not available to the public, commercially sensitive and, at times, are subject to express confidentiality provisions with third parties; and (b) highly confidential business information,

financial projections, financial data, and competitive strategy that are proprietary, not available to the public, and commercially sensitive.

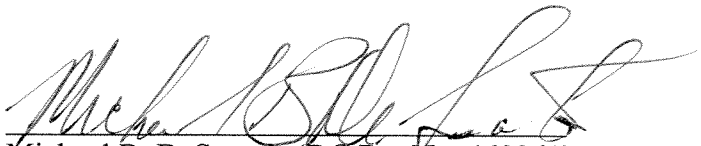
5. If this commercial or financial information were to become public, it would provide an unfair competitive advantage to the witnesses' competitors and entities with whom they do business (some, but certainly not all, of whom are parties to this proceeding). Public disclosure of this information would place SoundExchange and those it represents at a significant commercial disadvantage and would seriously jeopardize their business interests.

6. SoundExchange also has submitted designated testimony from Docket No. 2005-1 CRB DTRA from economist Michael Pelcovits. This testimony and the accompanying exhibits include detailed discussion of commercial and financial information related to digital license agreements entered into by SoundExchange members, and detailed discussion of SoundExchange's confidential business practices. This testimony and accompanying exhibits were and remain Restricted in Docket No. 2005-1, and include information that is proprietary, not known to the public, and commercially sensitive.

7. The commercial and financial information in the exhibits and designated testimony is proprietary, not known to the public, and commercially sensitive. It must be treated as "Protected Material" in order to prevent certain business and competitive harm that would result from the disclosure of such information while, at the same time, enabling SoundExchange to provide the Copyright Royalty Board with the most complete record possible on which to base its determination in this proceeding.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: July 24, 2007



Michael B. DeSanctis (DC Bar No. 460961)
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005
Tele: (202) 639-6000
Fax: (202) 639-6066
mdesanctis@jenner.com

Counsel for SoundExchange, Inc.

Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

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

SOUNDEXCHANGE REDACTION LOG FOR WRITTEN REBUTTAL STATEMENT, EXHIBITS, AND DESIGNATED TESTIMONY

SoundExchange Written Direct Statement and Exhibits Redaction Log

Witness	Pages, Exhibits	Description
Ciongoli, Charles	Page 6, last paragraph; Page 7, first paragraph; Page 7, Figure 1; Page 8, second full paragraph; Page 9, Figure 2; Page 10, first paragraph (carried over from page 9); Page 10, Figure 3; Page 10, last paragraph; Page 11, first paragraph; Page 12, Figure 4	Restricted financial information concerning UMG record label expenditures and Universal Music Publishing Group expenditures
	SX Exhibit 213 RR, SX Exhibit 214 RR	Restricted financial information concerning UMG Record Labels' and Universal Music Publishing Group's income and expenses
Eisenberg, Mark	Page 5, table; Page 5, note 3; page 6, first paragraph (carried over from page 5); Page 6,	Restricted financial information concerning confidential agreements

	table; Page 6, last paragraph (carried over onto page 7); Page 7, second full paragraph; page 10, last full paragraph; Page 11, first paragraph (carried over from page 10).	between SONY BMG and digital services and between music publishers and these same services.
	Page 12, last paragraph	Restricted financial information concerning Sony BMG's gross margins and costs associated with the sales of CDs.
	SX Exhibit 253 RR, SX Exhibit 254 RR, SX Exhibit 256 RR, SX Exhibit 257 RR, SX Exhibit 258 RR	Restricted commercial and financial information in agreements between Sony BMG and digital services for use of sound recordings
Pelcovits, Michael		All restricted information in this testimony is information marked as Restricted by the Services pursuant to the Protective Order in this proceeding

SoundExchange Designated Testimony Redaction Log

Witness	Pages, Exhibits	Description
Pelcovits, Michael	**Designated prior written testimony:**	
	Page 4, table	Restricted information on fees that SONY BMG gets for its sound recordings and musical works in other digital markets.
	Page 6, first full paragraph, last paragraph	Restricted information concerning the current fee the SDARS pay for sound recordings

	Page 14, first paragraph, second sentence and last sentence carried over onto page 15	Restricted commercially sensitive financial information on sources of SoundExchange's revenues
	Page 15, last paragraph, first sentence	Restricted information concerning the terms of agreements from the four major record companies for use of their sound recordings.
	Page 28, last paragraph, carried over onto page 29.	Restricted information concerning the rates the record labels receive in agreements for use of their sound recordings.
	Designated exhibits to prior written testimony:	
	SX Exhibit 001 RR, SX Exhibit 002 RR, SX Exhibit 003 RR, SX Exhibit 004 RR, SX Exhibit 005 RR, SX Exhibit 006 RR, SX Exhibit 007 RR, SX Exhibit 008 RR, SX Exhibit 008 RR, SX Exhibit 010 RR, SX Exhibit 011 RR, SX Exhibit 012 RR, SX Exhibit 013 RR, SX Exhibit 014 RR, SX Exhibit 015 RR, SX Exhibit 016 RR, SX Exhibit 017 RR	Restricted commercial and financial information contained in agreements between different labels and services for use of sound recordings
	SX Exhibit 026 RR	Information restricted by a Webcaster under the Protective Order in effect in Docket No. 2005-1 CRB DTRA. (Also submitted by XM in 2006-1: XMCRB 00033076) Certain information designated as Restricted by other parties in Docket No.

		2005-1 CRB DTRA was redacted pursuant to the terms of the Protective Order in that proceeding.

CERTIFICATE OF SERVICE

I, Albert Peterson, hereby certify that a copy of the public version of the foregoing filing has been served this 27th day of July, 2007 by hand delivery to the following persons:

R. Bruce Rich
WEIL, GOTSHAL & MANGES LLP
767 5th Ave.
New York, New York 10153
(P) 212/310-8170
(F) 212/310-8007
r.bruce.rich@weil.com
Counsel for XM Satellite Radio, Inc.

Bruce G. Joseph
Karyn K. Ablin
WILEY REIN LLP
1776 K Street NW
Washington, D.C. 20006
(P) 202/719-7258
(F) 202/719-7049
bjoseph@wileyrein.com
kablin@wileyrein.com
Counsel for Sirius Satellite Radio, Inc.

Kenneth L. Steinthal
WEIL GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, California 94065
(P) 650/802-3081
(F) 212/310-8007
kenneth.steinthal@weil.com
Counsel for MTV Networks

Albert Peterson