

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

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In the matter of:

The Digital Performance  
Right in Sound Recordings | Docket No.  
and Ephemeral Recordings | 2005-1 CRB DTRA

(Webcasting Rate  
Adjustment Proceeding)  
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Volume 14

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Washington, D.C. 20540

Tuesday,  
June 6, 2006

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

BEFORE:

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

APPEARANCES

On Behalf of Sound Exchange

DAVID A. HANDZO, ESQ

JARED O. FREEDMAN, ESQ

PAUL M. SMITH, ESQ

Jenner & Block

601 Thirteenth Street, N.W.

Suite 1200 South

Washington, D.C. 20005

(202) 639-6060

dhandzo@jenner.com

GARY R. GREENSTEIN, ESQ

General Counsel

SoundExchange

1330 Connecticut Avenue, N.W.

Suite 330

Washington, D.C. 20036

(202) 828-0126

greenstein@soundexchange.com

On Behalf of National Public Radio  
Inc. (NPR), NPR Member Stations, CPB-  
Qualified Public Radio Stations

DENISE B. LEARY, ESQ

635 Massachusetts Ave., NW

Washington DC 20001

202.513.2049

dleary@npr.org

(202) 513-2049

On Behalf of Collegiate Broadcasters  
Inc. (CBI)

WILL ROBEDEE

6100 South Main Street

MS-529

Houston TX 77005

(713) 348-2935

willr@ktru.org

On Behalf of Royalty Logic, Inc.

KENNETH D. FREUNDLICH, ESQ.  
Schleimer & Freundlich, LLP  
9100 Wilshire Boulevard  
Suite 615 - East Tower  
Beverly Hills, California 90212  
(310) 273-9807  
kfreundlich@earthlink.com

On Behalf of Intercollegiate  
Broadcasting System Inc., Harvard Radio  
Broadcasting Co. Inc.

WILLIAM MALONE, ESQ  
Miller & Van Eaton PLLC  
1155 Connecticut Ave., NW  
#1000  
Washington DC 20036-4306  
202.785.0600  
wmalone@millervaneaton.com

On Behalf of Digital Media Assoc.  
(DiMA), AOL, Live365, Microsoft Corp.,  
Yahoo! Inc., National Public Radio

KENNETH L. STEINTHAL, ESQ  
Weil Gotshal & Manges LLP

201 Redwood Shores Parkway  
Redwood Shores CA 94065  
(650) 802-3100  
kenneth.steinthal@weil.com

KRISTIN KING BROWN, ESQ  
Weil Gotshal & Manges

1300 Eye Street, N.W.  
Suite 900  
Washington, D.C. 20005  
(202) 682-7024

On Behalf of AccuRadio, Discombobulated LLC,  
Digitally Imported Inc., myradio.com LLC,  
Radioio.com LLC, Radio Paradise Inc., 3WK  
LLC, Educational Media Foundation

DAVID D. OXENFORD, ESQ  
Davis Wright Tremaine LLP  
1500 K Street, N.W., Suite 450  
Washington DC 20005  
202.508.6656  
davidoxenford@dwt.com

On Behalf of The National Religious  
Broadcasters Noncommercial Music License  
Committee, Bonneville International Corp.,  
Clear Channel Communications Inc., Salem  
Communications Corp., Susquehanna Radio  
Corp., The National Religious Broadcasters  
Music License Committee

BRUCE G. JOSEPH, ESQ  
KARYN ABLIN, ESQ  
MATT ASTLE, ESQ  
MARGARET RYAN, ESQ  
SETH WOOD, ESQ  
Wiley Rein & Fielding  
1776 K Street, N.W.  
  
Washington, D.C. 20006  
(202) 719-4913  
bjoseph@wrf.com

## CONTENTS

WITNESS:	DIRECT	CROSS	REDIRECT
Mark Ghuneim			
By Mr. Handzo	6		110
By Mr. Steinthal		15	
By Mr. Astle		78	
By Ms. Brown		106	
Barrie Kessler			
By Mr. Perrelli	126		
By Mr. Steinthal		227	
By Ms. Ablin		281	

## EXHIBITS

NO.	DESCRIPTION	MARK	RECD
129	email from Donohue	34	35
130	email from Donohue	42	45
131	email from Donohue	51	52
132	Wiredset MP3 Link	58	59
133	Wiredset web Link	61	
134	Press Release	296	

1       Freundlich for Royalty Logic. We had, I  
2       think, discussed - I think Mr. Watkins on  
3       that phone call, that we were going to go  
4       second. We have one witness, and it just  
5       made, we thought, logistical sense to just  
6       put our witness on, get all the cases on  
7       that side in first, and then have the  
8       broadcasters come after that. But I just  
9       want to sort of clarify that, because I have  
10      to make plans to go back to L.A., and then  
11      to get back here with my one witness.

12                   CHIEF JUDGE SLEDGE: You have no  
13      response at this point, but we'll get you  
14      one soon.

15                   MR. FREUNDLICH: Thank you.

16                   CHIEF JUDGE SLEDGE: Mr.  
17      Perrelli.

18                   MR. PERRELLI: Thank you, Your  
19      Honor. Sound Exchange would call Barrie  
20      Kessler.

21                   CHIEF JUDGE SLEDGE: Thank you,  
22      Ms. Kessler, for remaining standing. Would

1 you please raise your right hand.

2 WHEREUPON,

3 BARRIE KESSLER

4 was called as a witness and, after having  
5 been first duly sworn, was examined and  
6 testified as follows:

7 CHIEF JUDGE SLEDGE: Thank you.  
8 Please be seated.

9 MR. PERRELLI: Your Honor, with  
10 your permission, I'll hand out binders with  
11 Ms. Kessler's testimony. Thank you, Your  
12 Honor.

13 DIRECT EXAMINATION

14 BY MR. PERRELLI:

15 Q Ms. Kessler, can you give your  
16 full name for the record?

17 A Barrie Kessler.

18 Q And can you tell the Board your  
19 job title?

20 A Yes. I'm the Chief Operating  
21 Officer of Sound Exchange.

22 Q And in that job, what are your

1 responsibilities?

2 A All the operational functions of  
3 the organization report to me, including the  
4 membership outreach function, all of the  
5 distribution operations functions, the  
6 accounting and royalty administration  
7 functions, and the general legal and  
8 compliance functions. In addition, the IS&T  
9 function, the systems development and  
10 extensions report to me.

11 Q And when you say IS&T, what does  
12 that refer to?

13 A Information Systems & Technology.

14 Q And how long have you served in  
15 that position?

16 A Since the summer of 2001.

17 Q And what was your position before  
18 your current job?

19 A I was the Director of  
20 Distribution Operations.

21 Q For Sound Exchange?

22 A For Sound Exchange, yes.



1 Q And how long did you serve in  
2 that role?

3 A That was since November of '99 to  
4 the summer of 2001.

5 Q And what were your job  
6 responsibilities in that job?

7 A In that role, my responsibilities  
8 were to ascertain the business and systems  
9 requirement for the royalty distribution  
10 system, to design, build, and implement that  
11 system, and all of the data ingestion  
12 requirements around that system, meaning the  
13 performance logs, as well as the royalty  
14 accounts.

15 Q So with respect to the royalty  
16 collection and distribution systems now  
17 operating in Sound Exchange, were you in  
18 charge of developing those?

19 A Yes, I was the architect.

20 Q I want to start with an overview  
21 and ask you just how you describe sort of  
22 overall an overview of what it is that Sound

1 Exchange does.

2 A Sound Exchange is responsible for  
3 the collection and the timely, and  
4 efficient, and transparent distribution of  
5 royalties under Sections 112 and 114 of the  
6 Copyright Act.

7 Q Okay. From whom do you collect  
8 royalties?

9 A We collect royalties from a  
10 number of licensee types, including the pre-  
11 existing services, the SDARS, business  
12 establishment services, and the webcasters.

13 Q Do you also collect royalties  
14 from foreign collecting societies?

15 A Yes, we have limited collections  
16 from foreign collecting societies.

17 Q And how many -- can you identify  
18 how any different services you collect  
19 royalties from?

20 A With respect to each one of those  
21 categories?

22 Q Sure.

1           A        The PES, we currently have two;  
2       the SDARS we currently have two; the  
3       business establishment services two;  
4       webcasters over 570, I believe.

5           Q        Now when you talk about 570  
6       webcasters, does that reflect the number of  
7       webcasting channels that are available to  
8       the public?

9           A        No, in no way does that number  
10      reflect the number of channels. That number  
11      is substantially higher. You have your  
12      large commercial webcasters who have many,  
13      many, many channels of music. You also have  
14      licensees who are reporting as part of a  
15      broadcast group, so there's one reporting  
16      by, for example, a Clear Channel, but that's  
17      on behalf of many terrestrial stations that  
18      are simulcasting over the internet.

19          Q        Do you also have webcasters  
20      reporting who are aggregators?

21          A        Yes, we do. In the case of Live  
22      365, they aggregate many, many individual

1 webcasters, many hundreds.

2 Q And to whom do you distribute  
3 royalties?

4 A We distribute royalties to the  
5 copyright owner of the sound recording  
6 transmitted, as well as the featured  
7 performer, and also the non-featured  
8 performers through their union. That would  
9 be AFTRA and AF of M.

10 Q And how do you decide how much to  
11 give each of those groups?

12 A It's set by the statute. There's  
13 a statutory split of 50 percent to the  
14 copyright owner, 45 percent to the feature  
15 performer, and 5 percent total to the non-  
16 feature performers. And that's with respect  
17 to the 114.

18 Q And with respect to Section 112?

19 A That is 100 percent of those  
20 royalties are distributed to the copyright  
21 owners.

22 Q Do you have to be a member of

1 Sound Exchange in order to receive royalty  
2 distributions?

3 A No, you do not. Membership is  
4 not required, and we make no distinction  
5 between a member of a non-member with  
6 respect to collections and distributions.

7 Q And can you give the Board a  
8 rough sense of the number of performances of  
9 sound recordings that Sound Exchange has --  
10 on which Sound Exchange has received reports  
11 to-date?

12 A Yes. We have currently processed  
13 just about 700 million performances from  
14 licensees who are reporting.

15 MR. PERRELLI: Okay. With the  
16 Court's permission, I'm going to put up the  
17 demonstrative exhibit. And for the record,  
18 this is a blown-up versions. It's labeled  
19 Sound Exchange Demonstrative 54, but it is a  
20 blown-up version of Sound Exchange Exhibit  
21 211DP. We're going to get into these issues  
22 in a little bit more detail.

1 BY MR. PERRELLI:

2 Q Can you describe what this  
3 demonstrative exhibit reflects?

4 A Yes. This demonstrative reflects  
5 the basic functions of Sound Exchange from  
6 the moment we collect the royalty to the  
7 point where we distribute the royalties to  
8 copyright owners, and artists, and some of  
9 the post-distribution activities that ensue.

10 Q Okay. And what was your role in  
11 developing these processes?

12 A I was the architect of these  
13 business processes.

14 Q And how long did it take Sound  
15 Exchange to develop the system?

16 A Sound Exchange spent a great  
17 deal, a tremendous amount of time, energy,  
18 and money developing both the business  
19 processes and the systems that model those  
20 processes to effect the distribution to  
21 copyright owners and artists. And while  
22 there was an initial investment in these

1 systems and services, we have since expended  
2 additional resources refining, expanding,  
3 and making more efficient the business  
4 process, as well as the underlying computer  
5 system.

6 Q Does that process continue to  
7 this day?

8 A I expect it will always continue.

9 Q I want to go step-by-step through  
10 the various steps of your collection and  
11 distribution efforts. First of all, does  
12 Sound Exchange bill webcasters for their  
13 usage of sound recordings?

14 A No, we don't. We're not a kind  
15 of typical business that has a product,  
16 sells the product, invoices for the product,  
17 receives payments, and then delivers the  
18 product. We're in a situation of self-  
19 invoicing by the licensees. All of the  
20 information that Sound Exchange needs to  
21 distribute the royalties are in the  
22 possession of the webcasters, and that

1 includes the performances that they've  
2 transmitted, as well as the number of  
3 listeners to those performances. And in  
4 addition, all the financial information is  
5 in their possession.

6 Q And what kind of information does  
7 Sound Exchange need from, in this instance,  
8 webcasters in order to conduct its  
9 collection and distribution operations?

10 A Ideally, we receive several  
11 pieces of information. First is an election  
12 of which license metric they're going to be  
13 making their payments. We receive, ideally,  
14 the payment itself, along with a statement  
15 of account reflecting how the royalty  
16 obligation was calculated. Concurrent with  
17 the receipt of those three documents is the  
18 performance log, which lists all of the  
19 performances performed during a specific  
20 period.

21 Q And just so we're clear, when you  
22 talk about a performance, what are you



1 referring to?

2 A Performance is a transmission of  
3 a sound recording that's listened to by an  
4 end-user. It's a non-interactive digital  
5 transmission.

6 Q You talked about several  
7 different pieces of paper. Can you explain  
8 what information that you receive on each,  
9 for example, the statement of account?

10 A Yes. Depending if the webcaster  
11 is paying on a percentage of revenue,  
12 percentage of cost, per performance, or  
13 aggregate tuning hour, it reflects that  
14 metric, and the usage of the content times  
15 the applicable rate resulting in the royalty  
16 obligation. In addition to the extent a  
17 minimum fee was paid, that royalty  
18 obligation is reduced by the minimum fee,  
19 and if the minimum fee is not exhausted,  
20 then the balance is the current royalty  
21 obligation.

22 Q And, again, on the reports of

1 use, what is the report of use, and what  
2 information does it provide Sound Exchange?

3 A A report of use is a listing of  
4 sound recordings transmitted, which includes  
5 information, such as the title, the artist,  
6 the album, the marketing label, in some  
7 cases the catalogue number, in other cases  
8 an ISRC, and it reflects transmissions  
9 during a relevant period. It will also  
10 reflect the number of performances or  
11 aggregate tuning hours for that performance.

12 Q Now does Sound Exchange always  
13 get those different pieces of paper, those  
14 different pieces of information from  
15 webcasters?

16 A No, we commonly don't get all of  
17 the paperwork, payment, and logs at the same  
18 time. We sometimes receive payments without  
19 any statement of account. The alternative  
20 is true, we get statements of account  
21 without the attendant payment. We are  
22 currently not receiving performance logs

1 from many, many, many of the webcasters, but  
2 it is not uncommon for us not to receive all  
3 the items necessary to log the receipt of  
4 the payment, and ultimately distribute those  
5 royalties.

6 Q Now without a statement of  
7 account, are you able to actually distribute  
8 royalties?

9 A No, we are not. The statement of  
10 account reflects the period for the payment,  
11 and in order to match the payment with the  
12 log, we need to know what date the payment  
13 is for, what period the payment is for. In  
14 addition, certain services are paying on  
15 behalf of a great many stations, or they are  
16 paying multiple royalties in one check, and  
17 so without the statement of account, we have  
18 no idea how to attribute that money on a  
19 station-by-station basis, or to which  
20 service that licensee is paying for.

21 Q And without the reports of use,  
22 are you able to distribute royalties?

1           A       No, the reports of use are the  
2 basis for the distribution. Without that,  
3 we have no way of knowing which performer's  
4 recordings have been transmitted, or  
5 copyright owners, as well.

6           Q       You mentioned that you don't get  
7 reports of use from at least some  
8 webcasters. Can you explain why?

9           A       Currently there are no final  
10 regulations with respect to the reports of  
11 use for the webcasters to the extent of the  
12 format of those reports, and the mechanism  
13 that they are to deliver them to Sound  
14 Exchange. There are regulations in place  
15 with respect to the information they're  
16 supposed to retain and ultimately report to  
17 us, but without the format, the file format,  
18 the manner in which they actually deliver it  
19 to Sound Exchange, those regulations have  
20 not been promulgated.

21          Q       Why is the file format important  
22 to Sound Exchange?

1           A       Well, it's critical to the  
2 efficient processing of the performances.  
3 If webcasters can report in any old file  
4 format with information in any order they  
5 please, there's no way that we could build  
6 an efficient system that would ensure the  
7 prompt and efficient payment to the  
8 copyright owners and artists that these  
9 services are building their businesses on.

10          Q       Let's go through the process.  
11 Assuming you've gotten the statement of  
12 account and the report of use, can you  
13 explain the first step once Sound Exchange  
14 receives payment from a licensee?

15          A       When we receive the payment, of  
16 course, we log that payment and deposit the  
17 check. We review the statement of account  
18 for completeness, and accuracy, and we  
19 forward the logs to our distribution  
20 operations department.

21          Q       And what's the next step in your  
22 processing of payment and in the logs?

1           A       Well, in some cases in step one  
2 there is some follow-up required, if  
3 information is missing, or a payment is  
4 received late, so there may be special  
5 follow-up in step one. But presuming that  
6 everything is received together and on time,  
7 we're able then to move to step two, which  
8 is the loading of the performance log into  
9 our computer system for identification.

10          Q       And can you explain that log  
11 loading process and how it operates?

12          A       Yes. First, we receive the log  
13 and the system tries to recognize the log,  
14 and verify that the log is structurally  
15 loadable, meaning that the format is proper  
16 and can be loaded. Upon successful loading  
17 of the log, then each performance in the log  
18 is examined to see if we have received that  
19 performance in the past from this or another  
20 webcaster, and to the extent that it has  
21 been seen before, we match it to an existing  
22 record in our database. If the performance

1 has not been matched, we move into step  
2 three, and manual identification. The  
3 system kind of learns as it goes along. We  
4 retain all the performances from all the  
5 webcasters, and all the licensees who have  
6 ever reported. And we know that webcasters  
7 and licensees don't always report everything  
8 exactly correctly in the title, artist,  
9 album, label, catalogue, copyright owner,  
10 and so on in those fields, and so we expect  
11 to see the same performance reported  
12 incorrectly or improperly repeatedly from  
13 the same service.

14 Q And how does your software  
15 account for that or address that problem?

16 A We take all of those improperly  
17 reported records and ascertain what the  
18 proper text representation is for that sound  
19 recording, and so we match all these  
20 incorrect incoming - incorrect from a text  
21 standpoint incoming sound recordings, and  
22 match it to our standard actor processing

1 value, so it's kind of our master version of  
2 all those variations of how a sound  
3 recording can be reported.

4 Q You talked about matching it  
5 against an existing database. Where did  
6 Sound Exchange get that database?

7 A Sound Exchange built that  
8 database from the reports of use from the  
9 licensees themselves. It was not pre-loaded  
10 by any other source. This has all be  
11 discerned from the perfection of data  
12 reported by the services.

13 Q Is there any requirement for  
14 copyright owners to register their works  
15 with Sound Exchange?

16 A No, unfortunately there is no  
17 requirement for copyright owners to register  
18 with Sound Exchange for the payment of their  
19 royalties, and as a result, we only get the  
20 information from the licensees themselves.

21 Q And when you're talking about  
22 matching, how many records are you talking



1 about matching in any particular report of  
2 use or log?

3 A Well, as I said, we processed  
4 over or nearly 700 million individual  
5 performances, and the amount of performances  
6 from log to log varies depending on what  
7 period we're loading, but it's in the tens  
8 of millions of records. And our system is  
9 able to identify in the exact matching step  
10 number two, typically anywhere from around  
11 70 percent to all the way up to 93 or 95  
12 percent matching.

13 Q If you have the artist and the  
14 name of the sound recording, is that enough  
15 to tell Sound Exchange to whom to pay  
16 royalties?

17 A No, it's not enough information  
18 to ascertain that. Just having a title of a  
19 song and an artist's name doesn't lead us to  
20 the exact recording being reported.

21 Q Why not?

22 A Because artists record the same

1 songs, multiple versions of the same songs  
2 throughout the life of their career, which  
3 could span many decades. If the artist is a  
4 group, the group members may be different on  
5 one version of the sound recording to the  
6 next, and the feature performer, the non-  
7 featured performers, the background  
8 vocalists and musicians will change from  
9 version of the sound recording to the next,  
10 even though it's the same song and the same  
11 group.

12 Q Why can't Sound Exchange simply  
13 pay Fleetwood Mac if it's a Fleetwood Mac  
14 song?

15 A Well, Fleetwood Mac is a good  
16 example of a featured artist who over their  
17 30 or 35 year career has changed the  
18 composition of their group frequently,  
19 almost from album to album, and they've re-  
20 released songs that they previously recorded  
21 on a subsequent album, and so in their case  
22 we pay the individual members of the group.

1 And unless we know what album the track has  
2 been performed, we don't know which version  
3 of the group it is. If we don't know which  
4 version of the group it is, then we don't  
5 know who the individual performers are who  
6 are entitled to the royalties.

7 Q Is it sufficient for Sound  
8 Exchange to pay out artists and copyright  
9 owners to get a sample of data from an  
10 individual webcaster showing a sample of the  
11 performances?

12 A No. There's nothing that I'm  
13 aware of that says some artists should be  
14 paid and some shouldn't, or some copyright  
15 owners should be paid and some shouldn't.  
16 And by definition, a sample will exclude  
17 copyright owners and artists from the  
18 receipt of those royalties to the extent  
19 they're not present in the log, simply by  
20 virtue of it being a sample.

21 CHIEF JUDGE SLEDGE: Ms. Ablin.

22 MS. ABLIN: Your Honor, I would

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

1 privy to the testimony going on in here  
2 which is an adjudicatory proceeding as  
3 opposed to a promulgation of regulations  
4 done by notice and comment, so I would move  
5 to strike that, as well. That list of  
6 exhibits which we can handle now or later  
7 that Ms. Kessler is sponsoring and that deal  
8 exclusively with the record keeping  
9 proceeding.

10 CHIEF JUDGE SLEDGE: Ms. Ablin, I  
11 appreciate your attention to relevance to  
12 the matters before the Board, but  
13 unfortunately at this point, if we had  
14 applied that standard to the evidence we've  
15 received, about 80 percent of what we've  
16 heard would not have been heard. Your  
17 motion is denied.

18 BY MR. PERRELLI:

19 Q Ms. Kessler, I want to take you  
20 back and finish this topic. You talked  
21 about Sound Exchange looking at sampling.  
22 Has Sound Exchange looked at the impact of

1 sampling on the distribution of royalties to  
2 copyright owners and performers?

3 A Yes, we have. Based on census  
4 reporting supplied by a webcaster, we  
5 conducted a sample on those performances  
6 which reflect the two week sample per  
7 quarter which has been indicated in the  
8 interim regulations, and we found that over  
9 40 percent of the artists performed in the  
10 census were not picked up by the sample.  
11 And those that were picked up by the  
12 samples, some of those artists were over-  
13 paid, and some of the artists, of course, we  
14 under-paid.

15 Q On whom does that problem fall  
16 most directly in the artist and copyright  
17 owner community?

18 A It falls -- the displacement of  
19 the royalty payments falls most heavily on  
20 independent copyright owners, the small  
21 copyright owners, and the feature artists.

22 Q We talked about Sound Exchange's

1 automated matching. Is the software that  
2 Sound Exchange uses off-the-shelf software?

3 A No. It's completely custom  
4 built.

5 Q Now if the software is unable to  
6 match a particular sound recording with an  
7 existing sound recording on Sound Exchange's  
8 database, what's Sound Exchange's next step?

9 A The next step is the system will  
10 present to a computer user a listing of all  
11 of the sound recordings that have not been  
12 matched; in other words, we have not yet  
13 seen them reported or identified them  
14 previously. In some cases, these sound  
15 recordings are new releases, and we expect  
16 around a 7 or 8 percent new release rate, so  
17 we anticipate not matching everything. But  
18 it also includes sound recordings that may  
19 have a match in our database, but based on  
20 the complex algorithm in the matching, the  
21 automated matching, it was unable to a  
22 degree of certainty match that sound

1 recording, and so one of our staff has to  
2 look at the computer screen with the  
3 unmatched recording, and then below that are  
4 typically a list of six or so possible  
5 matches that represent that same sound  
6 recording.

7 Q Are there particular kinds of  
8 sound recordings or works that raise more  
9 difficult issues for matching purposes?

10 A Yes. Sound Exchange has a couple  
11 of categories of problematic performances.  
12 The first is the compilation album, where a  
13 copyright owner is marketing the overall  
14 album and licensing tracks from other  
15 copyright owners. I can think of, like for  
16 example, the Soprano soundtrack. I believe  
17 it's a Sony compilation, but of course, they  
18 license independent and other major label  
19 content. Very often licensees will report  
20 compilations not with the individual  
21 copyright owners of each track, but the  
22 overall marketing label for the sound



1 recording.

2           Further, they often won't  
3 identify who the featured artist is, but  
4 rather they'll report the featured artist as  
5 various because it's a compilation and  
6 different artists are on different tracks.  
7 Kind of a running joke at Sound Exchange is  
8 the first band that's named various is in  
9 for quite a windfall because we've got a  
10 number of recordings that are reported that  
11 way. But Sound Exchange, of course, has to  
12 undertake the tremendous research involved  
13 in finding alternate sources of information  
14 to truly identify who the copyright owner  
15 is, and who the featured artist is, so  
16 compilations are challenging.

17           Classical music is another big  
18 challenge for us. I can't tell you how many  
19 times a sound recording is reported, the  
20 featured artist is really the composer, and  
21 so it's -- we know who the composers are.  
22 What we're trying to find out are who the

1 featured artist is, and so sometimes based  
2 on other information on the record, for  
3 example, the album, or the track title, we  
4 can get a sense of who the featured artist  
5 may be, which symphony recorded that  
6 particular composition. But often, it  
7 requires a tremendous amount of research to  
8 make that determination.

9 Q Are there particular problems  
10 caused, challenges posed by foreign works?

11 A Yes. Foreign works are another  
12 challenge, in part because there's not a lot  
13 of candidates for staff that have extensive  
14 knowledge of all types of world music. But  
15 remember, Sound Exchange is paying out sound  
16 recordings that are transmitted by services  
17 that are playing a vast array, a great  
18 breadth and depth of music, and that  
19 includes quite a lot of world music, so  
20 we're not just paying U.S. artists, we're  
21 paying artists who are all over the world,  
22 and their content is being performed by

1 these services, and it makes it quite  
2 difficult to identify with certainty what  
3 the sound recording is.

4 Q And what kinds of additional  
5 information is helpful to Sound Exchange  
6 when it's engaged in this kind of research?

7 A We rely on additional sources of  
8 sound recording information. We rely quite  
9 a lot on All Music Guide with whom we have a  
10 license to use their information. And their  
11 information is far more extensive than the  
12 title, artist, album, label type of  
13 information. It has biographical  
14 information, members of the groups, liner  
15 notes, years an artist recorded, what other  
16 bands or groups they may have participated  
17 in and recorded with. And sometimes that  
18 additional information, in conjunction with  
19 the limited fields that are reported to us,  
20 we're able to discern what the sound  
21 recording really is.

22 With respect to our classical

1 music challenge, we provided AF of M, the  
2 non-featured union, with a list of, I want  
3 to say over 90,000 records to review. They  
4 have quite a lot of -- they have staff who  
5 are quite experienced with respect to  
6 classical music, and so we rely on these  
7 types of partners to help us through the  
8 identification process.

9 Q And how large is Sound Exchange's  
10 staff that works on this kind of research?

11 A Well, it will fluctuate depending  
12 on that initial match rate that's  
13 established, but anywhere from four to eight  
14 staff members are working through the  
15 unmatched performances.

16 Q Now what happens if you cannot  
17 identify what sound recording a particular  
18 performance, what sound recording artist a  
19 particular performance is?

20 A If we can't identify the sound  
21 recording, then we can't determine who's the  
22 entitled party of the sound recording that's

1 entitled to the distribution of the  
2 royalties.

3 Q Do Sound Exchange employees  
4 continue to research unmatched performances?

5 A Oh, yes. I mean, we never stop  
6 in our quest to identify what the sound  
7 recording really is. And sound recordings  
8 are placed in a separate account and noted  
9 as unidentified, and we continually go back  
10 and look, and refine, and perhaps down the  
11 road another licensee will report something  
12 like that track, and it will show up in one  
13 of the potential matches for the sound  
14 recording. And this is an ongoing process  
15 that continually is occurring.

16 Q Once you have a match for the  
17 sound recording, are you able then to pay  
18 out the royalties owed for that sound  
19 recording?

20 A No. A simple identification of  
21 what sound recording this actually is, is  
22 really just the start for being able to pay

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

21 Q Now this account assignment  
22 process, is it automated or manual?

1           A           It's automated to the extent that  
2 we have seen the performance before and it's  
3 assigned to an account. It's not automated  
4 if it's a new performance, or if it's one of  
5 the performances that we're able to identify  
6 who the sound recording is, but we never got  
7 information from the copyright owner or  
8 artist of how to pay out on that track, so  
9 artists, we find artists, artists come to us  
10 and then we register them as an account in  
11 the system, and attach their performances to  
12 that account. And then we establish how the  
13 money is to be paid out on those particular  
14 tracks.

15           Q           How do you decide how to pay out  
16 particular artists of a particular track?

17           A           We will always take the direction  
18 of the artist, and we will pay it out the  
19 way the artist instructs us to. To the  
20 extent that that artist is a group, the  
21 whole group will tell us how to pay out  
22 those tracks.

1           Q        You talked about how the artist  
2 might tell you to pay out a particular  
3 track. What kinds of directions do you get  
4 from artists in terms of different ways to  
5 distribute royalties for particular tracks?

6           A        Well, typically when the artist  
7 is an individual, they may have a company  
8 that they want us to send their royalties to  
9 for business purposes. Some artists want us  
10 to make the check out to them and send it to  
11 someplace other their home. Some artists  
12 want us to pay them the royalties and send  
13 it to a particular address. Some artists  
14 who are living abroad will have to have tax  
15 withholding on their royalty distributions,  
16 and so in the simple case of the individual  
17 artists, it's typically 100 percent of the  
18 royalties go to them or their company that  
19 is handling the accounting for them.

20                       With groups it can become more  
21 difficult. Absent the direct instructions  
22 from the group members, Sound Exchange has a



1 number of policies on how to split the  
2 royalties among those artists.

3 Q And can you describe some of  
4 those policies?

5 A Yes. I guess it's important to  
6 note here that the objective is to be as  
7 fair and transparent as possible with  
8 respect to the distribution of royalties, so  
9 in no case do we have -- the approach is to  
10 value the members of the group fairly, and  
11 so each member of the group will get their  
12 pro rata share. So if there's four members  
13 of the group, each will get 25 percent of  
14 the performance for that sound recording.  
15 And remember, that's of the 45 percent of  
16 the performance's value, so they get 25  
17 percent or 45 percent.

18 In the case where, by virtue of  
19 the sound recording it's not so easy to  
20 split it evenly among the group members, and  
21 this is an example in classical music where  
22 you have the orchestra, the soloist and the

1 conductor, and they've all contributed to  
2 the creation of the sound recording - those  
3 are the kinds of things that Sound Exchange  
4 will not in a vacuum make a policy decision  
5 about. We go out to the artist community in  
6 the form of roundtables with artist  
7 managers, artist attorneys, and the artists  
8 themselves, present some of these examples  
9 and complications to those groups. We try  
10 to determine what current business practices  
11 are with respect to the division of  
12 royalties, with the whole objective to have  
13 our stakeholders buy into the policy and  
14 help Sound Exchange establish them.

15 Then the policies go to a Sound  
16 Exchange committee called the Distribution  
17 Policy Committee, which was created by  
18 virtue of the bylaws. And the policies are  
19 presented to that committee, with options or  
20 recommendations that Sound Exchange has  
21 gathered through these roundtables that  
22 we've held. The Distribution Policy

1 Committee then will decide the best course  
2 of action, and make a recommendation to the  
3 full board for adoption.

4 Q And who makes up the Distribution  
5 Policy Committee?

6 A It's evenly comprised of three  
7 copyright owner members and three artist  
8 members.

9 Q And who makes up Sound Exchange's  
10 Board?

11 A That is also equally comprised of  
12 artists and copyright owners, nine copyright  
13 owners and nine artists.

14 Q When Sound Exchange distributes  
15 its royalties to individuals, does it  
16 identify for the artist, for example, how  
17 the royalties may have been divided up among  
18 other members of a group, for example?

19 A Yes. Sound Exchange produces a  
20 very detailed and thorough statement to each  
21 artist and copyright owner, for that matter,  
22 who is paid a royalty. And without showing

1 confidential information, such as Tax Ids or  
2 addresses, we do show each artist how that  
3 group's royalties were split, so the 25  
4 percent or whatever they're instructed us,  
5 however they have instructed us to split the  
6 royalties.

7 Q What happens if there are  
8 disputes among a group, for example?

9 A We do have some disputes where  
10 the members of the group can't decide how  
11 the royalties, or can't agree on how the  
12 royalties should be split. In those cases,  
13 we immediately put the account on hold and  
14 simply accrue the royalties earned by those  
15 sound recordings for future distribution,  
16 and we hold those royalties until the  
17 dispute is resolved.

18 Q And what role does Sound Exchange  
19 play in resolving that dispute?

20 A Sound Exchange would never make a  
21 determination of how to split the royalties.  
22 What we do try to do, however, is facilitate

1 the communication among the disputing  
2 parties, remind them that the royalties  
3 aren't going to get distributed if they  
4 can't agree on how to allocate the payments  
5 of those royalties. And we're more in kind  
6 of a broker situation than anything else.

7 Q I don't mean to interrupt you.  
8 Do you want to finish your answer?

9 A We haven't yet had a situation  
10 where a dispute has gone on for a long  
11 period of time where it had to be referred  
12 to another one of Sound Exchange's  
13 committees, which is the Dispute Resolution  
14 Committee.

15 Q And has that committee ever  
16 decided any dispute?

17 A Not to-date. I have no doubt  
18 there will be an occasion when it will have  
19 to, but so far, no.

20 Q One of the things we didn't talk  
21 about was, are you distributing monies just  
22 to artists, or also to their heirs, for

1 example?

2 A Sound Exchange has seen in its  
3 performance log such a breadth of music  
4 spanning many decades, and we have quite a  
5 number of featured artists who have died,  
6 and so rather than trying to pay the  
7 featured artist, we're looking for their  
8 heirs. And when you look at the breadth of  
9 music being performed, and the vitality of  
10 it, you see that in some cases we're  
11 actually looking for heirs of heirs, so  
12 we're always looking to find those entitled  
13 to the royalties from a particular artist's  
14 recordings.

15 Q Do performances by non-human  
16 performers, Barney, for example, or the  
17 Muppets, do those raise particular problems?

18 A Yes, that's another area that  
19 Sound Exchange, I'm telling you, didn't  
20 anticipate when we first launched, but we do  
21 have the Muppet characters, and the  
22 Chipmunks, and Barney, and on and on. And

1 again, webcasters do perform a lot of  
2 children's music. It's a wonderful array of  
3 children's music, and a lot of times these  
4 are animated characters or non-human  
5 characters, and Sound Exchange struggled  
6 with this issue, and took it to our  
7 roundtables and to our committee, and we  
8 looked at the legislative history, and we  
9 pondered our options around this. And it  
10 was ultimately determined that we should try  
11 to find the voices behind the animation, or  
12 the voices in the costume. And that's  
13 exactly what we're doing, so we are trying  
14 to find outlets to determine who the actual  
15 voice is that recorded that sound recording.

16 Q You've talked a number of times  
17 about the breadth of music performed. What  
18 do you expect to happen with respect to the  
19 breadth of music on which you're going to  
20 receive reports when all of the webcaster  
21 data comes in eventually?

22 A Once all the webcasters are

1 reporting, and we do look forward to that  
2 day, I expect that just the sheer volume  
3 will increase by virtue of going from a  
4 handful of licensees reporting, to the 570,  
5 plus all of their individual stations, in  
6 the Live 365 example, I expect that we're  
7 going to see an absolute explosion in the  
8 number of performances reported. I would  
9 also not be surprised if we see sound  
10 recordings that aren't new releases, but  
11 have never been performed by the services  
12 currently reporting, again, because there's  
13 just this incredible breadth of music that's  
14 being transmitted by the webcasters.

15 Q We've gotten to the account  
16 assignment section of this chart. If you  
17 can't figure out who the copyright owner or  
18 performer is, what happens to that account?

19 A The performances for whom we  
20 can't identify the artist, or we don't  
21 receive them from the artists instructions  
22 on how to pay them, they're assigned to an



1 account, an escrow account where we continue  
2 to accumulate those royalties in the hope  
3 that our various outreach mechanisms will --  
4 that artist will eventually come forward or  
5 the copyright owner will eventually come  
6 forward and make a claim to those  
7 performances.

8 If we've been able to identify  
9 the copyright owner but not the artist, we  
10 will pay the copyright owner 50 percent  
11 share. If we're able to find the featured  
12 performer but not the copyright owner, we'll  
13 pay that, so we pay to the extent that we  
14 can. But if on either side we're unable to  
15 fulfill that payment obligation, we escrow  
16 those funds and identify those performances  
17 as undistributable.

18 Q And for those copyright owners  
19 and performers you able to identify, do you  
20 have any obligations with respect to income  
21 tax, for example?

22 A Can you repeat that?

1           Q       With respect to copyright owners  
2 or performers you are able to identify, do  
3 you have any obligations with respect to the  
4 Internal Revenue Service?

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

1       sure the withholding is done properly.

2               Q       Once you've identified the  
3       copyright owner or performer, does that mean  
4       you know how to locate the individual or the  
5       company?

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

1 information where to make the deposit.

2 Q Once you've -- let's assume  
3 you've got all that information and you're  
4 ready to move to the next step, step five,  
5 allocation and distribution of royalties,  
6 what does Sound Exchange do there?

7 A Allocation and distribution is  
8 kind of the culmination of this process  
9 where we actually get to send royalties to  
10 the deserving copyright owners and artists.  
11 The allocations happen four times a year on  
12 a quarterly basis. Distributions have been  
13 done on a quarterly basis, but we're looking  
14 at more frequent distributions in order to  
15 get more money to more artists more  
16 frequently, more timely.

17 The first step in that process  
18 is, as I said, the allocation, and the  
19 allocation is where we take the royalties  
20 received by each licensee and allocate them  
21 to the performances reported by that  
22 licensee. In the case of just one

1 webcaster, if they paid us \$100 and there's  
2 100 performances, each one of those  
3 performances is valued at a dollar. In the  
4 case of a broadcast group, for example,  
5 Clear Channel that's reporting for many,  
6 many, many, many different stations, and  
7 this goes back to why we need the statement  
8 of account, we take the money attributable  
9 to each station and allocate that money  
10 across those performances.

11 Q Why isn't the value of a  
12 performance the same regardless of the  
13 licensee?

14 A First, not all webcasters have  
15 opted for the per-performance or the  
16 aggregate tuning hour metric of payment, but  
17 more importantly, because we're in a  
18 situation where it's just sample reporting;  
19 in other words, the two weeks per calendar  
20 quarter of reporting, we don't have a full  
21 accounting of each and every performance to  
22 value at the per performance rate, so our

1 only option then is to allocate the  
2 royalties received across those  
3 performances.

4 Q Can you explain in a little bit  
5 more detail how you actually allocate  
6 particular performance with or particular  
7 set of featured artists or copyright owners?

8 A Yes. As I said, the first step  
9 is allocating the royalties received on a  
10 station-by-station, channel-by-channel,  
11 licensee-by-licensee basis. Once that has  
12 been done for the entire group of licensees  
13 to whom we're distributing, we then  
14 consolidate those allocations on the  
15 copyright owner and the artist level. So in  
16 the example I gave before, if there's 100  
17 performance, each performance is \$1.00, and  
18 Madonna has one performance, and then on  
19 another allocation there's \$1,000, the same  
20 100 performances, and her performance is  
21 worth \$10, that performance consolidated is  
22 \$11. That \$11 is then split based upon the

1 statutory requirement of 50 percent to the  
2 copyright owner. In the Madonna example, I  
3 think it's Warner, and then 45 goes to  
4 Madonna, and 5 percent goes to the non-  
5 featured unions. So there's the allocation,  
6 the application of the statutory split, and  
7 the consolidation of all these allocations.

8           Once you've allocated, then you  
9 have to figure out based on the account  
10 assignment how to pay out the featured  
11 artist portion, the 45 percent. So if you  
12 take an artist, for example, Eric Clapton,  
13 who's been a solo performer, a member of the  
14 group Cream, Blind Faith, Derrick and the  
15 Dominoes, and all the collaborations he's  
16 done, he may have a different split on a  
17 variety of performances, but we still send  
18 him one check consolidating all those  
19 individual allocations.

20           Q       Do you report to him how each of  
21 those allocations was made?

22           A       Yes, we do.

1 Q At that point, are you ready to  
2 cut a check?

3 A Not quite. Not quite. We make  
4 sure that we've got the right tax  
5 withholding applied to the distribution, and  
6 then we create a banking file, which is an  
7 electronic file that we transmit to our  
8 banking partner, and then they process that,  
9 and actually cut the checks, or effect the  
10 direct deposit. While that's going on,  
11 we're running our statements, which is a  
12 detailed comprehensive listing of each and  
13 every sound recording to whom the recipient  
14 is being paid.

15 Q You've got another step that  
16 comes after the allocation and distribution  
17 step, which refers to adjustments. Can you  
18 describe for the Board what that is?

19 A Yes. Typically, Sound Exchange  
20 will see a spike in customer care calls  
21 after a distribution. Each distribution  
22 we're distributing to more artists, and more



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

1 credit the party to whom we should have  
2 originally made the payment.

3 And then in the next distribution  
4 cycle, that adjustment is manifested or is  
5 actually effected, so it's out of future  
6 royalties from the improperly paid artist,  
7 they pay back the credit that we've made to  
8 the artist that we should have paid.

9 Q Do you sometimes hear from  
10 artists saying that they shouldn't have been  
11 paid?

12 A Yes. We have, on occasion, heard  
13 from artists who will send a check back  
14 along with a statement and say, you know,  
15 I'm not that John Williams. I'm a different  
16 John Williams, and by the way, I know how  
17 you can reach him, and here's his contact  
18 information, so that has happened by virtue  
19 of, again, the incredible amount of music  
20 being performed, the not common but not  
21 particularly uncommon occurrence when we  
22 incorrectly pay out a royalty.

1           Q       At the end of this process, what  
2 happens with royalties that can't be  
3 distributed?

4           A       Again, those royalties are held  
5 in separate accounts and we continue to chip  
6 away at the undistributed royalties in an  
7 effort to maximize the amount of royalties  
8 that we're paying through to the deserving  
9 featured artists and copyright owners.

10          Q       Now do the Copyright Office's  
11 regulations provide for what's supposed to  
12 happen to that money?

13          A       Yes. The regulations say that  
14 we, after three years from the time of  
15 payment by the licensee, the undistributed  
16 funds may be used to offset the cost of  
17 administering the royalties.

18          Q       And has Sound Exchange ever  
19 applied that provision?

20          A       No, we have not.

21          Q       What has Sound Exchange decided  
22 to do?

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

18          Q           Does Sound Exchange have a goal  
19          for what percentage of the royalties it  
20          hopes to distribute?

21          A           Yes, my staff doesn't like to  
22          hear this, but 100 percent. We would like

1 to pay absolutely every penny out to every  
2 artist and every copyright owner. That's an  
3 ideal that I don't expect that we will ever  
4 reach, but our goal by October of this year  
5 is to be able to pay out 65 percent of the  
6 artist royalties, and 85 percent of the  
7 copyright owner royalties.

8 Q Now how does that compare to the  
9 ability of other collecting societies of  
10 which you're aware in terms of paying out  
11 royalties?

12 A I think one good comparison is  
13 SENA, which is the Dutch collecting society.  
14 It took them approximately 10 years to get  
15 to between a 90 and a 95 percent pay through  
16 rate. Sound Exchange is in its fifth year,  
17 and we expect to be at 65 percent, and are  
18 quite proud of that achievement. But it's  
19 important to kind of compare the two  
20 organizations. I mean, SENA is paying Dutch  
21 artists, and Sound Exchange is not just even  
22 paying American artists, we're paying

1 artists worldwide, so the task before us is  
2 far greater than that of the Dutch, but we  
3 will strive to meet that mark.

4 Q I want to move on to some other  
5 aspects of Sound Exchange's operations.

6 First of all, we've talked a number of times  
7 about outreach. Can you talk a little bit  
8 about Sound Exchange's efforts to find  
9 copyright owners and performers?

10 A Yes. You know, this is a fairly  
11 new entitlement, and Sound Exchange has some  
12 general outreach activities that it year-in  
13 and year-out undertakes, and those include  
14 attendance at industry conferences and  
15 events, participation on panels, speaking  
16 engagements, attendance at music festivals,  
17 participating in these roundtables with  
18 artist groups, and then, of course, general  
19 advertising, both print and we've gotten an  
20 occasional story done on television about  
21 us, and so we work those angles. And those  
22 are kind of our general, here's what Sound

1 Exchange is. We exist. We might have money  
2 for you.

3 We have some print ads that we  
4 also place. For example, we had the back of  
5 the ASCAP magazine for a few months that was  
6 meant to reach out to those songwriters who  
7 happen to be recording artists, as well, so  
8 we have our general outreach. We also have  
9 a number of specific outreach activities  
10 that we undertake.

11 Q Can you describe the more  
12 specific outreach opportunities?

13 A Yes. We have found that one of  
14 the most efficient ways to find artists who  
15 are entitled to these royalties is to work  
16 in conjunction with other organizations  
17 whose membership may overlap with our  
18 artists that we are to-date unable to find  
19 and pay. Those organizations include our  
20 two unions, AFM and AFTRA. We've done  
21 matching exercises with their membership and  
22 our unpaid artists, and been able to get

1 contact information for a great many  
2 featured performers by virtue of this  
3 exercise. CD Baby sent out an email blast  
4 to about 100,000 artists, many of whom own  
5 their own copyright, so they're entitled to  
6 both the featured artist portion and the  
7 copyright owner portion of the sound  
8 recording. Our phones rang off the hook or  
9 two and a half weeks as a result of that  
10 mailing, and we found many, many, many  
11 artists and copyright owners through that  
12 endeavor.

13 We work with the Grammy  
14 organization, MARIS, and the Latin Grammys,  
15 LARIS. We've done coordinated outreach  
16 efforts with the Blues Foundation, the Folk  
17 Alliance, all the individuals escape me at  
18 this moment, but there must two dozen  
19 different organizations that we've worked  
20 with in our effort to find featured artists  
21 and sound recording copyright owners, and  
22 also let them know that we exist, this right



1 exists, and we may have royalties owed to  
2 you.

3 Q Do you also work with foreign  
4 collection societies on locating artists  
5 overseas?

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

1 paid to those artists.

2 Q Why doesn't Sound Exchange have  
3 agreements with a broader range of foreign  
4 societies?

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

1 extent that in three years they're unable to  
2 pay it through to their artist.

3 Now I did kind of want to make  
4 the distinction that even if we pay RAAP for  
5 Irish artists, and Irish artists can  
6 certainly come directly to us, and we will  
7 always honor paying the artist directly.  
8 This is just one more thing we can do to get  
9 as much of the royalties out to the featured  
10 artists and the copyright owners.

11 Q Talked a lot about Sound  
12 Exchange's operations. How large is Sound  
13 Exchange staff?

14 A We're 26 full-time employees, we  
15 have two positions vacant at the moment, so  
16 a total of 28. We also have the unpaid  
17 interns that help Sound Exchange out.  
18 Occasionally, we hire temporary help,  
19 depending on the spikes in our workload.

20 Q What kind of skills do you look  
21 for in employees at Sound Exchange to do  
22 this kind of work?

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

20           Q       Does Sound Exchange calculate an  
21 administrative rate?

22           A       Yes, we do.

1           Q       And can you describe for the  
2 Board what that is?

3           A       Sure. The administrative rate is  
4 a percentage that reflects the cost Sound  
5 Exchange has incurred compared to the amount  
6 of royalties is has collected.

7           Q       And what Sound Exchange's  
8 administrative rate been over time?

9           A       Well, in the early years it  
10 hovered around the 20 percent figure. And,  
11 again, that was when royalties were low, and  
12 we have start-up costs. It has consistently  
13 dropped each year. Last year our final  
14 admin rate was a little over 7-1/2 percent,  
15 and this first quarter I don't have  
16 finalized financials for the first quarter,  
17 but it looks like it will be south of that.

18          Q       And does that figure include  
19 repayment for prior proceedings to set  
20 royalty rates?

21          A       It includes current, but not the  
22 original CARP that established the

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

19 Q You talked about Sound Exchange's  
20 admin rate. How does that compare to other  
21 entities that are collecting monies for  
22 public performances?

1           A           It's far lower. Our 7-1/2 admin  
2 rate compares to, I don't know, 14, 16  
3 percent for ASCAP and BMI, so it's very low,  
4 and getting lower.

5                   MR. PERRELLI: Your Honor, I  
6 still have a ways to go, but I actually am  
7 at a breaking point. I don't know what the  
8 schedule the Court intends for this  
9 afternoon, if we're going to continue until  
10 3:1, or if this would be a time for a break.

11                   CHIEF JUDGE SLEDGE: Go ahead and  
12 continue.

13                   MR. PERRELLI: Okay. Thank you,  
14 Your Honor.

15                   BY MR. PERRELLI:

16           Q           Ms. Kessler, I want to shift a  
17 little, and we've covered a lot of ground  
18 about collection and distribution. I want  
19 to talk about how all of this might be  
20 different if there are multiple designated  
21 agents, all administering the same statutory  
22 license. First of all, I want to ask you,

1 can you explain the distinction between a  
2 statutory license and its rates and terms  
3 set by the CRB, and a direct or voluntary  
4 license?

5 A Yes. The statutory license is a  
6 license that is one set of rights, one set  
7 of terms, one set of rates that applies to  
8 everybody evenly, and ultimately those rates  
9 and terms will be set by this Board. And  
10 compared to a direct license, which permits  
11 a copyright owner to directly negotiate with  
12 a service as to those rates and terms for  
13 the use of their sound recordings. And this  
14 could be the copyright owner themselves, or  
15 through someone that they've designated to  
16 negotiate that direct license.

17 Q So if a copyright owner doesn't  
18 like the rates and terms that come out of  
19 this proceeding, are they able to actually  
20 license their content separate and apart  
21 from this proceeding?

22 A Yes, the statutory license is



1 non-exclusive. We can't force anyone to  
2 operate under the statutory license. Any  
3 copyright owner is free to negotiate  
4 directly and establish whatever rates and  
5 terms are in their interest.

6 Q You talked in your written  
7 testimony about a multi-tier designated  
8 agent system. Can you explain what that is?

9 A The way I understand the multi-  
10 tier system is there would be the concept of  
11 a receiving agent, and then designated  
12 agents, and so the first level would be the  
13 receiving agent would receive all the  
14 royalties, and the reports of use, and the  
15 paperwork, and the statements of account and  
16 all that sort of thing, and then they would  
17 figure out how to distribute, or they would  
18 administer the distribution to each of the  
19 individual distributing agents for their  
20 downstream distributions.

21 Q How is that different from a  
22 multi-agent system?

1           A           The way I understand the multi-  
2 agent system to work is, anybody could be a  
3 designated agent, and you could have two, or  
4 ten, or a hundred of them, and you would  
5 eliminate the receiving agent concept.

6           Q           Now of the -- well, who would  
7 decide how much to be paid to each  
8 designated agent under the multi-agent  
9 system?

10          A           I can only presume the licensee  
11 would have to figure out how to do the  
12 splits in the payments to the individual  
13 designated agents.

14          Q           Why couldn't each designated  
15 agent bill the webcasters?

16          A           Well, the way it works now is we  
17 don't have the information available. A  
18 designated agent wouldn't have that  
19 information available to them until the  
20 licensee reported to them, so it's based on  
21 the usage of the sound recordings. And the  
22 sound recordings could be represented by the

1 same -- one sound recording could be  
2 represented by multiple agents, so until you  
3 get the performances, you wouldn't be able  
4 to determine what the split is.

5 Q Now among the three options, the  
6 single agent system, a multi-tier system, a  
7 multi-agent system, which one is more  
8 efficient?

9 A Oh, a single designated agent is,  
10 by far, the most efficient way to administer  
11 a single license, like a statutory license  
12 with a single rate and a single set of  
13 terms. In my view, the statutory license  
14 should be administered with a single set of  
15 rules, and one organization should be tasked  
16 with the administration and implementation  
17 of those rules.

18 Q What would the impact on overall  
19 costs of distribution of royalties be from  
20 having a multi-tier or a multi-agent system?

21 A They would increase tremendously.

22 Q What would the impact be on the

1 time, the promptness of distribution of  
2 royalties for a multi-agent or a multi-tier  
3 system?

4 A I have no doubt that in a multi-  
5 agent system there will be disputes, and  
6 those disputes among the agents will cause  
7 delays, and some of those disputes, I don't  
8 know how they would get resolved. And it  
9 would ultimately impact the timely,  
10 efficient, and fair distributions to all the  
11 copyright owners, and all the artists who  
12 are entitled to the royalty under the  
13 statutory license.

14 Q Does the fact that we're talking  
15 about the administration of a single  
16 statutory license, rather than a set of  
17 voluntary licenses, affect your thinking on  
18 this?

19 A Yes. I mean, it seems common  
20 sense to me that you've got one statutory  
21 license, one set of terms, there's one price  
22 set, there's one rate, and there should be

1 one set of rules on how that is  
2 administered. In a direct license  
3 situation, you could be licensing a whole  
4 panoply of rights and different rates and  
5 different terms for different business  
6 purposes, but on behalf of that copyright  
7 owner, so the alternative to the statutory  
8 scheme is always direct licensing. But in a  
9 statutory situation, there's no -- it seems  
10 inefficient, and excessively and unnecessary  
11 costly to have multiple agents.

12 Q Couldn't you have cost  
13 competition among designated agents?

14 A Well, to me, cost competition is  
15 really nothing more than an incentive to  
16 free ride, and by that I mean, I could  
17 foresee in a multi-agent system where one  
18 designated agent undertakes all of these  
19 costs, and all of this marketing and  
20 outreach, and all of these efforts to pay  
21 through royalties, and another designated  
22 agent just free riding on all of the work

1 done by the other designated agent. And  
2 that's with respect to whether it's the  
3 costs associated with a rate setting  
4 proceeding, or trying to draw down - reduce  
5 the undistributed royalties, or what have  
6 you.

7 Q What's the benefit of that kind  
8 of free riding?

9 A Well, that the designated agent  
10 who's free riding doesn't incur the costs.  
11 They potentially have a lower admin rate.  
12 We can't compete on price here, we can only  
13 compete on costs. And in spite of all the  
14 good work that the one designated agent is  
15 doing, the other designated agent enjoys the  
16 benefit of the cost reduction. And to the  
17 extent that designated agent is a for-profit  
18 company, they get to keep that.

19 Q What is the effect on the  
20 incentive to do research, for example, on  
21 unmatched performances in a system like  
22 that?

1           A           I think it creates a disincentive  
2 to dedicate resources to those types of  
3 activities, that it's to the benefit of the  
4 free rider not to distribute royalties  
5 rather than distribute them.

6           Q           Going back up to the  
7 demonstrative exhibit, can you explain to  
8 the Board the kinds of additional costs and  
9 inefficiencies that you would find in a  
10 multi-agent system each step along the way?

11          A           Yes. I believe that there are  
12 complications, delays, and increased costs  
13 throughout this series of steps that are  
14 required to distribute royalties timely and  
15 efficiently. I think in step one, the first  
16 area of confusion will be with the licensees  
17 themselves, who do they report to, who do  
18 they pay, how much do they pay, how do they  
19 figure out their split among the designated  
20 agents. For them when they call, for  
21 example, Sound Exchange, they get consistent  
22 information about the statutory license,

1 about the rates and terms and what they have  
2 to do to comply. Now do they have to call  
3 all the designated agents to make sure that  
4 they're operating under the same  
5 understanding with respect to the license,  
6 so I think it will be difficult for the  
7 licensees, in the first instance.

8 The actual splitting of the  
9 money, I'm not sure how that will occur,  
10 because you would essentially have to go  
11 through this entire process practically to  
12 distribution, and then come back and say  
13 okay, well, that results in so much money  
14 going to this designated agent by virtue of  
15 which artists and copyright owners are  
16 represented by the individual designated  
17 agents, so I'm not sure even how the  
18 payments are made. And if there's some  
19 approximation of how the payments are to be  
20 allocated among the multiple, the two, the  
21 ten, hundred designated agents, I would  
22 fully expect there to be disputes about



1 shares of who gets what. I don't know how  
2 those disputes get resolved, but I assure  
3 you that those disputes will cause delays in  
4 the distribution to copyright owners and  
5 artists.

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

1 is with respect to payments and the logs,  
2 those are some of the complications, delays  
3 and additional costs that I see.

4 Q Do you see additional  
5 inefficiencies and costs in the matching and  
6 research aspects of the collection and  
7 distribution operations?

8 A Sure I do. I mean, again, Sound  
9 Exchange firmly believes that the proper  
10 identification of what that sound recording  
11 is, is essential to the accurate and prompt  
12 payment of the royalty. We expend resources  
13 both manual and automated, and we're  
14 constantly refining our matching algorithm  
15 and efficiency with the use of technology.  
16 Another designated agent may decide you know  
17 what, we're just not going to spend those  
18 kinds of resources. We'd rather keep that  
19 money for something else, and not process  
20 the logs in the same level that Sound  
21 Exchange or another designated agent might,  
22 which will ultimately result in one

1 designated agent thinking the sounding  
2 recording and the log is something, and  
3 another designated agent saying it's  
4 something else all together. And again,  
5 this all leads to the improper distribution  
6 of royalties, so I think just in these two  
7 steps alone, there's a free rider issue, as  
8 well as a different result among the  
9 designated agents.

10 Q Moving to account assignment, do  
11 you see additional inefficiencies and costs  
12 from a multi-agent system, or a multi-tier  
13 system?

14 A Yes. The account assignment, and  
15 remember, that's identifying that it's  
16 Fleetwood Mac, and then identifying all the  
17 different versions of the group, and all the  
18 different pay splits on the track. This is  
19 where my head explodes. I don't know how  
20 you are going to figure out account  
21 assignment when you've got two or more  
22 designated agents applying different policy

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

19 Q Would you expect to see  
20 competition among designated agents for  
21 drummers or trombone players?

22 A Well, I mean, that's the extreme

1 of this. Of course, that could happen, but  
2 I also see the designated agent spending  
3 money just in general on marketing to  
4 artists and copyright owners to have them  
5 join their organization, an unnecessary  
6 expense, in my view. We would much prefer  
7 to spend those funds on finding actual  
8 artist contact information to effect the  
9 royalty, rather than competing for  
10 performers to join our organization. And,  
11 again, there's no differentiation between  
12 members and non-members under the statutory  
13 scheme.

14 Q Moving to the allocation and  
15 distribution of royalties, do you see  
16 additional inefficiencies and costs by a  
17 multi-agent or a multi-tier system?

18 A Now that piece almost has to  
19 happen first in order to make the initial  
20 distribution among the designated agents, so  
21 this whole thing gets out of order. But  
22 let's presume we were even able to make the

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

1           Q       In looking at these various  
2 systems, the single agent, the multi-agent,  
3 and the multi-tier system, did you look at,  
4 or did you consider other models in other  
5 countries or in the United States?

6           A       We've looked at how other  
7 countries handle the similar right to the  
8 statutory license, and most countries have a  
9 single entity charged with the  
10 administration of the license. Even  
11 countries where the copyright owner was  
12 administered apart from the featured artist,  
13 we're seeing mergers occur. For example, in  
14 the UK, PBL which represents the copyright  
15 owners, and Pamra and Aura, which represent  
16 the artists, have now merged into a single  
17 type line, and it's for the very reasons of  
18 efficiency, to eliminate cost duplication,  
19 and to better serve copyright owners and  
20 artists collectively, that they have merged.  
21 And another example in the UK is with the  
22 Mechanical Rights Society and the Performer

1 Society, MCPS and PRS, they also merged,  
2 again for efficiencies and economies of  
3 scale. And when you look at countries that  
4 have multiple agents, for example, Brazil,  
5 which at one point had 14, it's highly  
6 dysfunctional, with tremendous delays,  
7 royalties never getting anywhere near the  
8 entitled parties, and little by little we're  
9 seeing a reduction from those 14 societies.  
10 I think they're down to maybe eight now, so  
11 elsewhere in the world the model when you're  
12 comparing the statutory license with a  
13 similar right elsewhere, it's a single  
14 organization.

15 Q Did you consider ASCAP, BMI, and  
16 SESAC, all of which administer public  
17 performance rights for music publishing?

18 A You know, that's not an apples-  
19 to-apples comparison. Sound Exchange is  
20 operating under a statutory license, that's  
21 what's at issue here, and its rates and  
22 terms that will be decided in this



1 proceeding. ASCAP, BMI, and SESAC are more  
2 akin to the direct licensing, where on  
3 behalf of members, their members, and their  
4 members only, negotiate in the marketplace  
5 rates and terms for a variety of uses of  
6 their copyrights. They engage in these  
7 negotiations and rate settings independent  
8 of one another, and only for their members.  
9 In a statutory license, it's really  
10 everybody, it's all the copyright owners,  
11 it's all the artists, without distinction of  
12 membership, and if a copyright owner wishes  
13 to escape the statutory rates and terms,  
14 they are welcome to do that through a direct  
15 license. And so that this is in no way a  
16 comparison and, therefore, was not a model  
17 we considered.

18 Q Do your comments about the  
19 additional costs and inefficiencies apply  
20 whether there are two, or ten, or fifty  
21 designated agents?

22 A Well, the moment a second

1 designated agent is introduced into the  
2 statutory scheme, you're going to incur  
3 costs in systems, revamping systems,  
4 revamping business processes, retraining  
5 staff, developing marketing campaigns, so  
6 all the costs are introduced the minute a  
7 second designated agent exists. And it only  
8 increases exponentially with each and every  
9 other designated agent that comes along.

10 Q Would you also envision delays in  
11 the distribution of royalties?

12 A I have no doubt there will be  
13 extensive delays in distributions.

14 Q Now has Sound Exchange looked at  
15 the cost that would be required to modify  
16 its systems for a multi-agent system?

17 A Yes, we have looked at the cost  
18 of just modifying the systems, and I believe  
19 it's between a quarter of a million and  
20 \$350,000 simply to remodel this, and that's  
21 just the start, I mean, that's just a drop  
22 in the bucket of the way the costs will

1 increase. That's just technology, that's  
2 just this piece of the technology.

3 Q So that \$250,000 does not include  
4 personnel and other costs?

5 A It does not.

6 MR. PERRELLI: Your Honor, if  
7 this is a time for a break, I imagine I have  
8 20 minutes or so remaining.

9 CHIEF JUDGE SLEDGE: We'll recess  
10 for 10 minutes.

11 MR. PERRELLI: Thank you.

12 (Whereupon, the proceedings went  
13 off the record at 3:13 p.m. and went back on  
14 the record at 3:28 p.m.)

15 CHIEF JUDGE SLEDGE: Thank you.  
16 We'll come to order. Mr. Perrelli?

17 MR. PERRELLI: Thank you, Your  
18 Honor.

19 BY MR. PERRELLI:

20 Q Ms. Kessler, just to finish up  
21 the subjects that we were talking about  
22 before the break, have you heard from

1 licenses about whether they would prefer to  
2 pay and send reports of use to a single  
3 licensee -- sorry, a single designated agent  
4 or multiple designated agents?

5 A No, the licensees have repeatedly  
6 stated that they want to submit payments,  
7 paperwork, and reports of use to just one  
8 agent.

9 Q Now, in SoundExchange's history,  
10 have you experienced working in a multi-  
11 agent system before?

12 A Yes. RLI was designated for the  
13 '98 to '02 period, and we did have occasion  
14 to attempt to work with them on one aspect  
15 of the distribution services.

16 Q Can you explain that experience  
17 of attempting to work with RLI?

18 A Yes. We were working under a  
19 deadline where we had to post a statement of  
20 account on our website and make that  
21 available to licensees for the calculation  
22 of their royalty obligation. And as we

1 understood, the designated agents were  
2 required to work together to come up with,  
3 you know, paperwork, the statements of  
4 account that were jointly created.

5           And so in the first instance, it  
6 was difficult to get the meeting with RLI's  
7 principals to even begin the conversation.  
8 And, again, we were working under a  
9 deadline, so time was of the essence. We --  
10 you know, finally after, you know, a couple  
11 of tries we were able to get a meeting in  
12 the form of a conference call with Ron Gertz  
13 and Doug Brainin -- I think he's the CFO of  
14 MRI or RLI or both of them.

15           And they clearly had not given  
16 any thought to the statement of account.  
17 They had little or no opinion about the  
18 statement of account or how this would work.  
19 They asked questions that I found irrelevant  
20 to the purpose of that meeting, which was to  
21 come up with a statement of account. And so  
22 SoundExchange went ahead on its own and

1 designed the statement of account and posted  
2 the statement of account for all licensees,  
3 irrespective of, you know, how many  
4 designated agents or who ultimately would be  
5 administering the royalties.

6 So that experience led me to  
7 believe that if on something as simple as a  
8 statement of account there wasn't  
9 cooperation, I couldn't imagine on the more  
10 complicated issues that might arise that  
11 they would be any more cooperative.

12 Q Now, in that 1998 to 2002  
13 timeframe, did RLI distribute any royalties  
14 under the statutory license?

15 A No, not to my knowledge. They  
16 didn't come forward with -- as representing  
17 any copyright owner or artist during that  
18 time period.

19 Q Since that 2002 timeframe, can  
20 you describe SoundExchange's experiences  
21 with RLI?

22 A Yes. In the '03/'04 period where

1 the rates were ultimately pushed forward and  
2 settled by the parties, RLI forced a CARP  
3 based on the sole term of the designated  
4 agent status. And, of course, SoundExchange  
5 encountered costs in both money and time  
6 preparing a case to argue our position on  
7 the multi-agent scheme. And inexplicably,  
8 before the proceeding commenced, RLI  
9 withdrew, and, you know, SoundExchange had  
10 already incurred not insignificant  
11 expenditures preparing that case.

12 Q Again, since that 2002/2003  
13 timeframe, have you -- what efforts have you  
14 seen RLI undertake on behalf of copyright  
15 owners and performers?

16 A They have done absolutely  
17 nothing. In fact, they have worked contrary  
18 to the interests of copyright owners and  
19 artists, supporting the rates of the music  
20 users, not trying to maximize the benefit to  
21 copyright owners and artists. They have not  
22 advocated for census reporting, which would

1 ensure the accurate and fair distribution of  
2 royalties to copyright owners and artists.

3 I have seen no indication of them  
4 working for copyright owners' and artists'  
5 interests. And, in fact, you know, their  
6 sister company, MRI, as I understand it, the  
7 objective is to get the lowest possible  
8 price for -- that music users have to pay  
9 for copyrights.

10 MR. STEINTHAL: Your Honor, I  
11 rise to object on foundation grounds to the  
12 last comment, which is also unresponsive to  
13 the question itself.

14 MR. FREUNDLICH: I raise the same  
15 exact objection. There was no foundation.  
16 She is speculating about what MRI does or  
17 doesn't do.

18 MR. PERRELLI: I'm happy to ask  
19 her questions about what MRI does or doesn't  
20 do, and to lay the foundation for that  
21 question.

22 CHIEF JUDGE SLEDGE: You don't



1 resist their motion.

2 MR. PERRELLI: I'm not going to  
3 resist their motion. I'm happy to ask a  
4 couple of questions.

5 CHIEF JUDGE SLEDGE: Objection  
6 sustained.

7 BY MR. PERRELLI:

8 Q Ms. Kessler, are you aware of  
9 what MRI's business is?

10 A To an extent, yes.

11 Q Okay. What is the extent of your  
12 knowledge?

13 A They represent music users with  
14 respect to musical works, and the objective  
15 is to get the lowest possible price that  
16 they have to --

17 MR. STEINTHAL: You Honor, I  
18 again move to strike. There's no foundation  
19 for her testimony as to what MRI's objective  
20 is.

21 MR. FREUNDLICH: Same objection.  
22 She is completely speculating.

1 CHIEF JUDGE SLEDGE: So the  
2 objection is that "their objective is" as  
3 opposed to "I observed that they."

4 MR. STEINTHAL: Right. I don't  
5 believe she has established a foundation for  
6 commenting on what MRI's business is or what  
7 its objective is.

8 CHIEF JUDGE SLEDGE: Sustained.

9 MR. PERRELLI: I'm just going to  
10 move on, Your Honor.

11 CHIEF JUDGE SLEDGE: All right.

12 BY MR. PERRELLI:

13 Q Ms. Kessler, at the end of your  
14 written testimony there are a number of  
15 terms -- issues discussed, specific areas,  
16 specific terms issues. Why is SoundExchange  
17 proposing changes to a number of terms in  
18 the statutory license?

19 A We have found that, through our  
20 experience in administering the license,  
21 that there are some things that we propose  
22 be changed, in some cases tweaks or in some

1 cases terms that we would like changed or --  
2 in order for us to fulfill our mission of  
3 the prompt and efficient distribution of  
4 royalties.

5 I believe that, you know, a lot  
6 of these were established before there was  
7 an agent in the role of administering the  
8 royalty and the license, and so there are  
9 just some things that we believe should be  
10 adjusted in order, you know, to facilitate  
11 the prompt distribution of royalties.

12 Q Among the recommendations that  
13 you make are some changes to issues related  
14 to late payment. Can you describe those for  
15 the Board?

16 A Sure. Right now there's -- when  
17 a licensee pays late, there is a nominal  
18 late fee that is required on the amount of  
19 royalties paid. And, you know, it's a low  
20 amount and we would hope for something that  
21 would give us more teeth and more -- and  
22 incentivize licensees to pay their royalties

1 on time.

2 You know, the prompt payment of  
3 royalties is the first step in a prompt  
4 distribution. And so, you know, at the low  
5 amount of interest that they're paying on  
6 their late fee, in conjunction with the only  
7 other remedy available to us, which would  
8 likely be a copyright infringement suit, we  
9 had hoped that there would be something in  
10 between where penalty and interest could be  
11 applied to the late payment of royalties.

12 Q And has SoundExchange indeed had  
13 problems with late payments?

14 A Yes, we've had problems with both  
15 non-payment and late payment that have gone  
16 on for weeks, months, years. And so  
17 particularly where there are licensees who  
18 are paying just minimum fees or small  
19 amounts, it's not likely going to be the  
20 economic decision of the copyright owners to  
21 bring an infringement action, yet those  
22 licensees continue to enjoy the use of the

1 sound recordings on their services.

2 Q Have you also had problems with  
3 late or failure to submit statements of  
4 account and reports of use?

5 A Yes. This is a problem for  
6 SoundExchange. There's no penalty, there's  
7 no late fee assigned to the non-compliance  
8 of submitting paperwork. And so, again, but  
9 for a copyright infringement action, I don't  
10 know of any way that we can, you know,  
11 encourage or incentivize licensees to submit  
12 their paperwork timely and as required by  
13 the regs.

14 Q Has SoundExchange had problems  
15 under the current confidentiality  
16 regulations that govern the statutory  
17 license?

18 A Yes. There are a couple of  
19 specific areas where the confidentiality  
20 clause causes SoundExchange some difficulty  
21 and frustration. You know, the first is  
22 with respect to the audit provision. You

1 know, our Board is comprised of copyright  
2 owners and artists, and we're unable, under  
3 the current terms, to share the results of  
4 an audit with copyright owners.

5 And so unless we get permission  
6 from the licensee that we've audited, we're  
7 unable to share information from the audit  
8 report that would allow them to make the  
9 appropriate next step business decisions of  
10 how to proceed, you know, based on the  
11 royalties at stake as determined by the  
12 audit process.

13 We're also unable to share  
14 payment history of a particular licensee  
15 with our copyright owners. Remember that  
16 our copyright owners are sitting on our  
17 Board. Our Board approves, you know,  
18 financial and programmatic, you know,  
19 activities of SoundExchange, and so we're  
20 only permitted to share with them in the  
21 aggregate our receipts, but not with respect  
22 to any particular licensee.

1                   This is particularly problematic  
2 with respect to copyright owners trying to  
3 determine if there are other things that  
4 they want to engage in with respect to, you  
5 know, a potential infringement or non-  
6 compliance by the licensee. Without being  
7 able to share that information, they are  
8 unable to make those business decisions.

9                   Q           What information can you share  
10 with copyright owners about a particular  
11 licensee that's, say, delinquent in payment?

12                  A           What we can say -- you know, that  
13 they have a history of paying on time or not  
14 paying on time, but not the amount of money  
15 at risk.

16                  Q           Why do the copyright owners want  
17 that information?

18                  A           Because one of the factors in  
19 determining what next actions to take is,  
20 you know, the cost of, you know, engaging in  
21 copyright infringement action makes sense  
22 against the amount of royalties that may be

1 collected.

2 Q You also make some proposals  
3 about audit provisions. Can you explain the  
4 audits that SoundExchange currently  
5 conducts?

6 A Yes. We have conducted two  
7 audits of the pre-existing services, and we  
8 have noticed about a dozen audits that we  
9 intend to conduct this year.

10 Q And without going into specific  
11 details about what you found in any  
12 particular audit, can you explain generally  
13 what you find in these audits?

14 A Well, what we find primarily is  
15 that it's very -- it's impossible to share  
16 the results of the audit with our Board or  
17 with our appropriate committees because of  
18 the confidentiality issues. And so it makes  
19 it difficult for us to go to the next step  
20 in resolving issues identified in the audit.

21 MR. PERRELLI: I believe, Your  
22 Honor, I think we will -- I will conclude



1 the examination of Ms. Kessler and leave the  
2 rest of the specific details to her written  
3 testimony. Thank you, Your Honor.

4 CHIEF JUDGE SLEDGE: Thank you.  
5 You're not next, Mr. Freundlich.

6 MR. FREUNDLICH: Okay, Your  
7 Honor. Can I just ask a quick question? I  
8 didn't catch the last words that he -- that  
9 you said. Leave the rest of the details --  
10 I just didn't hear what you said.

11 CHIEF JUDGE SLEDGE: For her  
12 written -- for her written statement.

13 MR. FREUNDLICH: Oh, okay. I'd  
14 like to ask to go next, but if it's Your  
15 Honor's preference that I don't, then I'll  
16 stand back.

17 CHIEF JUDGE SLEDGE: Based on our  
18 rotation that has been established, you're  
19 pretty near the end of the line.

20 MR. FREUNDLICH: All right.

21 CHIEF JUDGE SLEDGE: Mr.  
22 Steintal?

1 MS. ABLIN: Your Honor?

2 CHIEF JUDGE SLEDGE: Yes, ma'am.

3 MS. ABLIN: If I may, before we  
4 move into the cross examinations, I'd just  
5 like to ask for some clarification on one  
6 thing. I understood Your Honor's ruling  
7 earlier today about Ms. Kessler talking  
8 about census versus sample that sample --  
9 I'm sorry. I understood Your Honor's ruling  
10 earlier today about Ms. Kessler talking  
11 about -- testifying about census versus  
12 sample reporting -- I just wanted to clarify  
13 whether the denial of that motion also  
14 applied to the exhibits, which I don't  
15 believe I squarely raised, but I would like  
16 to do so now just to, again, receive further  
17 clarification.

18 Exhibits 414 through 418 were a  
19 set of pleadings that had been filed in  
20 various recordkeeping proceedings that  
21 lawyers, I believe, from the Recording  
22 Industry Association of America, and then

1 SoundExchange had filed, signed by their  
2 counsel, that dealt with various  
3 recordkeeping issues that they have proposed  
4 to admit through Ms. Kessler's testimony.

5 I just would, again, squarely  
6 move to -- or, you know, seek clarification  
7 whether you have also denied moving to  
8 strike those and just point out that if  
9 those stay in evidence -- and perhaps this  
10 is just going to be the unfortunate result  
11 -- certainly the parties on this side would  
12 feel compelled, if there's record evidence  
13 on recordkeeping issues handled elsewhere  
14 that's admitted into the record, you know,  
15 in the upcoming rebuttal phase, we're going  
16 to feel compelled to put those same  
17 submissions in if, you know, Exhibits 414  
18 through 418 stay.

19 So if you could just clarify,  
20 Your Honor, if those -- if my motion to  
21 strike those exhibits was denied, and, you  
22 know, we can act accordingly in the next

1 phase.

2 CHIEF JUDGE SLEDGE: Ms. Ablin,  
3 that's not a proper form to address that  
4 issue, in an oral motion in the middle of  
5 the testimony, so you'll present that in  
6 writing or in more -- consistent with the  
7 regulations on dealing with the provisions  
8 of a written statement.

9 MS. ABLIN: Okay. We will do  
10 that, Your Honor, in the written submission.

11 CHIEF JUDGE SLEDGE: Thank you.

12 MS. ABLIN: Thank you.

13 CROSS EXAMINATION

14 BY MR. STEINTHAL:

15 Q Good afternoon, Ms. Kessler.

16 A Good afternoon.

17 Q You mentioned at the beginning of  
18 your testimony that there were some 570  
19 webcasters I think that you said that were  
20 making payments, is that right?

21 A That's correct.

22 Q Is it correct that more than 90

1 percent of the webcasting royalties come  
2 from less than 10 of those webcasters?

3 A I don't know if it's -- it's 10.  
4 You know, it could be as many as 15 or 20,  
5 but it's not 10.

6 Q Okay. The 570 webcasters that  
7 are making payments, do they include the  
8 simulcasters or radio signals?

9 A Yes, they do.

10 Q Do you know roughly how many of  
11 those 570 are engaged in simulcasting as  
12 opposed to non-simulcast webcasting?

13 A Well, it's difficult to ascertain  
14 from that number, because, again, the  
15 broadcast simulcasters would be counted once  
16 as a broadcast group, but they would  
17 represent quite a large number of stations.  
18 So I don't have that figure for you.

19 Q But in terms of that 570, roughly  
20 how many are entities that are engaged in  
21 simulcasting?

22 A I don't know the answer to that.

1 Q Is it over half?

2 A I wouldn't expect so, no.

3 Q And you mentioned that there were  
4 difficulties in reporting or that there was  
5 bad reporting from your perspective. Can  
6 you draw any conclusions as to what  
7 categories of companies have been the  
8 greatest violators in your view, compared to  
9 others?

10 A No, I can't. I never quantified  
11 the data in that regard. We load logs and  
12 for efficiencies consolidate those  
13 performances irrespective of licensee for  
14 the purposes of the identification and the  
15 account assignment. So there was never any  
16 operational reason to examine the data in  
17 that regard.

18 I will tell you that it has not  
19 been my experience that one licensee is a  
20 particularly bad actor or a bad data  
21 reporter over another. I think that, you  
22 know, each log has its issues, and, you

1 know, each log is dealt with by staff in the  
2 manner that I described earlier.

3 Q Are there specific objections you  
4 have with the reporting made by the DiMA  
5 companies?

6 A I'm not sure --

7 Q I'll be more specific, so that --  
8 in particular, Microsoft and AOL and Yahoo  
9 and Live365 that are testifying in this case  
10 for DiMA?

11 A I don't understand the question.  
12 That they've objected about the reporting or  
13 --

14 Q No, no.

15 A -- that I have objections or  
16 SoundExchange has objections --

17 Q Right. That SoundExchange --

18 A -- to the way they're reporting?

19 Q -- had specific objections with  
20 the manner of reporting by those four  
21 companies.

22 A Well, remember that there aren't

1 any regulations in place with respect to the  
2 format and delivery of those reports of use.  
3 As a result, those webcasters who  
4 voluntarily report, the reports are coming  
5 in inconsistently. But I would expect that  
6 once the regulations are promulgated that  
7 SoundExchange would work with their  
8 licensees -- your DiMA companies -- to work  
9 through those issues.

10 Q And when you talk about the  
11 regulations being promulgated, through what  
12 process does that happen? It's a process  
13 different than this proceeding, correct?

14 A Well, prior to CARP reform, the  
15 process was through a notice in  
16 recordkeeping proceedings.

17 Q Right. And is it your  
18 understanding that the notice in  
19 recordkeeping proceeding process still goes  
20 on with respect to matters that have been  
21 subject to those kinds of proceedings  
22 before?



1           A           I understand that terms are under  
2 the auspices of this Board, and I don't know  
3 the -- where the notice in recordkeeping  
4 will be determined.

5           Q           Okay. And by that, you mean  
6 where -- the issues relating to  
7 recordkeeping and reporting?

8           A           Correct.

9           Q           I just want to ask you some  
10 questions about the terms portion of your  
11 testimony, which start at page 24, and as to  
12 which Mr. Perrelli just asked you a few  
13 questions towards the end of your  
14 examination.

15          A           Thank you. I'm sorry. You said  
16 page?

17          Q           It starts at page 24. Section 3  
18 of your written testimony is modifications  
19 needed to license terms. And you only spent  
20 a little bit of time on your oral testimony  
21 on that subject, and there are certain  
22 questions I wanted to ask about that.

1           First of all, the importance of  
2 census reporting, which starts at page --  
3 starts on page 25 of your written testimony,  
4 and you did testify a bit about that this  
5 afternoon. Is it your testimony, Ms.  
6 Kessler, that no sample can be accurate for  
7 purposes of providing SoundExchange with  
8 ample information to distribute royalties  
9 collected?

10           A       No. My testimony is that I have  
11 never seen any evidence by any of the  
12 licensees that prove that a sample results  
13 in the proper allocation and distribution of  
14 royalties. That wouldn't disenfranchise  
15 certain artists or copyright owners.

16           Q       Well, you're familiar with the  
17 fact that internationally it's common, is it  
18 not, in particular for radio, for  
19 collections by collecting societies to be  
20 distributed on a sample basis, correct?

21           A       I'm not aware if that's common.  
22 I do know that over the years other

1 organizations that distribute royalties are  
2 moving to census reporting that is conducted  
3 through technology, you know, monitoring  
4 services of each and every performance.

5 Q But are you familiar with the  
6 fact that, for example, in broadcast radio  
7 the general practice of collecting societies  
8 has been to distribute based on a sample and  
9 not a census?

10 A Well, no, I understand that ASCAP  
11 and BMI have been monitoring radio stations  
12 for quite some time now through their joint  
13 ventures with technology services companies  
14 like Media Guide to -- and those are census  
15 collection. I mean, they collect all the  
16 data. And one of the purposes for that is  
17 to distribute royalties.

18 Q Is it your testimony that they  
19 actually distribute for broadcast radio  
20 based on a census rather than a sample at  
21 this point?

22 A I don't know if they are or

1 they're not. I know that the -- one of the  
2 chief purposes of investing in this joint  
3 venture was to collect the broadcast  
4 performance information.

5 Q And while I would certainly agree  
6 with you that a census is better than a  
7 sample in terms of getting more information,  
8 is it correct that samples can be created  
9 that are generally accurate barometers of  
10 the greater use being made of a given media?

11 A Well, since all that information  
12 is in the possession of your clients and the  
13 broadcasters, I would like to see that  
14 analysis done on that census reporting  
15 applying various samples to see if there is  
16 a mathematical and scientific and  
17 statistical way. I have never seen any  
18 evidence, and to the contrary  
19 SoundExchange's own analysis reveals, you  
20 know, that based on information reported by  
21 certain webcasters to SoundExchange's sample  
22 does not remotely result in the fair

1 distribution of royalties to artists and  
2 copyright owners.

3 Q Other than that one snapshot that  
4 you looked at, are you aware of any other  
5 tests of samples that have been done of  
6 webcaster performances under the statutory  
7 license to see how accurate a sample could  
8 be?

9 A I'm unaware, and I'm unaware of  
10 any evidence put in by your clients in any  
11 notice and recordkeeping proceeding that  
12 would prove your supposition that sample is  
13 appropriate.

14 Q I'm not supposing anything. I'm  
15 just asking you some questions, okay?

16 A Well --

17 Q Now, in Section B, starting on  
18 page 25 of your testimony, it deals with  
19 your request that the terms state that the  
20 failure to pay royalties when required,  
21 followed by payment of a late fee, does not  
22 preclude a copyright infringement claim. So

1 is it your testimony, then, that you want  
2 the regs or the law to explicitly state that  
3 non-payment of a statutory fee could result  
4 in copyright infringement penalties to the  
5 entity that didn't pay on time?

6 A Penalties?

7 Q Copyright infringement penalties.

8 A Is your question about my written  
9 testimony?

10 Q Yes.

11 A Can I take a moment and --

12 Q Sure.

13 (Pause.)

14 A Can you repeat your question,  
15 please?

16 Q I first want to find out what the  
17 proposal is. Is the proposal that if a  
18 statutory licensee doesn't pay on time that  
19 you want the statute to read, or the regs to  
20 read, that a statutory licensee can be  
21 liable for copyright infringement for having  
22 failed to pay its statutory royalties?

1           A           The objective of this request to  
2 change to the term is so that a persistently  
3 delinquent licensee who doesn't pay on time  
4 and, in fact, could go months and, you know,  
5 in one case years of not paying their  
6 statutory obligation had simply, by paying  
7 those royalties and getting those up to date  
8 and paying the attendant late fee, does not  
9 absolve them from a potential copyright  
10 infringement action.

11           Q           So you -- well, let me ask it  
12 this way. Do you have any basis that you're  
13 aware of for legislating that the failure to  
14 pay a licensee fee during a time period when  
15 someone is operating under a statutory  
16 license could render that entity liable for  
17 copyright infringement during that time  
18 period?

19           A           I'm not an attorney, but my  
20 understanding is that failure to comply to  
21 the rates, the payment of the royalty  
22 obligation and the terms, would expose a

1 licensee to a potential copyright  
2 infringement action.

3 Q Did you have any basis for  
4 proposing what is set forth in Section B of  
5 your testimony in terms of support from any  
6 other medium or any other statutory license  
7 regime?

8 A Well, again, you know, this  
9 requested change in the term is just to  
10 clarify that simply by making the payment  
11 and paying the late fees does not absolve  
12 you or -- or inhibit a copyright owner from  
13 bringing an infringement case, simply  
14 because you ultimately, after many months or  
15 however long of non-payment, you know,  
16 finally paid your royalties and late fees.  
17 That's all this is saying.

18 Q I understand what you're saying  
19 it's saying. My question was: did you have  
20 any basis, in other statutory licenses or  
21 any other support, for the request to change  
22 the terms being made in this aspect of your



1 testimony?

2 A You know, I think this is clear  
3 in -- I don't remember -- maybe the -- with  
4 respect to the PES. I'm not sure. But it's  
5 not done in a vacuum. This is not a new  
6 term.

7 Q But you don't cite PES, meaning  
8 the pre-existing services, statutory  
9 license?

10 A Well, it's not cited in the  
11 testimony, no.

12 Q And are you familiar with the  
13 fact that copyright infringement penalties  
14 are pretty draconian, up to \$150,000 per  
15 infringement, if it's wilful? Are you  
16 familiar with that?

17 A Well, I wouldn't agree that they  
18 are draconian. I would agree that they are  
19 not insubstantial.

20 Q Well, hypothetically, if a  
21 licensee owed \$150 for a given license  
22 period, and it could be rendered liable for

1 just one infringement at \$150,000, wouldn't  
2 you believe that to be fairly draconian  
3 relative to the amount of royalties due?

4 A No, I do not believe that.

5 CHIEF JUDGE SLEDGE: It would be  
6 a big incentive.

7 MR. STEINTHAL: Excuse me?

8 CHIEF JUDGE SLEDGE: It would be  
9 a big incentive.

10 (Laughter.)

11 MR. STEINTHAL: That's for sure.

12 BY MR. STEINTHAL:

13 Q Now, aren't there other less  
14 draconian ways to arrive at the same result  
15 that you'd like to get, meaning  
16 incentivizing people to pay on time?

17 A I think that there are a  
18 combination of changes that could be made  
19 that would incentivize licensees to pay on  
20 time. I do not, however, believe that if a  
21 licensee doesn't pay on time, and doesn't  
22 pay their late fees or otherwise comply with

1 the various aspects of the statutory  
2 license, that a copyright owner -- again,  
3 this isn't my decision, it would be the  
4 copyright owners' decision -- if they chose  
5 to pursue a copyright infringement action,  
6 that's completely up to them.

7 Q Well, let me ask you this. Did  
8 you consider, for example, whether to solve  
9 the very problem you're talking about, which  
10 is having to sue people for not making  
11 payments on time -- did you consider, for  
12 example, whether if the regulations were  
13 amended to provide that in any action  
14 brought by SoundExchange to collect for non-  
15 payment SoundExchange would be entitled to  
16 the attorney's fees incurred as part of any  
17 such effort, might be another way of making  
18 sure that SoundExchange is not out of pocket  
19 for having to pursue late payers?

20 A I don't disagree that there are  
21 ways in which SoundExchange could -- or the  
22 regulations or the terms could be written to

1       incentivize folks to pay on time and to  
2       submit the appropriate paperwork, and I've  
3       made a number of suggestions in my testimony  
4       of how that would happen. But it's not  
5       SoundExchange's copyright. You know, we're  
6       administering the license, and if a  
7       copyright owner feels that non-compliance  
8       with the terms of the license, you know,  
9       warrants a copyright infringement action  
10      they should absolutely be entitled to do so.  
11      And one doesn't impact the other.

12             Q       Then, why do you need to change  
13      the rest? If your position is that a  
14      copyright owner has the right anyway, why do  
15      we have to saddle the regs with explicit  
16      language of the nature that you're seeking?

17             A       To make it clear.

18             Q       So apparently it's not that  
19      clear, is it?

20             A       I wouldn't be requesting a change  
21      in my testimony if it were crystal clear.

22             Q       Okay. So it's not clear that an

1 entity that doesn't pay a statutory license  
2 fee is liable for infringement simply for  
3 failing to pay, correct?

4 A Again, failure to comply with the  
5 statutory license -- it's my understanding,  
6 as a non-lawyer, that a copyright owner does  
7 have the avenue of bringing a copyright  
8 infringement action.

9 Q But that was the very thing that  
10 you just said was unclear, which is why you  
11 wanted to clarify it, right?

12 A No. I wanted to make clear that  
13 by simply finally making your payments  
14 didn't absolve you of the -- or protect you  
15 from a potential copyright infringement  
16 action is what I said.

17 Q I guess that just puzzles me,  
18 then, as to why you need the change in the  
19 regulation.

20 Let me have you turn to page 27  
21 where you talk about the interest penalty.  
22 And is it true -- I mean, I'm just reading

1 from your testimony here on pages 27 to 29  
2 -- that you seek a change in the regs to  
3 increase the late payment fee from .75  
4 percent to 2-1/2 percent per month, right?

5 A That's correct.

6 Q So if I get that right, that's 30  
7 percent per annum?

8 A I trust your calculation.

9 Q Do you know of any other  
10 collecting society that has late payment  
11 fees as high as 30 percent per annum?

12 A Well, I think the point here is  
13 that, you know, we want to disincentivize a  
14 licensee from waiting and waiting and just  
15 paying this nominal amount. And if they're  
16 similar to the IRS that charges penalties  
17 and interest when taxes aren't received,  
18 that that would incentivize licensees to pay  
19 on time.

20 Q Do you view SoundExchange as  
21 operating essentially like the IRS?

22 A I do not, nor would I want to

1 undertake that massive undertaking. But I'm  
2 using that as an example of, you know, the  
3 concept of some sort of graduated or  
4 escalating penalty for lengthy and repeated  
5 non-payment of royalties that inhibit  
6 SoundExchange's ability from making the  
7 timely distributions that it is charged to  
8 make.

9 Q Well, wouldn't a better analogy  
10 be to whatever the late payment fees are  
11 that are prevalent with collecting societies  
12 in the United States and elsewhere?

13 A I don't know what those late fees  
14 are, and I haven't really given thought to  
15 whether those would be, you know, applicable  
16 or not.

17 Q So where did --

18 A I was trying to --

19 Q I'm sorry. Where did the 2-1/2  
20 percent come from, then?

21 A In my testimony I'm trying to  
22 solve an administrative problem that we have

1 seen where licensees for months and months  
2 aren't paying their royalties, or repeatedly  
3 they do not pay their royalties on time.

4 And I can only surmise that having a rate of  
5 .75 percent isn't a very big problem for  
6 them if they continue to pay late.

7 And this is a suggestion of what  
8 may give some teeth to the requirement --  
9 and, I mean, it's the requirement in the  
10 first instance -- to pay on time.

11 Q I understand that. I'm not here  
12 to defend deadbeats. I'm here to try to  
13 make sure that whatever the regs are that  
14 are ultimately rendered are fair. Okay? Do  
15 you know of any collecting society that  
16 comes near a 30 percent annual rate for late  
17 payments?

18 A I don't know if it would be near  
19 or not, because I don't know what their late  
20 fee percentages are.

21 Q Is it the fact that the number  
22 just came out of SoundExchange's desire to



1 make sure that people pay on time, so let's  
2 pick a high number, that they don't want to  
3 have to pay as a late fee, without any  
4 consideration of comparable late fees  
5 existing in other collecting society  
6 arrangements?

7 A Can you repeat the question?

8 Q Let me rephrase it this way. Is  
9 it true that the number that was taken here  
10 was taken without consideration of any other  
11 comparable collecting society late fee  
12 arrangements, the 2-1/2 percent per month?

13 A You know, I -- the number was  
14 reflective of what credit card companies  
15 charge when you don't pay on time, and it  
16 was something that we felt was a substantial  
17 enough late fee to disincentivize licensees  
18 from paying late. That's where it came  
19 from.

20 Q And when you talked before about  
21 a graduated late fee for people that are  
22 recalcitrant, this proposal isn't a

1 graduated late fee, is it? It's just a --  
2 basically changing the late fee to 2-1/2  
3 percent per month or 30 percent per annum,  
4 is that right?

5 A Let me take a second to look at  
6 this, please.

7 (Pause.)

8 Well, when I talked about the  
9 graduated late fee, I was really referring  
10 to the second paragraph on page 28, with  
11 respect to the grace period, and then late  
12 fees would be doubled.

13 Q Doubled on top of --

14 A Yes.

15 Q -- the 2-1/2 percent --

16 A So that's the --

17 Q -- per month or --

18 A -- graduated.

19 Q Right. Let's turn to page 29, if  
20 you will. When you talk about penalties  
21 should also apply for services that fail to  
22 submit completed statements of account and

1 reports of use. Let me ask you this: did  
2 you consider how one would resolve  
3 situations where entities might not have  
4 every bit of information on a SoundExchange  
5 reporting form and what the implications  
6 would be if they were subject to late  
7 payment fees for failure to provide  
8 information that doesn't exist?

9 A Well, my job is to consider how  
10 SoundExchange distributes royalties timely,  
11 efficiently, transparently, and accurately.  
12 And so in order to get the royalties out on  
13 time, we absolutely need a completed and  
14 accurate statement of account. That's the  
15 first step in this entire process and will  
16 result in delays in distributions otherwise.

17 So what I considered was what  
18 might be an approach to solve the problem of  
19 missing statement of accounts or -- or  
20 incomplete statements of account. And, you  
21 know, there's a 45-day window after the end  
22 of the month where the statements of account

1 can be prepared, and that seems ample time  
2 to collect the information on the statement  
3 of account -- a statement of account, by the  
4 way, which the licensee opted to take.

5 So if they were unable to report  
6 and comply with that, then perhaps the  
7 statutory license wasn't the way for them to  
8 go.

9 Q Well, we don't even have, as you  
10 said at the beginning, final reporting and  
11 recordkeeping regulations, right?

12 A That's on the reports of use, not  
13 on the statement of account information.

14 Q But on the reports of use -- your  
15 proposal here applies to both statements of  
16 account and reports of use, right?

17 A Yes.

18 Q So you're proposing that there be  
19 late payment penalties for incomplete  
20 reporting for reports that we don't even  
21 know what they're going to be, and whether,  
22 for example, a given reporting obligation

1 would be applicable to every individual  
2 licensee, right?

3 A So that was a multi-part  
4 question, and I -- I'll try to address --  
5 address it. You know, there is an  
6 obligation for a licensee to report the use  
7 of the sound recording to the copyright  
8 owner. That is their obligation. The  
9 mechanism for doing that is through the  
10 reports of use. Reports of use have been in  
11 operation with the pre-existing services for  
12 a long period of time, and, you know, so the  
13 -- you know, the idea that reports of use  
14 are something brand new and unknown just  
15 really isn't the case.

16 The piece of the notice in  
17 recordkeeping that's outstanding is not what  
18 data elements should be reported, and it's  
19 what format should the file be in, and how  
20 do you physically deliver that file or  
21 electronically deliver that file to  
22 SoundExchange. So maybe I'm not answering

1 your question.

2 Q Well, for example -- let me ask  
3 it this way. I'll do it in little bits and  
4 pieces.

5 A Thank you.

6 Q If we go to what an ISRC code is  
7 -- would you tell the Panel what an ISRC  
8 code is?

9 A Yes, I know what an ISRC code is.

10 Q What is it?

11 A It's the International Sound  
12 Recording Code, which uniquely identifies a  
13 sound recording.

14 Q And doesn't SoundExchange want  
15 licensees to report the ISRC code with  
16 respect to all of their transmissions?

17 A Yes, we do.

18 Q And isn't it true that it doesn't  
19 exist with respect to all of the sound  
20 recordings?

21 A Isn't it true that it doesn't  
22 exist with all the sound recordings.

1           Q       There isn't an ISRC available to  
2 every webcaster for each sound recording  
3 that it transmits, is there?

4           A       Well, I know that at least for  
5 the last 16 or so years ISRCs have been  
6 assigned to new releases. I mean, that's  
7 quite a bit of catalog. But we're not  
8 asking for ISRC to the exclusion of other  
9 information. If you read the reporting  
10 requirements, you know, licensees have the  
11 option of reporting the ISRC or the  
12 marketing label on the album or some other  
13 combination of fields.

14                       So it's not -- it's not a  
15 requirement. It's an either/or situation.  
16 To the extent that you have it, it's a great  
17 bit of information for us to have. If you  
18 don't, then go ahead and report these other  
19 elements.

20           Q       But in a situation where you're  
21 proposing that a report that's not  
22 "complete" when so many fields of

1 information are being requested, could  
2 render a licensee liable for late payment  
3 penalties when they've done their best  
4 efforts to comply, isn't that a bit penal  
5 when the issue of what is complete or not  
6 complete may depend on the eyes of the  
7 beholder?

8 A I don't believe completion of the  
9 file is remotely unknown. I think the  
10 regulations are quite clear that if you're  
11 going to report the ISRC you need not report  
12 other fields. If you report the other  
13 fields, you need not report the ISRC. A  
14 computer program can examine that file and  
15 ascertain, to the extent on a record-by-  
16 record basis, what is complete and what  
17 isn't, what has adhered to the reporting  
18 requirements and what has not.

19 And, no, I do not think that it's  
20 unreasonable to expect a licensee to comply  
21 with, you know, the terms of the statutory  
22 license when they get the tremendous benefit



1 of using copyright owner and artist sound  
2 recordings. So I think they should report  
3 and report timely and completely in order  
4 for us to get through this entire process  
5 and distribute the royalties.

6 Q And I'm not suggesting otherwise.  
7 However, when a licensee is reporting, as  
8 you said, hundreds of thousands of  
9 performances of sound recordings during a  
10 given reporting period, have you or have you  
11 not seen situations where the licensee feels  
12 that it has reported completely, and  
13 SoundExchange feels that there are a couple  
14 of things missing?

15 A Well, first, you know, the  
16 regulations aren't final. So, you know,  
17 currently while webcasters are required to  
18 retain the information, they aren't yet  
19 required to deliver those reports of use to  
20 SoundExchange.

21 Secondly, you know, I'm not  
22 really understanding your characterization

1 of reporting. I mean, first of all, you  
2 know, I believe I have all the fields right,  
3 but it's title of the sound recording, it's  
4 the artist, it's the marketing label and  
5 album, or the ISRC, and then the number of  
6 performances in your transmission category  
7 and some other elements about the licensee.

8 But with respect to identifying a  
9 sound recording, it's a handful -- truly a  
10 handful of fields. That is not unreasonable  
11 when the sound recording and the information  
12 about the sound recording and the act of  
13 transmitting that sound recording is in the  
14 possession of the licensee.

15 Q Isn't it true, Ms. Kessler, that  
16 the basis of the information that the  
17 licensee has is directly from the record  
18 companies that provide it with the sound  
19 recordings for purposes of airing?

20 A I'm not sure how webcasters  
21 obtain the product from which they stream.  
22 I don't know if they're getting it directly

1 from the record company or through a third  
2 party, like a Loudeye. I don't know where  
3 your clients are getting either the sound  
4 recordings or the information.

5 Q So do you have any basis for  
6 testifying that every one of those fields is  
7 information that the webcasters have for  
8 every one of the sound recordings that they  
9 stream?

10 A You know, at the risk of  
11 repeating myself, it's not that all five  
12 fields are required. It's some combination  
13 of them that are required. And the purpose  
14 of it is to identify the sound recordings,  
15 so we can pay it out. And if you don't  
16 provide it to us, where will SoundExchange  
17 -- SoundExchange won't know --

18 Q The suggestion is not --

19 A -- the information --

20 Q -- that you not get these  
21 reports, ma'am. The suggestion is not that  
22 at all. The question is whether, when you

1 have a proposal, that because a report in  
2 your judgment is not complete, even though a  
3 licensee has endeavored to provide  
4 information in response to a reporting  
5 obligation, that if there is this dispute  
6 between SoundExchange and a licensee over  
7 the completeness of their report, they  
8 should be rendered liable for late payments  
9 when they have endeavored to comply but  
10 there is a dispute as to the completeness of  
11 it.

12 A Well --

13 Q Is it your position that there  
14 should be a late payment fee in that  
15 circumstance?

16 A I firmly believe that a late  
17 payment should be in place when a service  
18 simply doesn't send us any report of use.  
19 You know, SoundExchange's experience has  
20 been -- as I've explained in this process,  
21 we get misreported information, poorly  
22 reported information, all the time. And we

1 expend a lot of resources to clean up those  
2 -- those records of use in order to get our  
3 job done and distribute the royalties.

4           If after all of this we still  
5 don't know what the sound recording is  
6 because one of your clients is reporting  
7 Bach as the featured artist and -- or  
8 various as the featured artist or something  
9 like that -- we have no remedy to require  
10 you, or we have no resource of funds to go  
11 out and do something else, apart from  
12 depleting the statutory royalties that are  
13 going to copyright owners and artists.

14           The intent of this is to  
15 disincentivize sloppy recording and the  
16 untimely delivery of reports of use.

17           Q       Is it your position that a good  
18 faith effort to report, that nonetheless  
19 yields not as much information as  
20 SoundExchange would like, should render a  
21 licensee liable for late payment fees?

22           A       Well, let me answer it this way.

1 SoundExchange has demonstrated its  
2 willingness to work with licensees on the  
3 reporting issues. We have, and we will, and  
4 we do. But to the extent that there is  
5 repeated behavior of not making any attempt  
6 to rectify issues identified in trying to  
7 process those reports of use, I think, yes,  
8 there should be a penalty of -- you know,  
9 short of a copyright infringement action for  
10 that repeated type of behavior.

11 But in the first instance, not  
12 reporting -- you know, not even sending a  
13 log in at all should definitely -- there  
14 should definitely be a penalty for that. It  
15 delays our entire process when we don't  
16 receive logs on time.

17 Q You didn't answer my question.  
18 In the instance where there is a good faith  
19 effort to report -- I didn't say a recurring  
20 problem, which is what you answered -- in  
21 the instance of a good faith effort to  
22 comply with the reporting obligations, and a

1 disagreement or dispute between  
2 SoundExchange and the licensee as to whether  
3 the information provided is complete, is it  
4 your position that SoundExchange in that  
5 situation should get a late payment fee?

6 A I think that SoundExchange -- and  
7 I did answer this, and I said that to the  
8 extent SoundExchange works with the  
9 licensee, and when you see improvement in  
10 the reporting, and we work together to try  
11 to rectify the problems, then there is no  
12 problem.

13 But to the extent that there is,  
14 you know, no effort being made to report the  
15 very basic five fields, not even -- some  
16 combination of that information, in order  
17 for us to definitively know what sound  
18 recording was transmitted, yes, I think that  
19 a penalty should be applied.

20 Q So when you said in your answer  
21 that you didn't think there was a problem  
22 when there's a good faith effort to comply

1 and an exchange of information between  
2 SoundExchange and the licensee, I gather  
3 when you said there was no problem that your  
4 position is there's no need for a late fee  
5 for that particular circumstance.

6 A I would say that when we work  
7 with licensees and they demonstrate a  
8 willingness and an improvement that  
9 SoundExchange -- this is on a case-by-case  
10 basis, and I don't have the particulars in  
11 front of me, but it -- you know, it should  
12 be our -- you know, we would have the option  
13 of waiving those late fees. But not to have  
14 them in the first instance would give us  
15 absolutely no ability to require accurate  
16 and timely reporting.

17 Q Well, isn't another way of  
18 dealing with it to make clear that good  
19 faith efforts to comply on a non-recurring  
20 basis don't yield a payment -- a late  
21 payment obligation as distinguished from  
22 your request to have it across the board,



1 and the ability of SoundExchange and its  
2 discretion to waive?

3 A I think that's an alternative,  
4 but I prefer my recommendation.

5 Q Well, I'm sure you would.

6 CHIEF JUDGE SLEDGE: I'm somewhat  
7 puzzled by your questions focusing more on a  
8 fault issue. Isn't the issue who is in the  
9 best position to provide information in  
10 order to have an efficient system as opposed  
11 to fault?

12 MR. STEINTHAL: Well, Your Honor,  
13 I think that there is a -- this whole issue  
14 of the terms is one that is full of data  
15 issues and the like.

16 CHIEF JUDGE SLEDGE: Right.

17 MR. STEINTHAL: It's not just a  
18 question of fault. In other words, our  
19 objections here -- and we didn't have notice  
20 of these proposed terms until SoundExchange  
21 filed its case. And to the extent we have  
22 any concerns about these terms, we will deal

1 with them in our rebuttal case. What I  
2 wanted to do in this cross is just simply,  
3 on certain of the issues that I know our  
4 clients have some concerns about, ask  
5 questions as to what the bases are and what  
6 the limits are of the proposals.

7 So, for example, in this  
8 instance, Your Honor, it's simply a question  
9 of I don't dispute the notion that repeat  
10 offenders that either don't pay or don't  
11 report in a good faith, accurate manner  
12 should be subject to some term provisions,  
13 whatever they may ultimately be.

14 But one of the things that I have  
15 trouble with in reading these terms is its  
16 over-precautionary in favor of SoundExchange  
17 approach. So, for example, there is a lot  
18 of data here. The witness is talking about  
19 the fields. We're talking about hundreds of  
20 thousands of sound recordings. It is not  
21 uniform.

22 The data that the webcasters get,

1 as you'll hear, is not uniform. Some of  
2 them are old sound recordings where there is  
3 no ISRC number. The data we get is -- you  
4 know, we rely on the sound recording  
5 providers that give it to us or what's in  
6 the actual album or the CD that we, you  
7 know, digitize to put on the server to get  
8 that information.

9 So the universe of information  
10 isn't perfect. And I'm simply trying to ask  
11 questions, so that we can ultimately get to  
12 a world in which good faith efforts to  
13 report, which may not be exactly what the  
14 licensors wanted to have, don't render  
15 somebody responsible for financial  
16 penalties. I'm not here to argue in favor  
17 of deadbeats, as I said before.

18 CHIEF JUDGE SLEDGE: Right. But  
19 my -- my question deals with -- because I  
20 would think that the focus is on who is in  
21 the best position to provide the  
22 information, and perhaps some incentives are

1 required on one part or the other as part of  
2 the terms in order to encourage people to do  
3 that. But --

4 MR. STEINTHAL: But we're only in  
5 the position --

6 CHIEF JUDGE SLEDGE: I hear you  
7 all talking about who is at fault, and that  
8 just doesn't seem very important.

9 MR. STEINTHAL: Well, this seems  
10 to be -- their proposal seems to be a no-  
11 fault situation, where if the data isn't  
12 complete you get penalized. And if we don't  
13 have the data, and we have no way of getting  
14 better data than what we have, then that, in  
15 our view, is an unfair system.

16 CHIEF JUDGE SLEDGE: But if  
17 you're determined to be the one in the best  
18 position to provide the data, then the fact  
19 that you don't have the data is no excuse.

20 MR. STEINTHAL: Well, again, Your  
21 Honor, the question is: do you require of a  
22 licensee -- a statutory licensee to report

1 data that may not exist?

2 CHIEF JUDGE SLEDGE: Which  
3 wouldn't be a very good regulation.

4 MR. STEINTHAL: No, it wouldn't  
5 be.

6 CHIEF JUDGE SLEDGE: Yes.

7 MR. STEINTHAL: And that's our  
8 concern.

9 CHIEF JUDGE SLEDGE: Right.

10 MR. STEINTHAL: And to have a no-  
11 fault situation where completeness is  
12 required, otherwise you have a late payment  
13 fee, and if we don't have the information in  
14 the first place -- and that's the nature of  
15 the question. We will deal with these in  
16 more detail.

17 CHIEF JUDGE SLEDGE: If the  
18 system requires data that doesn't exist,  
19 then the system needs changing.

20 MR. STEINTHAL: Exactly.

21 CHIEF JUDGE SLEDGE: Okay. Thank  
22 you.

1 BY MR. STEINTHAL:

2 Q Now, there's a provision in your  
3 proposed terms regarding audits. And am I  
4 correct that the proposal is that  
5 SoundExchange be permitted to audit  
6 licensees with its own staff rather than  
7 requiring independent outside auditors doing  
8 the auditing of the licensees?

9 A If you don't mind, if you could  
10 give me a page reference, so that I --

11 Q I believe it's in Section F  
12 starting on page 35.

13 A Thank you. And I'm afraid I'm  
14 going to have to ask you to repeat the  
15 question.

16 Q Well, my question is whether the  
17 SoundExchange position is that SoundExchange  
18 ought to be able to conduct the audit with  
19 its own staff rather than use an outside  
20 independent auditor to do the auditing  
21 function.

22 A Well, let me answer your question

1 this way. SoundExchange is confronted with  
2 a situation where audits rather than being  
3 financial in nature are data and analytic or  
4 technical in nature. And so we are  
5 wondering if there should not be a  
6 clarification as to what an independent  
7 auditor is.

8           And to the extent that  
9 SoundExchange has the technical capability  
10 of doing the data analytics, you know, our  
11 -- the question is: what makes an auditor  
12 independent or not? I believe that's what  
13 we're getting at here.

14           Q       Well, isn't the -- in the past,  
15 under statutory licenses, hasn't  
16 SoundExchange or its predecessor been  
17 required when conducting audits to do  
18 independent audits with outside auditors?

19           A       Isn't SoundExchange required --

20           Q       Or its predecessor, RIAA, when it  
21 was doing --

22           A       To engage an outside auditor.

1 The way I understand the regulation that's  
2 in place right now is that an independent  
3 auditor is to conduct the examination.

4 Q And in suggesting that  
5 SoundExchange be able to do that itself  
6 without requiring an independent auditor,  
7 what's the basis for seeking to change a  
8 system that requires outside independent  
9 auditors to one where SoundExchange can  
10 conduct the audits with their in-house  
11 people? Or is that just something that  
12 SoundExchange would like and it has put it  
13 in the regs as something it would like?

14 A I'm just reading again.

15 (Pause.)

16 Where is this language that  
17 you're referring to?

18 Q It -- I'm not sure where this  
19 specific language is, but it's the subject  
20 of what you're testifying to.

21 A I just want to make sure I  
22 respond.



1 JUDGE WISNIEWSKI: You might try  
2 point 5 on pages 38 and 39.

3 THE WITNESS: Thank you, Your  
4 Honor.

5 MR. STEINTHAL: I thank you as  
6 well.

7 THE WITNESS: You know, this  
8 discussion is really about what does  
9 independence mean. I mean, that's -- we've  
10 come cross auditors who own copyrights, and  
11 the question is, you know, does that  
12 disqualify them under the independence  
13 factor, because they own copyrights, as  
14 opposed to independence from the licensor.

15 BY MR. STEINTHAL:

16 Q Well, then, is it your testimony  
17 that SoundExchange is not seeking to be able  
18 to conduct the audits, whether they be  
19 technical or financial, through their own  
20 in-house people?

21 A Well, I think to the extent that  
22 SoundExchange develops technology that can

1 examine the server logs in a cost effective  
2 manner that we should -- we would like to be  
3 able to conduct those types of technical  
4 data analytic audits.

5 Q And are you familiar with any  
6 precedent and other statutory license  
7 schemes that permits the licensor to conduct  
8 audits through their own in-house staff  
9 rather than through independent outside  
10 auditors?

11 A Well, remember, you know --

12 Q Just yes or no would be fine.

13 A Well, I can't -- I can't just  
14 answer yes or no. I can say that, you know,  
15 SoundExchange doesn't own any copyrights.  
16 We're administering a license. It's  
17 copyright owners who own -- own -- and  
18 they're not exactly licensing their content.  
19 A statutory license is being taken by virtue  
20 of it being established by the government.  
21 So, you know, no, to answer your question,  
22 I'm not aware of what you're referring to,

1 but I just wanted to make clear that we're  
2 not the licensor. We're administrating the  
3 statutory license.

4 Q And my question is simply whether  
5 you are familiar with any other statutory  
6 license scheme where the licensor or its  
7 administrator is permitted to conduct the  
8 audits through their own in-house staff as  
9 distinguished from relying on outside  
10 independent auditors?

11 A I'm not familiar with how other  
12 statutory licensees conduct their audits.

13 Q And to be clear, is it  
14 SoundExchange's proposal that just the  
15 technical audits be able to be conducted by  
16 their in-house staff or technical and  
17 financial as well?

18 A Just the examination of the  
19 server logs, the technical audits where  
20 we're looking at the numbers of performances  
21 reported on the statements of account.

22 Q So you're not seeking to have a

1 system in which the financial audits, to the  
2 extent they're conducted, of a licensee be  
3 conducted by anyone other than an outside  
4 independent auditor?

5 A I had not contemplated that, no.

6 Q And there are outside independent  
7 technical auditors, are there not, including  
8 Mr. Bernstein's company, which is currently  
9 under contract by SoundExchange to conduct  
10 audits of the very licensees in this  
11 proceeding?

12 A Royalty Review Council is one  
13 auditor that we identified who may have the  
14 capability of doing these types of audits.  
15 We've identified him in our notices of  
16 intent to audit.

17 Q And to be clear, that's in  
18 relation to notices that were sent by  
19 SoundExchange to, among others, AOL and  
20 Yahoo and Microsoft and Live365, in  
21 connection with a prior license period?

22 A That's correct.

1 Q Okay. Now, there's another  
2 provision that you propose in relation to  
3 the audits, which is on pages 39 to 40,  
4 where you propose a change in the -- what  
5 I'll call the error threshold for which  
6 penalties are imposed where you basically  
7 propose that the current 10 percent leeway  
8 be changed to 5 percent, is that right?

9 A Yes.

10 Q And just to be clear, currently  
11 under the regs, if an audit reveals a  
12 differential of less than 10 percent, then  
13 SoundExchange pays for the cost of the  
14 audit. But if the differential is greater  
15 than -- is 10 percent or greater, then the  
16 licensee has to pay for the cost of the  
17 audit. Is that what your --

18 A That's my understanding, yes.

19 Q And you propose to change that 10  
20 percent to 5 percent, correct?

21 A That's correct.

22 Q Do you have any basis in other

1 statutory licenses for changing that 10  
2 percent to 5 percent?

3 A No. The basis for this change is  
4 that this could essentially result in a 10  
5 percent discount to the licensee. It's that  
6 for, you know, the audit period they could  
7 underreport, you know, and not hit this 10  
8 percent threshold and never have -- be  
9 required to reimburse SoundExchange for the  
10 cost of the audit. And it just seems like  
11 an incentive to underreport, and it should  
12 be tightened.

13 Q Do you have any evidence --

14 A It's a practical solution to a  
15 problem that we have identified.

16 Q Do you have any evidence under  
17 the current statutory license of licensees  
18 deliberately underreporting by 9 percent?

19 A Do you mean with respect to  
20 webcasters?

21 Q Yes.

22 A We haven't conducted the audits

1 yet.

2 Q So when you talk in paragraph 7  
3 about -- at the bottom of page 39 you say,  
4 "At a 10 percent threshold, services could  
5 have an incentive to underpay by 9 percent,  
6 knowing that the only likely consequence is  
7 an obligation to pay the underpayment,  
8 excluding for the moment the possibility of  
9 an infringement action," that's just a  
10 hypothetical assumption on your part,  
11 because you've got no evidence that under  
12 the current system people are actually  
13 deliberately underreporting at 9 percent,  
14 right?

15 A We have not conducted the audit,  
16 so I have no results to examine.

17 Q And have you undertaken before in  
18 making this proposal to look at other  
19 collecting society arrangements to see what  
20 the prevalent practice, if any, is with  
21 respect to where there is a cost shift for  
22 the cost of an audit in terms of

1 underreporting?

2 A No, I did not.

3 Q Did you look at any other  
4 benchmarks to justify the change from 10 to  
5 5 percent?

6 A No, I did not.

7 Q Take a look on page 42 and  
8 Section I, the section on transmissions of  
9 recordings of comedic performances. What's  
10 the basis for this change?

11 A Again, it's a clarification that  
12 a sound recording consisting of spoken word  
13 is also compensable under the statutory  
14 license as opposed to musical content.

15 Q Is it SoundExchange's position  
16 that under the prior license comedic  
17 performances are not required to be paid  
18 for, and this is a change to -- to elaborate  
19 upon the existing performances, subject to  
20 license?

21 A SoundExchange believes comedic  
22 performances are compensable, but we wanted



1 to make it absolutely clear in the event  
2 that there might be some confusion with  
3 respect to what licensees were required to  
4 pay.

5 Q Have there been any disputes  
6 between licensees and SoundExchange over the  
7 issue of comedic performances?

8 A I wouldn't characterize it as a  
9 dispute. I would characterize it as a  
10 reporting issue that they were unaware that  
11 they might have to report performances on  
12 their spoken word channels, and that, in  
13 fact, yes, they should and they are  
14 compensable.

15 MR. STEINTHAL: No further  
16 questions, Your Honor.

17 CHIEF JUDGE SLEDGE: Let me just  
18 follow up on that last question. Is there  
19 any difference between comedic reporting --  
20 recordings versus any spoken word  
21 recordings, or is that just --

22 THE WITNESS: This was one

1 specific clarification that we requested.

2 And to the extent that, you know, spoken  
3 word booked as a sound recording -- it seems  
4 to me it should be compensable as well.

5 CHIEF JUDGE SLEDGE: Thank you.

6 Okay.

7 CROSS EXAMINATION

8 BY MS. ABLIN:

9 Q Good afternoon, Ms. Kessler.

10 A Good afternoon.

11 Q It's good to see you again. I'd  
12 like to start by asking you about a  
13 statement or -- that you made on page 2 of  
14 your testimony. Actually, let's go straight  
15 to page 16, shorten this a little bit. Go  
16 to page 16. That's the more direct  
17 statement.

18 A Yes.

19 Q And I believe that back in  
20 October 31st or thereabouts when direct  
21 cases were due, you testified that  
22 SoundExchange had allocated more than 55

1 million in royalties.

2 A Yes.

3 Q And just so we have all the  
4 figures down, what is that number today?

5 A As of the distribution we're  
6 conducting right now, that's nearly 70  
7 million.

8 Q And that's out of how much in  
9 royalties that's been collected?

10 A This distribution represents two  
11 quarters of -- am I permitted to say this?

12 MR. PERRELLI: I'm not sure I  
13 know the answer to -- to the extent the  
14 witness is going to get into restricted  
15 testimony about a particular licensee or  
16 licensee payments, it may require us to go  
17 into closed session.

18 CHIEF JUDGE SLEDGE: What  
19 restricted testimony?

20 MR. PERRELLI: Well, I don't  
21 believe she has any restricted testimony in  
22 her direct testimony, but it's -- as I

1 understand from the witness' hesitance, she  
2 may feel that the question requires her to  
3 reveal some restricted information.

4 CHIEF JUDGE SLEDGE: Well, you'll  
5 have to be more specific before you're  
6 persuasive.

7 MR. PERRELLI: I'm not sure I can  
8 be more specific, since I don't -- to the  
9 extent that the question is seeking  
10 information about specific payments by  
11 specific licensees, that is information that  
12 is -- has been treated as restricted under  
13 the protective order, and this is  
14 specifically confidential under the  
15 regulations.

16 So to the extent that the  
17 question seeks that information, and Ms.  
18 Kessler was about to provide that  
19 information, that information should be  
20 restricted, and I think pursuant to the  
21 regulations needs to be treated as  
22 restricted.

1 CHIEF JUDGE SLEDGE: What  
2 regulation?

3 MR. PERRELLI: It's 261 -- or --  
4 sir, I believe it's the PES. If it relates  
5 to the PES, it's 262 -- 261. And if we're  
6 talking about --

7 CHIEF JUDGE SLEDGE: I'm sorry.  
8 I didn't understand -- with your  
9 interchange, I didn't understand your  
10 answer.

11 MR. PERRELLI: If it relates to  
12 the pre-existing subscription service, it's  
13 36 CFR 261. If it relates to the satellite  
14 digital audio radio services, that relates  
15 to the prior -- a private agreement, which  
16 is subject to the confidentiality provisions  
17 within that agreement and has been treated  
18 as restricted in this proceeding.

19 It may make sense for Ms. Ablin  
20 to ascertain from the witness what types of  
21 information she is seeking to elicit, so  
22 that we can identify most appropriately the

1 basis for the restriction.

2 CHIEF JUDGE SLEDGE: You're  
3 saying that under the regs 361 --

4 MR. PERRELLI: 261. I'm sorry,  
5 Your Honor.

6 CHIEF JUDGE SLEDGE: -- 261 for  
7 pre-existing.

8 MR. PERRELLI: Yes, sir.

9 CHIEF JUDGE SLEDGE: And 262 for  
10 satellite?

11 MR. PERRELLI: For satellite,  
12 that is the subject of a private agreement  
13 --

14 CHIEF JUDGE SLEDGE: Private  
15 agreement --

16 MR. PERRELLI: Which has  
17 confidentiality provisions in it that  
18 restrict that information.

19 CHIEF JUDGE SLEDGE: That's not  
20 the question nor the answer that has been  
21 given, so please proceed, Ms. Ablin.

22 MS. ABLIN: Thank you, Your

1 Honor.

2 BY MS. ABLIN:

3 Q And how much of -- I believe my  
4 question right before the little break was  
5 how much -- you had said that nearly 70  
6 million in royalties had been allocated.  
7 How much had been collected? That's  
8 70 million that has been allocated out of  
9 what bigger number?

10 A Oh, the total collected to date?  
11 I don't know what that number is. What I  
12 can say is that the distributions have taken  
13 us through collections on the PES and the  
14 SDARS through the end of 2005. Remember,  
15 the webcasters haven't been required to  
16 report because of the outstanding  
17 regulations on format delivery and -- file  
18 format and delivery specifications. So  
19 without the logs we can't distribute those  
20 royalties, and I just don't have that figure  
21 off the top of my head.

22 Q Okay. So for the --

1           A           So we've distributed royalties  
2 collected through Q1 of 2004 for the  
3 webcasters, and through the end of 2005 for  
4 the PES and the SDARS.

5           Q           Okay. Well, let's start with the  
6 webcasters, the money that you have  
7 distributed through Q1 2004. How much total  
8 webcaster money, through that quarter, has  
9 been collected? Putting aside what happened  
10 after Q1 2004.

11          A           I have innumerable reports that  
12 say all this. Off the top of my head  
13 sitting here in this moment, I can't recall  
14 what the exact number of -- of what we've  
15 distributed. I know that for the '98 to '02  
16 period it was in excess of \$10 million, but  
17 I'd have to refer to my distribution reports  
18 to be able to answer your question with  
19 accuracy.

20          Q           I guess what I'm trying to get at  
21 is, out of the money, approximately -- out  
22 of the money that has been collected through



1 Q1 2004 where you do have a basis for paying  
2 it out, what percent of that money has been  
3 distributed versus the percent that is  
4 sitting in an account because you haven't  
5 been able to find, for example, the  
6 copyright owner that it needs to go to?

7 CHIEF JUDGE SLEDGE: I couldn't  
8 hear your question.

9 MS. ABLIN: I'm sorry. I can try  
10 to repeat all of that again.

11 BY MS. ABLIN:

12 Q I'm trying to get at how much --  
13 of the total money that has come in, how  
14 much of the -- for webcasters, through Q1  
15 2004, how much of that money has been  
16 distributed versus the money that has not  
17 been distributed, for whatever reason, it  
18 has either not been allocated or it is  
19 sitting in an escrow account, because you  
20 don't know how to allocate it?

21 A So with respect to the copyright  
22 owners' share of the royalty, 85 percent of

1 the money has been paid through to the  
2 copyright owner, and 15 percent is  
3 unidentifiable, either because of our issue  
4 with the sound recording or our issue of  
5 locating the copyright owner that we should  
6 pay.

7 Q For copyright owners, what about  
8 the artist money?

9 A On the artist side, we're at  
10 about a 60 percent pay-through rate to  
11 featured artists, and we expect to hit the  
12 65 percent pay-through rate by October.

13 Q October of this year.

14 A Yes.

15 Q And can you -- I know you can't  
16 give a number with precision without looking  
17 at reports, but can you just give a ballpark  
18 of how much money we're talking about that  
19 has come in, just to your best recollection?

20 A Well, if we take the 70 million  
21 that we've allocated and approximate, you  
22 know, between the artists and the copyright

1 owners, whatever that blended percentage is  
2 paid through, that would result in what we  
3 have been able to not only allocate but pay  
4 through. So I think that blended rate must  
5 be what is -- 35 and 15, it's, you know, 60  
6 percent or whatever it happens to be.

7 Q Let me just make sure I'm on the  
8 same page with you.

9 A Yes.

10 Q The 70 million -- because I don't  
11 know that I am -- the 70 million that has  
12 been allocated, has that amount also been  
13 distributed, or has it just --

14 A Yes.

15 Q -- been allocated?

16 A Yes. No, we allocate and  
17 distribute --

18 Q Okay.

19 A -- at the same time.

20 Q So when you testify that a  
21 certain amount of money has been allocated,  
22 it has also been distributed?

1           A       No. The distinction is that the  
2 allocation has occurred, and the  
3 distribution from the sound recording to the  
4 accounts has occurred but may not have  
5 resulted in an actual payment due to the  
6 lack of address information or identify of  
7 the artist or copyright owner to pay. So we  
8 distributed the funds to the sound recording  
9 level. It just hasn't necessarily resulted  
10 in a check to a recipient.

11                   And those percentages that I was  
12 describing to you, the 65 percent pay-  
13 through or the 85 percent pay-through is  
14 what we have been able to successfully  
15 allocate and distribute in the form of a  
16 payment. The remaining percentage is what  
17 is in our unidentified escrowed accounts  
18 waiting identification.

19           Q       Okay. I'll leave that. Not  
20 quite sure, but I'll have to -- I'll go  
21 back.

22           A       And if you're asking, you know,

1 what is collected versus what is allocated,  
2 we're -- we've allocated through 2005 for  
3 two of -- the PES and the SDARS. But due to  
4 this lack of reporting on the webcasters, we  
5 have only been able to distribute through Q1  
6 of 2004.

7 Q And then, how does the amount of  
8 money sitting in what I think -- I believe  
9 you testified was called a suspense account,  
10 how does that amount of money relate to what  
11 is allocated?

12 A That is what has been allocated  
13 but not paid out, so --

14 Q Okay. And about what percentage  
15 of the total royalties collected for  
16 webcasters is sitting in an expense account  
17 -- a suspense account, rather?

18 A It's that similar percentage --

19 Q Okay.

20 A -- and spread across all our  
21 royalty streams. Thirty-five percent of the  
22 artist entitlement and 15 percent of the

1 copyright owners has yet to be distributed  
2 in the form of a payment to those entitled  
3 parties.

4 Q Okay. If you could -- I guess  
5 you are on page 16 of your testimony still,  
6 correct? And you said there that you  
7 projected that SoundExchange's  
8 administrative costs, exclusive of expenses  
9 incurred in participating in proceedings  
10 such as this one, at the time you projected  
11 a figure of 12-1/2 percent as of October  
12 2005.

13 A Yes.

14 Q Now, I thought I heard you say a  
15 couple of hours ago that the actual number  
16 was 7-1/2 percent?

17 A A little bit more than 7-1/2  
18 percent for 2005. That's correct.

19 Q And did you ever provide -- did  
20 you provide documents to your counsel that  
21 showed the basis for this number? Because I  
22 don't see -- obviously, it's a recent

1 number. It didn't appear in your written  
2 direct statement.

3 A We will provide documents -- I  
4 mean, I have documents, obviously, that  
5 calculate the administrative rate and the  
6 factors that go into it, and that I provided  
7 to counsel -- I mean, I'm assuming I  
8 provided that report to counsel, but -- I  
9 think that I did.

10 Q Okay.

11 A But not the 7-1/2 percent,  
12 because we just closed our books for '05.  
13 So the 12-1/2 was based on a budget  
14 projection, and in actuality the admin rate  
15 was a little north of 7-1/2 percent after we  
16 closed our books for 2005.

17 Q And the books closed on what  
18 date?

19 A Recently. We just had our  
20 accountants take a look at them and certify  
21 them, and we're about to be audited for that  
22 2005 period.

1           Q       Now, in the 7-1/2 percent rate,  
2       were legal fees -- I think you said legal  
3       fees, for example, for this proceeding are  
4       included in -- for the current proceedings,  
5       I'm not talking about the past CARP  
6       proceedings, are --

7           A       Well, any legal fees, whether it  
8       was this proceeding or some other licensing  
9       activity, your general legal is included in  
10      the 7-1/2 percent, except the CARP  
11      repayment. The CARP repayment that we're  
12      making is based on the differential between  
13      our actual admin rate last year of a little  
14      more than 7-1/2 percent and a 20 percent  
15      cap.

16          Q       So your 2006 projections, then,  
17      do they take account of -- for example, if  
18      current legal proceedings are now going to  
19      be included in the administrative rate on a  
20      going-forward basis, did the 2006 estimate  
21      account for, for example, the legal fees  
22      getting incurred right now in this room, in



1 this proceeding?

2 A We estimated just some amount for  
3 the purposes of coming up with the admin  
4 rate. And remember that the cost of the  
5 proceeding is for a five-year license  
6 period. So under accounting procedures you  
7 would capitalize those costs over the term  
8 of the license.

9 So with respect to the expression  
10 of the admin rate, we're taking one-fifth of  
11 our estimated cost for each year of the  
12 license.

13 Q But you are, in fact, including  
14 the one-fifth in there.

15 A It is in there, yes.

16 Q Okay. I'd like to hand you a  
17 document in a minute here, which is going to  
18 be marked as Services Exhibit 134.

19 (Whereupon, the above-  
20 referred to document was  
21 marked as Services  
22 Exhibit No. 134 for

1 identification.)

2 Actually, before I do this, I'll  
3 just direct you to your witness statement  
4 again where you say on page 16, for  
5 comparison purposes when you're, again,  
6 discussing your admin rate, that you believe  
7 the administrative costs for ASCAP and BMI  
8 are typically around 16 percent of total  
9 revenue.

10 A Yes.

11 Q I just wanted to -- we're going  
12 to explore that statement a little bit. And  
13 I'm going to hand you a document that we  
14 received in discovery from your counsel.  
15 It's Bates numbered SX74113 to 114. It's a  
16 -- actually, why don't you describe this  
17 press release for us, Ms. Kessler. Are you  
18 familiar with this? Have you seen this  
19 press release?

20 A No. I'll have to -- may I first  
21 read it?

22 Q Certainly.

1 (Pause.)

2 Have you finished reading --

3 A I have.

4 Q -- the press release? I will  
5 represent to you that this was produced by  
6 your counsel as a document that supported  
7 the statement that you made in your witness  
8 statement concerning the administrative  
9 expenses. Have you ever seen this document  
10 before today?

11 A I believe I have read this  
12 before.

13 Q You have read this document.  
14 Okay. And could you describe the document?

15 A It's a description of BMI and its  
16 reporting for the '04/'05 fiscal period.  
17 It's collections, it's costs, and it's  
18 describing the year that it had.

19 Q And just for the record, the  
20 document is dated September 12, 2005?

21 A Yes, it is.

22 Q It's covering the fiscal year

1 spanning the 2004/2005 timeframe?

2 A I'm not sure what BMI's fiscal  
3 year is.

4 Q Well, at least the document says  
5 that on the -- in the first sentence it's  
6 covering whatever they call "fiscal  
7 '04/'05." It's reporting a rate over a  
8 period of -- let's back up. The document is  
9 reporting revenues over a period of time  
10 that they are describing as fiscal  
11 2004/2005.

12 A Yes. But, again, I don't know if  
13 --

14 Q Sure.

15 A -- fiscal year 2005 ends in  
16 January of '05 or September of '05.

17 Q Well, that's fine.

18 A I don't know what 12-month period  
19 they are describing here.

20 Q But in any event, the revenues  
21 that BMI posted for the period of time were  
22 728 million?

1           A       Yes, according to this press  
2 release.

3           Q       And they also state that BMI's  
4 royalty distribution out of those -- that  
5 revenue pool to BMI affiliated songwriters,  
6 composers, and publishers was over 623  
7 million for the time period?

8           A       That's what this document says.

9           Q       And it states that BMI's  
10 operational expenses as a percentage of  
11 revenues were 14.2 percent?

12          A       That's correct. That's what this  
13 says.

14          Q       So in other words, the amount  
15 that BMI did not distribute, I take it,  
16 would be the difference between the revenues  
17 that they received and the money that was  
18 actually paid out, right?

19          A       You'll have to ask them. I don't  
20 know what their undistributed royalties  
21 consist of.

22          Q       Okay. Well, at a minimum, the

1 press release says that their operating  
2 costs were 14.2 percent of their revenues,  
3 correct?

4 A That's what this press release  
5 says, yes.

6 Q Okay. And if you just simply  
7 perform the calculation of taking the money  
8 that they -- that BMI reports in here as  
9 having been collected, and you divide into  
10 that the money that they actually paid out  
11 -- and, actually, I'd like you to do that  
12 for us. I brought a calculator.

13 A I'll accept your characterization  
14 that the difference between the 700 million  
15 and the 623 million is what they incurred in  
16 their admin cost. Is that what -- how you  
17 --

18 Q Okay. Which is -- I was just  
19 trying -- right, and that number comes out  
20 to be approximately what they report as 14  
21 --

22 A Fourteen percent. Okay. I

1 accept that.

2 Q Okay. Fair enough. Now, BMI,  
3 just like SoundExchange, that performance  
4 rights organization engages in license  
5 negotiations on behalf of its affiliated  
6 songwriters and publishers, and what-not?

7 A BMI, on behalf of its members,  
8 and their members only, negotiates the  
9 rates. That's right.

10 Q And BMI also participates in  
11 rate-setting proceedings -- well, let me  
12 back up. BMI operates pursuant to a consent  
13 decree, correct?

14 A I understand that BMI operates  
15 under a consent decree, yes.

16 Q And there is a rate court that  
17 has been established to litigate fee  
18 disputes when BMI is not able to reach  
19 agreement with potential licensees over  
20 funds?

21 A When BMI is unsuccessful in its  
22 negotiations, which I don't even know the

1 last time that happened, then they would be  
2 subject to a rate-setting procedure.

3 Q You're not aware of the BMI/Music  
4 Choice, for example, rate court proceedings?

5 A I don't -- no, I'm not.

6 Q In any event, BMI, when they  
7 don't reach agreement, they do participate  
8 in these rate court proceedings. And the  
9 purpose of those is to set a rate.

10 A My understanding is that, absent  
11 a negotiated deal, they are subject to a  
12 rate-setting procedure, yes.

13 Q And BMI also, on behalf of its  
14 members, or perhaps with the participation  
15 of its members, also engages in direct  
16 enforcement actions or copyright  
17 infringement actions on behalf of its  
18 members, correct?

19 A I would assume that BMI enforces  
20 its license and engages in compliance  
21 activity, although I certainly can't speak  
22 to what, if anything, they do. I would



1 assume that BMI does those things.

2 Q You know, if BMI engages in --  
3 and all of those activities are activities  
4 that SoundExchange engages in, correct? Or  
5 let's back up.

6 A Go ahead and ask the question.

7 Q SoundExchange, like BMI, engages  
8 in license negotiations.

9 A No, no. SoundExchange is nothing  
10 like BMI. We are not a membership  
11 organization. We have to pay -- we pay  
12 copyright owners and artists, whether they  
13 are members or not of SoundExchange. So  
14 we're not a membership organization. We're  
15 not remotely like BMI in that respect.

16 You know, BMI, in my view, is  
17 engaged in more of a direct licensing type  
18 of a situation, where SoundExchange is  
19 operating under a statutory license. I  
20 think those things are completely different,  
21 and so I wouldn't agree with you that  
22 SoundExchange and BMI operate the same way.

1           Q       Well, no, that's actually not  
2 what my question was. I simply asked  
3 whether SoundExchange, like BMI, engaged in  
4 the activity of license negotiations. BMI,  
5 in fact, negotiates licenses and  
6 SoundExchange negotiates licenses.

7           A       If you oversimplify it, that's  
8 the case. But, again, the license that  
9 we're involved with, which is a statutory  
10 license and the license that BMI is  
11 negotiating, which is akin to a direct  
12 license, are just different. But licensing  
13 occurs, if that's what you're asking.

14          Q       Yes, that is, and --

15          A       Licensing occurs.

16          Q       And so BMI -- all I'm trying to  
17 get at is BMI incurs costs in negotiating  
18 licenses.

19          A       I assume that they do, yes.

20          Q       Okay. Just like SoundExchange  
21 incurs costs in negotiating licenses.

22          A       Oh, we incur costs with respect

1 to licensing, yes.

2 Q Now, I believe you testified that  
3 for 2005, although your stated  
4 administrative rate was a little over 7-1/2  
5 percent, the actual deduction was 20  
6 percent, because there's still this  
7 outstanding CARP repayment figure that has  
8 not been repaid. And so the monies that are  
9 actually being deducted for administrative  
10 expenses by SoundExchange total 20 percent  
11 of collections for 2005?

12 A That's correct. But remember  
13 that the 7-1/2 percent is the cost of  
14 actually operating SoundExchange. And that  
15 pursuant to a promissory note for the  
16 repayment of some startup costs with respect  
17 to the rate-setting for Webcaster I are  
18 being repaid over time through these  
19 royalties.

20 Q Right. But for the year 2005,  
21 the activities that we're talking about that  
22 are included in the CARP repayment rate are

1 the same types of activities -- namely,  
2 participating in a rate-setting proceeding  
3 -- that BMI engages in as part of its  
4 operations.

5 A Well, the way in which the rate  
6 was established for Webcasting I is not, as  
7 I understand it, the way BMI's rates are  
8 set. But if what you're saying is that the  
9 differential between actual operating costs  
10 and the 20 percent is what we are required  
11 to pay down the promissory note for the  
12 startup arbitration cost, that's correct.  
13 But that was from a prior period. That's  
14 not the current -- a current cost to  
15 SoundExchange.

16 Q But it's --

17 A This is repayment of startup  
18 costs.

19 Q Just looking at the year 2005,  
20 though, in fact, SoundExchange took a 20  
21 percent deduction.

22 A SoundExchange took a little more

1 than 7-1/2 percent to cover operations, and  
2 the differential between the 20 percent and  
3 the 7-1/2 percent was used to repay the  
4 debt. That's the way I characterize it.

5 Q So the total deduction from both  
6 of those sources was 20 percent.

7 A Twenty percent.

8 Q For 2005.

9 A For 2005.

10 Q And according to this press  
11 release, BMI's deduction was 14.2 percent,  
12 correct?

13 A According to this press release,  
14 yes, their admin rate is 14.2 percent.

15 Q So actually, for 2005, BMI  
16 deducted a lesser percentage from its  
17 revenues received as SoundExchange -- than  
18 SoundExchange did, correct?

19 A See, I think that you're  
20 incorrect in how you're characterizing this  
21 admin rate. When we talk about the 20  
22 percent, it's on certain royalty streams.

1 Other royalty streams are -- the 7-1/2  
2 percent are applied. So blended across our  
3 various royalties, the admin rate is not 20  
4 percent.

5 I believe that this number that  
6 BMI is reporting is, if you broke it down  
7 into various licenses that they administer  
8 and enforce, that sort of thing, some would  
9 be in excess of the 14 percent, and some  
10 would be below, you know, would be around  
11 this 14.2 percent.

12 But this number is not well  
13 described to the extent of, what is it  
14 really costing them to enforce in their  
15 clubs, and this number may be artificially  
16 reduced from -- you know, from royalties  
17 that we're receiving. And so that's why I  
18 want to be very clear in how we describe  
19 SoundExchange's admin rate. That on certain  
20 royalty streams, the way you're describing  
21 it the admin rate is 20 percent simply  
22 because of the repayment of this debt.

1           But the actual cost of operation,  
2           which is what I think this percentage  
3           reflects, or is the comparable to  
4           SoundExchange's number, is 7-1/2 percent.

5           Q       Let's talk about the webcasting  
6           stream, though. I take it that the  
7           webcasting CARP royalties -- or CARP  
8           expenses, rather, have not yet been repaid.

9           A       From the CARP I, Webcast I --

10          Q       Yes.

11          A       -- CARP proceeding, we owe a  
12          balance of \$2-1/2 million for those costs.

13          Q       So the deduction in  
14          administrative expenses to the webcasting --  
15          in the webcasting stream of royalties was,  
16          in fact, 20 percent.

17          A       That was 20 percent, but our  
18          blended admin rate is not 20 percent, which  
19          is what -- I think this admin rate that  
20          they're reporting is a blended admin rate  
21          across licenses. Do you understand what I'm  
22          trying -- you know, I'm trying to, you know,

1 understand what this number is across all  
2 their royalties, which is what I think they  
3 are reporting and what SoundExchange reports  
4 across all of its royalties.

5 Q When you refer to -- when you say  
6 "blended admin rate," though, the 7-1/2  
7 percent number, as I understood your  
8 testimony, was not a blended rate. That was  
9 your actual operating cost? It did not  
10 include the CARP repayment?

11 A That's right.

12 Q So what would --

13 A That's right.

14 Q Do you know what the blended rate  
15 is?

16 A I actually don't have that report  
17 in front of me, so, no, but it's not 20  
18 percent.

19 Q But the webcaster deduction was,  
20 in fact, 20 percent.

21 A The webcaster deduction for that  
22 license is 20 percent, and the difference



1 between actual cost and the 20 percent is  
2 used to repay the bank.

3 CHIEF JUDGE SLEDGE: Ms. Ablin,  
4 could I clarify confusion that I have from  
5 that last answer? Do I understand correctly  
6 that they have been no distributions on  
7 webcasting since first quarter 2004?

8 THE WITNESS: Yes.

9 CHIEF JUDGE SLEDGE: So how can  
10 there be a deduction of 20 percent in  
11 distributions in 2005 if you've made no  
12 distributions?

13 THE WITNESS: Well, that's an  
14 excellent question. So we don't take our  
15 admin rate at the moment; the money goes  
16 through this entire cycle. We're permitted  
17 to deduct the cost of operating  
18 SoundExchange from the royalties received.

19 So at the moment of distribution,  
20 we know that costs for any particular period  
21 -- in this example 7-1/2 percent -- that's  
22 what we -- that's when we book the admin

1 rate for accounting purposes. But in order  
2 to operate SoundExchange, we need the admin  
3 rate, you know, on a cash basis to pay for  
4 the costs of operating SoundExchange.

5 So, and I know this is a little  
6 complicated, it confuses our auditors all  
7 the time, but the booking of the admin rate  
8 and the taking of the admin rate aren't the  
9 same thing.

10 CHIEF JUDGE SLEDGE: Thank you.

11 THE WITNESS: You're welcome.

12 MS. ABLIN: Your Honor, I note  
13 the time, and I'm about to move into another  
14 area. Perhaps it might be --

15 CHIEF JUDGE SLEDGE: That's a  
16 good suggestion. Thank you. We'll recess  
17 -- Mr. Handzo, did you have --

18 MR. HANDZO: No, I'm sorry. I  
19 just wanted to alert the Board that what  
20 we're going to do is pick up with Mr.  
21 Kenswill tomorrow, because of scheduling  
22 issues. So we'll bring Ms. Kessler back

1 after that.

2 CHIEF JUDGE SLEDGE: That's  
3 understood.

4 MS. ABLIN: And if I might  
5 clarify, because it obviously involves me,  
6 will Ms. Kessler -- is she scheduled to  
7 appear at the end of Mr. Kenswill's  
8 testimony or --

9 CHIEF JUDGE SLEDGE: That's what  
10 he went over this morning.

11 MS. ABLIN: I'm sorry. I must  
12 not have been here.

13 MR. HANDZO: Yes, she is. I  
14 mean, I think our assumptions have been that  
15 Mr. Kenswill is likely to go all day, but --

16 CHIEF JUDGE SLEDGE: We don't  
17 need this on the record. You all can have  
18 that conversation. All right. We'll recess  
19 until 9:30 in the morning.

20 (Whereupon, at 5:11 p.m., the  
21 proceedings were adjourned, to reconvene at  
22 9:30 a.m., the following day.)