

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)
|-----+

Volume 16

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

Thursday,
June 8, 2006

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

BEFORE:

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

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2 (9:34 a.m.)

3 CHIEF JUDGE SLEDGE: Mr.

4 Perrelli?

5 MR. PERRELLI: Yes, sir. We are
6 prepared to resume with Ms. Kessler.

7 CHIEF JUDGE SLEDGE: All right.

8 Thank you.

9 Ms. Kessler, I remind you that
10 you're under oath.

11 THE WITNESS: Thank you.

12 WHEREUPON,

13 BARRIE KESSLER

14 was recalled as a witness and, having been
15 previously duly sworn, resumed the witness
16 stand, was further examined and testified as
17 follows:

18 CROSS EXAMINATION (cont'd)

19 BY MS. ABLIN:

20 Q Good morning, Ms. Kessler.

21 A Good morning.

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

1 couple of the issues that we touched upon on
2 Tuesday, just for a few questions here.

3 A Would you mind speaking up a
4 little, please?

5 Q I'm sorry. Yes. I'd like to go
6 back and touch on a couple of questions that
7 relate to our conversation last Tuesday. Do
8 you recall when we talked about
9 SoundExchange's allocation -- and I believe
10 you testified that they had allocated
11 approximately 70 million to date?

12 A That's correct.

13 Q And I just -- I don't believe I
14 ascertained how much of the total royalties
15 they had collected to date. Could you give
16 me your best approximation, as the Chief
17 Operating Officer, of that number?

18 A Yes. Remember that we're unable
19 to distribute webcasting royalties as a
20 result of awaiting the regulations with
21 respect to format and delivery. And I
22 believe those amounts are about \$10 million

1 for that period. In addition, we have not
2 distributed the first quarter distributions
3 for 2006, which is approximately \$15
4 million.

5 So remember that we allocate and
6 distribute in arrears, because we're
7 awaiting reports of use and the payments,
8 and so forth. So that's my best estimate.

9 Q So the total amount collected to
10 date is still the number I'm trying to get
11 at, which I take it has got to be a number
12 in excess of \$70 million.

13 A That's correct. It would be the
14 \$70 million plus the 25 that I just
15 identified.

16 Q So \$95 million.

17 A Approximately.

18 Q Okay.

19 A Is my best recollection.

20 Q Sure, sure. We won't hold you to
21 specific dollar amounts. Just to give us a
22 ballpark.

1 And then, I also don't believe I
2 got from you how much money has actually
3 been paid out to date across all statutory
4 licensees, the money coming in from all
5 statutory licensees getting paid out.

6 A Yes. Of the 70 million
7 allocated, which is the only way I can
8 express the pay-through rate, if you assume
9 about 45 percent goes to the featured
10 artist, we're paying for almost 65 percent
11 of that money. Of the copyright owner's
12 share, which would be 50 percent of that
13 money, we're paying through about 85 percent
14 of that money.

15 The undistributed royalties are a
16 result of the inability to identify the
17 sound recording with certainty, or being
18 unable to identify or locate a copyright
19 owner or a featured artist. Or it's a
20 result of not having payment information in
21 which to actually cut a check to a copyright
22 owner or a featured artist.

1 So the first quarter royalties
2 for 2006 have not been allocated or
3 distributed, and then of the 70 million that
4 we have allocated, that's the pay-through.

5 Q And what about the five percent
6 that goes to the unions?

7 A That goes direct to them. That's
8 fully paid through.

9 Q Okay. Thank you.

10 Now, we also talked for quite a
11 while on CARP repayments. I'm sure you
12 recall that testimony. I just wanted to
13 ascertain from you -- are there any other
14 CARP proceedings, besides the prior
15 webcaster proceedings, for which
16 SoundExchange was repaying CARP fees in
17 2005?

18 A CARP fees?

19 Q In what SoundExchange has called
20 CARP repayment -- the CARP repayment costs,
21 the initial \$9 million.

22 A The \$9 million was all from the

1 PES and Webcasting I CARP proceeding.

2 That's it.

3 Q Okay. And the only CARP
4 proceeding that was still getting repaid in
5 2005 was the webcaster proceeding?

6 A The PES and the webcasting
7 proceeding.

8 Q Okay.

9 A That's correct.

10 Q And is the preexisting
11 subscription services CARP repayment
12 complete, or will there be a repayment on
13 that category of services for 2006?

14 A It's combined with the
15 webcasting, so the CARP repayment includes
16 both -- both -- you know, both licenses,
17 both the PES and the webcasting.

18 Q Okay. And then, I'm sure you
19 also recall our discussion Tuesday about
20 BMI's administrative or operating costs, and
21 we talked at some length about those costs
22 vis-a-vis SoundExchange's costs. Do you

1 recall that testimony?

2 A Yes, I do.

3 Q And in your written testimony, I
4 believe also in your oral direct testimony,
5 you drew a comparison between the two
6 operating expenses of SoundExchange on the
7 one hand and ASCAP and BMI on the other. Is
8 that right?

9 A Yes.

10 Q And we went through some
11 activities that BMI engages in as part of
12 its operations. Do you remember that
13 testimony?

14 A I remember you describing what
15 those activities were.

16 Q And do you remember, for example,
17 affirming that BMI participates in rate
18 court proceedings -- for example --

19 A I understand that BMI
20 participates. I have no way of knowing if
21 those costs are reflected in the admin rate
22 expressed in that document you showed me,

1 however.

2 Q Well, how else would BMI fund
3 rate court proceedings, if not from their
4 royalties?

5 A I have no idea.

6 Q Okay. Fair enough. And one
7 activity we did not touch upon I think with
8 BMI is statutory license rate-setting
9 proceedings. And I believe you testified
10 that BMI is not participating in this rate-
11 setting proceeding under Section 114. But
12 it is true, is it not, that BMI participates
13 in other statutory license proceedings?

14 A I'm not sure what rate settings
15 they participate in.

16 Q Well, are you aware, for example,
17 that there is a Section 118 statutory
18 license that covers non-commercial
19 broadcasting?

20 A I know there's a Section 118. I
21 wouldn't begin -- I couldn't begin to
22 explain what 118 covers.

1 Q Are you aware at least that
2 Section 118 concerns musical work public
3 performances?

4 A Honestly, I'm not sure what the
5 118 does.

6 Q Okay.

7 A I'm not -- you know, I'm in the
8 114 and the 112 world, so --

9 Q Okay. Well, at a minimum that's
10 a proceeding that SoundExchange does not
11 participate in.

12 A That I can say.

13 Q Okay.

14 A We are not participating in that.

15 Q Are you familiar with the Section
16 118 jukebox license, statutory license?

17 A No, I am not.

18 Q Are you familiar with any other
19 statutory licenses besides the 112 and 114?

20 A I know a little about the 115,
21 but not much.

22 Q But no others, okay. Now, you

1 also testified that -- about ASCAP's
2 administrative costs. We've been mostly
3 focusing on BMI up until now. Is that
4 correct, that you -- you did, in fact,
5 testify in your written statement about
6 ASCAP's operating expenses in addition to --

7 A Yes.

8 Q -- BMI's.

9 A Yes.

10 Q And I believe you gave a 16
11 percent estimate of their operating expenses
12 in your written statement?

13 A Yes, I did.

14 Q What did you base that number on
15 for ASCAP?

16 A Just my knowledge and experience
17 in what others state that the admin rate for
18 ASCAP is.

19 Q Did you do any independent
20 checking on ASCAP's website, or did you call
21 anyone at ASCAP to --

22 A I looked on ASCAP's website and

1 don't recall if there was a figure on there
2 or not. But I did look on their website,
3 yes.

4 Q Well, let's take a look at --
5 we're going to take a look at a document
6 here that's being marked as Services Exhibit
7 151. I'll give you a moment to review it.

8 (Whereupon, the above-
9 referred to document was
10 marked as Services
11 Exhibit No. 151 for
12 identification.)

13 Are you finished? Okay. And,
14 Ms. Kessler, I will represent to you that
15 this is a document that was -- it was
16 printed off ASCAP's website on June 5, 2006.
17 And could you tell us the date of this
18 document and the title of the document, or
19 the title of the release?

20 A The date I see is March 13, 2006,
21 ASCAP Adapts to Rapidly-Changing Music
22 Market and Reports Record Revenues, Royalty

1 Payments, for the Year 2005.

2 Q And in this document, ASCAP
3 reports its operating expenses at 12-1/2
4 percent, is that correct?

5 A Yes, that's what it says.

6 Q And like BMI -- let me rephrase.
7 ASCAP engages in the same types of
8 activities as BMI by and large, does it not?

9 A That's my understanding.

10 Q Okay. And, in fact, ASCAP also
11 participates in, for example, tape surveys
12 to survey radio station performances, is
13 that correct? That would be another
14 activity undertaken by ASCAP?

15 A I don't know if they are still
16 doing that. I know that they at one time
17 did that. But with their joint venture with
18 Media Guide, they are doing full monitoring
19 of broadcast stations. So I'm not sure if
20 they're still engaged in that activity or
21 not.

22 Q Okay. Ms. Kessler, I'm about to

1 hand you another document, actually, that is
2 going to be marked as Services Exhibit 152.
3 And while the exhibit is getting marked, I
4 will represent to you that this is going to
5 -- that this memo --

6 (Whereupon, the above-
7 referred to document was
8 marked as Services
9 Exhibit No. 152 for
10 identification.)

11 A I'm sorry. I can't really hear
12 you.

13 Q I'm sorry. I will represent to
14 you that this document was also printed off
15 ASCAP's website on June 7, 2006. And if you
16 could just take a look at the radio
17 description in the middle of the page there,
18 and then I'll ask you a question or two
19 about that.

20 A Okay.

21 Q Now, this is a document that's --
22 at the top of the page it's described as

1 about ASCAP identifying performances,
2 correct?

3 A Yes.

4 Q And in the radio section in the
5 middle of the page ASCAP, as of June 7th,
6 still publishes on its website that it
7 conducts tape surveys of actual broadcasts,
8 correct?

9 A Okay, yes.

10 Q Okay. I'm going to switch gears
11 for a minute now, and we're going to talk
12 about some of the terms that you are
13 proposing to be changed. If you could turn
14 to pages 39 and 40 of your testimony.

15 A Yes.

16 Q And one of the terms that you
17 propose to be changed is the audit
18 underpayment term. You propose that the
19 cost for the audit be flipped to the
20 licensee at a five percent underpayment in
21 lieu of the current 10 percent underpayment,
22 correct?

1 A Yes.

2 Q And are you aware that the 10
3 percent cost flipping underpayment term was
4 a term agreed to by all of the parties,
5 including the Recording Industry Association
6 of America, for the license period 1998 to
7 2002?

8 A I know that that is a term. I'm
9 not sure that -- I don't recall if it was
10 negotiated or agreed upon or -- I don't know
11 how it came to be, but I understand that the
12 five percent is the -- I'm sorry, the 10
13 percent threshold is the number in the term.

14 Q Ms. Kessler, when were you first
15 hired as SoundExchange's Chief Operating
16 Officer?

17 A I was promoted in the summer of
18 2001.

19 Q And at the time, SoundExchange
20 was an unincorporated division of the
21 Recording Industry Association of America?

22 A That's correct.

1 Q So when the terms were being
2 discussed in the CARP proceeding that
3 occurred in 2001 covering the period 1998
4 through 2002, did you have any input into
5 what those terms would be? Did RIAA's
6 counsel consult you at all concerning the
7 terms?

8 MR. PERRELLI: I'm going to
9 object to the extent that this is starting
10 to get into communications with counsel
11 about that proceeding.

12 CHIEF JUDGE SLEDGE: In addition,
13 Ms. Ablin, let me ask, why is it relevant
14 what somebody agreed to in -- prior to 1998
15 as to what we're doing in 2006?

16 MS. ABLIN: Your Honor, just to
17 -- I was just trying to establish that the
18 terms that are in place now were -- were
19 terms that at least at one point in time
20 SoundExchange was willing to accept.

21 CHIEF JUDGE SLEDGE: Why is that
22 relevant?

1 MS. ABLIN: Well, I think it is
2 relevant that -- if a party at one point in
3 time is willing to accept terms, and if
4 there has been no material change in
5 circumstances since that time --

6 CHIEF JUDGE SLEDGE: Do you think
7 it's conceivable that you can show that
8 there's no change -- material change of
9 circumstances from 1998 to 2006?

10 MS. ABLIN: I think with some of
11 the terms I can, yes, Your Honor, including
12 this one. And if you'll permit me to ask
13 one or two more questions. And if it
14 doesn't work, I can move on.

15 CHIEF JUDGE SLEDGE: The
16 objection is sustained.

17 MS. ABLIN: Well, Your Honor, I
18 understood the objection to be getting into
19 attorney-client privilege material.

20 CHIEF JUDGE SLEDGE: That's
21 correct.

22 MS. ABLIN: Okay. Okay. So I'll

1 rephrase my question.

2 BY MS. ABLIN:

3 Q Did you participate at all in
4 setting the terms or in -- yes, in setting
5 the terms for the 1998 to 2002 proceeding?

6 A Did I participate? My job is to
7 implement the license, the administration of
8 the license, the terms of it. And to the
9 extent that -- I don't recall if -- you
10 know, my involvement in those rates and
11 terms, but my job is to implement those
12 terms, you know, and to establish the
13 guidelines for staff and the computer
14 systems to interpret those terms correctly.

15 Q Okay. So you just don't recall
16 one way or the other if --

17 A I wouldn't have been asked -- I
18 just -- I'm not a copyright owner. I run
19 the operations of the organization, and my
20 role is to give input as to the
21 administrability of terms, not what they
22 ought to be.

1 Q Ms. Kessler, I'm going to hand
2 you a document that has been marked as
3 Services Exhibit 153. I'm going to see if
4 this document refreshes your recollection at
5 all.

6 (Whereupon, the above-
7 referred to document was
8 marked as Services
9 Exhibit No. 153 for
10 identification.)

11 I will represent to you that this
12 is a document entitled Request to Enter the
13 Party's Proposed Terms Into the Record, and
14 the date at the top of the document is
15 December 20, 2001. If you could turn to the
16 second page of the document. Do you see at
17 the top of the page it's been signed by
18 Michelle Woods from Arnold & Porter?

19 A Yes.

20 Q Who is Michelle Woods?

21 A She is an attorney with Arnold &
22 Porter who worked on the first CARP.

1 Q And so she represented
2 SoundExchange as part of RIAA during the
3 1992 to -- 1998, rather, to 2002 proceeding?

4 A Yes.

5 Q And do you see on -- if you flip
6 back to page 1, the second paragraph. Do
7 you see on here the language that says,
8 "After a long and detailed settlement
9 negotiation, the parties have reached
10 agreement on all but one of the proposed
11 terms. That issue concerns the appointment
12 of an agent to receive and distribute
13 royalties." And then, going on to the third
14 sentence, "The parties, therefore, request
15 that the agreed-upon terms attached hereto
16 as Exhibit A be admitted into evidence." Do
17 you see --

18 A Yes, that's what it says.

19 Q Have you ever seen this document
20 before today?

21 A Probably.

22 Q Can you flip to Attachment A of

1 the document?

2 A Yes.

3 Q And if you could turn to page 7,
4 and Section 5G on that page, do you see
5 there that one of the terms that RIAA and
6 many other parties agreed to was a 10
7 percent cost of living provision?

8 A A one percent --

9 Q A 10 percent threshold for
10 flipping the costs of the audit at which --
11 let me back up. It's a 10 percent threshold
12 -- underpayment threshold past which the
13 costs for conducting an audit flip --

14 A Yes.

15 Q -- from -- okay. Flip to the
16 licensee --

17 A Yes.

18 Q -- being audited. Okay. And I
19 believe you testified on Tuesday that
20 SoundExchange has not conducted -- not yet
21 conducted any audits of any webcasters --

22 A That's correct.

1 Q -- in this proceeding. So you
2 don't know whether any webcasters have, in
3 fact, underpaid by any amount.

4 A I wouldn't be able to without an
5 audit.

6 Q Okay. Are you aware that
7 SoundExchange again voluntarily agreed to
8 extend this 10 percent term for the
9 2003/2004 license period?

10 A I understand that SoundExchange
11 agreed to the whole package that was
12 extended for the '03/'04 period.

13 Q Including this term?

14 A This term wasn't there.

15 Q Okay. Ms. Kessler, if you could
16 turn to page 26 of your testimony.
17 Actually, before we do that, I wanted to ask
18 you, have you seen Attachment A -- going
19 back to this agreed-upon terms document we
20 were discussing, you said that you had seen
21 this document before. Have you seen
22 Attachment A?

1 MR. PERRELLI: I'll object.
2 You're mischaracterizing the witness'
3 testimony. Her only answer on the document
4 was probably -- whether she had seen it
5 before was "probably." She didn't confirm
6 whether she had seen it or not.

7 CHIEF JUDGE SLEDGE: Sustained.

8 MS. ABLIN: I'll rephrase.

9 BY MS. ABLIN:

10 Q Ms. Kessler, have you seen this
11 document before? Let me ask that again.

12 A Likely that I have seen this
13 attachment.

14 Q Have you seen Attachment A
15 before?

16 A It is likely, it is probable that
17 I saw it -- this attachment, yes.

18 Q Do you recall whether you had any
19 input into the creation of Attachment A?

20 A Again, my job is to implement
21 terms and --

22 Q But my question was: do you

1 recall whether you have had input into this
2 document?

3 A It's unlikely that I would,
4 because my job is to implement the terms and
5 ascertain the administrability of the terms,
6 not what the terms would have been.

7 Q So it's unlikely you had input
8 into this document.

9 A That's right.

10 Q Okay. Now, if you could turn to
11 page 26 of your testimony. And on that page
12 you make a request of the Board to adopt
13 regulations that state that a licensee that
14 fails to make royalty payments on a timely
15 basis may be subject to liability for
16 infringement in addition to late fees, is
17 that correct?

18 A Yes.

19 Q Now, I just want to explore that
20 statement with you a little bit, just to
21 make sure I understand fully your position
22 on that request. Is it your position that

1 copyright owners should have a right to sue
2 a licensee for infringement if a licensee
3 is, for example, 30 days late in paying its
4 license fees?

5 A I think that decision is up to
6 the copyright owners.

7 Q So they should have the right to
8 sue for infringement?

9 A Again, I think the decision is
10 not mine to make. It's up to the copyright
11 owner to decide if a 30-day late payment
12 rises to the level of a copyright
13 infringement action.

14 Q But your position is that it
15 should be up to the copyright owners to
16 decide that.

17 A Yes.

18 Q And they should have the rights
19 under the regulations in the first instance.

20 A I'm not sure I understand that
21 question.

22 Q It's your position that the

1 copyright owners should have that right to
2 decide whether to sue for infringement.

3 A I think it is their decision to
4 make.

5 Q And they should have that right
6 --

7 CHIEF JUDGE SLEDGE: Ms. Kessler,
8 you're not answering the question.

9 THE WITNESS: Then I must --

10 CHIEF JUDGE SLEDGE: Please
11 listen to the question and answer it.

12 BY MS. ABLIN:

13 Q Are you asserting that the
14 copyright owners should have the right to
15 sue for infringement if a licensee is 30
16 days late in making payments?

17 A If that is their decision, yes,
18 they should have the right to sue, if they
19 feel that that non-compliance warrants a
20 copyright infringement action, yes.

21 Q And would that still be your
22 position for a licensee that's, say, one day

1 late in making payments?

2 A I can't imagine that a copyright
3 owner would make that decision, but, again,
4 if -- if they wanted to sue under that
5 situation, they should be entitled to sue
6 under that situation.

7 Q Okay. I'm just trying to
8 understand what your position is.

9 A One day, 30 days, you know.

10 Q Okay. And would that also be
11 your position irrespective of the amount in
12 fees by which a licensee is late? For
13 example, if a licensee is late in paying,
14 say, \$10.

15 A This is theoretic. Again, I
16 can't imagine in a business situation a
17 copyright owner under those circumstances
18 would sue. But I think that they should be
19 permitted to, if they so desire.

20 Q Okay. So in other words, just to
21 sum up this last string of questions, your
22 position is that a copyright owner should

1 have the right to sue for infringement if
2 literally a licensee is a day late and a
3 dollar short.

4 A If you want to characterize it
5 that way, you can. That's not what I said.
6 I think in a real business situation that
7 wouldn't occur, but it is their right to sue
8 for copyright infringement if they feel that
9 a licensee is, you know, not complying with
10 the statutory license. So yes.

11 Q Okay. And would that also be
12 your position if SoundExchange had accepted
13 payment of the full fee plus the late fee
14 and deposited it?

15 A Just say that one more time,
16 please.

17 Q Yes. Would your position remain
18 the same even if the licensee had paid in
19 full the license fees due plus the late fee,
20 and SoundExchange had cashed the check or
21 deposited the check?

22 A Yes.

1 Q Okay. If you could turn to --
2 you're almost there -- pages 27 to 29. I
3 think that's in the vicinity of where you
4 are. Now, there I believe you've asked for
5 an increase in the late payment interest
6 rate from .75 percent per month to 2.5
7 percent per month?

8 A That's correct.

9 Q Okay. And I believe you
10 discussed with Mr. Steinthal on Tuesday that
11 on an annual basis 2.5 percent a month is 30
12 percent -- 30 percent interest per annum?

13 A I accepted his calculation, yes.

14 Q Okay. Well, in fact 2-1/2 times
15 12 is 30.

16 A Okay.

17 Q Okay. And, of course, that
18 calculation would just be of simple
19 interest. Are you seeking compound interest
20 or simple interest?

21 A I think SoundExchange would be
22 pleased with compound interest, but would

1 likely take not compounded interest.

2 Q Okay. Are you aware that the .75
3 percent a month interest term was also a
4 term that was agreed upon in 2001 to cover
5 the period '98 to 2002 by the recording
6 industry?

7 A I understand that that was a term
8 in that agreement, yes.

9 Q And you understand also that that
10 term was then extended by agreement to apply
11 to the 2003/2004 license period as well?

12 A Yes, along with all the other
13 terms.

14 Q Okay. Are you aware that some
15 states have usury laws that limit the
16 maximum amount of interest that can be
17 charged?

18 A No. I assume that they do, but I
19 don't know for certain that they do. But --

20 Q Okay. So in coming up with the
21 30 percent interest request for the late fee
22 amount, did you do any analysis of what

1 those usury laws might say and how they
2 might limit interest rates for their -- in
3 their state?

4 A No, I did not.

5 Q Okay. So you're not aware of
6 whether an annual interest rate of 30
7 percent would exceed any state's usury law.

8 A No, I am not.

9 Q Okay. Okay. Now, in addition to
10 the 30 percent annual interest rate that
11 you're seeking, you've also requested I
12 believe that the late fee amount would
13 double every five days that the amount
14 remains unpaid -- and please correct me if I
15 get this wrong -- in excess of 20 days after
16 the postmarked date on a demand letter from
17 SoundExchange? I refer you to page 28 of
18 your testimony.

19 A Yes, that the -- after the 20-day
20 period the late fee should be doubled every
21 five days.

22 Q Okay. Let's walk through an

1 example of this request, just to make sure I
2 understand your position here. We've
3 already established that if a service is
4 late in paying royalties the initial
5 interest rate that you've sought would be 30
6 percent --

7 A Yes.

8 Q -- per year. And then, suppose
9 that SoundExchange sends a demand letter and
10 the service would -- pays royalties let's
11 say 46 days after the postmark on the demand
12 letter -- 46 days. So I take it that that
13 service would get a 20-day grace period --

14 A Yes.

15 Q -- and then after -- the fifth
16 day after the 20 days -- so in other words
17 the 25th day after the postmark of the
18 demand letter, the late fee amount would
19 double.

20 A Yes, every five days.

21 Q Okay. So on the 25th day the 30
22 percent per year interest rate would double

1 to 60 percent per year.

2 A I don't know if the math works
3 like that, but -- I mean, it's clear from
4 my statement that the amount of late fees
5 should double.

6 Q Okay. Well, and in fact, two --
7 if you take two percent of \$100, that's \$2,
8 correct?

9 A Right.

10 Q And if you double the two
11 percent, you come up with four percent.

12 A That's correct.

13 Q And four percent of \$100 is \$4.

14 A Yes.

15 Q Four is double two, four percent
16 is double two percent, correct?

17 A Yes, that's correct.

18 Q Okay. So then, that means that
19 on day 30, which is an additional five days
20 after day 25, the 60 percent would double to
21 120 percent.

22 A The \$4 would double to \$8, yes.

1 Q And on day 35, the 120 percent
2 would double to 240 percent?

3 A The \$8 would go to \$16.

4 Q On day 40, just to -- I'm trying
5 to get us to the 46 days I posited. On day
6 40, 240 percent would double to 480 percent?

7 A I'm not sure how you're doing
8 your math. It's fairly simple. The amount
9 of late fees owed would double every five
10 days. So, you know, 2 to 4 to 8 to 16 to
11 32, and so on, yes.

12 Q And that means that the annual
13 percent would also double? If the absolute
14 amount doubles, that's equivalent to the
15 percent rate -- the percent --

16 A The way you're describing it,
17 that seems right. But I don't know.

18 Q Well, we can all go back and
19 check it, and I'm sure your counsel will
20 tell me if I'm wrong in his submission. So
21 on day 40 we're up to 480 percent, day 45,
22 the 480 percent would then double to 960

1 percent, correct?

2 A That's quite a disincentive to
3 pay late, isn't it?

4 Q Yes, it is. And so now we're at
5 day 46, so that service is paying the
6 equivalent of a 960 percent interest rate.

7 JUDGE WISNIEWSKI: Excuse me, Ms.
8 Ablin. Are you suggesting that that's the
9 APR?

10 MS. ABLIN: Yes.

11 JUDGE WISNIEWSKI: You might want
12 to check your math. Okay. Well, we will do
13 that, Your Honor.

14 BY MS. ABLIN:

15 Q And you've also testified that
16 you want the same increase in late fees,
17 whether it's doubling the amount or doubling
18 the interest rate, however you want to look
19 at it. Those late fees would apply even to
20 a service that has paid on time if they have
21 an error, for example, in their statement of
22 account?

1 A If the statement of account or
2 the performance logs are delinquent or
3 incomplete, and SoundExchange is, therefore,
4 unable to timely distribute royalties, I
5 think that they should be penalized for it.
6 And this is the metric we're using for that
7 interest and penalty, yes.

8 Q So if a service has left out a
9 piece of -- one bit of information from a
10 statement of account, your position would be
11 that SoundExchange has the right to assess
12 the late fees at the levels we've just been
13 discussing?

14 A That is not what SoundExchange
15 does. SoundExchange works with its
16 licensees to help them through the statement
17 of account process, so that it is -- the
18 objective is to have it accurate and
19 complete, so that we can conduct our
20 distributions timely. And I can't imagine
21 that SoundExchange wouldn't go back to a
22 licensee and say, you know, "You left out

1 this calculation," or "did you" -- you know,
2 "You haven't sent us a statement of account
3 at all."

4 And in a situation where that
5 behavior is persistent, I think we'd need
6 something apart from copyright infringement
7 action to give us some teeth and some
8 incentive -- and to incentivize the
9 licensees to comply with the terms of a
10 license that they took.

11 Q But in the first instance,
12 though, your position as a theoretical
13 matter is that SoundExchange should have the
14 right -- irrespective of what happens in the
15 real world, SoundExchange should have the
16 legal right to charge these late fees, if a
17 statement of account is incomplete.

18 A You're asking me to answer a
19 question in a theoretic sense that I know
20 with SoundExchange would not happen. But if
21 you want to take it to that extreme and that
22 level of absurdity, the answer would be yes.

1 But that's not what would happen with
2 SoundExchange.

3 Q Okay. And it's not what would
4 happen, because that wouldn't be reasonable
5 for SoundExchange to do that, would it?

6 A It wouldn't happen, because
7 SoundExchange -- SoundExchange's objective
8 is to get the money to the featured artists
9 and the copyright owners. And the only way
10 we can do that is to obtain information
11 that's in possession by the licensees. And
12 if we don't get it timely, then our artists
13 and our copyright owners suffer the
14 consequences.

15 Q Now, you testified just a few
16 minutes ago I believe that even if
17 SoundExchange has accepted payment in full
18 from a licensee that was late, along with
19 the late fee, and deposited that money, they
20 should still -- SoundExchange -- the
21 copyright owners should still have the right
22 to sue for infringement?

1 A The request is to make it clear
2 in the terms that simply by finally paying
3 your royalties and meeting your late fee
4 obligation does not release you from a
5 copyright infringement action. That's what
6 we're requesting.

7 Q And I believe on -- and I'm
8 referring to page 41 of your testimony, if
9 you'd like to take a look at it. I believe
10 that you've stated that the contrary
11 argument that --

12 A I'm sorry. 41?

13 Q Yes, I believe it's 41. I
14 believe you stated on that page that the
15 contrary argument that copyright owners will
16 have waived the right to argue that the
17 service is making transmissions not eligible
18 for statutory licensing. Therefore, they
19 would be entitled to sue -- would not be
20 entitled to sue has "no legal merit."

21 A Just give me a moment. I'm not
22 seeing that language.

1 Q Sure.

2 A So are you referring to the
3 sentence that says, "The copyright owners
4 and performers represented by SoundExchange
5 have waived the right to argue that the
6 service is making transmissions not eligible
7 for the statutory license"?

8 Q Yes. And then, the following
9 sentence where you say, "I believe this
10 argument has no legal merit."

11 A Yes. But it does call for
12 clarification. That's what we're seeking.

13 Q Right. Well, I just want to
14 focus on your "no legal merit" statement.
15 You don't hold a law degree, do you?

16 A No, I don't.

17 Q Maybe that's a blessing. You
18 wouldn't spend so much time in proceedings
19 such as this. Have you ever attended law
20 school?

21 A No, I have not.

22 Q Have you ever taken any legal

1 courses?

2 A Yes, I have.

3 Q Taught -- well, let me finish my
4 question. Have you ever taken any legal
5 courses that would have taught that that
6 specific position that you testified to has
7 no legal merit?

8 A No.

9 Q Okay. Okay. If you could turn
10 to page 30 of your testimony. Now, here you
11 include a request that licensees' statements
12 of account should be made public?

13 A That's right.

14 Q Okay. Let's talk about this
15 request for a few minutes. Again, I take it
16 you're aware that the confidentiality terms
17 currently in place were, again, part of the
18 package of terms that was agreed to for the
19 '98 to 2002 proceeding, and then agreed to
20 again for the 2003/2004 proceeding by the
21 recording industry.

22 A Yes.

1 CHIEF JUDGE SLEDGE: Ms. Ablin,
2 you continue to return to that, and you've
3 never established any basis on which any of
4 that is relevant.

5 MS. ABLIN: Okay. Well, we'll --

6 CHIEF JUDGE SLEDGE: This is
7 about the fourth time that you've gone into
8 it now.

9 MS. ABLIN: Well, Your Honor, I
10 believe it is relevant if at one point a
11 party agrees to a term and there are no
12 material --

13 CHIEF JUDGE SLEDGE: You've never
14 shown us any relevance, so we're waiting for
15 that.

16 MS. ABLIN: Well, going back to
17 the audit provision, for example, Your
18 Honor, with the cost -- if there has been --
19 I believe the burden is on the party seeking
20 a change in the term to demonstrate that
21 there has been a material change in
22 circumstances that would justify the change

1 from something that they had agreed to.

2 CHIEF JUDGE SLEDGE: Now, why do
3 you say that?

4 MS. ABLIN: That the burden would
5 be on them to seek a change? Otherwise,
6 they would have to demonstrate good cause
7 for something that has been agreed to.

8 CHIEF JUDGE SLEDGE: Why do you
9 say that?

10 MS. ABLIN: I think it's self-
11 evident. But if it's not, then we can --

12 CHIEF JUDGE SLEDGE: Do you mean
13 if somebody makes an agreement one year, and
14 five years later they make another
15 agreement, the fact that they made a prior
16 agreement, they've got to explain why
17 they're taking a different position?

18 MS. ABLIN: Your Honor, I think
19 that it's, at a minimum, relevant to the
20 current argument that a term change is
21 sought, and, you know, how relevant it is
22 would go more to the weight of that

1 position. In any event, I will refrain from
2 making this point any more and move on.

3 CHIEF JUDGE SLEDGE: Nobody has
4 objected, so I just -- I've still been
5 waiting on you to clarify why any of that is
6 relevant. That's why I asked.

7 MS. ABLIN: Okay. We'll save
8 that for briefing.

9 CHIEF JUDGE SLEDGE: All right.

10 MR. STEINTHAL: Your Honor, if I
11 may on that point --

12 MS. ABLIN: No, Mr. Steinthal,
13 we'll go ahead with Ms. Ablin.

14 MR. STEINTHAL: Okay.

15 BY MS. ABLIN:

16 Q Okay. Going back to the
17 confidential information terms that we've
18 been discussing, one of the reasons that you
19 give for why copyright owners should have
20 access to information relating to statements
21 of accounts -- let me back up. You list a
22 number of reasons in your written testimony

1 I believe as to why you're seeking this
2 change.

3 A Yes, that's correct.

4 Q And one of those reasons that you
5 give is that you believe that copyright
6 owners should have it, so they can decide
7 whether to sue for copyright infringement,
8 is that correct?

9 A I think that copyright owners are
10 entitled to know how much a licensee has
11 paid or paid late or their payment history
12 with respect to non-payment, so that they
13 can make the business decision and move
14 forward with some future action, including
15 copyright infringement action, yes.

16 Q Well, it's true, is it not, that
17 the current regulations already allow
18 SoundExchange to disclosure the identities
19 of services that have obtained licenses and
20 whether or not -- licenses under Section 112
21 or 114, and whether or not those services
22 are current in their obligations to pay

1 minimum fees and submit statements of
2 account?

3 A That's true, but not the amount.
4 And that's a critical element when you're
5 making a decision whether to proceed with a
6 lawsuit.

7 Q But at a minimum, SoundExchange
8 is able to disclose those licensees that are
9 delinquent.

10 A At the very minimum.

11 Q Copyright owners, Ms. Kessler,
12 are always free to track music use on
13 various services themselves, aren't they?

14 A Well, I'm not sure how a
15 copyright owner could track music usage
16 without an audit or being able to review the
17 reporting of SoundExchange --

18 Q Well, at a minimum, a copyright
19 owner would be able to find out from
20 SoundExchange who in fact is delinquent,
21 correct?

22 A That's correct.

1 Q And then, they would be able to,
2 just as anyone in the general public is able
3 to, go online and listen to the webcast and
4 see if their music is being played, correct?

5 A Well, for anything presently
6 being performed, not necessarily things that
7 have happened in the past or in the future
8 when they are unable to listen.

9 Q Sure. But to get a sense of the
10 extent to which their music is being played
11 on that service, to get a rough sense, they
12 could in fact listen online to the service
13 itself.

14 A They could listen, but remember
15 the webcasters are playing such a breadth
16 and depth of music that, you know, it's
17 conceivable that it would take, you know, 24
18 hours for them to hear something that they
19 owned, particularly if they're a small
20 copyright owner or an artist who owns their
21 own masters. So while, yes, that's one way
22 to gather the information, it's not a

1 particularly good way.

2 Q When you were formulating this
3 request that SoundExchange be permitted to
4 disclose this type of information to
5 copyright owners, were you aware that ASCAP
6 radio -- that the ASCAP radio broadcaster
7 license agreement requires ASCAP to treat
8 similar information from radio station
9 licensees as confidential and forbids ASCAP
10 from disclosing that to its members?

11 A I hadn't -- I did not know that.

12 Q So you didn't research or compare
13 with any of the license agreements that
14 ASCAP has done.

15 A I didn't look at ASCAP. My job
16 was to address SoundExchange's needs.

17 Q Okay. So you also wouldn't have
18 looked at any BMI license agreements to see
19 what their confidentiality provisions would
20 look like.

21 A No, I did not look at BMI.

22 Q Now, another reason you give in

1 support of your request to -- for a change
2 to the confidentiality terms is to enable
3 copyright owners to include royalty
4 estimates in their revenue projections. Is
5 that correct?

6 A That's correct.

7 Q Now, putting aside the question
8 for the moment of whether it's appropriate
9 under the regulations to use licensee data
10 for independent business reasons other than
11 royalty collection and distribution, we're
12 putting that issue aside, copyright owners
13 already are able to see royalty payment
14 information in aggregate form across all
15 licensees, so long as no individual licensee
16 is identifiable?

17 A That's correct.

18 Q And receiving that type of
19 aggregated royalty information would enable
20 copyright owners to estimate incoming
21 royalties for the purposes of including them
22 in their revenue projections, wouldn't it?

1 A Reviewing the history would give
2 someone a basis for projecting future
3 royalties, yes.

4 Q Okay. And another reason that
5 you gave, I believe -- we're still on page
6 31 of your testimony -- for a change to this
7 term is that copyright owners need payment
8 information when they are negotiating
9 collectively with licensees. Is that
10 correct?

11 A That's correct.

12 Q I take it you were talking about
13 negotiations under the statutory licenses at
14 issue here --

15 A That's correct.

16 Q -- when you made that statement.
17 And so those negotiations, as I believe you
18 testified on direct, would lead to statutory
19 rates that would apply to everyone within
20 the category of service for the license
21 being negotiated?

22 A That's correct.

1 Q And so, again, copyright owners
2 are able to see aggregated information
3 across various categories of licensees under
4 the current regulations, is that right?

5 A They are able to see the license
6 royalties in the aggregate. But when you're
7 in the negotiating period and negotiating
8 with such a vast array of groups,
9 individually and not collectively, in order
10 for them to make good decisions and informed
11 decisions, they need to know with more
12 specificity the receipts.

13 Q But SoundExchange doesn't
14 typically negotiate with individual
15 licensees one by one, do they? Their job is
16 to establish statutory rates that would
17 apply to categories of licensees, is that
18 true?

19 A Can you repeat that?

20 Q SoundExchange does not engage in
21 license negotiations with individual
22 services, individual licenses for a

1 particular service, as opposed to licenses
2 that would apply more generally across a
3 group of similarly situated licensees.

4 A Yes. SoundExchange would be
5 involved in negotiations with groups of
6 licensees, such as the participants that are
7 here today.

8 Q Now, you're aware that both
9 SoundExchange and DiMA have proposed, as one
10 of their -- at least one of their license
11 metrics, a percentage of revenue fee metric
12 in this proceeding?

13 A I'm aware that DiMA -- I'm sorry.
14 I just want to make sure I --

15 Q I'll break that into two pieces.

16 A Thank you.

17 Q Are you aware that SoundExchange,
18 your company, has -- your organization,
19 rather, has proposed rates in this
20 proceeding that include a rate based on a
21 percentage of the service's revenues?

22 A That's correct.

1 Q And are you also aware that DiMA
2 has proposed in this proceeding a rate based
3 on the service's percentage of revenues?

4 A I believe that's true, yes.

5 Q So under your proposal to change
6 the confidentiality provisions so that
7 copyright owners can see information related
8 to statements of account, that would enable
9 copyright owners to see individual services'
10 revenue data, would it not, if a revenue fee
11 metric is adopted?

12 A That's correct.

13 Q Okay. We are going to switch
14 gears now. We're done with the terms. Now,
15 if you could turn to page 2 of your
16 testimony. And I just wanted to focus on
17 one of your statements there. You say that
18 you believe there are hundreds of services
19 from whom SoundExchange collects statutory
20 royalties, correct, on this page?

21 A Yes.

22 Q And if I remember correctly, I

1 believe that you stated that the number of
2 services paying royalties was on the order
3 of -- correct me if I'm wrong -- 570?

4 A That's correct.

5 Q Okay. Now, you're aware that
6 there was a CARP proceeding, because we've
7 talked about it on several occasions, that
8 was convened in 2001 to establish rates for
9 the 1998 to 2002 period?

10 A That's correct.

11 Q And rates were set through that
12 CARP proceeding process and approved by the
13 Librarian of Congress as a result of that
14 proceeding?

15 A Yes, I am.

16 Q And then, you're also aware that
17 those rates were extended by agreement, with
18 a few tweaks here and there, but largely
19 unchanged through 2003/2004, that period?

20 A Yes, the rates were pushed
21 forward.

22 Q Now, those rates that were set

1 through the CARP process, those are not the
2 only rates under which services pay
3 royalties to SoundExchange, are they?

4 A That's correct.

5 Q In fact, some services pay under
6 alternative agreements that were negotiated
7 pursuant to the Small Webcasters Settlement
8 Act?

9 A That's correct.

10 Q And that act resulted in
11 agreements that apply to both commercial
12 services and non-commercial services?

13 A That's correct.

14 Q And you're also aware that RIAA
15 and NPR negotiated a separate license
16 agreement?

17 A For the -- which period?

18 Q For the '98 to at least I believe
19 the 2004 period?

20 A That's correct.

21 Q And so some webcasters have paid
22 royalties to SoundExchange through that

1 agreement, the NPR agreement.

2 A That's correct.

3 Q Now, just to get a better sense
4 of who we're talking about here, I'm going
5 to show you a document that we've marked as
6 Services Exhibit 154. And I will represent
7 to you this is a document we received after
8 the close of business the eve of your
9 testimony on Tuesday.

10 I should also point out at this
11 time that the document I handed out has been
12 marked as restricted. And I'm about to ask
13 some questions about this document and
14 wanted to give counsel for SoundExchange the
15 opportunity to move -- to go into closed
16 session.

17 (Whereupon, the above-
18 referred to document was
19 marked as Services
20 Exhibit No. 154 for
21 identification.)

22 MR. PERRELLI: If you'll give me

1 just a moment to review.

2 MS. ABLIN: Certainly.

3 MR. PERRELLI: I know there was
4 some restricted information, but it was
5 redacted off that document. And so we may
6 not need -- I don't believe -- I think the
7 restricted information was licensee
8 information, a particular licensee on the
9 second page. So, actually, I don't believe
10 we need to go into restricted session.

11 BY MS. ABLIN:

12 Q Now, this document was Bates
13 numbered before it was produced to us as
14 pages, just for the record, SoundExchange
15 114258 through 261, and it's titled Receipt
16 and Enforcement Effectiveness Tracking. Ms.
17 Kessler, are you familiar with this
18 document?

19 A Yes, I am.

20 Q Can you describe the document for
21 us?

22 A Yes. As the title describes,

1 this is an analysis of the receipts and the
2 effectiveness of some of our enforcement and
3 compliance activities, which includes
4 minimum fee analysis, total receipts
5 analysis, payment receipt date analysis, as
6 well as a series of other analyses which
7 breaks the licensees into various
8 categories.

9 Q Did you play a role in the
10 creation of this document?

11 A No, I did not.

12 Q Do you know who did?

13 A Yes, I do.

14 Q Who is that?

15 A That would be our legal
16 department, under the direction of Gary
17 Greenstein.

18 Q Did you review the document
19 before it was produced to us to verify
20 whether it was accurate?

21 A I reviewed the document before it
22 was produced, yes.

1 Q And can the figures on here be
2 trusted to be accurate?

3 A Yes, they can.

4 Q Now, if you could turn to page
5 SX114260? I believe it's the third page of
6 this document. Now, I believe you just
7 testified that this page and the following
8 page list various categories of services,
9 and it also lists the number of each
10 services -- the number of such services in
11 each category that paid royalties at any
12 time during the listed year.

13 A That's correct.

14 Q And 2005 is the most recent year
15 reflected on this chart for which license
16 fees have been -- are in place, is that
17 correct?

18 A Yes. This license expired in
19 2005, but there is an ongoing requirement to
20 pay under the current rates for 2006.

21 Q Sure. But I'm just trying to get
22 at the fact that no rates are in place yet.

1 Regardless of the payment obligation, there
2 are no rates in place for 2006.

3 A That's correct.

4 Q Okay. So let's look at the data
5 in the 2005 column, then. And I see -- the
6 first category listed on here is commercial
7 webcasters, is that correct? And you list
8 248 services that were commercial
9 webcasters?

10 A Yes.

11 Q And those commercial webcasters
12 would have paid under the rates set through
13 the CARP proceeding that were then extended
14 through 2003/2004?

15 A That's correct.

16 Q And then, I should say later
17 extended by statute through 2005?

18 A Yes.

19 Q And then, the next category on
20 this document contains information about new
21 subscription services.

22 A That's correct.

1 Q And the new subscription services
2 listed -- there are 20 such new subscription
3 services listed, is that correct?

4 A That's correct.

5 Q And those services also would
6 have paid under the CARP rates -- for ease
7 of reference, I'm going to call the rates --
8 the rates that were set in the '98 to 2002
9 proceeding, and then extended all the way
10 through 2005, I'll refer to those as CARP
11 rates. Is that acceptable?

12 A That's acceptable.

13 Q Okay. So the new subscription
14 services listed here, would they all have
15 paid under the CARP rates?

16 A Yes.

17 Q Okay. And then, the third
18 category there, could you explain what
19 services would be included there, even
20 though it's a null set?

21 A These are the eligible non-
22 subscription services, and I'm not sure what

1 the NSTS stands for. But the ENTS are the
2 eligible non-transmission services.

3 Q Could it possibly be --

4 A Non-commercial perhaps.

5 Q Could it possibly be new
6 subscription transmission services?

7 A Oh, yes. New subscription
8 transmission services, yes.

9 Q And would the -- if there were
10 any services listed in the 2005 category,
11 those services would also pay pursuant to
12 the CARP rates?

13 A That's correct.

14 Q Okay. Moving on to the fourth
15 category, which is labeled SWSA Commercial,
16 there are 26 such services listed in the
17 SWSA Commercial category?

18 A There are 26 services in the SWSA
19 category, Swissa (phonetic) Commercial.

20 Q Swissa (phonetic), okay. I'll
21 refer to -- Swissa (phonetic) is a term that
22 you use to denote SWSA.

1 A Internally, that's what we call
2 SWSA.

3 Q Okay. I'll try to refer to that
4 as Swissa (phonetic) myself.

5 A And those 26 SWSA commercial
6 services, I take it, would have paid under
7 the SWSA small commercial rates that were
8 established pursuant to the SWSA?

9 Q You're correct. Which again,
10 just so the record is clear, SWSA denotes
11 the Small Webcasters Settlement Act,
12 correct?

13 A Correct.

14 Q And then, moving on to the next
15 category, in 2005 there are 68 services
16 listed in the category called SWSA Non-Comm?

17 A That's correct.

18 Q Now, the services in that
19 category I take it would be non-commercial
20 services other than non-commercial
21 educational entities that would have paid
22 under SWSA rates?

1 A I believe so. That's correct.

2 Q And moving on to the next
3 category, which is SWSA educational, there
4 were 203 such services listed in that
5 category?

6 A Yes. According to this report,
7 203 SWSA educational services, yes.

8 Q And those services would have
9 paid under the SWSA non-commercial
10 educational entity rates, is that correct?

11 A That's correct.

12 Q And finally, we have as the last
13 category the Non-SWSA Non-Comm category.
14 And I note 13 such services for 2005, is
15 that right?

16 A Correct.

17 Q And those services, I take it,
18 would have paid under the non-commercial
19 CARP rates, is that correct?

20 A The non-commercial CARP rates,
21 not the SWSA rates. That's correct.

22 MS. ABLIN: Okay. Your Honor,

1 I'd like to offer this Exhibit 154 into
2 evidence.

3 CHIEF JUDGE SLEDGE: Any
4 objection to Exhibit 154?

5 MR. PERRELLI: No objection.

6 CHIEF JUDGE SLEDGE: Without
7 objection, it is admitted.

8 (Whereupon, the above-
9 referred to document,
10 previously marked as
11 Services Exhibit No. 154
12 for identification, was
13 admitted into evidence.)

14 THE WITNESS: Your Honors, may I
15 ask when we might be having a break?

16 CHIEF JUDGE SLEDGE: We normally
17 stop a little bit after 11:00. Do you want
18 to stop now?

19 THE WITNESS: No, no. I was just
20 wondering.

21 BY MS. ABLIN:

22 Q Just to be clear, then, Ms.

1 Kessler, if we add up the number of services
2 for 2005, I came up with the number 578,
3 which largely aligns with your 570 number
4 that you provided earlier. I'm happy to
5 have you verify the 578, or if you can
6 accept that, we can --

7 A I'll accept that.

8 Q -- go through the math if you'd
9 like. Okay. And another question about
10 this document -- I don't see a category
11 listed for NPR stations. Are they reflected
12 in this document?

13 A I would imagine they are in one
14 of the other categories under which they
15 fit. But I'm not sure, because like you I
16 don't see the breakdown of the individual
17 licensees.

18 Q All right. But NPR stations
19 don't pay pursuant to CARP rates, do they?

20 A Well, absent a rate or absent a
21 negotiation or a settlement with NPR, they
22 need to be paying under one of the existing

1 rates, right?

2 Q Okay. Let me rephrase the
3 question. We established earlier that there
4 is an NPR agreement in place, correct?

5 A Yes. I'm not sure when that
6 agreement expired. And to the extent that
7 it expired prior to --

8 Q Oh, I see.

9 A -- then they would have to be
10 paying under an alternate rate. But, again,
11 I just -- it just escapes me sitting here
12 today which rate they're paying under.

13 Q Okay. For at least the -- the
14 NPR agreement was in place in 2004, correct?

15 A I think it went for -- at least
16 from '98 to '04, but I don't recall what
17 happened after that.

18 Q Okay. So those NPR stations that
19 were -- that are licensed and paying
20 royalties pursuant to the NPR agreement, are
21 they reflected anywhere in this document for
22 2004?

1 A Again, I'm assuming they are, but
2 absent a detailed listing of all licensees I
3 can't say for certain.

4 Q Okay. Just so we're clear on the
5 math on this document, just a couple of
6 other questions before we leave it. Just so
7 we have a count of the services for 2004, I
8 take it we would get the count listed in
9 this document again by adding up the various
10 categories of services and coming up with a
11 number, is that correct?

12 A Yes, I would imagine that the
13 math in -- the 420 equals the individual
14 categories, yes.

15 Q I'm sorry. The math in the?

16 A In the column 2004, where it says
17 number of services that paid royalties at
18 any time during the year, the 420 figure.

19 Q Yes. Okay. At this point, Ms.
20 Kessler, I'd just like to see if you can
21 help me clear up some honest confusion
22 between a couple of documents we received in

1 discovery, so I'm going to hand out a
2 document. It has previously been marked as
3 Services Exhibit 98.

4 And I note that this document is
5 marked restricted. When it came up before,
6 I know we went into closed session, so I
7 will hand a copy to your counsel and allow
8 him the opportunity to so move at this time,
9 if he chooses.

10 MR. PERRELLI: I'm going to allow
11 Ms. Ablin to ask a question about it, and
12 then I'll make an appropriate motion.

13 BY MS. ABLIN:

14 Q I will represent to you, Ms.
15 Kessler, that this document was produced to
16 us by your counsel as support from an
17 assertion in Mr. Simpson's witness statement
18 concerning the number of services paying
19 royalties and the amounts paid by them for
20 the year 2004.

21 And I will also represent to you
22 that when I asked -- attempted to ask him

1 about this document, he said that, despite
2 the fact that it supported a statement in
3 his testimony, that you would be the person
4 more familiar with the document. Have you
5 seen this document before?

6 A I don't know if I have.

7 Q Could you take a look at the
8 document and tell us -- describe the
9 document for us?

10 A It appears to be a listing of
11 services' parent name, the amount -- some
12 amount, I'm assuming it's royalties, and it
13 looks to be perhaps what is a percentage --
14 I don't know -- of some sort, perhaps the
15 total. I don't know without doing the math.
16 But that's what it looks like to me.

17 Q And at least according to the
18 document, if you flip to the last page of
19 it, there are three lines there that says
20 total webcaster payments for 2004, and it
21 lists a figure of just under 9.7 million.

22 A Yes.

1 Q And it says that the top 10
2 webcaster payments for 2004 comprised 8.95
3 million, give or take?

4 A That's what it says, yes.

5 Q And the percentage of royalty
6 payments represented by the top 10
7 webcasters it lists as 92.4 percent?

8 A For 2004, yes.

9 Q For 2004, yes.

10 A That's what it says.

11 Q Do you know who -- I guess I'm
12 still puzzled at -- do you know who within
13 SoundExchange would have prepared this
14 document?

15 A It possibly came out of our
16 Royalty Administration Department or it was
17 created at the direction of our general
18 counsel for compliance purposes or some
19 other licensee-specific purpose.

20 Q Do you recognize the formats in
21 the document as a document that was
22 generated by someone at SoundExchange?

1 A Well, it's clearly an Excel
2 spreadsheet.

3 Q But do you recognize it to be
4 information that would have come -- would
5 have been generated by SoundExchange?

6 A Well, certainly, the information
7 contained in here appears to be information
8 from our database of licensees and parents
9 as this document describes. So I'm assuming
10 it -- you know, it came from a SoundExchange
11 source.

12 Q Can the document be relied upon
13 to be accurate in the numbers?

14 A These numbers look like numbers
15 I've seen in other documents, so I would say
16 yes.

17 Q I take it SoundExchange would
18 attempt in documents it's generating to be
19 accurate.

20 A Absolutely. Of course we would.

21 Q Okay. Well, my question -- and
22 this truly is just a matter I was confused

1 about. If you look at the left-hand column
2 here, you see the handwritten notations
3 which I will represent to you are from me,
4 just the 10, 20, 30, 40, the numbers on
5 here. I was just trying to obtain a count
6 of the services, and I came up with 309.
7 And I was just confused as to the difference
8 between the 309 listed on this document
9 versus the 420 or so listed on the document
10 we've just been looking at.

11 A Well, if you note, that column
12 heading is parent name. And a parent may be
13 paying and reporting for multiple services,
14 multiple broadcast stations, that sort of
15 thing. So that's one possibility for the
16 difference in the figure.

17 Q Is that the only possibility that
18 sitting here today you can think of?

19 A You know, I'm not sure when this
20 list was prepared. But it's possible
21 licensees paid late for this period and we
22 didn't receive the payments until 2005 but

1 attributed them to 2004. So, you know, this
2 information is just more current -- is
3 likely more current than this, depending,
4 again, when this information was prepared.

5 MS. ABLIN: Okay. Your Honor, I
6 would offer Services Exhibit 98 into
7 evidence.

8 CHIEF JUDGE SLEDGE: Any
9 objection to Exhibit 98?

10 MR. PERRELLI: No objection, Your
11 Honor.

12 CHIEF JUDGE SLEDGE: Exhibit 98
13 is admitted.

14 (Whereupon, the above-
15 referred to document,
16 previously marked as
17 Services Exhibit No. 98
18 for identification, was
19 admitted into evidence.)

20 JUDGE WISNIEWSKI: Just for
21 purposes of clarity in the record, Ms.
22 Kessler, when you say that this document's

1 figures are more up to date -- I forget how
2 you characterized it -- could you identify
3 which document you're --

4 THE WITNESS: Oh, I'm sorry.

5 Yes, I would assume that the exhibit marked
6 154 is more up to -- is likely more up to
7 date than Exhibit 98.

8 JUDGE WISNIEWSKI: Okay. Thank
9 you.

10 THE WITNESS: You're welcome.

11 BY MS. ABLIN:

12 Q While we're on the subject, Ms.
13 Kessler, of services -- making counts of
14 services making royalty payments, I'm about
15 to show you another document that's getting
16 marked as Services Exhibit 155.

17 MR. PERRELLI: Your Honor, I
18 neglected on Services 98 to ask that it be
19 admitted into the record on a restricted
20 basis. The document includes licensee-by-
21 licensee payments for the year 2004, so
22 individual licensees and individual

1 payments. The discussion -- the question
2 and answer -- was all public, but the
3 document itself is required to be
4 confidential under -- pursuant to the
5 regulations, 37 CFR 261. So I move to have
6 the document admitted on a restricted basis.

7 MR. MALONE: Your Honor, please,
8 may I be heard on that?

9 CHIEF JUDGE SLEDGE: Just a
10 moment. Ms. Ablin?

11 MS. ABLIN: I have no objection.

12 CHIEF JUDGE SLEDGE: Yes, sir.
13 Mr. Malone?

14 MR. MALONE: It seems to me that
15 the case then has been made only for
16 restricting that part of the document which
17 has names of licensees. So I would suggest
18 as a more appropriate and less restrictive
19 alternative that only the names of the
20 licensees be restricted, which would leave
21 us to address the numbers apart from the
22 names of the licensees in the open.

1 CHIEF JUDGE SLEDGE: How can that
2 be accomplished, Mr. Malone?

3 MR. MALONE: Well, simply that
4 the restrictive order extends beyond the
5 record, in the sense that it says who may
6 have the -- I take it the information.

7 CHIEF JUDGE SLEDGE: The exhibit
8 is what is being offered.

9 MR. MALONE: Right. But I think
10 that restrictions on the use of the exhibit,
11 and what I think should -- is more
12 appropriate under the circumstances, that
13 the use of the non-confidential information
14 be permitted under the terms of the order,
15 even though the document itself, without
16 that blanked out, could not be.

17 CHIEF JUDGE SLEDGE: I'm sorry.
18 I still don't understand. How could that be
19 accomplished?

20 MR. MALONE: Well, I'm not asking
21 the Board to do anything. What I am asking
22 is simply that there be no restriction on

1 the use of the non-confidential portions of
2 the document. And that's counsel's
3 responsibility, as is in the case with any
4 restricted document.

5 CHIEF JUDGE SLEDGE: I don't
6 think we have the ability to -- I don't
7 think there is an ability under the
8 protective order to apply the protective
9 order to the portion of an exhibit and not
10 provide the other portions of the exhibit.
11 I think you are -- I'm suggesting you're
12 asking a physical impossibility.

13 MR. MALONE: At the risk of
14 trying your patience, the --

15 CHIEF JUDGE SLEDGE: I've ordered
16 the patience.

17 (Laughter.)

18 MR. MALONE: Yes, Your Honor. It
19 seems to me that the order does two
20 different things. One, it says that you may
21 not disclose a document to an unauthorized
22 person. It also I think prevents counsel

1 from simply orally reading the document to
2 an unauthorized person.

3 What I am saying is that to the
4 extent the reading of the document is
5 confined to non-confidential information, I
6 think that should be permitted under the
7 order that has been entered. And I would
8 like it clear from the fact that we have now
9 established that parts of the document
10 contain confidential information, and
11 severable parts of the document do not.
12 Counsel is at liberty to disclose the non-
13 confidential information to unauthorized
14 persons.

15 JUDGE ROBERTS: Mr. Malone, if we
16 were to do that for this document, how does
17 that impact the other documents that have
18 been admitted into evidence, many of which
19 are subject to the protective order?

20 MR. MALONE: At this point at
21 least, I don't think you're establishing a
22 precedent beyond this particular document as

1 to which the question has been raised. So
2 far as I'm aware, the question has not been
3 raised to any of the other documents to
4 which you refer.

5 CHIEF JUDGE SLEDGE: We are
6 simply not able to enforce a modification of
7 the protective order that is in place for
8 each exhibit. And our -- you are completely
9 free, of course, to take information from
10 this that you think is not subject to the
11 protective order and use that. But that
12 would be subject to your part when you get
13 to cross examination.

14 MR. MALONE: Thank you.

15 CHIEF JUDGE SLEDGE: The
16 objection is overruled. The motion is
17 granted.

18 BY MS. ABLIN:

19 Q Ms. Kessler, I'm now going to
20 hand you a document that has been marked as
21 Services Exhibit 155. And I will represent
22 to you that this is an interrogatory

1 response that we received from your counsel
2 in the course of this proceeding, and it's
3 specifically Interrogatory Response Number
4 9. And before I --

5 (Whereupon, the above-
6 referred to document was
7 marked as Services
8 Exhibit No. 155 for
9 identification.)

10 A Okay.

11 Q I'm sorry. Before I --

12 A I'm not a lawyer, so this is --
13 what do you -- is there a number 9 I'm
14 supposed to be looking for?

15 Q No. I was just stating for the
16 record that this, in fact, is
17 SoundExchange's ninth interrogatory
18 response, as reflected on the second page of
19 the document.

20 A Okay. Gotcha.

21 Q And before I move on, I will note
22 that there was an attachment, Attachment 1,

1 produced in conjunction with this
2 interrogatory response that contains
3 information that SoundExchange has
4 designated as restricted. And, again, I
5 will pause to allow SoundExchange counsel to
6 move -- to go into closed session if it so
7 chooses.

8 MR. PERRELLI: Once again, Your
9 Honor, I'll wait for a question and answer
10 to see if it leads to restricted
11 information.

12 BY MS. ABLIN:

13 Q I would like to focus your
14 attention, Ms. Kessler, specifically on the
15 attachment to this document. Could you
16 please take a look at the attachment? And
17 after you've had a chance to review it, if
18 you could describe it for us.

19 A It appears to be a listing of
20 services, licensees, and their parent, and
21 unfortunately this copy has -- you know, the
22 heading names aren't so clear. It's a

1 little difficult to read, but it has their
2 -- what type they are, the amount, which I
3 assume is a royalty payment amount, looks
4 like perhaps that says -- my eyes aren't as
5 good as they used to be -- station letters
6 or -- and then various amounts throughout --
7 from 19 -- I think that's an 8, 1998,
8 through 2005.

9 Q Are you familiar with this
10 document?

11 A I'm familiar with these types of
12 documents, yes.

13 Q And this one, in particular, sets
14 forth a list of non-commercial services,
15 specifically, and the payments they have
16 made to SoundExchange for the time period
17 you described, is that correct?

18 A The legend includes non-
19 commercial SWSAs, yes, it appears to be.

20 Q Were you involved in the
21 preparation of the document?

22 A I don't recall.

1 Q Did you oversee those who did
2 prepare it?

3 A I have overseen similar types of
4 things, but this particular document I'm not
5 certain. But we generate this type of stuff
6 within SoundExchange.

7 Q Okay. And do you believe the
8 information in the document to be accurate?

9 A Yes, I do.

10 Q And just so it's clear to
11 everyone here, could you just explain the
12 simulcast column on the left-hand side? I
13 see true and false as the two possible
14 options listed in that column. What does
15 that denote?

16 A That's our way to differentiate
17 between a broadcast radio station
18 simulcasting over the web compared to a
19 licensee who is what we call internet only.
20 They are only transmitting over the web,
21 they don't have a terrestrial counterpart.

22 Q Okay.

1 A So true would mean that they are
2 a simulcaster, broadcast simulcaster.

3 Q And, again, just so it's clear
4 for the record, in the legend at the top,
5 the service categories listed in the
6 document include, for example, the -- well,
7 actually, let's look at the fourth column of
8 the document. Let's start there. You see
9 there's a big grouping of services that have
10 been categorized as NCPB services, and those
11 will be, according to the legend, non-SWSA,
12 non-commercial public broadcast services.

13 A That's correct, yes.

14 Q So those would be services, I
15 take it, paying under the CARP, the non-
16 commercial CARP rates?

17 A I would assume so, yes.

18 Q And then, the next category was
19 to -- going down the column 4 is NCW?

20 A I'm sorry. The non-commercial
21 CARP rates include in your definition the
22 NPR agreement, correct?

1 Q Not in my definition.

2 A Not in your definition. So, yes,
3 I'm not -- I'm not sure if these are NPR
4 stations or these are non-commercials paying
5 under the CARP rate.

6 Q Okay. So --

7 A I just don't remember what this
8 category means.

9 Q So the NCPB category would either
10 be, then, I guess services paying under the
11 non-commercial CARP rates or possibly
12 services paying under the NPR agreement.

13 A It may be, yes.

14 Q Possibly, okay.

15 A I just can't say for certain.

16 Q Okay. And then, moving on to the
17 next category, which is NCW --

18 A Yes.

19 Q -- those services denote,
20 according to the legend, non-commercial
21 services paying under the Small Webcasters
22 Settlement Act of 2002?

1 A Yes.

2 Q And I take it those would be all
3 SWSA and non-commercial webcasters except
4 for SWSA non-commercial educational
5 entities?

6 A Yes.

7 Q Okay. And then, flipping through
8 the pages until we hit another category
9 listed, we come a few pages down to NEE --

10 A Yes.

11 Q -- as a category. And those
12 services would be the non-commercial
13 educational entities paying pursuant to the
14 SWSA rates.

15 A That's right.

16 MS. ABLIN: I would like to offer
17 Services Exhibit 155 into evidence.

18 CHIEF JUDGE SLEDGE: Any
19 objection to 155?

20 MR. PERRELLI: Your Honor, I have
21 no objection. We would only ask, Your Honor
22 -- move, Your Honor, that it be subject to

1 the protective order for the same reason as
2 the prior document we discussed, which it is
3 a document that has licensee by licensee and
4 specific payment information, and it should
5 be protected as confidential under the
6 regulations.

7 CHIEF JUDGE SLEDGE: This is
8 undecipherable to me. Where are you
9 referring to licensee-by-licensee specific
10 information?

11 MR. PERRELLI: I apologize. This
12 is the attachment, Attachment 1, which is a
13 spreadsheet which has individual stations
14 and their payments on a year-by-year basis.

15 CHIEF JUDGE SLEDGE: Where are
16 the payments?

17 MR. PERRELLI: They are on the
18 right-hand side of the spreadsheet under
19 columns for individual years.

20 CHIEF JUDGE SLEDGE: The columns
21 that are blacked out?

22 MR. PERRELLI: I don't think

1 they're -- they are shaded, and, therefore,
2 difficult to read, but those are -- I
3 believe they read, at least the last eight
4 columns, read 1998, '99, 2000, 2001, and so
5 on.

6 CHIEF JUDGE SLEDGE: The payments
7 of what is what I'm -- I haven't heard yet
8 what you're --

9 MR. PERRELLI: I apologize, Your
10 Honor. Payments of royalties to
11 SoundExchange.

12 CHIEF JUDGE SLEDGE: And where do
13 you see that that -- these are payments of
14 royalties to SoundExchange?

15 MR. PERRELLI: I believe that is
16 clear from the question, the interrogatory
17 question, which is Interrogatory Number 9,
18 and the answer thereto. This attachment is
19 a response to that question, Interrogatory
20 Number 9.

21 CHIEF JUDGE SLEDGE: Any
22 objection to the application of the

1 protective order to Exhibit 155?

2 (No response.)

3 No objection. The motion is
4 granted.

5 Any objection to the admission of
6 Exhibit 155?

7 MR. PERRELLI: No objection, Your
8 Honor.

9 CHIEF JUDGE SLEDGE: Without
10 objection, the exhibit is admitted.

11 (Whereupon, the above-
12 referred to document,
13 previously marked as
14 Services Exhibit No. 155
15 for identification, was
16 admitted into evidence.)

17 THE WITNESS: Your Honor, would
18 it be possible to request a break now?

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

21 (Whereupon, the proceedings in
22 the foregoing matter went off the

1 record at 11:06 a.m. and went
2 back on the record at 11:19 a.m.)

3 CHIEF JUDGE SLEDGE: On the
4 record.

5 BY MS. ABLIN:

6 Q Ms. Kessler, are you aware that
7 record labels frequently or at least
8 sometimes provide terrestrial radio stations
9 with free CDs in the hopes of obtaining air
10 play for those particular recordings?

11 A I'm aware they provide product to
12 the stations. I'm not sure what the intent
13 behind it is.

14 Q Okay. Are you aware that labels
15 sometimes provide product to radio stations
16 in advance of the commercial release date of
17 a particular sound recording?

18 A I've heard that that happens,
19 yes.

20 Q Are you aware that the copies of
21 those sound recordings or products provided
22 sometimes only contain information

1 concerning the title of a sound recording
2 and the featured artist?

3 A I've heard that as well, yes.

4 Q Now you referred, I believe --
5 Let me direct you to page 25 of your
6 testimony and you refer there to
7 SoundExchange's longstanding request for
8 census reporting.

9 A Yes.

10 Q And of course, sample versus
11 census reporting is an issue that's already
12 been addressed at length in a separate
13 record-keeping rulemaking proceeding. Is
14 that correct?

15 A Notice in record-keeping, there's
16 been extensive discussion of this. Yes.

17 Q Are you aware that as ASCAP and
18 BMI only require sample reporting of
19 terrestrial radio stations?

20 A I know that in the past they've
21 relied on samples for their distributions,
22 but I'm also aware that they monitor 24/7

1 comprehensively terrestrial radio stations
2 currently.

3 Q But the activity of monitoring
4 though is an activity that ASCAP and BMI
5 undertake. Correct?

6 A That's correct.

7 Q It's not an activity that the
8 radio stations are required to do. Correct?

9 A I know the radio stations don't
10 do that and that ASCAP and BMI undertake
11 that activity. Yes.

12 Q Okay. And as for the radio
13 stations themselves, ASCAP and BMI do not
14 require them to submit census reporting. Is
15 that true?

16 A I believe so, but I'm not exactly
17 sure of what requirements ASCAP and BMI have
18 with respect to reporting.

19 MS. ABLIN: Okay. Well, let me
20 show you a document then that has been
21 marked as Services Exhibit 156 that I will
22 represent is a document printed off BMI's

1 website on June 7, 2006.

2 (Whereupon, the above-
3 referred to document was
4 marked as Services
5 Exhibit No. 156 for
6 identification.)

7 THE WITNESS: Okay.

8 MS. ABLIN: And just if you could
9 let me when you're finished reviewing the
10 document. Are you finished? Okay.

11 BY MS. ABLIN:

12 Q Ma'am, this document is titled
13 "Royalty Information: U.S. Radio Royalties."
14 Correct?

15 A That's correct.

16 Q And if I could direct your
17 attention to the paragraph in the middle of
18 the page on the first page entitled -- It's
19 immediately after the heading, "Commercial
20 Radio." It states there that "BMI uses
21 information provided by its commercial radio
22 station licensees to determine performances.

1 All licensed stations are requested to log
2 performances for a three-day period each
3 year with different stations logging each
4 day of the year. This sample is unfactored
5 to create a statistically reliable
6 projection of all future performances on all
7 commercial music format radio stations
8 throughout the country." Is that correct?

9 A That's what it says, yes.

10 Q So at according to this BMI
11 document, they require samples from radio
12 stations of music use for only three days
13 per year.

14 MR. PERRELLI: Your Honor, I'm
15 going to object to this. The witness is
16 reading a document that she's seen for the
17 first time and hasn't indicated she knows
18 what it is and for her to say this is what
19 BMI does I think is an improper use of this
20 document. If she wants to ask Ms. Kessler
21 what she knows or doesn't know, I think she
22 can do it. Simply reading from the document

1 I don't think makes it evidence.

2 CHIEF JUDGE SLEDGE: Ms. Ablin.

3 MS. ABLIN: I'll rephrase the
4 question.

5 CHIEF JUDGE SLEDGE: All right.

6 BY MS. ABLIN:

7 Q Ms. Kessler, are you aware in
8 fact of what BMI's sample versus census
9 music use reporting requirement is for
10 commercial radio stations?

11 A As I said, I know that ASCAP and
12 BMI have relied on samples in the past, but
13 they also have technology ventures with
14 companies that are doing comprehensive
15 monitoring. To the extent that they are
16 using that for their royalties, I don't
17 know.

18 Q But I guess that wasn't exactly
19 my question. My question is are you aware
20 of what BMI requires radio stations to
21 report.

22 A Apart from reading this document,

1 I wasn't aware of this three-day situation.

2 Q Okay. Are you aware of what
3 ASCAP requires radio stations to report?

4 A I believe that at one point again
5 they required a sample. I forget how many
6 hours sitting here today, but also they have
7 their Media Guide which does comprehensive
8 24/7 monitoring of terrestrial radio
9 stations.

10 Q Right, but again that's not an
11 activity that radio stations are required to
12 undertake. Correct?

13 A No, they are doing the
14 monitoring. So --

15 Q ASCAP is doing the monitoring.

16 A ASCAP is doing the monitoring.
17 That's correct.

18 Q Are you aware that the Section
19 118 regulations governing noncommercial
20 public broadcasters require samples for only
21 one week a year?

22 A No, I'm not aware of that.

1 Q Now do you recall in your
2 testimony I believe on Tuesday during your
3 direct examination that you stated, I
4 believe, that SoundExchange analyzed a
5 sample of census reporting supplied by a
6 webcaster to determine how many artists were
7 captured in the sample?

8 A We conducted -- Yes, that was my
9 testimony.

10 Q When was that analysis conducted?

11 A It was probably we did that third
12 quarter last year perhaps.

13 Q And just for the record, what
14 months were included in that quarter?

15 A Of the analysis?

16 Q Oh, I'm sorry. That's when you
17 conducted the analysis.

18 A Yes.

19 Q The third quarter and that would
20 have been in the time frame of which three
21 months?

22 A You know, September, October,

1 November time frame probably.

2 Q Okay. And who conducted the
3 analysis specifically?

4 A SoundExchange conducted the
5 analysis.

6 Q Who within SoundExchange worked
7 on this project?

8 A Jonathan Sowers, Christine Patton
9 conducted the analysis at my direct,
10 supervision and review.

11 Q So SoundExchange employees in
12 other words conducted the analysis.

13 A That's correct.

14 Q And what was the census period
15 covered in the analysis?

16 A It was a three month period. I
17 believe it was the first quarter of 2005 if
18 I'm not mistaken.

19 Q And just so it's clear, would the
20 first quarter 2005 refer to the last three
21 calendar months of 2004 or are you talking
22 calendar quarters?

1 A No. January, February, March
2 2005.

3 Q Okay.

4 A I believe.

5 Q So the census period was the
6 first three months of 2005 was the census.
7 Correct?

8 A I believe so, yes.

9 Q And what was the sample that you
10 analyzed?

11 A We examined two conservative
12 seven day periods.

13 Q And do you recall which seven day
14 periods within the quarter you analyzed?

15 A I know they were randomly
16 generated, but I don't recall specifically
17 which two conservative seven day periods
18 were identified.

19 Q And how many webcasters did you
20 analyze in this study?

21 A One.

22 Q Which webcaster was that?

1 A XM.

2 Q How did you decide to analyze,
3 which one to analyze? How did you settle
4 upon XM?

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

21 Q Were there other webcasters for
22 which you had data that you considered

1 analyzing?

2 A No.

3 Q And XM transmits a number of
4 channels, does it not?

5 A Yes, they do.

6 Q Do you know about how many?

7 A I don't recall, no.

8 Q Did you analyze all of XM's
9 channels?

10 A Yes, we did.

11 Q Do you know how many genres of
12 music XM transmits?

13 A No, I don't.

14 Q But in any event, did you analyze
15 all of the genres how many ever there are
16 that XM transmits?

17 A Yes.

18 JUDGE ROBERTS: Ms. Kessler, XM
19 is voluntarily offering this information I
20 presume because they were already providing
21 information for their satellite services.
22 Is that right?

1 THE WITNESS: That's correct.

2 BY MS. ABLIN:

3 Q I know you stated that the two
4 seven day periods, two conservative seven
5 day periods, were randomly generated. Could
6 you describe how the random generation
7 process worked?

8 A Yes, there's a function in Excel
9 called Random or Random Number or something
10 like that and so based on all the available
11 days Excel randomly generated the first day
12 of the first seven day period and another
13 one for the second. It's a function in
14 Excel.

15 Q Did you analyze any other
16 quarters besides the one quarter, the first
17 quarter of 2005?

18 A No, we did not.

19 Q You just analyzed one quarter.

20 A That's correct.

21 Q What were the confidence limits
22 on the percent of artists that you stated

1 were not picked up in the sample?

2 A I'm not sure what you mean by
3 confidence level. We simply looked at those
4 that were included in the sample and those
5 that weren't included in the sample and
6 that's how we determined being a percentage
7 of all artists compared to those that were
8 missed.

9 Q Did you perform any sort of
10 statistical analysis on the result or you
11 just simply ran a count of X songs appeared
12 in the sample versus why songs appeared in
13 the census?

14 A The analysis we looked again are
15 of those artists that were performed during
16 the three-month period compared to those
17 that were picked up by the sample and what
18 the difference was. That's what we
19 examined.

20 Q And I guess what I'm getting at
21 is did you perform any sort of statistical
22 analysis apart from what you just described.

1 A We did what I described. We
2 compared what was in the census to what was
3 missed in the sample, what was in the sample
4 and how the artists who were in the sample
5 were either over compensated or under
6 compensated for their performances of sound
7 recordings.

8 Q So beyond that, you didn't
9 perform any sort of -- Beyond what you just
10 described, you performed no other sort of
11 analysis.

12 A No, the analysis I described is
13 what we conducted.

14 Q Now XM is not a radio
15 simulcaster, are they?

16 A No, they are not.

17 Q Did you perform any sample versus
18 census analyses on any radio simulcasters?

19 A We have no data from radio
20 simulcasters. So we were unable to do so.
21 That information is in the possession of the
22 radio stations and to the extent they would

1 conduct that analysis, I would be interested
2 to see those results.

3 Q So I take it that's a no.

4 A No.

5 Q So your analysis consisted then,
6 just to recap, of a single webcaster, that
7 is XM, for a single two weeks or two
8 conservative seven day periods during a
9 single calendar quarter. Correct?

10 A Correct.

11 Q Now as a mathematician and data
12 analyst, you would agree, would you not,
13 that the larger a sample the more accurate
14 it becomes?

15 A Well, I'm either a statistician
16 or a mathematician. I have analyzed data
17 extensively and obviously the more you
18 analyze things the more you'll see a trend.
19 But we analyzed the data we had available to
20 us.

21 Q And in considering the size of
22 the sample, you don't typically consider the

1 data from just one source, do you, but from
2 all sampled sources?

3 A I would love to work with the
4 broadcasters and the webcasters to examine
5 the data and see if there is something
6 beyond census reporting that would result in
7 the equitable distribution of royalties, but
8 I don't have that information. So I'm
9 unable to do so, but I would love to have a
10 much larger size of data to examine. Yes.

11 Q Did your written direct testimony
12 discuss this analysis at all?

13 A Through I think incorporation of
14 all my comments and SoundExchange's comments
15 with respect to notice and recordkeeping,
16 yes.

17 Q So the analysis that was
18 performed in the first quarter of 2005 is
19 set forth in one of the exhibits that was
20 submitted.

21 A I think that's right or it was a
22 prior study that we did.

1 Q I'm sorry. Could you repeat
2 that?

3 A It was either the study that I
4 described that was in my notice, in
5 SoundExchange's notice and recordkeeping
6 comments or a prior analysis.

7 Q And that's something that's been
8 submitted in this proceeding as evidence?

9 A Yes, by incorporation, those
10 documents are exhibits -

11 Q Could you point me to the
12 document?

13 (Discussion off the microphone.)

14 BY MS. ABLIN:

15 Q Ms. Kessler, if I could just
16 interrupt you for one minute? Did you state
17 earlier that you performed this analysis in
18 October or November of 2005?

19 A Yes, I believe we conducted the
20 analysis in the third quarter of `05, yes.

21 Q Which would be October, November
22 and December of `05?

1 A Third quarter would be July,
2 August, September.

3 Q July, August, September.

4 A Yes, sorry about that.

5 Q Okay.

6 (Discussion off microphone.)

7 MR. PERRELLI: Your Honor, I
8 think it will speed things along if I can
9 identify the section, assist the witness
10 rather than having her page through many
11 exhibits.

12 CHIEF JUDGE SLEDGE: I'm afraid
13 that's not permitted, Mr. Perrelli.

14 MR. PERRELLI: Fair enough, Your
15 Honor. Thank you.

16 THE WITNESS: So I think it's
17 Exhibit 418DP page 13 where the discussion
18 of sample reporting takes place and since
19 the exhibits to this document aren't in this
20 book I'm not sure of the study is
21 incorporated with this document. There may
22 be a reference in an earlier discussion

1 however. I'm unable to locate it --

2 (Discussion off microphone.)

3 BY MS. ABLIN:

4 Q Ms. Kessler, did you prepare a
5 study plan before conducting the analysis
6 outlining what the purpose of the analysis
7 would be?

8 A Yes.

9 Q And is that provided in one of
10 the exhibits that we received?

11 A I don't know.

12 Q In any event, a minute ago you
13 were not able to find the study or documents
14 related to the study.

15 A Yes, I haven't been able to find
16 it yet.

17 Q Did you keep a record of the
18 techniques you used to analyze the data?

19 A Yes, we did.

20 Q Is that included in any of the
21 exhibits?

22 A I don't know.

1 Q You were not able to find it a
2 minute ago in any event.

3 A That's correct.

4 MS. ABLIN: I have no further
5 questions.

6 THE WITNESS: I might have found
7 it. It appears that on page nine -

8 CHIEF JUDGE SLEDGE: Just a
9 moment. Are there any questions by NPR?

10 MS. BROWN: Yes.

11 CROSS EXAMINATION (NPR)

12 BY MS. BROWN:

13 Q Good morning, Ms. Kessler.

14 A Good morning.

15 Q My name is Kris Brown and I
16 represent National Public Radio. I just
17 have a few questions for you to clarify some
18 of the documents that Ms. Ablin asked you
19 about. If you could turn first to Services
20 Exhibit 154. It's the full page printout
21 that was just produced. If you turn to page
22 three of that exhibit that's marked

1 SX0114260.

2 A Yes.

3 Q Under the column ENTS NSTS
4 analysis.

5 A Yes.

6 Q I see that two services are
7 listed there for 2004.

8 A Yes.

9 Q Do you know which two services
10 those were?

11 A No.

12 Q Okay. And you'll see in 2005
13 that that number is reduced to zero.

14 A Yes.

15 Q Do you know if those two services
16 under 2004 and ENTS NSTS were moved to
17 another category?

18 A They likely were but I'm not
19 sure.

20 Q Do you know which category they
21 were moved to?

22 A No, I don't.

1 Q If you turn to the next page
2 marked SX114261 under category NONSWSA
3 NONCOM analysis.

4 A Yes.

5 Q I believe in response and clarify
6 me if I'm incorrect to Ms. Ablin's question,
7 you said that you thought NPR and CPB funded
8 station were reflected in this category.

9 A I said I didn't know which
10 category they might be reflected in. I
11 think that's what I said.

12 Q So is it your belief that NPR and
13 CPB funded stations are reflected somewhere
14 in this document?

15 A I don't know if they're reflected
16 in this document or not.

17 Q What is your basis for your
18 belief that they may be reflected in the
19 NONSWSA NONCOM analysis?

20 A Well, to the extent that their
21 license agreement expired and again I'm not
22 sure what year they expired they would

1 likely have to pay under one of the existing
2 CARP rates which would be or the SWSA rates
3 which are the ones presented here.

4 Q Are you aware that there are
5 approximately 799 CPB funded and NPR member
6 stations?

7 A I know there are hundreds of NPR
8 stations, yes.

9 Q And here in this category under
10 NONSWSA NONCOM analysis for 2004, there are
11 14 services listed. Is that correct?

12 A That's correct.

13 Q And that's less than 799.

14 A Yes, it is.

15 Q And for 2005, there are 13
16 services listed. Is that correct?

17 A That's correct.

18 Q And that's less than 799.

19 A Yes, it is.

20 Q And for 2006, there are seven
21 services listed. Is that correct?

22 A That's correct.

1 Q And that's less than 799.

2 A It is and to the extent that NPR
3 was reported as broadcast group with all of
4 its hundreds of stations then they might be
5 represented as one in one of those numbers.

6 Q Do you generally receive reports
7 from all NPR member stations or at least
8 those that are performing webcasting?

9 A What type of reports?

10 Q Reports as required by
11 SoundExchange in terms of webcasting by NMP
12 member organizations.

13 A Again often broadcast groups
14 report, they pay with a single check and
15 their statements of account are supposed to
16 indicate all the individual stations
17 broadcasting, but they often neglect to do
18 so.

19 Q And to the extent that you had
20 received a lump sum payment from NPR, do you
21 think that would be reflected on this chart
22 here?

1 A To the extent -- Well, the lump
2 sum payment I believe was for 1998 through
3 2002 but again I'm not sure when that
4 license expired. So to the extent that it
5 extended to 2004, it may be reflected in
6 there. I simply can't say.

7 Q Okay. I'd like to draw your
8 attention to Services Exhibit 155 and if you
9 would turn to Tab 1. Again this is just to
10 clarify Ms. Ablin's question and correct me
11 if I misheard you, but I think that you said
12 that you thought that NPR and CPB funded
13 stations were reflected in the category
14 that's denoted on this chart as NCPB or
15 NONSWSA NONCOMMERCIAL public broadcasts.

16 A Yes, I said that they may be. I
17 didn't know.

18 Q And looking on page one which
19 I'll represent to you is the only page that
20 contains the notation for NCPB according to
21 this category, under that if you look a few
22 lines down ComedyCentral.com is listed

1 there. Can you tell me why that's included
2 in the NCPB category?

3 A No, I can't.

4 Q And to your knowledge, is Comedy
5 Central an NPR or CPB funded station?

6 A I don't know.

7 Q And you'll look going down,
8 several of these stations are listed with
9 the parent name Moody Broadcasting Network.

10 A Yes.

11 Q And to your knowledge are any of
12 the stations with the parent Moody
13 Broadcasting Network part of NPR or CPB?

14 A I don't know.

15 Q And I'll represent to you that
16 for the category NCPB there are 42 stations
17 listed on this chart.

18 A I'm sorry. Repeat that.

19 Q There are 42 stations listed on
20 this chart.

21 A Categorized as NCPB?

22 Q NCPB. I'll represent that to you

1 and that's far less than the 799 NPR and CPB
2 member stations. Is that correct?

3 A It's far less than the 700 figure
4 you quoted me, yes.

5 MS. BROWN: May I have one
6 moment, Your Honor? No further questions.

7 CHIEF JUDGE SLEDGE: Mr.
8 Freundlich, any questions?

9 MR. FREUNDLICH: Yes, Your Honor.

10 CROSS EXAMINATION (ROYALTY LOGIC)

11 BY MR. FREUNDLICH:

12 Q Good morning, Ms. Kessler. I'm
13 Ken Freundlich of Royalty Logic, Inc.

14 A Good morning.

15 Q I have a few questions for you.
16 In listening to your testimony over these
17 past two days, is it fair to say that you
18 oppose Royalty Logic's attempt to get DARPA
19 which we refer to as Direct Accounting
20 Royalties Payment and Auditing directly from
21 the licensees as the same basis as
22 SoundExchange does because you think

1 competition would create inefficiencies?

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

18 Q I appreciate you reconstituting
19 my question, but my question was do you
20 think that competition would create
21 inefficiencies.

22 A I think that competition in a

1 statutory framework leads to free ridership
2 and it's inefficient and overall costs right
3 across all copyright owners and all artists
4 would increase.

5 Q So is that a yes to that
6 question?

7 A Yes, it would introduce cost
8 inefficiencies.

9 Q Okay, and what about those
10 artists and copyright holders that do not
11 want to be affiliated with RIAA and
12 SoundExchange that want their own
13 representation? What about those people?

14 A Copyright owners are free to
15 engage in direct licensing and could have
16 any representation they so desired.

17 Q So they can direct license but
18 they can't appoint another agent to do their
19 business on the same basis as SoundExchange.

20 Is that your testimony?

21 A My testimony is that we're the
22 sole designated agent right now and we

1 represent members and nonmembers alike, all
2 copyright owners and artists entitled to
3 payment under the statutory license, but
4 anyone who wants to engage in direct
5 licensing may do.

6 Q But doesn't the law, Ms. Kessler,
7 give nonmembers of SoundExchange the choice
8 to designate their own agents?

9 A There is the concept of common
10 agents somewhere in the law, but it's not
11 clear if they're acting in the capacity of a
12 designated agent or simply a common agent
13 which would represent that artist or
14 copyright owner subsequent to the
15 distribution from SoundExchange.

16 Q I know you're drawing a
17 distinction between designated agents and
18 common agents, but my question would be
19 would that choice that the law gives that
20 you just referred to be meaningful if a
21 nonmember of SoundExchange was not paid the
22 same amount of money for the same

1 performance as a member of SoundExchange.

2 MR. PERRELLI: I'm going to
3 object to the extent that he's trying to
4 characterize the law and ask a nonlawyer to
5 provide some form of interpretation.

6 CHIEF JUDGE SLEDGE: Please
7 rephrase, Mr. Freundlich.

8 MR. FREUNDLICH: Okay.

9 BY MR. FREUNDLICH:

10 Q Would it be fair for a Royalty
11 Logic member to receive payments on a
12 different basis, a different amount, for the
13 same performances as a member of
14 SoundExchange, Ms. Kessler?

15 A Again, SoundExchange is not a
16 membership organization. We do not
17 discriminate between members and nonmembers.
18 But should a collection of members of an
19 organization wish to differentiate the value
20 of those performances I would imagine that
21 they could.

22 Q But only after SoundExchange

1 processed and took their own administrative
2 costs out of the payments. Isn't that
3 correct?

4 A In the event that they are a
5 common agent receiving royalties from
6 SoundExchange, yes. Their downstream
7 distribution, I'm assuming that with the
8 agreement of the membership they could apply
9 any rules they so chose.

10 Q Right, and the performances would
11 not be valued, get the same amount of money,
12 as the ones that went through SoundExchange
13 to SoundExchange payees.

14 A SoundExchange doesn't
15 differentiate among members or nonmembers.
16 All performances are valued equally and it's
17 a question of their rotation or listenership
18 that one performance will earn more money
19 than another.

20 Q Ms. Kessler, isn't direct
21 accounting reporting payment and auditing
22 from the licensees the only way that a non

1 SoundExchange payee can assure that they get
2 the same amount for the same performances as
3 a SoundExchange payee?

4 A I'm not sure I understand the
5 question.

6 Q Well, if Royalty Logic, for
7 example, was not getting direct accounting
8 royalties payment and auditing rights from
9 the licensees, how could they assure that
10 their members would get payments on the same
11 basis as a SoundExchange person?

12 A Again, I'm not sure what you're
13 asking. I mean SoundExchange reports in
14 great detail to every recipient of royalties
15 exactly what they're being paid
16 SoundExchange for and as far as I
17 understand, a copyright owner or artist as
18 an audit rep to SoundExchange and certainly
19 could examine our allocations and
20 distributions. Our system is completely
21 transparent and doesn't differentiate in any
22 way.

1 Q So the copyright owners would get
2 to audit SoundExchange. That's what you're
3 saying.

4 A They can audit SoundExchange. I
5 believe that's right.

6 Q So Royalty Logic would be in the
7 same position. They would have to audit
8 SoundExchange in order to see what the
9 payments were that came in from the
10 licensees.

11 A No, again, we're not permitted to
12 show individual licensee payments. We're
13 only allowed to do so in the aggregate.
14 That aggregate figure is displayed on the
15 statement so they know precisely what the
16 pool of money is that's being allocated and
17 distributed. From there, they see their
18 individual performances as a copyright owner
19 or as an artist and what performance was
20 valued and then they see their statutory
21 split applied to that.

22 Q So the Royalty Logic people

1 wouldn't get the same information as the
2 SoundExchange people then. Is that correct?

3 A If Royalty Logic is a common
4 agent on behalf of a copyright owner or an
5 artist, they would get the same information
6 that any other recipient of royalties from
7 SoundExchange would get.

8 Q From SoundExchange, but they
9 wouldn't get the same information that
10 SoundExchange got from the licensees, would
11 they?

12 A They would not get the reports of
13 use or the individual payment information
14 that SoundExchange gets. That's correct.

15 Q So non SoundExchange payees, the
16 members of Royalty Logic, are going to be
17 forced then under your interpretation to
18 rely on the SoundExchange Recording Industry
19 of America (RIAA) auditing for your
20 decisions of when you're going to audit, how
21 you're going to audit, the licensees.

22 A You know SoundExchange has an

1 audit with respect to the licensees and
2 we've asked that copyright owners, any
3 copyright owner, have the same right to
4 audit. It may be collectively. There may
5 be a business reason to audit services or
6 not audit other services that we don't think
7 we should stand in the shoes of each and
8 every copyright owner with respect to that
9 audit right and we've requested that any
10 copyright owner be permitted to audit a
11 service.

12 Q To audit the licensees.

13 A Correct.

14 Q And would that include RLI?

15 A To the extent that RLI is a
16 copyright owner which I don't think they
17 are.

18 Q So it wouldn't include RLI if
19 they were designated as an agent for their
20 members.

21 A Well, again this is theoretic but
22 if RLI is a designated agent by this board,

1 then they would be operating under some set
2 of rules that I would assume includes an
3 audit right.

4 Q And what if RLI were a common
5 agent?

6 A To the extent RLI is a common
7 agent representing copyright owners those
8 copyright owners have an audit, should have
9 an audit right to the licensees.

10 Q But RLI would not under your
11 interpretation?

12 A You're drawing a distinction. If
13 they are representing a group of copyright
14 owners who wish to audit a service, then
15 whether it's the RLI conducting the audit or
16 the copyright owner giving permission to RLI
17 to conduct the audit, I'm not sure how that
18 would work since we don't have regulation or
19 rules around that.

20 Q Ms. Kessler, do you think that
21 Royalty Logic's members would compromise
22 their right to choose a collective based on

1 SoundExchange's notion of what's efficient
2 and what's not efficient?

3 A Repeat the question please.

4 Q Do you think that a Royalty Logic
5 member would compromise its right to choose
6 whichever collective it wanted to affiliate
7 with based on your company's notions of
8 efficiency?

9 A I think --

10 MR. PERRELLI: Your Honor, I'm
11 going to object to asking her to guess
12 what's in the mind of the Royalty Logic
13 members with her, I guess, the premise of
14 this question.

15 CHIEF JUDGE SLEDGE: Mr.
16 Freundlich.

17 MR. FREUNDLICH: I'll rephrase
18 the question.

19 BY MR. FREUNDLICH:

20 Q Do you think it's fair to make
21 Royalty Logic members and non members of
22 SoundExchange or non payees of SoundExchange

1 compromise their right to choose based on
2 SoundExchange's notion of what's efficient
3 and what's not?

4 A You know I tried to make this
5 clear that I think under a statutory license
6 with a single right and a single set of
7 rates and terms that there should be a
8 single set of rules and that those rules are
9 best administered by a single agent who like
10 SoundExchange represents copyright owners
11 and artists. They're on our board of
12 directors. They participate in our various
13 committees and that is the appropriate place
14 for the administration of this statutory
15 royalty.

16 Q But haven't the Royalty Logic
17 members in fact demonstrated what they think
18 about SoundExchange's decision making by
19 affiliating with Royalty Logic because
20 they've not had a good experience with the
21 RIAA and the major labels in the past?

22 MR. PERRELLI: I object again. I

1 don't know how she could possibly testify
2 about whatever experience Mr. Freundlich is
3 representing.

4 CHIEF JUDGE SLEDGE: Sustain.

5 BY MR. FREUNDLICH:

6 Q I want to go back to the other
7 question which you still haven't answered,
8 Mr. Kessler. Do you think it's fair that
9 Royalty Logic members should have to not
10 have a right to choose which collective they
11 want to do their bidding with respect to
12 these royalties and take it through
13 SoundExchange?

14 A You know again a copyright owner
15 has the right to engage in direct licensing
16 and determine what they feel is fair outside
17 of the statutory license. Once a statutory
18 license is in place, however, I think this
19 is across all copyright owners and all
20 artists and services can take that license.
21 So if you're operating in a statutory
22 framework, again I feel a single

1 organization better serves that collective
2 community for both efficiencies and cost
3 saving reasons.

4 Q You keep referring to the
5 efficiencies, Ms. Kessler, but isn't this
6 really about choice?

7 A In a statutory license, I'm not
8 sure what choice you have. Again, if you
9 want choice, you may direct license. Under
10 statutory license, the price is set, the
11 terms are set, the ways in which you can
12 exploit those sound recordings is set. So
13 there is not choice in that situation. The
14 choice exists outside of that license.

15 Q Are the methods of payments to
16 your copyright holders set?

17 A The method of payments to our
18 copyright owners and artists are mandated by
19 statutory splits and further with respect to
20 the payees' schedules by the recipients
21 themselves.

22 Q I'm not talking about the

1 amounts. Are the frequency of payments set
2 or is that something the SoundExchange board
3 decides?

4 A As far -- No, there is no term
5 with respect to a requirement with the
6 frequency of distributions that
7 SoundExchange conducts quarterly with
8 respect to allocations of new royalties and
9 more frequently with distributions of
10 checks.

11 Q But that's a decision that
12 SoundExchange makes. Correct?

13 A That is a decision that
14 SoundExchange makes in conjunction, well,
15 with the approval and direction of its
16 committees and it's board of directors
17 comprised equally of copyright owners and
18 artists.

19 Q But it's not comprised of any
20 Royalty Logic members, is it?

21 A To my knowledge, Royalty Logic is
22 not a copyright owner and to the extent they

1 have members, I'm not sure who they are. So
2 I can't --

3 Q But you're not aware that any of
4 your committees and board of directors are
5 populated by any Royalty Logic members.

6 A No, I'm not aware of that.

7 Q And in terms of the auditing, are
8 the auditing policies of SoundExchange also
9 set by its board?

10 A Well, the auditing provisions are
11 set forth either in the statute or in
12 regulations. So that's where those are set.

13 Q Are you talking about the
14 auditing rights of the -- The frequency with
15 which you're going to conduct audits is set
16 by the regulations?

17 A No, the regs or the terms are
18 silent with respect to frequency. It does
19 establish the right however.

20 Q So you set your own audit
21 policies then, SoundExchange does.

22 A Again with the input direction

1 and oversight of our board, yes.

2 Q Right, but there are not RLI
3 members on that board to your knowledge, are
4 there, Ms. Kessler?

5 A That's correct.

6 Q Okay. Now you described in some
7 detail in your direct written statement as
8 well as in earlier testimony, the manner in
9 which you receive payment logs, I guess you
10 refer to those as statements of accounts,
11 from webcasters and how they are logged in
12 and processed by SoundExchange. Correct?

13 A Yes.

14 Q Ms. Kessler, is this receipt and
15 logging of statements by SoundExchange
16 anything different than what any data
17 processing entity would have to do with
18 that material like ASCAP or BMI or Harry
19 Fox?

20 A I can't speak to how they process
21 paperwork. I can speak to how SoundExchange
22 deals with its statements of accounts,

1 payments and reports of use.

2 Q But wouldn't you say that having
3 logs occasionally failed to conform with
4 format and delivery specs in the job of
5 matching and research to assure correct
6 association of copyright owners and
7 performers with performance is something
8 that a data processing entity like
9 SoundExchange has to do to perform its
10 function?

11 A You know SoundExchange has
12 undertaken a number of activities with a
13 level of thoroughness and comprehensiveness
14 in order to ensure that royalties are
15 received by absolutely everyone entitled to
16 them and to the extent that SoundExchange
17 has gone through this very broad process of
18 making sure that sound recordings are
19 identified accurately and that we conduct
20 all the necessary outreach to pay out as
21 much of the royalties as we possibly can,
22 that is something that SoundExchange in its

1 philosophy has undertaken. What other
2 collecting societies or similarly situated
3 organizations do, I just can't speak to.

4 Q But aren't all these things that
5 SoundExchange has undertaken in fact common,
6 everyday functions of the business of
7 copyright research and royalty accounting?

8 A Again, I think that depending on
9 a company's membership, their profit motive,
10 their other activities, may trade off one
11 thing for another. SoundExchange is simply
12 administering a single license with single
13 terms and doing that as fairly,
14 transparently and efficiently as possible.
15 So I can't speak to the business decisions
16 or where resources are expended in other
17 organizations.

18 Q And you're administering those
19 licenses based on in part on the regulations
20 and in part on the decisions of
21 SoundExchange's board and all those
22 committees you described.

1 A You know we're heavily regulated
2 and we adhere to those regulations and to
3 the extent that the regulations or the terms
4 are silent or unclear on issues we engage
5 our copyright owner and artist community
6 with input and guidance on the most
7 efficient and transparent way to implement
8 those policies. So it is with the very
9 people who are receiving the benefit of the
10 royalty distributions that are making the
11 decisions of what to do with those
12 royalties.

13 Q But none of those very people
14 include members from Royalty Logic to your
15 knowledge, do they?

16 A No, they don't.

17 Q Now in your direct statement and
18 in some of your testimony, you state that
19 millions of performances that SoundExchange
20 logs in are principally from the preexisting
21 subscription services and satellite
22 services. Do you remember making that

1 statement, Ms. Kessler?

2 A Yes.

3 Q And these would include Muzak,
4 Music Choice, DMX, XM and Cirius. Is that
5 right?

6 A That's correct.

7 Q So processing information from
8 these five services constitutes the lion
9 share of your experience at SoundExchange.
10 Would that be correct, Ms. Kessler?

11 A The lion share with respect to
12 processing performances or in general?

13 Q Right, processing performances.

14 A Yes, that's correct.

15 Q So your system essentially
16 receives the bulk of its data from these
17 five sources. Is that correct?

18 A That's correct.

19 Q And each of these five companies
20 has very sophisticated play lists and data
21 presentation in your requested format, don't
22 they?

1 A Sophisticated? I think it's the
2 minimum necessary to get to the point where
3 you can fairly and efficiently distribute
4 royalties. I'm not sure quite sure how
5 sophisticated it makes it though.

6 Q But your testimony in this case
7 just so we can be clear is based on reports
8 primarily received from these five companies
9 and conjecture with respect to the rest who
10 are not reporting because there are no rules
11 in place for the formats of those reports.

12 A Well, there are interim
13 regulations in place with respect to the
14 data elements and other information that the
15 services will likely be required to report.
16 So we are not in the dark with respect to
17 the data content. What we are in the dark
18 about is what file format and by what
19 mechanism those reports are delivered to
20 SoundExchange.

21 Q And are you aware, Mr. Kessler,
22 that for example MRI processes reports from

1 over 300 different local television stations
2 each with their own or slightly different
3 formats of data presentation?

4 A I'm unaware of what data
5 ingestion MRI conducts.

6 Q And that the television use, the
7 MRI reports, are generally excerpts of
8 songs, three second cues, five second
9 background cues which are even more
10 difficult to match than those that you've
11 described at SoundExchange.

12 A First, I couldn't speak to the
13 difficulty of the matching, but I can't
14 speak to what MRI ingests as I've stated.

15 Q Now on page 14 of your written, I
16 don't think you have to go there, but you
17 refer something called the "theory of
18 certain entities." Is that so, Ms. Kessler?
19 It's on page 14 if you want to take a look.
20 It's the second full paragraph.

21 A Page 14?

22 Q Where you say -- I'll read it

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

18 Do you remember that statement? Is that a
19 true statement?

20 A Yes.

21 Q So is it your testimony that if
22 there are multiple collectives the system of

1 collection and payment of royalties would
2 more inefficient and complicated?

3 A If there are multiple agents,
4 it's my view that the cost would be
5 increased, delays would increase and it
6 would be far more difficult to distribute
7 royalties, yes.

8 Q So is it your belief, Ms.
9 Kessler, that a system with any checks and
10 balances to SoundExchange is cost structure
11 and investment is more efficient?

12 A SoundExchange has extensive
13 checks on its costs and expenditures because
14 of its board oversight. I mean again the
15 recipients of the royalties are on our board
16 and on our committees and they are the ones
17 that review our budget, approve our
18 programs, have twice deferred the taking of
19 the undistributed royalties to reduce
20 SoundExchange's costs to give us an
21 opportunity to reach more and more copyright
22 owners and artists who deserve the

1 royalties. So I disagree with your
2 characterization that SoundExchange's
3 expenditure of funds goes unchecked in some
4 way.

5 Q But it's -

6 A That's not the case.

7 Q So you're describing checks and
8 balances then that are internal to
9 SoundExchange. Correct?

10 A By its committees and its board,
11 yes.

12 Q But there aren't any Royalty
13 Logic members on those committees or board,
14 are there, Ms. Kessler?

15 A No, there is not.

16 Q Isn't it true, Ms. Kessler, that
17 the board of SoundExchange does not
18 represent all copyright holders and
19 performers?

20 A Well, SoundExchange's board
21 consists of nine copyright owners. So it -

22 Q But that's not my question. My

1 question is isn't it true, Ms. Kessler, that
2 the board of SoundExchange does not
3 represent all copyright holders and
4 performers.

5 A SoundExchange represents members
6 and nonmembers. So to that extent,
7 SoundExchange does represent all copyright
8 owners who aren't direct licensing outside
9 of the statutory license.

10 Q But aren't there in fact many
11 independent labels and artists that are
12 members of Royalty Logic that are not
13 represented by SoundExchange?

14 A I don't know who they are.

15 Q But hypothetically, if there are
16 some, is it your testimony that
17 SoundExchange still represents them even
18 though they don't want to be represented by
19 SoundExchange?

20 A SoundExchange pays all copyright
21 owners regardless of membership in
22 SoundExchange.

1 Q And sets policies as you
2 described before based on information they
3 received from persons other than the Royalty
4 Logic members?

5 A SoundExchange sets its programs
6 and its policies and its budget based on
7 approval by its board of directors, yes.

8 Q But you agree, Ms. Kessler, don't
9 you, that all artists and performers deserve
10 a say in how their dollars are spent by
11 their collective?

12 A In a perfect world, every
13 statutory recipient would be involved in and
14 participate. But there are tens of
15 thousands of featured artists, some of whom
16 are groups, and have group members of three
17 or four or five people. There are thousands
18 of copyright owners here in the United
19 States and around the globe. There are many
20 artists who own their own masters and in my
21 view and the decision lies with this board
22 of what organization is going to be charged

1 with the humbling task of fairly
2 distributing these royalties to those
3 entitled parties.

4 Q So are you advocating, Ms.
5 Kessler, denying Royalty Logic's members and
6 others a say in how their chosen collective
7 spends their money and how their payments
8 are calculated?

9 A I can't speak to what those
10 members decide or not. It's up to them.

11 Q But you're saying they don't have
12 a choice.

13 A I'm saying again at the risk of
14 repeating myself that in a statutory
15 framework it makes more sense to have a
16 single agent administering a set of rules
17 that apply to all copyright owners and
18 artists who are within the statutory
19 framework and those that don't like it may
20 direct license outside of it. That's what
21 I'm saying.

22 Q Are you familiar with artists

1 known as Dr. Dre and Metallica?

2 A Yes, I am.

3 Q And that they sold million of
4 records over the past roughly 10, 15 years.

5 A Yes, I am.

6 Q Okay. So you're saying that Dr.
7 Dre and Metallica for example shouldn't be
8 entitle to a choice in their collectives and
9 receive royalties on the same exact basis as
10 a SoundExchange member for equivalent
11 performances?

12 A I'm saying that Dr. Dre and
13 Metallica receive their royalties on the
14 same basis as anybody else who received
15 royalties from SoundExchange and I'm not
16 denying Metallica their say. We would
17 welcome them to participate on our advisory
18 committees and we have artists' seats on our
19 board and we would welcome their
20 participation.

21 Q But that would be involuntary
22 though because Dr. Dre and Metallica and

1 others do not want to be affiliated with
2 SoundExchange and the Recording Industry of
3 America.

4 A I'm not sure --

5 MR. PERRELLI: Objection, Your
6 Honor.

7 CHIEF JUDGE SLEDGE: Sustained.

8 BY MR. FREUNDLICH:

9 Q Isn't it true, Ms. Kessler, that
10 if SoundExchange is acting as the
11 monopolistic funnel through which all
12 royalties flow that a non SoundExchange
13 member would receive less than a
14 SoundExchange member for the same exact
15 performance?

16 MR. PERRELLI: I'm going to
17 object one on simply just arguing with the
18 witness and making statements too. I think
19 she has answered the question over and over
20 again that talks about copyright owners and
21 performers whether they're members or not
22 and how they are paid.

1 CHIEF JUDGE SLEDGE: Mr.
2 Freundlich.

3 MR. FREUNDLICH: I'll try to
4 rephrase the question.

5 CHIEF JUDGE SLEDGE: Rather than
6 rephrase, can you not go over the same
7 things you've covered many times.

8 MR. FREUNDLICH: Fair enough,
9 Your Honor.

10 BY MR. FREUNDLICH:

11 Q Now, Ms. Kessler, you've
12 presented to us samples of statements of
13 account from SoundExchange to its members.
14 Correct? We have some of those that are
15 attached to your testimony. We have seen
16 those.

17 A SoundExchange statements to its
18 recipients?

19 Q Right. To its members.

20 A Yes.

21 Q Now do these statements show the
22 recipient of funds from SoundExchange, how

1 the calculations were arrived at? For
2 example, what costs were first deducted from
3 the gross receipts?

4 A I'm not sure if the admin rate is
5 on the statements. The total amount of
6 royalties collected are and then the
7 payments made to recipients is what is
8 displayed, not the admin rate.

9 Q Not the admin rate or any other
10 information about cost deductions. Isn't
11 that correct, Ms. Kessler?

12 A In our annual reports, all of
13 that is fully expressed.

14 Q But it's not on the any of the
15 reports to the artist, is it, to the members
16 I should say? Sorry.

17 A Well, again we send statements to
18 members and nonmembers and as I said, the
19 admin rate is not on the statement, but it's
20 elsewhere within SoundExchange's public
21 information.

22 Q Could you tell me which exhibit

1 it is that you're looking at there for that
2 information?

3 A Do you mean where the admin rate
4 is -

5 Q Yes, well, you just looked at
6 some portions of the exhibits that -

7 A Yes, 252 is a statement from
8 SoundExchange.

9 Q Now you say though, Ms. Kessler,
10 that one of the goals of SoundExchange is to
11 create a fair system of royalty payment and
12 allocation. Isn't that correct?

13 A Yes.

14 Q So how can a member determine
15 that SoundExchange is being fair if the
16 statement's giving so little information
17 about how SoundExchange is arriving at the
18 net payment to them?

19 A Again SoundExchange posts an
20 annual report on its website so that artists
21 and copyright owners, the general public,
22 whomever, can examine what our costs are and

1 what our effective admin rate is.

2 Q And how do you tell the members
3 about the fact that in order to find out
4 what costs are being deducted they have to
5 go to the SoundExchange website?

6 A Well, if they inquire at
7 SoundExchange a staff member will certainly
8 tell them what the admin rate is and what
9 the link is where they can see the annual
10 report.

11 Q So then if they don't make a
12 phone call to your customer service person
13 asking the question, they have no way of
14 finding that out, do they?

15 A They can find out. I mean it's
16 not hidden what SoundExchange admin rate is.
17 It's on our website. So they're welcome to
18 come and see that.

19 Q Right, but if they don't ask for
20 the information how are they going to know
21 that they could go to the website?

22 A I don't know how they would know.

1 Q Is it fair that you haven't
2 communicated that to them as part of their
3 statements?

4 A No -- Well, if you're saying is
5 the admin rate absent from the statement,
6 yes, it is and it's an excellent suggestion.

7 Q And on the website, is there
8 information with respect to each member's
9 statement as to how much of an overall cost
10 has been deducted off of their statements?

11 A Well, every copyright owner and
12 artist is subject to a single admin rate.
13 Again in a statutory license, it seems to be
14 fair to me that all recipients of the
15 statutory royalty share equally in the costs
16 of administration unless of course the
17 licensees want to pay for the administration
18 and statutory license.

19 Q And none of the members have any
20 independent way of knowing, for example,
21 that that \$9 million that the RIAA lent to
22 SoundExchange to start itself, the startup

1 costs, are being deducted from their
2 royalties, do they?

3 A No, it's evident from the annual
4 report on our website what the CARP
5 repayment is. We've never attempted to not
6 discuss the CARP repayment.

7 Q But again just to be clear, the
8 only way that a member can find out about
9 this CARP repayment again is to go on the
10 website. Right?

11 A Yes, I think I've answered that.

12 Q Okay. Thank you. But isn't it
13 true, Ms. Kessler, that in order for the
14 system to really be transparent and
15 auditable by its members that statements
16 would have to be more detailed?

17 A Again, if you look at the
18 statements, they are quite detailed with
19 respect to the list of sound recordings but
20 I'll certainly take back the idea of putting
21 the admin rate on each statement. The
22 problems is that there's an admin rate that

1 differs from royalty stream to royalty
2 stream. So it's going to further complicate
3 the statements, but I think it's a great
4 idea.

5 Q Right, but until you heard that
6 idea from me, had anybody at SoundExchange
7 considered putting that amount of
8 information on the statements so they could
9 be more transparent?

10 A Not to my recollection.

11 Q And how complicated would that be
12 to provide that information on a statement?

13 A I don't know. I'll have to ask
14 our Development Team how difficult it will
15 be.

16 MR. FREUNDLICH: Your Honor, we
17 have until 12:45 p.m. today. Is that the
18 timing?

19 CHIEF JUDGE SLEDGE: Yes, you're
20 right.

21 MR. FREUNDLICH: Okay.

22 BY MR. FREUNDLICH:

1 Q Now on page 16 of your written
2 testimony, you make the statement that there
3 have been nine royalty distributions to
4 date. I just want to make clear. Has there
5 been another one since then?

6 A There have been several, yes.

7 Q So how many royalty distributions
8 have there been to date?

9 A I think we're up to -- We skipped
10 No. 13. We didn't skip a distribution, but
11 we didn't incorporate 13 as a distribution.
12 I think we're up to 16 now. Can you tell me
13 what page it is on?

14 Q It was 16 at the top. I think --
15 Yes, the very first line.

16 A Yes, we're up to, I think, 14 or
17 16.

18 Q Is there any reason why there
19 couldn't be more frequent payments to
20 members, maybe on a monthly basis?

21 A Again we're examining
22 distributions and increasing the frequency

1 from quarterly to perhaps every six weeks or
2 monthly in order to expedite the receipt of
3 royalties to feature performers who
4 previously we were unable to find that we
5 have located or that they've come forward,
6 but these are business decisions and with
7 respect to cost containment any given
8 distribution is not an expense free
9 activity. So we try to balance the costs of
10 those distributions with the frequency of
11 those distributions. But certainly as the
12 royalties have grown over the years, we have
13 increased those distributions and
14 demonstrated that to our artists and
15 copyright owners that we have increased the
16 frequency.

17 Q Let's turn to the unallocated
18 money. You testified that there's a bulk of
19 money that is remaining in an unallocated
20 escrow account. Is that correct?

21 A There is a percentage of
22 undistributed royalties that are accounted

1 for that we're unable to pay the copyright
2 owners and artists as of this day, yes.

3 Q And that would be the 35 percent
4 for the artists and the 15 percent for the
5 copyright holders.

6 A That's correct.

7 Q That's the flip side of what you
8 say could be paid through.

9 A That's correct.

10 Q Okay. And is that -- I've come
11 up with a rough figure of what I think that
12 is. I just want you to let me know if
13 that's in the ball park of \$16 million.
14 Does that sound correct?

15 A That sounds high to me but it is
16 millions of dollars.

17 Q Is it more than \$10 million?

18 A Yes, probably.

19 Q Is it more than \$15 million?

20 A I don't think so. We're
21 analyzing all of that right now. So I can't
22 say with specificity.

1 Q Now you also testified that the
2 SoundExchange board voted or recommended
3 that SoundExchange hold over that
4 unallocated amount for more than the three
5 years that the statute allows. Is that
6 correct?

7 A Well, to be clear, the regulation
8 permits the reduction of costs of
9 administration by the undistributed funds
10 three years after the date of payment by the
11 service and SoundExchange's board has twice
12 delayed the use of those funds to offset
13 costs to permit SoundExchange ample
14 opportunity to ramp up its undistributed
15 funds strategies to reach the maximum number
16 of copyright owners and artists as possible.

17 Q Is there any idea, as of in
18 discussions, as to when in fact those moneys
19 will be applied to reduction of costs of
20 administration of funds?

21 A Yes, there has. There is a board
22 meeting in a couple of weeks where I believe

1 that decision will be made, but the policy
2 committee recently came to a recommendation
3 that will be presented to the board that
4 only the undistributed funds with respect to
5 SoundExchange's very first distribution of
6 over five years ago be subject to this type
7 of release and offsetting of costs. So it's
8 a fraction of the figure that you stated.

9 Q Do you anticipate that they're
10 going to roll that in over time then, just
11 starting way back then and rolling forward.
12 Is that what's been discussed?

13 A The recommended policy is to
14 stagger that and again at each stage,
15 reviewing the progress that SoundExchange
16 has made with respect to pay-through rate to
17 determine when the appropriate time is to
18 make that release.

19 Q Doesn't this current system with
20 the three-year recoup, with the permission
21 to recoup costs of administration after
22 three years, or as extended by the policies,

1 doesn't that create an incentive for
2 SoundExchange not to locate unidentified
3 artists so that they can apply the money at
4 some point to the recoupment of costs?

5 A On the contrary, if our copyright
6 owners and artists as represented our board
7 wanted to get that money somehow to offset
8 costs then they wouldn't have extended the
9 release of those funds nor would they as a
10 matter of course fund activities and
11 programs that SoundExchange recommends to
12 reduce that figure. So I think that by
13 virtue of the ownership of SoundExchange,
14 again the copyright owners and artists who
15 are entitled to these royalties, they have
16 demonstrated their commitment to reducing
17 that pay-through rate.

18 In addition, I think other
19 societies around the world recognize that
20 commitment of SoundExchange by entering into
21 reciprocal payment arrangements with
22 SoundExchange. They have the same

1 philosophy as SoundExchange with respect to
2 paying through absolutely as much as
3 possible.

4 Q Are those societies helping
5 SoundExchange to identify some of the
6 unallocated recipients?

7 A Yes, they are.

8 Q And wouldn't an additional
9 collective in this situation help to
10 identify even more of those unallocated
11 recipients?

12 A If you're referring to would RLI
13 help, I have no idea if their motives would
14 be such that they would want to reduce the
15 undistributed royalties. RLI is a for-
16 profit company and it gives me pause to
17 think they may participate in that way.

18 Q Ms. Kessler, you are aware, are
19 you not, that the DiMA Companies and RLI
20 have entered into an agreement for DiMA to
21 provide RLI with direct accounting reporting
22 payment and auditing?

1 A I understand that there is some
2 arrangement that RLI or MRI and DiMA have.
3 I have no idea with respect to the
4 particulars.

5 Q It's RLI, isn't it? It's not
6 MRI.

7 A Again, I'm not sure what the
8 particulars are.

9 Q Have you seen the agreement?

10 A No, I have not.

11 Q Were you aware of this agreement
12 when you made the statement on page 17 of
13 your written statement that "webcasters
14 object to having to report to more than one
15 collective"?

16 A No, I was not.

17 Q So that statement is false now.
18 Correct, Ms. Kessler?

19 MR. PERRELLI: I'm going object,
20 Your Honor.

21 CHIEF JUDGE SLEDGE: Basis?

22 MR. PERRELLI: Objection. He's

1 trying to characterize it as a false
2 statement based on something that she
3 doesn't know and he hasn't been able to put
4 before her related to an agreement. He just
5 simply is purporting to exist.

6 CHIEF JUDGE SLEDGE: Objection is
7 overruled.

8 THE WITNESS: Can you repeat the
9 question please.

10 BY MR. FREUNDLICH:

11 Q So your statement on page 17 that
12 "webcasters object to having to report to
13 more than one collective" is not false.
14 Isn't that correct, Ms. Kessler?

15 A Without being able to see what
16 the agreement is to see what, if any,
17 reporting is required under that with
18 respect to any aspect of that agreement, I
19 certainly can't say if this statement in my
20 testimony is inconsistent that time has
21 passed. At the time I made this statement,
22 it was absolutely true and today I would say

1 it is still true absent any evidence that it
2 is not.

3 Q Okay. And you say that the
4 overwhelming majority of copyright owners
5 and performers oppose such a system, a
6 system with more than one collective. Is
7 that also correct, Ms. Kessler?

8 A Yes.

9 Q Did this overwhelming majority
10 that you described even know that there was
11 a choice?

12 A I would say that this
13 overwhelming majority are receiving payments
14 from SoundExchange, reports from
15 SoundExchange and they are with
16 SoundExchange and we receive so many
17 positive feedback from our artists and
18 copyright owners that we're reporting
19 transparently with respect to their sound
20 recordings and how they're being exploited
21 by these services. So I think that they're
22 exercising their opinion by staying with

1 SoundExchange and their feedback to
2 SoundExchange.

3 Q Are you saying that your reports
4 to your payees are transparent when they
5 don't include any information whatsoever
6 about costs deducted from the gross
7 royalties?

8 A I am saying that SoundExchange's
9 statement are transparent and comprehensive.

10 Q Transparent in what respect?

11 A With respect to the sound
12 recordings for which they are receiving
13 royalty payments.

14 Q But not transparent with respect
15 to the costs that you're deducting from the
16 moneys that you're getting for those sound
17 recordings.

18 A We discussed this. Our admin
19 rate is on our website. It's a great
20 suggestion to put that on the statements
21 and when I go back, I will certainly make
22 that recommendation.

1 Q But as they exist right now, the
2 statements are very transparent, are they?

3 A I am saying that they are
4 transparent.

5 Q Isn't it true, Ms. Kessler, that
6 the settlement for the periods following
7 Webcaster 1 had SoundExchange agreeing to
8 extend the then existing rates only if the
9 webcasters would agree that SoundExchange
10 was the sole collective entitled to receive
11 royalties?

12 A I know that the rates and terms
13 for that period were extended. It was
14 likely done considering many factors, one of
15 which was that.

16 Q So SoundExchange insisted that
17 they would be the only collective. Right?

18 A As I said, that was one of the
19 terms with respect to that agreement moving
20 forward.

21 Q Now you're familiar, are you not,
22 with Mr. Simson's occasional postings

1 talking about RLI and the fact that there is
2 a competitor afoot for this function?

3 A What do you mean by "postings"?

4 Q On the website, occasionally Mr.
5 Simson writes a point of view on the website
6 and he's described on the website I gather
7 for the SoundExchange payees to look at the
8 fact that RLI exists and that there's
9 competition. Right?

10 A He has probably mentioned RLI in
11 our newsletter.

12 Q So you acknowledge on the one
13 hand SoundExchange acknowledges that there
14 is marketplace competition, but now you're
15 sitting here trying to eliminate that
16 competition through the regulatory process.

17 A I don't know how many times I can
18 say this. It's my belief that in a
19 statutory framework where there is no price
20 competition that this competition that
21 you're describing leads to increased costs,
22 delays in distributions, confusion in the

1 marketplace with respect to what rules are
2 being implemented. It will lead to
3 confusion with licensees, who they pay, how
4 they report, where they're getting their
5 information of walking through the statutory
6 requirements and so that is my testimony.

7 Q So that's your opinion then, Ms.
8 Kessler. Right?

9 A No, that is --

10 Q Is it based on any empirical
11 studies that you've done?

12 A It is based on my knowledge and
13 experience of the daunting task of
14 distributing royalties to tens of thousands
15 of artists and many, many hundreds of
16 copyright owners and administering a
17 statutory royalty where all of the
18 information we've received is in the hands
19 of the licensees and to wade through those
20 massive amounts of information to effect the
21 prompt and efficient distribution of
22 royalties to those entitled parties. That's

1 what my comments and testimony are based on.

2 Q Now, Ms. Kessler, it is true
3 though that at SoundExchange you created a
4 system that does not accommodate multiple
5 agents. Isn't that correct?

6 A My testimony is that it would
7 cost roughly \$250,000 to \$350,000 to modify
8 it so that it could address at least what
9 we've been able to identify are the massive
10 complications of a multi-agent system.

11 Q Right. But you created a system,
12 did you not, that didn't accommodate
13 multiple agents? Right?

14 A Yes, our system was created to
15 administer based on the business rules that
16 were established at the time.

17 Q On business rules established by
18 the SoundExchange board?

19 A By the regulation, by the
20 license, by the terms in the license, by the
21 statutory mandated splits and by other such
22 information, for example, requirements of

1 the IRS and that sort of thing.

2 Q So it's your testimony then that
3 SoundExchange is using its funds, moneys
4 that it intends to recoup against royalty
5 statements to build a system to create a
6 national monopoly for itself without
7 competition.

8 A That is so not my testimony.

9 Q Okay. Well, isn't it a fact that
10 SoundExchange is using its members' funds to
11 build such a system to create a national
12 monopoly for itself without competition?

13 A No, it is not.

14 Q Well, isn't that the effect of
15 what you're doing by eliminating all other
16 agents including my client from this playing
17 field?

18 A No, it is not.

19 Q So are you saying that my client
20 can compete on the same basis as
21 SoundExchange then?

22 A I'm saying that your client can

1 engage in direct licensing to the extent
2 that he can summon up copyright owners
3 selecting RLI to engage in that direct
4 licensing. That's what I'm saying.

5 Q So based on that statement, why
6 are you objecting then to this board giving
7 Royalty Logic the same rights and
8 obligations as SoundExchange has for direct
9 auditing, reporting, payment and accounting
10 directly from the licensees?

11 A Because under a statutory
12 framework where there is a single set of
13 rates and a single set of terms, there
14 should be a single set of rules and those
15 rules should be administered by an
16 organization that overwhelmingly represents
17 copyright owners and artists or an
18 organization that makes no distinction based
19 on membership, that is a nonprofit and
20 engaged in activities that promote the fair
21 and efficient distribution of royalties.

22 So it is the decision of this

1 board if they feel that a multi-agent system
2 would better serve copyright owners and
3 artists. But my testimony is that it would
4 only increase those costs. It would be a
5 disservice to copyright owners and artists
6 and that in a statutory framework cost
7 competition is nothing more than an
8 incentive to free ride.

9 Q Well, you testified, I think,
10 earlier, correct me if I'm wrong, that if
11 the copyright holders that, I want to
12 designate Royalty Logic, that Royalty Logic
13 can make direct licenses and achieve what
14 their goal is essentially to get direct
15 payments from the licensees. Is that
16 correct?

17 A It would completely bypass the
18 statutory license by engaging in direct
19 licensing. That's correct.

20 Q So they can't do that under the
21 statute.

22 A Again it's a statutory license.

1 There is a single rate. There is a single
2 set of terms. If copyright owners want
3 different rates and different terms, they
4 are welcome to go outside of the statute and
5 engage in direct licensing.

6 Q You are aware of Section 111,
7 that the statutory license contains Section
8 111.

9 A I know very little of 111. I
10 know there is a Section 111.

11 Q Are you aware that in that
12 section Congress provided for the collection
13 of moneys by the Copyright Office and a
14 process by which copyright owners could
15 receive their moneys as allocated in a CRB
16 proceeding, for example?

17 A I'm not aware of what 111 says.

18 Q Do you contend, Ms. Kessler, that
19 the collection of statutory royalties in
20 Sections 112 and 114 is a natural monopoly,
21 that it must be served by just one
22 collective and that this collective should

1 be SoundExchange?

2 A I am saying that it is more
3 efficient. It reduces cost for a single
4 designated agent to administer a statutory
5 royalty with a single set of rates and a
6 single set of terms. Yes, that's what I'm
7 saying.

8 Q Wouldn't it be more fair to those
9 that have not designated SoundExchange to
10 perhaps a neutral third party body that is
11 not the Recording Industry of America's
12 child to receive those royalties and then
13 pay them out on an equal basis to all of the
14 copyright owners?

15 A SoundExchange does pay out to
16 copyright owners and artists on an equal
17 basis. We make no differentiation between
18 membership and non membership. We have been
19 spun off from the RIAA since September of
20 2003. We are independent of the RIAA and at
21 the risk of repeating myself, I do believe
22 that SoundExchange fairly and efficiently

1 represents the administrative needs of
2 copyright owners and artists under the 112
3 and the 114.

4 Q Now on page 18 of your written,
5 you say that "a multi-agent system is
6 inconsistent with the concept of efficient
7 licensing." That is your testimony. I
8 think you said that before. Is that
9 correct?

10 A Yes.

11 Q Now are you suggesting that
12 ASCAP's fees would not be lower if BMI did
13 not exist?

14 A You know I don't think ASCAP, BMI
15 and SESAC is an apples-to-apples comparison
16 to what we're discussing today. But by
17 virtue of having multiple PROs engaged in
18 essentially the identical activities
19 necessarily duplicates or triplicates costs.

20 Q So you don't think that ASCAP's
21 fees are lower because of the competition
22 with BMI.

1 A I think that they spend more
2 money on marketing than they otherwise would
3 need to spend, duplication of systems that
4 they otherwise might need to, but again
5 they're not even remotely the same types of
6 organizations or operating under the same
7 framework that we are.

8 Q But ASCAP has 20 million members
9 and processes data in and out just like
10 SoundExchange does, doesn't it?

11 A They are members of that
12 organization, yes.

13 Q ASCAP is?

14 A Those 20 however many. I don't
15 know what the number of ASCAP's membership
16 is or BMI's membership, but again, they're
17 membership organizations.

18 Q Okay. So ASCAP has payees.
19 Let's call them payees for the moment.
20 Doesn't ASCAP process data coming in from
21 broadcasters and put out data going out to
22 copyright owners just like SoundExchange

1 does?

2 A Yes, they do.

3 Q Okay, and doesn't having more
4 than one collective in the PRO arena
5 actually keep ASCAP and BMI honest with each
6 other?

7 A Again what I'm saying is that
8 when two organizations are undertaking the
9 same sets of activities that they are
10 necessarily duplicating those costs. That
11 they may have other business reasons or
12 their members prefer one organization over
13 another for something apart from the
14 administrative aspect of the license. They
15 have that choice. We're talking about the
16 administration of the single license.

17 Q Are you aware of the practice,
18 Ms. Kessler, in some bands for instance to
19 affiliate two of the band members with BMI
20 and two of them with ASCAP to see which
21 statement gives them the most funds?

22 A I'm not aware of that.

1 Q Would it surprise you if that
2 practice existed?

3 A I don't know that I'm
4 particularly surprised, no.

5 Q Would it surprise you further
6 that in many cases the numbers are not the
7 same?

8 A I don't know that answer to that.

9 Q So for the same performances that
10 are reported by ASCAP and BMI, they come out
11 with different amounts for payments.

12 A Perhaps if they had census
13 reporting that wouldn't be the case.

14 Q Okay. On page 18, you also state
15 that "the purpose of the royalty collection
16 process is to make prompt, efficient and
17 fair payments to copyright owners and
18 performers with a minimum of expense." Is
19 that correct?

20 A Yes.

21 Q And this is in fact what it says
22 in The Federal Register as well. Correct?

1 A I'm not sure that The Federal
2 Register says.

3 Q But it's what SoundExchange's
4 policy seeks to effectuate.

5 A Absolutely.

6 Q So if the purpose of the system
7 is to make payments to the copyright owners
8 and performers with a minimum of expense,
9 isn't it true that owners and performers
10 would benefit from another agent with
11 systems that they have in place leverage to
12 prevent excessive costs from having to be
13 borne by its members?

14 MR. PERRELLI: Your Honor, I
15 think I'm going to object. It's been asked
16 and answered. I think we've been over this
17 quite a bit.

18 CHIEF JUDGE SLEDGE: Mr.
19 Freundlich.

20 MR. FREUNDLICH: I think it's a
21 different question. I'm talking about now
22 the systems that one collective may have in

1 place over another. I don't have anything
2 further on this particular point, but I
3 don't see why that question -

4 CHIEF JUDGE SLEDGE: All right.
5 Overruled.

6 THE WITNESS: Can you repeat the
7 question please.

8 BY MR. FREUNDLICH:

9 Q If the purpose of the system is
10 to make payments to the owners and
11 performers with a minimum of expense, isn't
12 it true that owners and performers would
13 benefit from another agent with systems that
14 are already in place to leverage to prevent
15 excessive costs from having to be borne by
16 its members?

17 A Again if you have two or ten or
18 hundred designated agents all developing
19 systems, maintaining systems, extending
20 systems that the overall cost to the group
21 of copyright owners and artists who are
22 entitled to the payments under the statutory

1 license would increase. There would not be
2 a cost savings there.

3 Q Ms. Kessler, how many parties are
4 here seeking to become or get status on an
5 equal basis with SoundExchange? Are there
6 two, ten or 100?

7 A There is one.

8 Q Okay.

9 A But that doesn't preclude many
10 more from coming forward.

11 Q Right, but there's only one here
12 today before this board.

13 A Right. One here today. That's
14 correct.

15 Q And what if the alternative
16 collective for example would offer advances,
17 guarantees or other methods of financing to
18 its copyright owners and performers of the
19 royalty streams under 112 and 144? Wouldn't
20 that be a fair choice to offer to those
21 copyright owners and performers?

22 A So you mentioned advances? And

1 what else?

2 Q Advances, guarantees or other
3 methods of financing.

4 A You know it's contrary to -- In
5 the statutory license, there is a set pot of
6 money. If you're advancing money to a
7 particular artist or a particular copyright
8 owner, you're taking it away from other
9 copyright owners and artists. I don't see
10 how that fair or transparent or efficient.

11 Q That's assuming that all the
12 money comes from a zero sum, isn't it?

13 A But again, SoundExchange's role
14 here is to administer the statutory license.
15 So again, it's one license, one set of
16 rules, one pot of money.

17 Q But the rules haven't been set
18 with respect to how you're going to treat
19 your copyright owners with respect to giving
20 advances, guarantees or other methods.
21 That's just a policy of the SoundExchange
22 board. Correct?

1 A Well, you may not differentiate
2 between members and nonmembers and
3 SoundExchange does not differentiate within
4 its members the value of their performances,
5 no.

6 MR. FREUNDLICH: Would this be a
7 good time?

8 CHIEF JUDGE SLEDGE: Well, is it
9 a good time for you to conclude your
10 examination?

11 MR. FREUNDLICH: No, I have
12 probably another half hour.

13 CHIEF JUDGE SLEDGE: We will
14 recess until 3:00 p.m. Off the record.

15 (Whereupon, at 12:45 p.m., the
16 above-entitled matter recessed to reconvene
17 at 3:00 p.m. the same day.)

18 MR. FREUNDLICH: Your Honor, I
19 have revisited my 30 minute estimate. I
20 think it's going to be quite a bit shorter.

21 CHIEF JUDGE SLEDGE: Well, that's
22 good news. Thank you.

1 MR. FREUNDLICH: I knew you'd
2 like to hear that.

3 CHIEF JUDGE SLEDGE: Not personal
4 to you, but from anyone.

5 MR. FREUNDLICH: I understand.

6 BY MR. FREUNDLICH:

7 Q You testified, Ms. Kessler, about
8 the fact that Royalty Logic members can
9 directly license if they so choose not to
10 deal with the licenses that Sound Exchange
11 is procuring. Is that correct? Is that how
12 I understand your testimony this morning?

13 A Not that we procure, the
14 licensees take the license. It's really the
15 license we're administering.

16 Q But your testimony was that the
17 Royalty Logic people could go directly to do
18 that, as well.

19 A Yes. That's correct.

20 Q So what you're really saying then
21 is that a disaffected Sound Exchange member
22 who might choose to go to RLI, their only

1 choice is to go to RLI to do a voluntary
2 license, which means they would have to
3 forego the statutory license?

4 A The rates and terms that they
5 determine are in their benefit could be the
6 statutory rates and terms, or something all
7 together different.

8 Q So they could potentially enter
9 into statutory licenses, but not have any of
10 the same regulations apply to them that
11 Sound Exchange does. Is that what you're
12 saying?

13 A I'm saying that a direct license
14 can have any rates and terms that the
15 parties negotiate.

16 Q But if it turns out that that's
17 statutory, wouldn't it be more efficient to
18 just have everybody on the same playing
19 field?

20 A You know, again, the statutory
21 license should be governed by one set of
22 rules. And one organization is best suited

1 to do that to eliminate duplicative costs
2 and all the other efficiency reasons I
3 stated before. So to the extent a copyright
4 owner wants to bypass that structure for
5 whatever reason, they certainly can do so.

6 Q Now do you say that -- are you
7 contending here that Sound Exchange should
8 be the sole agent for voluntary licensing,
9 as well?

10 A No, I'm not saying that.

11 Q Is Sound Exchange doing any
12 voluntary licensing?

13 A Sound Exchange has some payment
14 reciprocals with foreign societies.

15 Q How about the SDARS agreement, is
16 that a voluntary license?

17 A It is a voluntary license.

18 Q So there could potentially be
19 other situations where Sound Exchange is
20 making voluntary deals as opposed to the
21 statutory deals.

22 A Well, yes. Sound Exchange is

1 administering that license, and it's with
2 respect to the members of Sound Exchange.

3 Q So then you would agree, would
4 you not, that under your system here, that
5 an RLI member in order to receive direct
6 payments on statutory licenses, as opposed
7 to payments through the Sound Exchange
8 funnel would have to have two agents, one
9 for statutory licensings, which would be
10 Sound Exchange, and one for the voluntary
11 licenses, which would be RLI?

12 A Again, if a copyright owner
13 wanted a single agent for both purposes,
14 they could direct license.

15 Q But my hypothetical is that there
16 are, and we know that there are because
17 Royalty Logic is here and has members
18 representing to you that. If you're saying
19 that Royalty Logic should go and get the
20 voluntary licenses, then isn't the system
21 that you're positing that a member of
22 Royalty Logic needs to have two separate

1 agents, one for the voluntary license and
2 one for the statutory license?

3 A Well, that copyright owner could
4 still receive payment through Sound Exchange
5 for the statutory license. That's true.

6 Q And would that be fair and
7 efficient to those members, that they'd have
8 to go through both collectives?

9 A Again, the fairness and the
10 efficiency is really on behalf of all
11 copyright owners and all featured
12 performers, as well as the non-featured, so
13 we're really looking at a collective group,
14 not any one individual because they still
15 have the direct license right if they want
16 to do something else.

17 Q How many copyright owners and
18 performers do you think would opt for such a
19 complicated system, to have one agent for
20 the voluntary and one agent for the
21 statutory?

22 A That's a hypothetical. I have no

1 way of knowing what the answer to that is.

2 Q But isn't this whole event here
3 Sound Exchange's attempt to keep Royalty
4 Logic off of this playing field on an equal
5 basis really just an effort to create a
6 monopoly in the statutory area so that you
7 can gain an advantage in the marketplace
8 overall for statutory and voluntary
9 licensing?

10 A No, it is not.

11 MR. FREUNDLICH: I don't have
12 anything further.

13 CHIEF JUDGE SLEDGE: Mr. Malone.

14 MR. MALONE: Thank you, Your
15 Honor. Good afternoon, Ms. Kessler.

16 THE WITNESS: Good afternoon.

17 MR. MALONE: I'm Bill Malone,
18 representing some of the college
19 broadcasters and webcasters.

20 CROSS EXAMINATION

21 BY MR. MALONE:

22 Q In your testimony in the written

1 form, and then on the stand in the past
2 couple of days, you've put, I think, a good
3 deal of emphasis on the word "efficiency."
4 In fact, as look I look at page 2 of your
5 written testimony of the paragraph, the
6 second sentence of the paragraph at the
7 bottom of the page, you speak of
8 "facilitating the receipt and distribution
9 of the royalties in the most efficient
10 manner possible." And I take it -- well,
11 let me ask this. In this context, how do
12 you define, how do you measure efficiency?

13 A Oh, I think there's a number of
14 ways you can measure efficiency. I think
15 it's cost containment, it's the numbers of
16 copyright owners and artists an entity is
17 representing and paying. I think it's how
18 quickly - in Sound Exchange's case, how
19 quickly we developed our royalty
20 distribution and began distributing. I
21 think it's measured by the frequency and the
22 increase in frequency with which you

1 distribute the royalties. I think it can be
2 measured by the throughput of Sound Exchange
3 staff with respect to setting up accounts,
4 the accuracy of those accounts. I think it
5 can be measured by the acceptance in the
6 world of PROs. Sound Exchange is a partner
7 with organizations such as PPL, RAAP, SENA,
8 and so on, so I think it would be measured
9 by quite a lot of factors, which I'm sure I
10 haven't identified all of those. But
11 certainly, it is measured by the speed with
12 which, and at the minimum cost that you're
13 able to fulfill the obligations of
14 administering the royalty.

15 Q You referred to, I think,
16 administrative costs or administrative
17 ratio. Relate that to efficiency, please.

18 A I think that's an expression of
19 the costs the organization incurs compared
20 to the royalties that it collects and
21 distributes.

22 Q And this is the percentage that,

1 I think with justifiable pride, you
2 mentioned had fallen from what - 18-20
3 percent to 7-1/2 percent?

4 A That's correct.

5 Q So there are actually two
6 numerical terms that go into the calculation
7 of that ratio, one are the revenues, and the
8 other are the expenses.

9 A It's the royalties and the cost,
10 yes.

11 Q Okay. Thank you. And so one can
12 improve the efficiency ratio by increasing
13 the amount of revenue per dollar costs that
14 you incur.

15 A That's correct.

16 Q Well, let's look at page 10, and
17 the paragraph in the middle of page 10 talks
18 about the threshold for distributing
19 royalties to a payee of \$10. Can you relate
20 that for me to the administrative ratio?

21 A I don't know what that questions
22 means.

1 Q All right. Let me ask it this
2 way. You say here that, you say rather than
3 distribute smaller amounts and incur
4 significant additional transaction costs,
5 you wait until there's \$10 to pay out, at
6 which point that's distributed. Explain to
7 me how that contributes to the efficiency.

8 A Sure. With every distribution
9 there are transactional costs, including
10 preparation of data, staff time, and then
11 the physical act of producing a distribution
12 in the form of paper, checks, postage,
13 customer care, all those types of things.
14 The \$10 threshold was established because
15 that's when the IRS requires that you issue
16 a 1099, and so that seemed like a good
17 number. It wasn't as large as, for example,
18 RLI's \$100 figure, but it was a number that
19 was based by a government agency, and we
20 were able to eliminate certain incremental
21 and transactional costs, and feel that a \$10
22 amount wasn't so unreasonable or even

1 objectionable to an artist or a copyright
2 owner.

3 Q I'm persuaded. Now that's on the
4 distribution side. Does the same principle
5 apply on the income side?

6 A We don't receive royalty payments
7 that are that small, and I don't think that
8 you can really compare the two, because the
9 royalties received are really the value for
10 the use of all of the music that's
11 available, that's commercially released, so
12 there's a value to that. I'm not sure what
13 you're asking. If you're asking would we
14 not process a payment of \$10 or less?

15 Q Well, let's sneak up on it a
16 little bit this way. There is a cost in
17 processing a payment to you.

18 A Yes, of course.

19 Q And if that cost is very large in
20 relation to the amount of the payment that's
21 being booked, then your administrative
22 ratio, at least for that part of the

1 business goes to hell, doesn't it?

2 A Well, I think that's a strong
3 term, but I think that you could have high
4 transaction costs when the transaction
5 dollar value is smaller, I think as a
6 general rule.

7 Q Percentage-wise.

8 A Okay.

9 Q So that would -- to the extent
10 that the administrative ratio measures
11 efficiency like that's going to be tracked
12 from the favorable administrative ratio.

13 A Yes, but there are so few
14 situations where you would parse out the
15 work of administering a royalty to a task-
16 by-task basis. You look at all the tasks
17 involved with collection and distribution of
18 royalties, and you base your decisions on
19 the overall efficiency, not just one piece,
20 because certainly, we spend more time and
21 money on certain aspects than others.

22 Q Well, let's focus for a moment at

1 least, please, on payment size. If your
2 sole objective is to improve efficiency,
3 which translates into the administrative
4 ratio, you're going to try to minimize the
5 number of payments that have a high cost in
6 relation to the amount times our payment,
7 receipts. You're going to try to minimize
8 the number of transactions in which the
9 receipts are small in relation to the cost.

10 A Well, remember, too, that with
11 each payment, there's a cost associated with
12 it, so you have to balance first the point
13 at which the cost of conducting the
14 transaction exceeds the benefit. And so
15 there is that, but certainly -- and also
16 because of the breadth of content that's
17 being performed on the services, we have
18 occasion where performances are in fractions
19 of pennies, so it makes no sense to
20 distribute every single performance that has
21 earned a royalty when it could potentially
22 be less than a penny, and so we chose the

1 \$10 threshold for the reasons I described
2 earlier.

3 Q In a sense, these two things
4 somewhat relate. That is, if you have
5 reports, statements of account I guess you'd
6 call them, and remittances coming in that
7 are small and represent a few listeners, a
8 few hours, whatever the measure is, and
9 that, in turn, leads to small distributable
10 amounts, and you put a cap or a floor,
11 rather, on the distributable amount, why,
12 there's going to be some payments coming in
13 that are just going to get absorbed by the
14 system because you know from the outset that
15 they're never going to show up on the
16 distributions.

17 A I don't know that I can agree
18 with that statement.

19 Q Well, if you have remitters,
20 users, who are using, shall we say unpopular
21 musical works, for want of a better term,
22 they're not going to be remitting very much

1 money, and the works, because they're
2 unpopular, are not going to have very much
3 money in the pool. And if that money is
4 less than \$10, the remittance goes to no
5 end.

6 A Well, again - I mean, if you look
7 at this on a licensee-by-licensee basis, a
8 licensee paying a \$500 minimum fee may
9 result in a performance value of fractions
10 of pennies. But when you have hundreds and
11 hundreds of these types of services, and you
12 add those pennies up, you end up with a
13 check in excess of \$10 and you will be paid.

14 Q Only, however, if there's an
15 overlap in the works being played.

16 A Yes. It would require that those
17 sound recordings are played across multiple
18 services.

19 Q Now there have been two exhibits
20 that you've discussed this morning, Services
21 Exhibit 155, which I think we call a
22 receipts log/payment report.

1 A You're referring to the Exhibit 1
2 on --

3 Q The Attachment 1, yes.

4 A Yes.

5 Q And then there's Exhibit 98,
6 which is a list of receipts by, I guess, 309
7 remitters.

8 A Yes.

9 Q And the Services Exhibit 98
10 appears to be confined to 2004.

11 A Yes.

12 Q All right. So relate what's on
13 Services Exhibit 155 for 2004, and what's on
14 Services Exhibit 98 for 2004.

15 A So there's -- I haven't compared
16 these service-by-service, or parent-by-
17 parent, so I can't do a complete overlap,
18 but I would assume that the parent name on
19 Exhibit 98 and the parent name on Exhibit
20 155, that there would be an overlap for a
21 column that is named 2004.

22 Q Well, except for the fact that

1 the population of 98 covers commercial
2 services of some size.

3 A I'm sorry?

4 Q All right. For example, Yahoo
5 seems to be your big remitter on Exhibit 98,
6 and I don't think one finds Yahoo on Exhibit
7 155.

8 A Well, maybe they're under Launch.
9 I don't know. I'd have to look. So Yahoo -
10 let's see, parent, Yahoo. I don't see an
11 entry for Yahoo.

12 Q Well, in point of fact, on 155,
13 you don't see any entries for the large
14 commercial webcasters at all.

15 A Okay.

16 Q So they've been screened out.

17 A Well, I don't know they've been
18 screened out. Maybe that wasn't the intent
19 for this --

20 Q I think you're right.
21 Absolutely.

22 A Yes, I don't know.

1 Q But within the overlap of
2 populations then, the numbers should be, in
3 general terms, about the same for the
4 webcasters who are listed in 155.

5 A Yes. I think that would be
6 right.

7 Q Now there was some uncertainty in
8 your testimony in answer to questions from
9 both Ms. Ablin and Ms. Brown as to where NPR
10 stood. And you alluded to a couple of the
11 aspects of what I understand to be the
12 contractual arrangement between Sound
13 Exchange and NPR, or RIAA, as the case may
14 have been.

15 MR. MALONE: And I'm going to ask
16 to mark Services Exhibit 157, which is a
17 document of roughly 15 pages, Bates numbered
18 SX00585154-SX0085169, which is marked
19 "Restricted".

20 (Whereupon, Services
21 Exhibit No. 157 was
22 marked for

1 identification.)

2 MR. MALONE: And it, I think I
3 may say safely, that it is the webcasting
4 performance and ephemeral license agreement
5 dated November 13th, 2001 between Sound
6 Exchange and NPR and Corporation for Public
7 Broadcasting.

8 MR. PERRELLI: Your Honor, at
9 this point, I'd like to enter an objection.
10 This is -- this license agreement is subject
11 to an express provision prohibiting its
12 disclosure, provision 5.2 of the agreement,
13 which expressly prohibits the introduction
14 or use by any person, including the parties
15 and any public radio station, with respect
16 to the rates, terms, or reporting
17 obligations to be established for the making
18 of ephemeral phono records or the digital
19 audio transmission of sound recordings under
20 17 USC Section 112 and 114, et cetera.

21 That provisions applies, and we
22 think precludes any use of this agreement in

1 this proceeding, whether attempt to
2 introduce it into evidence or ask Ms.
3 Kessler about it. I would note that the
4 same agreement, which was entered into prior
5 to the decision of the Webcaster-1 CARP was
6 also excluded by them, and not used by them
7 in any way, shape, or form, as part of their
8 deliberations.

9 CHIEF JUDGE SLEDGE: Who is this
10 agreement with?

11 MR. PERRELLI: It's between, at
12 that time, when Sound Exchange was an
13 unincorporated division of the Recording
14 Industry Association of America and National
15 Public Radio, the corporation, National
16 Public Radio and the Corporation for Public
17 Broadcasting.

18 CHIEF JUDGE SLEDGE: Which does
19 not include Harvard Radio.

20 MR. PERRELLI: That's correct,
21 Your Honor. So the person offering it is
22 not a party to this agreement and,

1 therefore, not bound by the terms of the
2 agreement.

3 MR. PERRELLI: The argument I'm
4 making, I think, is not that Mr. Malone or
5 his clients are contractually bound, but
6 that agreements such as this - this is the
7 identical issue to the issue raised in our
8 motion on the SDARS agreement, which I know
9 is pending before the Board. And I wanted
10 to interpose that objection, and to the
11 extent that the Court wants us to file
12 something short to include use of this
13 agreement, or introduction of this agreement
14 in this proceeding on the same grounds, we
15 can do that, or I'm happy to have it simply
16 be added as part of an oral motion.

17 CHIEF JUDGE SLEDGE: Restate the
18 last phrase again.

19 MR. PERRELLI: I apologize, Your
20 Honor. We're happy to provide a written
21 motion to the Court if you would like us to
22 file a written motion, which argues that

1 this agreement, for the same reasons that
2 the SDARS agreement cannot be introduced
3 into evidence in this proceeding. But I am
4 making an oral motion at this time.

5 CHIEF JUDGE SLEDGE: All right.
6 We'll accept this issue as part of the
7 pending issue on the SDARS agreements. And
8 as I recall, and you all help me with this,
9 what we've done with those is proceed
10 subject to a motion to strike pending the
11 exclusion of those agreements.

12 MR. PERRELLI: That's correct,
13 Your Honor. Thank you.

14 CHIEF JUDGE SLEDGE: All right.

15 MR. MALONE: In the event that --

16
17 MR. PERRELLI: Pardon me, Your
18 Honor. Assuming you're going to go into
19 questioning on this - I'll let you ask the
20 question before I move to go into restricted
21 session.

22 MR. MALONE: In the event then,

1 Your Honor, that the Board should rule
2 against provisional allowance of the
3 exhibit, then I would want to move to strike
4 the testimony of the witness that
5 contradicts the terms of the agreement as
6 set forth in the exhibit.

7 CHIEF JUDGE SLEDGE: In the event
8 that the Board grants the motion to strike?

9 MR. MALONE: In the event that
10 the Board grants the motion to exclude or
11 grants the objection, however you wish to
12 put it, then I think that I would like to,
13 nonetheless, move to strike the answers of
14 the witness that are inconsistent with the
15 excluded exhibit.

16 CHIEF JUDGE SLEDGE: Ms. Ablin,
17 remind me. Didn't I tell you on a similar
18 motion that that was not the proper form to
19 raise that issue?

20 MS. ABLIN: Yes, that's correct,
21 Your Honor.

22 CHIEF JUDGE SLEDGE: Just as long

1 as I'm consistent, that's not the proper
2 form to raise that issue.

3 MR. MALONE: Thank you, Your
4 Honor.

5 BY MR. MALONE:

6 Q You have the contract in front of
7 you, and I direct your attention to
8 Paragraph 3.1. And the question is, does it
9 have a provision for a lump sum payment?

10 MR. PERRELLI: Your Honor, at
11 this time, I would move to go into
12 restricted session. The document was marked
13 "Restricted". It's also subject to a
14 confidentiality provision in Section 5.1
15 concerning disclosure of this information
16 and requires treatment of it as confidential
17 information.

18 CHIEF JUDGE SLEDGE: That
19 involves parties that aren't at issue now.

20 MR. PERRELLI: Well, Your Honor,
21 I think for purposes of the record, I think
22 this has to remain a restricted document

1 subject to the protective order.

2 CHIEF JUDGE SLEDGE: It does not.
3 You have to meet your burden of proof to
4 establish that it fits within the protective
5 order before it's restricted.

6 MR. PERRELLI: Well, Your Honor,
7 I think this is a contract between two
8 parties, both of whom are in this room, who
9 elected to make it confidential by its
10 terms, similar to license agreements
11 between, for example, record companies and
12 licensees, which I think have been treated
13 as restricted, and those confidentiality
14 provisions have been upheld, or have been
15 honored for prior witnesses. I think the
16 same provisions and the same rules would
17 apply here, as well.

18 CHIEF JUDGE SLEDGE: That
19 argument is not persuasive, Mr. Perrelli.
20 Do you have any other argument?

21 MR. PERRELLI: The specific
22 question that Mr. Malone is asking relates

1 to a specific term, the financial term of
2 this agreement, and I think that we have, I
3 think fairly consistently with respect to
4 such questions, included those in restricted
5 session when we're talking about a license
6 agreement, a voluntary license agreement,
7 that includes a provision compelling
8 confidentiality.

9 CHIEF JUDGE SLEDGE: On which
10 paragraph did you ask, Mr. Malone?

11 MR. MALONE: I asked with respect
12 to Paragraph 3.1.

13 CHIEF JUDGE SLEDGE: 3.1.

14 MR. MALONE: And the question I
15 asked --

16 CHIEF JUDGE SLEDGE: I remember
17 the question.

18 MR. MALONE: Okay. And that
19 relates to the answer the witness had
20 previously given so that I don't think with
21 that question I have gone beyond where we've
22 been before.

1 CHIEF JUDGE SLEDGE: Mr. Malone,
2 do you intend to disclose the number in
3 Paragraph --

4 MR. MALONE: That would be my
5 next question, Your Honor.

6 CHIEF JUDGE SLEDGE: Any
7 objection to applying the protective order
8 to the specific term contained in Paragraph
9 3.1 of Exhibit 157? No objection, motion is
10 granted.

11 (Whereupon, the proceedings went
12 into Closed Session.)
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1 MR. MALONE: I would like to mark
2 as 158, Mr. Reporter, 158.

3 COURT REPORTER: Yes.

4 (Whereupon, Services
5 Exhibit No. 158 was
6 marked for
7 identification.)

8 MR. MALONE: And this is a two-
9 page document being Bates numbered
10 SX0075778a and Bates number SX0075778b.
11 And it's headed "Sound Exchange Financial
12 Statement Inception Through Calendar 2005."

13 BY MR. MALONE:

14 Q And I'll ask the witness if she
15 is familiar with this financial statement.

16 A Yes, I am.

17 Q And am I correct that the first
18 page, that is (a) is devoted to expenses?

19 A That is correct.

20 Q And then the second page - I'm
21 sorry - the second page is split, so again,
22 looking at the first section of the

1 statement above the first appearance of the
2 word "redacted", that also deals with
3 expenses.

4 A That's correct.

5 Q All right. Then the remainder of
6 page (b) deals with royalties collected or
7 revenues.

8 A Royalties and interest, that's
9 correct.

10 Q Will you please clarify the
11 notation on page (b) that appears for
12 several entries, "RECON."

13 A Yes. That was simply a
14 verification of the math done in a prior
15 section of the spreadsheet.

16 Q Of this spreadsheet or of another
17 spreadsheet, or one of which this was part?

18 A Of this spreadsheet.

19 Q Of this spreadsheet. So the word
20 stands for reconcile?

21 A Reconciliation.

22 Q Reconciliation. All right. I

1 think then the information I seek is
2 contained solely on the (b) page. And in
3 terms of the administrative ratio, is it
4 simply a matter of dividing the, for
5 example, for fiscal 2004, again, dividing
6 the 15,860,587 on the line total revenues
7 reconciliation with the line seven or eight
8 lines above which is marked total expenses
9 reconciliation, to divide the bottom number
10 into the higher number, the upper number,
11 and get something that approximates the
12 administrative ratio?

13 A The administrative rate is
14 calculated by taking the costs, less the
15 interest received as the numerator, and the
16 denominator would be the total royalties
17 received.

18 Q All right. You're going to have
19 to help me a little bit, find these figures.
20 The total expenses are 2,936,550 less the
21 offset of 228,111?

22 A Correct.

1 Q And then the revenues that we're
2 using as the divisor is here in the line
3 marked "total revenues" of the 15,860,587?

4 A That 15 million total royalty is
5 corrected, the 15,632,000. It has the
6 interest --

7 Q All right. I understand. Thank
8 you. Now returning to the revenue side in
9 Services Exhibit 98, which is the 2004
10 itemized receipts, and don't answer before
11 counsel has an opportunity to object,
12 because I'm not quite sure where we are
13 here, but I'd like to -- you suggested, I
14 think, in your testimony this morning some
15 uncertainty as to the last column that --
16 the last full column which starts with a
17 number somewhere in excess of \$25 million.

18 A I'm looking at Exhibit 98.

19 Q Yes. And I'm looking at the
20 first line of that and trying to identify
21 the column that I'm attempting to address.

22 A The sum of amount, you're looking

1 at the dollar value?

2 Q Well, I'm looking one over in the
3 percentages.

4 A The percentage, yes.

5 Q Yes. All right. And then look
6 at the fragmentary column, which is
7 percentages that's on the far right.

8 A Yes.

9 Q And would you agree that the
10 number in the far right column is simply a
11 cumulation of the percentages in the column
12 to the immediate left up to that point?

13 A That looks right, yes.

14 Q All right. And so that one would
15 say that if you got down to the 20th entry
16 here as identified by the numbers at the
17 extreme left of the chart --

18 A Yes.

19 Q -- you have picked up 97.0212
20 percent of the total revenues, license fees
21 for 2004.

22 A That's what the percentage

1 appears to be displaying, yes.

2 Q All right. Now turn over,
3 please, to the fifth page which is
4 SX0073698, and the line that's marked 270.

5 A Yes.

6 Q And I would, subject to
7 objection, would ask you to state the number
8 that's on the far right of that line,
9 percentage.

10 A .0028 percent.

11 Q And do I understand the chart
12 correctly in the sense that what we're
13 saying is that that particular remitter
14 contributed towards the total 2004 license
15 revenues 0.0028 percent of the total.

16 A That's what I believe that
17 percentage does reflect, yes.

18 Q And so trying to sum up here a
19 little bit, the amount of revenues left
20 after line 20 is 3 percent of the total
21 webcaster payments for 2004.

22 A Yes.

1 Q And that's divided among 289
2 remitters.

3 A Approximately.

4 Q So it gets pretty thin down
5 there, doesn't it?

6 A It adds up.

7 Q Now I'd like to talk about that
8 portion of your testimony here which deals
9 with recommendations and the matter for
10 penalties or increase in penalties for
11 incomplete reports, which I guess you call
12 statements of account.

13 A Okay.

14 Q And you told us --

15 CHIEF JUDGE SLEDGE: Mr. Malone,
16 we've reviewed that three times now on cross
17 examination. I hope that you'll focus on
18 things that may be not have been covered
19 three times before.

20 MR. MALONE: Your Honor, I can
21 almost warrant that.

22 CHIEF JUDGE SLEDGE: Thank you.

1 MR. MALONE: I don't think we've
2 seen anything like this before.

3 CHIEF JUDGE SLEDGE: That got
4 everybody's interest.

5 MR. MALONE: It was intended to,
6 159.

7 (Whereupon, Services
8 Exhibit No. 159 was
9 marked for
10 identification.)

11 BY MR. MALONE:

12 Q I have marked as Services Exhibit
13 159 four pages of photocopies of what
14 appears to be an album or a recording. The
15 first page appears to be a picture of the
16 album cover, and I note in the upper right-
17 hand corner what appears to be a retail
18 price label. And this is for the new
19 exciting album called "AstroLaunch." And I
20 ask you to note immediately to the left of
21 the top of the L on the first page a number
22 which I make out as ES751, and I also call

1 your attention to the legend at the upper
2 right-hand corner, which refers to the
3 Estrus, E-S-T-R-U-S Manufacturing Company.

4 Turning to the second page, this
5 appears to be the backside of the album. It
6 also bears the number in the upper right-
7 hand corner of ES751, and what do you take
8 the description in the upper left-hand
9 corner of the back of that cover to be?

10 A You mean where it says "A Side -
11 B Side"?

12 Q Yes.

13 A Two sides to whatever --

14 Q Is inside.

15 A -- this is.

16 Q And would you interpret that as
17 there being two separate works, in your
18 parlance, on each side?

19 A We wouldn't call those works.

20 Q Songs?

21 A They could be two disks, or two
22 sides of a media.

1 Q Well, now --

2 A I'm sorry. Are you referring to
3 "A Side" and "B Side"?

4 Q Yes.

5 A Yes, two sides of a physical
6 media.

7 Q So you would admit in your
8 experience the possibility that there's an A
9 record and a B record?

10 A There's an A side over there, and
11 then there's a B side.

12 Q But it's what, as a layman, I
13 would call one record.

14 A Well, yes, on an LP. But on a CD
15 it might be two CDs --

16 Q I see.

17 A -- referred to as Side A and Side
18 B.

19 Q I see. All right. But there --
20 CHIEF JUDGE SLEDGE: I'm sorry.

21 That's strange, you can have a two-sided CD?

22 THE WITNESS: No, that's what I'm

1 saying, it would be two different disks.

2 CHIEF JUDGE SLEDGE: Two
3 different disks.

4 THE WITNESS: Yes.

5 CHIEF JUDGE SLEDGE: Okay. I
6 didn't think I'd ever heard of that.

7 BY MR. MALONE:

8 Q And can you infer that we're
9 talking about two different songs or works,
10 whatever your terminology is on A, and on B,
11 whatever it may be?

12 A I don't know what's on Side A and
13 Side B. I don't know if it's a single sound
14 recording, or multiple tracks.

15 Q I see. In other words, you don't
16 identify "Philip K. Dick" in the Pet Section
17 of the Walmart as one song, and "The Man
18 From Uncle" as being the second song?

19 A It may be, it could be.

20 Q Believe me, this is closer to
21 your generation than it is to my generation.

22 A I think you under-estimate my

1 age.

2 Q That's never dangerous. Now,
3 let's look at page 3, and are you able to
4 perceive whether there are one or two, or
5 some different number of bands on side 2?

6 A I --

7 MR. PERRELLI: Your Honor, I'm
8 going to object. He hasn't established that
9 she's ever seen this, and to ask her to try
10 to interpret the number of bands on this
11 document, I don't see how the witness could
12 do that.

13 CHIEF JUDGE SLEDGE: Number of
14 what?

15 MR. MALONE: Bands.

16 CHIEF JUDGE SLEDGE: Bands?

17 MR. MALONE: Yes. There's a
18 space between bands, so that if there are
19 six songs on a side in an LP, there will be
20 six visible breaks.

21 CHIEF JUDGE SLEDGE: Can you see
22 that?

1 MR. MALONE: I think I can.

2 CHIEF JUDGE SLEDGE: I can't see
3 that.

4 MR. MALONE: Well, I can
5 understand that. The light is a little
6 better here. But the witness in answer to
7 the objection, Your Honor --

8 CHIEF JUDGE SLEDGE: The
9 objection is overruled.

10 MR. MALONE: Thank you.

11 BY MR. MALONE:

12 Q And, similarly, page 4 appears --

13

14 CHIEF JUDGE SLEDGE: Do you want
15 an answer to your question?

16 MR. MALONE: Well, yes.

17 BY MR. MALONE:

18 Q Can you discern that?

19 A No.

20 Q No. All right. And I would, as
21 to page 4, I would ask the same question.

22 A I can't tell.

1 Q Now, with reference then to your
2 testimony Tuesday afternoon, does it look at
3 all probable to you based on your experience
4 in the music industry, which you've told us
5 that a large percentage of your staff has,
6 that the ISRC, would you translate for me,
7 please?

8 A ISRC, the International Sound
9 Recording Code.

10 Q All right. Is it probable as to
11 this particular disk, which appears to be
12 seven inches vinyl, that the SRIC is there?

13 A I don't know what this is. I
14 don't know if there's an ISRC on it or not.
15 If this is an LP that was released before a
16 certain time, it's unlikely it would be on
17 there, but I don't know what this is.

18 Q All right. Then you testified
19 that in default of a code embedded on the
20 record, that the licensee would be required
21 to provide certain other data elements in
22 order to allow you to identify the bands on

1 the record. Which of the - I think you
2 mentioned five - and which of the five do
3 you find on this record album in this
4 record?

5 A I don't know if this is the
6 complete packaging for this product or not.
7 I have no way of knowing if all the
8 information is here, so I don't know what
9 this is.

10 Q Well, if you will assume, please,
11 for the purpose of my question that it is
12 the complete package of ES751 as it was sold
13 retail.

14 MR. PERRELLI: Your Honor, I'm
15 going to object. I think he's just asking
16 her to read from a document that she's never
17 seen before and can't identify.

18 CHIEF JUDGE SLEDGE: Overruled.

19 THE WITNESS: Can you repeat your
20 question?

21 BY MR. MALONE:

22 Q Of the elements that you say that

1 the licensee should resort to in default of
2 the embedded code, how many of those
3 elements, or which of those elements do you
4 find from the exhibit?

5 A Well, these are a little bit of
6 an assumption because I'm looking at this in
7 a vacuum --

8 CHIEF JUDGE SLEDGE: No, wait a
9 minute. A minute ago you said -- you asked
10 the same question, but you asked her to
11 assume that this was the entire package, the
12 entire retail package.

13 MR. MALONE: Yes. Thank you,
14 Your Honor. Under that assumption. I mean,
15 you've got it.

16 THE WITNESS: So Estrus could be
17 a company, a marketing label that put it
18 out, AstroLaunch would be the name of the
19 artist, the tracks on Side A are "Philip A.
20 Dick in The Pet Section of Walmart", and
21 there's probably another track called "The
22 Man From Uncle", and Side B there are

1 "Transmissions from Venus 94", which would
2 be the title of the song, and "Time Bomb
3 (The Avengers 6)" would be the title of
4 another song, so marketing label, artist,
5 title. I'm not sure which is the album, and
6 let me just read all this other text. Yes,
7 because when you read this it says
8 "Transmission from Venus 94", which has 94
9 after it because it is a `94 version of a
10 `93 song, so I'm assuming that's the track
11 title. So those are the fields that I would
12 likely identify in this.

13 Q All right. And what would you
14 demand in addition in order to not charge
15 the webcaster with an incomplete report?

16 A Well, again, the regulations ask
17 for in addition to the name of the licensee
18 and the transmission category and the
19 program title, artist, album, and marketing
20 label, or ISRC, which you have, so this is
21 complete.

22 Q And unambiguous.

1 A And unambiguous.

2 Q You're absolutely certain about
3 what you're drawing from this album.

4 A Well, I'm not the service that
5 selected this track to put in my playlist,
6 so if I had the benefit of that, this might
7 be perfectly obvious to me who is what,
8 because they selected to put that in their
9 playlist.

10 Q But not having the benefit of
11 that, you're not totally certain.

12 A I'm not totally certain, no.

13 MR. MALONE: All right. I'm going
14 to mark for identification Services Exhibit
15 160.

16 (Whereupon, Services
17 Exhibit No. 160 was
18 marked for
19 identification.)

20 BY MR. MALONE:

21 Q The document has three pages,
22 which I will represent the first page is the

1 cover of a Jason Molina album, the second
2 page is one side of a 45 rpm disk, and the
3 third page is the other side of that same 45
4 rpm disk. And I am informed looking at page
5 2, I am informed that the Magnolia Electric
6 Company is the name of Mr. Molina's band,
7 and the small printing on the circumference
8 of the label at the center of the side of
9 the disk that's on page 3 I read as the
10 Chucklet Magazine located at P.O. Box 2514
11 in Athens, Georgia, which I guess fits with
12 Magnolia, from that part of the country.
13 And I would ask you, again, as to this
14 exhibit, if I correctly described it,
15 whether you think the 45 rpm disk has the
16 code embedded in it?

17 MR. PERRELLI: I'm going to
18 object, Your Honor, to the extent if Mr.
19 Malone, as he did before, wants to make a
20 representation that we should assume that
21 this is the entire packaging and the entire
22 material, as he did before. Otherwise, I

1 would object to ask her to just simply make
2 a guess as to what is or what is not in the
3 packaging of this record.

4 CHIEF JUDGE SLEDGE: Sustained.

5 BY MR. MALONE:

6 Q For the purposes of my next
7 question, or that question, would you please
8 assume that this is the complete product as
9 sold in retail distribution channels. And
10 my question then, subject to that
11 assumption, is, is it likely that the code
12 is embedded in this 45 rpm record?

13 A I have no way of knowing if the
14 ISRC code is embedded without reading it
15 with an ISRC reader. Again, if I had more
16 information, I could make a more informed
17 guess.

18 Q How far are you able to go with
19 what you have in front of you in identifying
20 the default elements, in default of the
21 code?

22 A The required data elements in the

1 interim regulations require ISRC or album
2 name and a marketing label, so I think the
3 information from here we could probably
4 discern that.

5 Q May I try you as to each of those
6 elements, please?

7 A Jason Molina is the artist, "No
8 Moon on the Water" is the track title, or
9 "In the Human World" is the track title,
10 Magnolia Electric Company might be the
11 marketing label or the name of the album, I
12 can't tell from this.

13 Q You would exclude the possibility
14 that it's the name of the band.

15 A I would say Jason Molina is the
16 featured artist. I'm guessing. "In the
17 Human World", I think Jason Molina is the
18 featured artist, and the Magnolia Electric
19 Company is the marketing label.

20 Q I'm sorry. And is?

21 A I would guess that Jason Molina
22 is the featured artist, and Magnolia

1 Electric Company is the name of the company,
2 but I'm not familiar with this recording.

3 MR. MALONE: I think that
4 concludes my questions for the witness. Oh,
5 Your Honor, please, I have, I think, three
6 exhibits hanging there that I would like to
7 move into evidence. I would like to move
8 into evidence subject to the pending
9 objection, the NPR contract.

10 CHIEF JUDGE SLEDGE: What exhibit
11 numbers?

12 MR. MALONE: 157, Your Honor.

13 CHIEF JUDGE SLEDGE: All right.
14 That's already --

15 MR. MALONE: I'd like to --

16 CHIEF JUDGE SLEDGE: Just a
17 moment. We've got a motion pending.

18 MR. MALONE: I'm sorry.

19 MR. PERRELLI: Your Honor, we
20 would object to the admission for the same
21 grounds of our motion to strike, so we would
22 request any ruling of the Court on that

1 exhibit to be subject to that motion, and
2 also would request that, as required by the
3 terms, that it be subject to the protective
4 order, if it is entered into evidence, be
5 subject to the protective order.

6 CHIEF JUDGE SLEDGE: Motion to
7 admit is taken under advisement.

8 MR. MALONE: I'd like to move the
9 admission of the Exhibit pertaining to the
10 financial statement which was 158.

11 CHIEF JUDGE SLEDGE: Any
12 objection to Exhibit 158?

13 MR. PERRELLI: No objection, Your
14 Honor.

15 CHIEF JUDGE SLEDGE: Exhibit 158
16 is admitted.

17 (Whereupon, Services
18 Exhibit 158 was
19 admitted.)

20 MR. MALONE: I'd like to move the
21 admission of Services Exhibit 159.

22 CHIEF JUDGE SLEDGE: On what

1 basis?

2 MR. MALONE: On the basis that
3 the conduct of the witness on the stand in
4 terms of answering the presence or absence
5 of the alternate elements showed, I think,
6 grave difficulty, and I think that is a
7 reasonable proxy for what a program director
8 would face when up against making out a
9 report, such as Sound Exchange requires, and
10 threatens to penalize for incompleteness.

11 CHIEF JUDGE SLEDGE: Mr. Malone,
12 I didn't hear you answer my question. On
13 what basis can this exhibit be admitted?

14 MR. MALONE: I think it should be
15 admitted, Your Honor, in that it is a
16 demonstrative exhibit, if you will, in the
17 sense that the witness --

18 CHIEF JUDGE SLEDGE:
19 Demonstrative exhibit summarizes evidence.

20 MR. MALONE: Well, it also
21 demonstrates in a more literal sense of the
22 term the practical difficulty that her

1 proposal would impose on the licensees. And
2 I don't think that you can fully interpret
3 her reaction on the stand without the
4 exhibit in front of you.

5 CHIEF JUDGE SLEDGE: That may be
6 a proper use of something that has been
7 admitted, but I still haven't heard you say
8 what basis there is to admit this exhibit.

9 MR. MALONE: This exhibit is the
10 exterior of the kind of works that Sound
11 Exchange's license covers.

12 CHIEF JUDGE SLEDGE: Is there any
13 evidence on that?

14 MR. MALONE: I can ask the
15 witness that.

16 CHIEF JUDGE SLEDGE: She's not
17 familiar with it. She's already said that.
18 Maybe I'm going too far. All right.
19 Anything else?

20 MR. MALONE: No, Your Honor.

21 CHIEF JUDGE SLEDGE: All right.
22 In response to Exhibit 159?

1 MR. PERRELLI: Your Honor, I
2 would object. The witness has never seen
3 the exhibit, can't make any statements or
4 representations about the actual -- a series
5 of questions based on assumptions, but not
6 on what the document is. She couldn't
7 identify it, and there's no basis for any
8 testimony about the voracity of anything
9 that, or of Mr. Malone's representations of
10 that.

11 CHIEF JUDGE SLEDGE: Any further,
12 Mr. Malone?

13 MR. MALONE: Well, I would like
14 to respond to the terms of the objection, in
15 that it's not being offered for the voracity
16 of the content. It's being offered to
17 illuminate the difficulty that Sound
18 Exchange seeks to impose on its licensees.
19 And I think the point is that she had before
20 her on the stand everything that a program
21 director would have had for him when he was
22 filling out the report.

1 CHIEF JUDGE SLEDGE: No, there's
2 no evidence of that.

3 MR. MALONE: No, I suppose not,
4 but there are certain things I think that
5 would be obvious to someone in the industry,
6 as she says she is, and I don't think
7 there's any doubt there as to what the
8 practical problem is.

9 CHIEF JUDGE SLEDGE: The
10 objection is sustained.

11 MR. MALONE: Well, I will offer,
12 also, Exhibit 160, which is subject to the
13 same objection.

14 CHIEF JUDGE SLEDGE: Any
15 objection to the offer of 160?

16 MR. PERRELLI: Same objection,
17 Your Honor; no foundation.

18 MR. MALONE: Then, if I may, Your
19 Honor, I will bring in a live witness when
20 my time comes to -- CHIEF JUDGE SLEDGE:

21 Based on the objection, the objection is
22 sustained.

1 MR. MALONE: Thanks.

2 CHIEF JUDGE SLEDGE: Mr.

3 Perrelli, any redirect?

4 MR. PERRELLI: I do, Your Honor.

5 CHIEF JUDGE SLEDGE: Go ahead.

6 MR. PERRELLI: I can continue, or
7 take a break. I'm happy to go either way.

8 CHIEF JUDGE SLEDGE: Recess ten
9 minutes.

10 MR. PERRELLI: Thank you, Your
11 Honor.

12 (Whereupon, the proceedings went
13 off the record at 4:15:05 p.m. and went back
14 on the record at 4:24:53 p.m.)

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

17 MR. PERRELLI: Thank you, Your
18 Honor. Good afternoon, Ms. Kessler.

19 REDIRECT EXAMINATION

20 BY MR. PERRELLI:

21 Q During your testimony, we've
22 talked a good deal about statements of

1 account. I'd like to direct you to Exhibit
2 212 that is attached to your written direct
3 statement. My only question is I'd like you
4 to point out in this exhibit what a
5 statement of account looks like, and what
6 information is required.

7 A The statement of account
8 describes which license you're reporting
9 for, so this is for an eligible non-
10 subscription transmission service, where to
11 send payment, and the statement of account,
12 contact information, requesting the period
13 for the reporting on the statement of
14 account, the name of the entity and the
15 service name, and the URL, and in this case,
16 the numbers of performances during whatever
17 months is covered by this statement of
18 account, annual liability section, and a
19 signature page.

20 Q So how many pages is that?

21 A Three.

22 CHIEF JUDGE SLEDGE: What was the

1 one before signature?

2 THE WITNESS: The annual
3 liability.

4 BY MR. PERRELLI:

5 Q You were asked a number of
6 questions about your rate of paying through
7 to artists. Has that number improved over
8 time?

9 A Yes, it has.

10 Q And can you identify what your
11 pay through to artists was a year ago?

12 A A year ago it was approximately
13 45 percent to 50 percent.

14 Q And where is it today?

15 A About 65 percent.

16 Q Did the decision of Sound
17 Exchange's award not to distribute or not to
18 distribute to Sound Exchange royalties that
19 had been paid more than three years ago
20 affect that number?

21 A Yes. By not releasing those
22 undistributed costs to offset cost, it gave

1 us opportunity to further reduce the
2 undistributed funds.

3 Q You received some questions about
4 monitoring webcasts. Let me take a step
5 back for a minute. When we talk about a
6 performance by a webcaster, what are we
7 talking about?

8 A We're talking about the
9 transmission of a sound recording and a user
10 listening to it.

11 Q Okay. When we talk about
12 monitoring webcasts, can you identify,
13 without the assistance of webcasters, can
14 you by monitoring identify the number of
15 performances that a webcaster performs?

16 A You can only identify the sound
17 recording, but not how many people were
18 listening to it, which is part of the
19 definition of a performance by a webcaster.

20 Q Can you calculate the liability
21 of a webcaster paying on a per-performance
22 basis without information from the webcaster

1 about listeners?

2 A No, you can't.

3 Q And again, who has that data?

4 A The licensees are in possession
5 of that information.

6 Q And do you know in what form that
7 data exists?

8 A No.

9 Q You were asked some questions
10 about a sample, sampling project that Sound
11 Exchange had done. I'd like to direct your
12 attention to Exhibit 417, again, attached to
13 your written testimony, and ask you to look
14 at page 9. These are comments Sound
15 Exchange filed on August 26th, 2005, and just
16 ask if that page refreshes your
17 recollection, page 8 and 9, refreshes your
18 recollection about the sampling project that
19 was done?

20 A Yes, it does.

21 Q And can you again describe that
22 project for the Board?

1 A Yes. We conducted a sample based
2 on a random period and a system identified
3 by Barry Massarsky, and we conducted the
4 sample against census reporting that
5 identified the titles and the artists that
6 are absent in the sample in the census
7 period.

8 Q And who is Mr. Massarsky?

9 A He's an economic consultant to
10 Sound Exchange.

11 Q Okay. You were asked some
12 questions about terms from 2001. In 2001,
13 did Sound Exchange have much experience
14 administering the statutory license?

15 A No, we did not.

16 Q In 2003, how much experience did
17 Sound Exchange have in administering the
18 statutory license?

19 A Some experience.

20 Q Today, how much more experience
21 has Sound Exchange had in administering the
22 statutory license?

1 A We have massively more experience
2 with respect to administering the statutory
3 royalty.

4 Q And how did that experience
5 affect the recommendation that you made to
6 the Board with respect to the terms?

7 A It was the basis of those
8 recommendations.

9 MR. PERRELLI: Okay. I'd like to
10 mark as Sound Exchange Exhibit 1 just for
11 identification.

12 (Whereupon, SX Exhibit
13 No. 1 was marked for
14 identification.)

15 BY MR. PERRELLI:

16 Q Ms. Kessler, this is part of the
17 Copyright Office regulations concerning the
18 pre-existing subscription services.

19 CHIEF JUDGE SLEDGE: I'm puzzled
20 by your designation - Sound Exhibit 1?

21 MR. PERRELLI: We labeled our
22 original exhibits according to with Sound

1 Exchange TP001 for trial, public. We're
2 happy to change that designation. We
3 haven't had occasion to introduce exhibits
4 other than those that were with our written
5 direct testimony.

6 CHIEF JUDGE SLEDGE: This is the
7 first exhibit to --

8 MR. PERRELLI: This is our first
9 exhibit. I think, and I don't intend to
10 offer this in evidence, I merely want to
11 refresh the witness' recollection.

12 CHIEF JUDGE SLEDGE: Go ahead.

13 BY MR. PERRELLI:

14 Q Ms. Kessler, if you'll look at
15 260.2(d) which says "The licensee shall pay
16 a late fee of 1.5 percent per month, or the
17 highest lawful rate, whichever is lower",
18 does that refresh your recollection with
19 respect to the late fee owed by pre-existing
20 subscription services under the regulations
21 governing them?

22 A Yes, it does.

1 Q Now in your experience with
2 webcasters, has the .75 percent monthly late
3 fee been successful in encouraging
4 webcasters to pay on time?

5 A I don't find it to be a
6 disincentive to pay late.

7 Q With respect to the pre-existing
8 subscription services, have you found that
9 the 1.5 percent per month late fee has been
10 successful in encouraging them to pay
11 timely?

12 A No, we have chronic late-payers
13 with respect to the past.

14 Q Now, Ms. Kessler, there were a
15 number of questions you were asked about
16 confidentiality, confidentiality provisions
17 and your recommendations with respect to
18 that. Just so we're clear, what information
19 can you provide copyright owners under the
20 current terms governing the statutory
21 license that went through 2005?

22 A We can only provide royalties

1 received in the aggregate, and with respect
2 to any specific licensee, just if they are
3 current or not in their payments.

4 Q If a licensee is one month late,
5 what can you tell a copyright owner?

6 A That they're not current with
7 their payments.

8 Q If a licensee is 12 months late,
9 what can you tell a copyright owner?

10 A That the licensee is not current
11 in their payment.

12 Q If you believe a licensee is
13 underpaying by \$5, what can you tell a
14 copyright owner?

15 A We can't tell them what that
16 underpayment is.

17 Q And if you believe a licensee is
18 underpaid by \$100,000, what can you tell
19 them?

20 A We cannot tell them that they are
21 \$100,000 short on their royalty obligation.

22 MR. PERRELLI: Okay. I'd like to

1 mark - this would be Sound Exchange TP
2 Exhibit 2, and again, only for
3 identification to refresh the witness'
4 recollection.

5 (Whereupon, SX Exhibit
6 No. 2 was marked for
7 identification.)

8 BY MR. PERRELLI:

9 Q Now, Ms. Kessler, this is, again,
10 part of the rates and terms for pre-existing
11 subscription services, Copyright Office
12 regulations. If you'll look at 260.6(f),
13 talks about the cost of verification
14 procedure, and discusses the cost shifting
15 provisions. Does that refresh your
16 recollection about the percentage rate at
17 which the costs would shift to a pre-
18 existing subscription service for
19 underpayment?

20 A Yes, it does.

21 Q And what is that?

22 A Five percent.

1 Q And is that consistent with what
2 you were recommending for this statutory
3 license?

4 A Yes, it is.

5 Q Now you were asked questions
6 about whether or not you have experience
7 with respect to auditing webcasters. Do you
8 have experience with respect to auditing
9 pre-existing subscription services?

10 A Yes, we do.

11 Q And without going into specific
12 licensees and the specific numbers, what
13 have those audits found?

14 A Significant under payments.

15 MR. PERRELLI: Your Honor, I
16 don't have anything further.

17 CHIEF JUDGE SLEDGE: Mr.
18 Steinthal, any further cross?

19 MR. STEINTHAL: No, Your Honor.

20 CHIEF JUDGE SLEDGE: Ms. Ablin,
21 any further cross?

22 MS. ABLIN: Yes, Your Honor, if I

1 could have just 30-60 seconds.

2 CHIEF JUDGE SLEDGE: Yes, ma'am.

3 RECROSS EXAMINATION

4 BY MS. ABLIN:

5 Q Ms. Kessler, Mr. Perrelli a few
6 minutes ago just showed you a couple of
7 provisions concerning the terms governing
8 the pre-existing subscription services. Do
9 you recall that?

10 A Yes.

11 Q Are you aware that certain of the
12 terms that you are seeking changes for are
13 actually terms that have been in effect with
14 respect to the pre-existing subscription
15 services?

16 A Some of the changes that Sound
17 Exchange is requesting are terms that exist
18 for the pre-existing services, yes.

19 Q Right. But some of the other
20 terms, as they currently exist in the
21 webcaster, or rather the eligible non-
22 subscription services and new subscription

1 transmission services terms, provisions,
2 exist in their current form in the pre-
3 existing subscription services' terms. Is
4 that correct?

5 A I'm not sure what those are.

6 Q Okay. Well, let's start with the
7 confidentiality provision. That's one of
8 the terms that your testimony seeks a change
9 for, the terms governing confidentiality and
10 statement of account information provided by
11 licensees.

12 A Yes.

13 MS. ABLIN: I'm going to show you
14 a document that's been marked as Services
15 Exhibit 161.

16 (Whereupon, Services
17 Exhibit No. 161 was
18 marked for
19 identification.)

20 MS. ABLIN: And if you could take
21 a look at Part D to this term. And just for
22 the record, this exhibit is 37 CFR Part

1 260.4, titled "Confidential Information and
2 Statements of Account."

3 BY MS. ABLIN:

4 Q Now, it's true, is it not, that
5 the pre-existing subscription services'
6 terms contain a confidentiality provision
7 like the current confidentiality provision
8 that's found in the webcaster terms?

9 A Yes.

10 Q And that terms restricts access
11 to the confidential information pertaining
12 to the royalty payments from going to
13 employees or officers of the sound recording
14 copyright owner or performing artist.
15 Correct?

16 A Yes, and we'll likely ask for
17 this confidentiality provision to be changed
18 when we commence the PES proceeding.

19 Q Are you aware that this term, the
20 pre-existing subscription services' term
21 has, in fact, been in place since 1998, so
22 it's been in place for eight years?

1 A 1998 or 1996?

2 Q Well, perhaps it's been in place
3 for ten years.

4 A Yes, I'm aware of when the PES
5 came into existence.

6 Q So your testimony is the term has
7 been in place for ten years?

8 A I'm not sure if this specific
9 term was a result of the extension of the
10 license, or this was in the original terms.
11 I don't know.

12 MS. ABLIN: Ms. Kessler, I'm now
13 having marked as Services Exhibit 162 the
14 terms provisions governing pre-existing
15 subscription services as they were in place
16 in 1998.

17 (Whereupon, Services
18 Exhibit No. 162 was
19 marked for
20 identification.)

21 THE WITNESS: Thank you.

22 BY MS. ABLIN:

1 Q And if you could just flip to
2 page 25414 of this document, and take a look
3 at Section 260.4(d).

4 A Yes.

5 Q So does this refresh your
6 recollection whether the confidentiality
7 provision that we've been discussing was in
8 place, in fact, since at least 1998?

9 A Yes.

10 Q With respect to the pre-existing
11 subscription services.

12 A Yes.

13 Q Are you aware that the Section
14 114 statutory license terms governing the
15 pre-existing subscription services also
16 include a term requiring that audits of both
17 statements of account and royalty payments
18 be conducted by independent auditors?

19 A That sounds familiar, yes.

20 Q And are you aware whether that
21 term has, in fact, been in place with
22 respect to pre-existing subscription

1 services since at least 1998?

2 A I think that's right.

3 Q You have the document in front of
4 you, if you would like to verify that that's
5 correct.

6 A I'd like to verify it.

7 Q Yes, let's do that.

8 CHIEF JUDGE SLEDGE: Do you want
9 to refer her to a section?

10 MS. ABLIN: Yes. It would be the
11 same page that you were on before, which was
12 25414, again Section 260.4(d)(2).

13 THE WITNESS: I'm sorry. That's
14 260?

15 MS. ABLIN: .4(d)(2).

16 THE WITNESS: .4(d)(2). Yes.

17 BY MS. ABLIN:

18 Q And that provision, in fact,
19 allows only independent and qualified
20 auditors who are not employees or officers
21 of a sound recording copyright owner or
22 performing artist to access the pre-existing

1 services confidential information.

2 A No, it says that "An independent
3 qualified auditor who is not an employee or
4 officer of the sound recording copyright
5 owner or performing artist, but is
6 authorized to act on behalf of the
7 interested copyright owner with respect to
8 the verification of the royalty payments,
9 verification of the royalty payments."

10 Q Right, which is the --

11 A Not the confidential information.
12 This is discussing the audit, yes.

13 Q Well, this is, in fact, a term
14 that talks about who can see the
15 information. Correct?

16 A Yes, that's right. Excuse me,
17 yes.

18 Q Okay. And so, in fact, this
19 provision restricts access to that
20 information to independent and qualified
21 auditors who are not employees or officers
22 of sound recording copyright owners or

1 performing artists?

2 A Yes.

3 Q And that term has been in place
4 since at least May 8th, 1998?

5 A Yes.

6 Q Now, Mr. Perrelli also asked you
7 a series of questions about the sample
8 analysis that you and I spent a little bit
9 of time talking about this morning.

10 Correct?

11 A Yes.

12 Q And I believe you testified a few
13 minutes ago with Mr. Perrelli that Barry
14 Massarsky conducted that analysis?

15 A He didn't conduct the analysis,
16 he set up the parameters for the analysis,
17 and my staff carried out the actual data
18 analysis.

19 Q And if you could look at page 9,
20 which I believe is the page Mr. Perrelli
21 directed you to, of Sound Exchange Exhibit
22 417 TP.

1 A 417?

2 Q Yes, 417.

3 A Page 9.

4 Q Page 9, yes.

5 A Yes.

6 Q And the first sentence refers to
7 a declaration of Barry Massarsky. Correct?

8 A Yes.

9 Q And I take it that that
10 declaration is where the analysis of the
11 sample that he performed was described? The
12 declaration that was attached to this
13 exhibit describes the analysis, the sample
14 analysis that he performed?

15 A The parameters that he came up
16 with, yes.

17 Q And that declaration was not, in
18 fact, included as an exhibit to this -
19 included as an attachment, rather, to this
20 exhibit?

21 A No.

22 Q Now I believe you told me that

1 the sample used in the analysis you referred
2 to earlier today was a sample consisting of
3 two seven-day periods.

4 A Two consecutive seven-day
5 periods, that's correct.

6 Q In a quarter. And again,
7 directing your attention to page 9 where you
8 are, Mr. Massarsky, according to this
9 document, conducted a sample analysis using
10 samples consisting of a one-week period, a
11 three-day period, a three non-consecutive
12 day period, and a one-day period, so he
13 conducted four separate sample analyses.

14 Correct?

15 A Yes.

16 Q But according to this document he
17 did not, in fact, conduct an analysis with
18 respect to two seven-day periods within a
19 quarter. Is that correct?

20 A That's correct.

21 Q And I believe you testified
22 during your direct testimony a couple of

1 days ago that in your analysis of the sample
2 of two seven-day periods, and I'm frankly
3 perplexed where that appears in the
4 Massarsky document, that you found that over
5 40 percent of the artists performed in the
6 census were not picked up by the sample.

7 A That's correct.

8 Q If you could turn to page 10 of
9 this document, take a look at the first full
10 paragraph. That's a paragraph providing the
11 results of Mr. Massarsky's work, is it not?

12 A The paragraph that begins, "The
13 results for the performers comparable".

14 Q Correct.

15 A Yes.

16 Q And there's nothing on this page,
17 is there, that says that over 40 percent of
18 the artists performed were missed in either
19 a one-week sample, or in a sample of two
20 seven-day periods. Is there?

21 A No, it doesn't mention the two-
22 week sample, no.

1 MS. ABLIN: I have no further
2 questions.

3 CHIEF JUDGE SLEDGE: Ms. Brown,
4 any further questions?

5 MS. BROWN: No, Your Honor.

6 CHIEF JUDGE SLEDGE: Mr.
7 Freundlich, any further questions?

8 MR. FREUNDLICH: I have no more
9 questions, Your Honor.

10 CHIEF JUDGE SLEDGE: Mr. Malone?

11 MR. MALONE: No further
12 questions, please.

13 CHIEF JUDGE SLEDGE: Mr.
14 Perrelli, anything arising from that cross
15 examination?

16 MR. PERRELLI: No, Your Honor.

17 CHIEF JUDGE SLEDGE: Anything by
18 the Court? Thank you, ma'am. You're
19 excused.

20 THE WITNESS: Thank you.

21 CHIEF JUDGE SLEDGE: Mr.
22 Perrelli, who will be your witness Monday

1 morning?

2 MR. PERRELLI: We will have
3 Michael Kushner testifying on Monday
4 morning, and he will be our last witness,
5 subject to our efforts to report to the
6 other side. I'm working on a schedule for -
7 -

8 CHIEF JUDGE SLEDGE: Do you
9 expect Mr. Kushner to take more than one
10 day?

11 MR. PERRELLI: We anticipate him
12 to last the day, but based on consultation
13 with the other side, I think we all believe
14 he will be on and off on Monday, but it will
15 be the bulk of the day.

16 CHIEF JUDGE SLEDGE: So as we
17 described earlier, then we would be in
18 recess Tuesday and start back on Wednesday
19 with Mr. Freundlich.

20 MR. FREUNDLICH: Just one
21 clarification.

22 CHIEF JUDGE SLEDGE: Yes, sir.

1 MR. FREUNDLICH: If for some
2 reason the witness doesn't conclude on
3 Monday, are we then going to start Royalty
4 Logic's case on Thursday?

5 CHIEF JUDGE SLEDGE: Yes, sir.

6 MR. FREUNDLICH: So there's
7 always going to be one full day in-between.

8 CHIEF JUDGE SLEDGE: One full day
9 in-between. We've got too much ahead of us
10 to not leave that time.

11 MR. PERRELLI: I think there's
12 incentive to have Mr. Kushner be on and off
13 on Monday, so we'll do our best.

14 CHIEF JUDGE SLEDGE: Thank you
15 very much. We'll recess until Monday at
16 9:30.

17 (Whereupon, the proceedings went
18 off the record at 4:53 p.m.)
19
20
21
22