Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
MECHANICAL AND DIGITAL PHONORECORD DELIVERY RATE ADJUSTMENT PROCEEDING	)	**Docket No. 2006-3 CRB DPRA**

REBUTTAL TESTIMONY OF

SCOTT PASCUCCI

President, Rhino Entertainment Co.

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RIAA Trial Ex. 80

Written Rebuttal Testimony of Scott Pascucci

I. Background and Qualifications

I am the President of Rhino Entertainment Company ("Rhino"), which is part of the Warner Music Group ("WMG"). Rhino is primarily responsible for marketing WMG's existing catalog of sound recordings throughout the world and developing new catalog-related business opportunities. Rhino is also responsible for master use licensing of the recordings of WMG's record labels, which include Atlantic Records, BadBoy Records, Lava Records, Roadrunner Records, Maverick Records, Nonesuch, Reprise Records, Warner Bros. Records and WBR Nashville, among others, and the rest of WMG's extensive catalog of sound recordings.

Rhino includes the following sub-divisions: Rhino Records, which is a leading pop culture record label; Warner Custom Products, which licenses WMG recordings for inclusion on records distributed by third parties and creates compilations and other records distributed by third parties; WMG Soundtracks, which coordinates film and television soundtrack opportunities for WMG labels; WMG Film, Television and Commercial Licensing, which licenses WMG recordings for inclusion in films, televisions shows, videogames and commercials; and Rhino Home Video, which maintains a catalog of over 500 video titles. Rhino also represents the catalog of several independent record companies for master use licensing.

I have worked in the music industry for over eighteen years. I graduated from Columbia Law School in 1985. My work in the music industry began at the James Phelan Company, a management company, where I managed music producers and engineers from 1990 to 1991. From 1991 to 1992, I was a Director of Business Affairs at Arista Records where I was responsible for licensing masters for record compilations, film, television, commercials and record clubs. From 1992 to 1993, I was Director of Business Affairs for Sony Music Special

Products where I oversaw licensing of masters for record compilations. In 1993, I was named a Director for Business Affairs for Sony Music, and later a Vice President. In 1998, I was promoted to Senior Vice President, Business Affairs, West Coast, for Sony Music. In that position, I oversaw all of Sony Music's master use licensing for films, television and commercials. From 2001 to the present, I have been President of Rhino, where I am responsible for overseeing all of the company's operations.

During my career, I have negotiated or overseen the negotiation of thousands of master use licenses. For the past ten years, I have overseen master use licensing of sound recordings for movies, television and commercials for Sony and now WMG's record labels. In the course of those negotiations, I was frequently made aware of the license fees quoted by the music publishers for the uses for which I was also quoting fees. I have also negotiated numerous mechanical licenses with artists during my career, have worked closely with colleagues who negotiate mechanical licenses directly with publishers, and have overseen mechanical licensing at Rhino.

I understand that the music publishers' and songwriters' expert witness, Professor Landes, testified in this proceeding that synchronization ("synch") licenses are an appropriate benchmark to use in setting the royalty rate to be paid for mechanical licensing under Section 115. As discussed below, there are numerous and vast differences between synch licensing and mechanical licensing. These differences make synch licenses an inapposite benchmark for the establishment of the mechanical royalty rates. I urge this Court to reject any claim that it should use synch licenses as the basis for setting the mechanical royalty rate to be determined in this proceeding.

II. Background on Synchronization and Master Use Licensing

When movie, television, and commercial music supervisors and producers want to use a sound recording in a movie, television show or commercial, they must obtain separate licenses from the owner of the copyright in the musical composition or "song" (usually a music publisher) and the owner of the copyright in the sound recording or "master" (usually a record company). The license authorizing the use of musical compositions in the foregoing situations is called a synchronization or "synch" license. The license authorizing the use of sound recordings is called a master use license.

At Rhino, we have a staff of approximately twenty-three people devoted to negotiating master use licenses with music supervisors or producers of movies, television shows and commercials and issuing master use licenses for WMG's sound recordings. A music supervisor is the person working on a movie, television show or advertisement who is responsible for coordinating the music for the project. Music supervisors frequently contact Rhino in order to obtain a master use license to use one of our recordings. In addition, Rhino actively seeks out opportunities to place our recordings in particular movies, shows or commercials.

III. Synch Licenses Are an Inappropriate Benchmark for Mechanical Rates.

A. Music Serves Different Purposes in the Synch/Master Use Context and the Mechanical License Context.

The purpose that music serves when it is licensed for use in movies, television shows and advertisements is fundamentally different from the purpose it serves when used in CDs, downloads and other audio formats, making synch licenses an inappropriate benchmark for mechanical licenses. When music supervisors put together the music for a movie or television project, they are not typically seeking to acquire master use and synch licenses for the purpose of selling a particular song to consumers. Rather, they are using the recording as background music

in connection with a larger audio-visual project. While music can serve important purposes in terms of dramatizing a story, setting a mood, creating positive associations with a product, or drawing people's attention, the purpose of the music is secondary to that of the larger audio-visual work into which the music is incorporated – and it is that larger work that consumers pay to watch (in the case of a movie) or for which producers and advertisers pay with the hope that consumers will watch (in the case of a television show or advertisement).

The secondary purpose that music plays in the context of master use/synch licenses is reflected in the characteristics of the marketplace for these licenses. Master use licensing and synch licensing are high volume businesses because music supervisors and producers seek to provide their clients with as many creative and financial choices as possible. They typically clear more music than they need, which pressures record companies and music publishers to keep their fees low, and discourages record companies from pressing for master use fees that are higher than the synch license fees that publishers receive (and vice-versa). As few as one in four license requests results in a completed, paid license. Last year, Rhino received approximately 10,000 license requests, of which, approximately 2,500 resulted in completed and paid master use licenses.

Music supervisors and producers typically operate under very strict budget constraints and thus must attempt to secure licenses for recordings and songs that will suit the purposes of their projects without spending more than they have been allotted for such licenses. By requesting licenses for more recordings and songs than they ultimately need, they are able to encourage competition among the various owners of the solicited recordings and songs in order to get the lowest possible fees. Even where a music supervisor or producer has decided upon the

use of a particular song, they may still have the ability to choose between numerous recordings of that composition, ensuring continued competition between the recording owners.

Finally, the amount of the fee for a particular movie, television show or advertisement will vary greatly, depending upon the nature of the project for which such licenses are being granted, the particular recordings and songs requested, how the recordings and songs will be used in the project, and the competitive nature of the negotiations. For example, the use of a full-length current hit recording by a popular recording artist in a major motion picture is likely to command a significantly higher price than the use of a 20-second clip of a long-forgotten recording in a single episode of a low-rated television show on a secondary cable station. While it is true that at one end of the spectrum, these factors may enable record companies and music publishers to demand higher license fees, generally speaking, the variable nature of the uses for which synch and master use licenses are sought provides music supervisors and producers with further leverage in their negotiations, since, if they are not able to license a particular recording or song for the fee they had hoped to pay, they can always choose to license a lesser known recording or song for a lower fee.

B. Publishers Often Have More Bargaining Leverage Than Record Companies in the Synch/Master Use Market.

While it is true that record companies and music publishers both have limited leverage in many cases when compared to that of the music supervisors and producers to whom they grant synch/master use licenses, in comparison to each other, music publishers often have significantly more bargaining leverage than record companies.

First, if a movie or television music supervisor or producer wants to use a particular song in their project (for example because the lyrics lend special meaning to a scene or theme of the project), but thinks that a record company is demanding too high a price for the use of a

particular recording of the song, they can often find an alternate recorded version of the same song owned by another record company that they can license for a lower price. When that happens, the music publisher that owns the musical work still receives its synch fee, but the record company that owns the original sound recording receives nothing. Because of this threat to use an alternate recording, the record company's leverage is considerably diminished.

A recent example of this involves the song "Come Fly With Me." While Frank Sinatra's recording of the song is perhaps best well-known, a number of other artists have recorded the song over the years. Recently, Rhino was approached by a music supervisor who was looking to use a recording of that song in a commercial. Because numerous recordings of the song existed, the music supervisor was able to approach several record companies to solicit offers for licenses and, ultimately, will be able to choose to license the recording that best fits its needs (including price, stature of artist, and style of recording)

Second, when a movie, television or advertising music supervisor or producer wants to use a sound recording by a particular artist, but feels that the price quoted by the record company that owns that sound recording is too high, if the artist who originally recorded the track is no longer under contract to the record company, the music supervisor or producer may be able to offer to pay the artist to re-record the song. Alternatively, if the artist has already created a "re-record" of the song concerned, the music supervisor or producer can license the existing re-record. Either way, if the artist is willing to license the re-record for at a lower price than the record company is willing to license the original, the music supervisor or producer can exclude the record company from the deal altogether. From an artist's perspective, this may be a preferable outcome, because the artist controls the rights to the new recording and, thus, receives the entire master use fee. From the record company's perspective, however, the threat of a re-

record reduces the record company's negotiating leverage. By comparison, publishers do not face a comparable threat because although the song may be re-recorded, it cannot be re-written, meaning the music publisher receives its synch fee no matter which recorded version the music supervisor or producer elects to use.

Third, given that music often plays a secondary role in movies and television, and given that music supervisors and producers operate on tight budgets, music supervisors and producers frequently must seek out inexpensive sound recordings in their projects, especially for background music. Recognizing this need, some music publishers have created or acquired music production libraries for which they own both the musical composition and sound recording copyrights. Often, the recordings in these libraries feature instrumental versions of popular songs for which the publisher already controls the musical composition copyrights. Because publishers own both the recordings and the songs contained in these libraries, they can offer to license them to movie and television producers at relatively low rates, creating the implicit risk for record companies in many of the negotiations they conduct that if the master use license fees they quote are too high, producers will opt to use production library music instead and, thus, avoid the need to deal with a record company altogether.

None of these potential threats – to use alternative versions, re-records, or background music – exists in the context of mechanical licenses, because it is the specific recording, by a specific artist, that consumers seek out when they purchase CDs, downloads and other records for which mechanical licenses are required. To rely on synch license fees to set mechanical license rates would deny these realities and would wrongly imply that record companies and publishers share equally in the expense and risk (and should share equally in the reward) of breaking and marketing artists and their records.

C. In Synch/Master Use Licensing, Artists Have Incentives to Inflate the Synch Payments.

The relationship between synch and master use fees may also be distorted if a given artist has an incentive to drive up the synch rate at the expense of the master use rate – something that is sometimes the case. Some WMG artists have provisions in their contracts that grant them the ability to block the use of their recordings in movies, television shows and advertisements. Under these contracts, the artists' consent is required for any such use. Artists can use these consent rights to exert considerable control over the rates and terms of the master use licenses. Where an artist is also a songwriter, it may be in the artist's best interest for the synch payment to the publisher to be as high as possible (and certainly as high as the master use payment to the record company), since the artist often receives a greater portion of the synch payment than the master use payment.

Because record companies typically pay artists much larger advances than publishers pay (a fact which reflects the greater costs record companies incur to create sound recordings), artists tend to recoup the advances they receive under publishing deals sooner than they recoup the advances they receive under record deals and, as such, stand to receive their share of synch license revenues paid to their music publisher sooner than they receive their share of master use license revenues paid to their record company. The differing recoupment status of artists under their publishing and recording deals thus creates a further incentive on the part of singer-songwriters to encourage and support inflated synch payments whenever possible.

These incentives are amplified by the fact that artists typically receive 75% of the publishing revenue from a synch license under a typical co-publishing deal, but only 50% of the recorded music revenue under a typical recording agreement. Accordingly, not only do artists recoup faster on the publishing side, but once they are fully recouped, they keep a greater share

of the publishing revenue than the recorded music revenue. For an established singer-songwriter who has an even more favorable split with his or her publisher or who has an administration publishing deal whereby the publisher merely administers the artist's catalog of songs in exchange for a lower fee (rather than co-owning those songs and receiving a higher fee under a co-publishing deal), these incentives exist to an even greater extent.

IV. Conclusion

For the reasons I have described, I urge the Court to reject the music publishers' claim that it should use synch licenses as a basis for setting the mechanical royalty rate to be determined in this proceeding.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: March 27 2008

/s/ Scott Pascucci
Scott Pascucci

Errata to the Written Rebuttal Testimony of Scott Pascucci

On page 1, paragraph 1, Roadrunner Records was inadvertently included in the list of record labels whose recordings are licensed for master use by Rhino Entertainment Company. It should be deleted from the list.