LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2005–1 CRB DTRA]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Copyright Royalty Judges, on behalf of the Copyright Royalty Board of the Library of Congress, are announcing their final determination of the rates and terms for two statutory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings, for the period beginning January 1, 2006, and ending on December 31, 2010.

DATES: *Effective date:* May 1, 2007.

Applicability date: The regulations apply to the license period January 1, 2006 through December 31, 2010.

ADDRESSES: The final determination is also posted on the Copyright Royalty Board Web site at *http://www.loc.gov/crb/proceedings/2005-1/final-rates-terms2005-1.pdf.*

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SUPPLEMENTARY INFORMATION:

I. Introduction

A. Subject of the Proceeding

This is a rate determination proceeding convened under 17 U.S.C. 803(b) *et seq.* and 37 CFR 351 *et seq.*, in accord with the Copyright Royalty Judges' Notice announcing commencement of proceeding, with a request for Petitions to Participate in a proceeding to determine the rates and terms for a digital public performance of sound recordings by means of an eligible nonsubscription transmission or a transmission made by a new subscription service under section 114 of the Copyright Act, as amended by the Digital Millennium Copyright Act (''DMCA''), and for the making of ephemeral copies in furtherance of these digital public performances under section 112, as created by the DMCA, published at 70 FR 7970 (February 16, 2005). The rates and terms set in this proceeding apply to the period of January 1, 2006 through December 31, 2010. 17 U.S.C. 804(b)(3)(A).

B. Parties to the Proceeding

The parties to this proceeding are: (i) Digital Media Association and certain of its member companies that participated in this proceeding, namely: America Online, Inc. (''AOL''), Yahoo!, Inc. (''Yahoo!''), Microsoft, Inc. (''Microsoft''), and Live365, Inc. (''Live365'') (collectively referred to as ''DiMA''); (ii) ''Radio Broadcasters'' (this designation was adopted by the parties): namely, Bonneville International Corp., Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee (''NRBMLC''), Susquehanna Radio Corp.; (iii) SBR Creative Media, Inc. (''SBR'') and the ''Small Commercial Webcasters'' (this designation was adopted by the parties): namely, AccuRadio, LLC, Digitally Imported, Inc., Radioio.com LLC, Discombobulated, LLC, 3WK, LLC, Radio Paradise, Inc.; (iv) National Public Radio, Inc. (''NPR''), Corporation for Public Broadcasting-Qualified Stations (''CPB''), National Religious Broadcasters Noncommercial Music License Committee (''NRBNMLC''), Collegiate Broadcasters, Inc. (''CBI''), Intercollegiate Broadcasting System, Inc., (''IBS''), and Harvard Radio Broadcasting, Inc. (''WHRB''); (v) Royalty Logic, Inc. (''RLI''); and (vi) SoundExchange, Inc. (''SoundExchange'').

DiMA, Radio Broadcasters, Small Commercial Webcasters, SBR, NPR, CPB, NRBNMLC, CBI, IBS and WHRB are sometimes referred to collectively as ''the Services.'' The Services are Internet webcasters or broadcast radio simulcasters that each employ a technology known as streaming, but comprise a range of different business models and music programming. DiMA and certain of its member companies that participated in the proceeding (namely: AOL, Yahoo!, Microsoft and Live365), Radio Broadcasters, SBR and Small Commercial Webcasters are sometimes referred to collectively as ''Commercial Webcasters.'' NPR, CPB, NRBNMLC, CBI, IBS and WHRB are sometimes referred to collectively as ''Noncommercial Webcasters.''

II. The Proceedings

A. Pre-Hearing Proceedings

A notice calling for the filing of Petitions to Participate in this proceeding to set the rates and terms for the period beginning January 1, 2006, and ending on December 31, 2010, was published February 16, 2005. 70 FR 7970. The Petitions were due by March 18, 2005. Forty-two petitions were filed. Following an order to file a Notice of Intention to Submit Written Direct Statements, the participants were reduced to the following twenty eight: SBR; NPR; NPR Member Stations; CPB; CBI; SoundExchange; RLI; IBS; WHRB; Digital Media Association; AOL; Live365; Microsoft; Yahoo!; AccuRadio LLC; Discombobulated LLC; Digitally Imported, Inc.; Radioio.com LLC; Radio Paradise, Inc.; Educational Media Foundation; NRBNMLC; Bonneville International Corp.; Clear Channel Communications, Inc.; CBS Radio, Inc.; NRBMLC; Salem Communications Corp.; Susquehanna Radio Corp.; and Beethoven.com LLC.

Following an unsuccessful negotiation period, the Written Direct Statements were due October 31, 2005. All of the above filed plus the additional following: Mvyradio.com LLC; 3WK; XM Satellite Radio, Inc.; Sirius Satellite, Inc.; Infinity Broadcasting Corp.

B. The Direct Cases

The participants conducted discovery and then began live testimony. By the time testimony began, the participants reduced to the following: SBR; NPR; NPR Member Stations; CPB; CBI; SoundExchange; RLI; IBS; WHRB; Digital Media Association; AOL; Yahoo!; AccuRadio LLC; Discombobulated LLC; Digitally Imported, Inc.; Mvyradio.com LLC; Radioio.com LLC; Radio Paradise, Inc.; 3WK LLC; Educational Media Foundation; NRBNMLC; Bonneville International Corp.; Clear Channel Communications, Inc.; NRBMLC; and Susquehanna Radio Corp.

Testimony was taken from May 1, 2005, through August 7, 2006. SoundExchange presented the testimony of the following 14 witnesses: (1) John Simson, SoundExchange, executive director; (2) Barrie Kessler, SoundExchange, chief operating officer; (3) James Griffin, One House LLC, chief executive officer; (4) Erik Brynjolfsson, MIT Sloan School of Management, professor of management and director of Center for eBusiness at MIT; (5) Michael Pelcovits, MiCRA, economic consultant; (6) Mark Eisenberg, SONY BMG, senior vice president of business and legal affairs; (7) Lawrence Kenswil, Universal eLabs, a division of Universal Music Group, president; (8) Michael Kushner, Atlantic Records Group, business and legal affairs; (9) Stephen Bryan, Warner Music Group, vice president of strategic planning and business development; (10) Harold Bradley, American Federation of Musicians of United States and Canada, vice president; (11) Jonatha Brooke, songwriter and performer, owner of Bad Dog Records; (12) Cathy Fink, songwriter and performer; (13) Bruce Iglauer, Alligator

Records, an independent blues label, founder; and (14) Mark Ghuneim, Wiredset, LLC, chief executive officer.

Royalty Logic, Inc. presented the testimony of Ronald A. Gertz, president.

The Services presented the testimony of the following 24 witnesses: Digital Media Association and its Member Companies: (1) Adam B. Jaffe, Brandeis University, professor in economics; (2) Christine Winston, America Online, executive director of programming strategy and planning; (3) David Porter, Live365, general manager of business development; (4) Jonathan Potter, DiMA, executive director; (5) N. Mark Lam, Live365, chairman and chief executive officer; (6) Robert D. Roback, Yahoo! Music, general manager; (7) J. Donald Fancher, Deloitte and Touche Financial Advisory Services LLP; (8) Jay Frank, Yahoo!, programming and label relations; (9) Fred Silber, Microsoft, business development manager for MSN; (10) Eric Ronning, Ronning Lipset Radio; (11) Jack Isquith, American Online Music, executive director Music Industry Relations; (12) Karyn Ulman, Music Reports, Inc.;

Radio Broadcasters: (13) Dan Halyburton, Susquehanna Radio, research, engineering and programming; (14) Roger Coryell, San Francisco Bonneville Radio Group, director strategic marketing and Internet; (15) Russell Hauth, National Radio Broadcasters Music Licensing Committee, executive director; (16) Brian Parsons, Clear Channel Radio, vice president of technology;

Small Commercial Webcasters: (17) Kurt Hanson, AccuRadio, president and RAIN newsletter, publisher;

National Public Radio: (18) Kenneth Stern, NPR, chief executive officer;

Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.: (19) Frederick J. Kass, Jr., IBS, chief operating officer; (20) Michael Papish, HRBC, treasurer and Media Unbound, president;

Collegiate Broadcasters, Inc.: (21) William Robedee, CBI, past chair and KTRU, Rice University, manager; (22) Joel R. Willer, KXUL, University of Louisiana, Monroe, faculty advisor;

National Religious Broadcasters Noncommercial Music Licensing Committee: (23) Eric Johnson, NRBNMLC, board member and CDR Radio Network, music director; and

SBR Creative Media, Inc.: (24) David Rahn, president.

C. The Rebuttal Cases

The participants filed Written Rebuttal Statements on September 29, 2006. Discovery was then conducted on the rebuttal evidence. Rebuttal testimony was taken from November 6 through November 30, 2006.

SoundExchange presented the testimony of the following nine witnesses: (1) Barrie Kessler, SoundExchange, chief operating officer; (2) James Griffin, One House LLC, chief executive officer; (3) Erik Brynjolfsson, MIT Sloan School of Management, professor of management and director of Center for eBusiness at MIT; (4) Michael Pelcovits, MiCRA, economic consultant; (5) Mark Eisenberg, SONY BMG, senior vice president of business and legal affairs; (6) Thomas Lee, American Federation of Musicians, president; (7) Simon Wheeler, Association of Independent Music, chair of New Media Committee; (8) Charles Ciongoli, Universal Music Group, North American, executive vice president and chief financial officer; and (9) Tom Rowland, Universal Music Enterprises, senior vice president, film and television music;

Royalty Logic, Inc. presented the testimony of the following two witnesses: (1) Ronald A. Gertz, president; and (2) Peter Paterno, entertainment attorney;

The Services presented the testimony of the following 16 witnesses:

Digital Media Association and its Member Companies: (1) Adam B. Jaffe, Brandeis University, professor in economics; (2) Christine Winston, America Online, executive director of programming strategy and planning; (3) N. Mark Lam, Live365, chairman and chief executive officer; (4) Robert D. Roback, Yahoo! Music, general manager; (5) J. Donald Fancher, Deloitte and Touche Financial Advisory Services LLP; (6) Jay Frank, Yahoo!, programming and label relations; (7) Jack Isquith, American Online Music, executive director Music Industry Relations; (8) Roger James Nebel, FTI Consulting;

Radio Broadcasters: (9) Keith Meehan, Radio Music Licensing Committee, executive director; (10) Eugene Levin, Radio Music Licensing Committee, controller; (11) Brian Parsons, Clear Channel Radio, vice president of technology; (12) Adam B. Jaffe, Brandeis University, professor of economics;

National Public Radio: (13) Adam B. Jaffe, Brandeis University, professor of economics;

Intercollegiate Broadcasting System, Inc. and Harvard Radio Broadcasting Co., Inc.: (14) Jerome Picard, economics professor (ret.); (15) Michael Papish, HRBC, treasurer; and

National Religious Broadcasters Noncommercial Music Licensing Committee: (16) Eric Johnson, member of board.

At the close of all the evidence, the record was closed. In addition to the written direct statements and written rebuttal statements, the Copyright Royalty Judges heard 48 days of testimony, which filled 13,288 pages of transcript, and 192 exhibits were admitted. The docket contains 475 entries of pleadings, motions and orders.

D. Post-Hearing Submissions and Arguments

After the evidentiary phase of the proceeding, the participants were ordered to file Proposed Findings of Fact and Conclusions of Law on December 12, 2006, and Responses to those proposals on December 15, 2006. The parties were also ordered to submit Stipulated Terms on December 15, 2006, but none have been filed. Closing arguments were heard on December 21, 2006. Then the matter was submitted to the Copyright Royalty Judges for a Determination.[1]

On March 2, 2007, the Copyright Royalty Judges issued the initial Determination of Rates and Terms. Pursuant to 17 U.S.C. 803(c)(2) and 37 CFR Part 353, the parties filed Motions for Rehearing.[2] The Judges requested the parties to respond to the motions filed, in order to know the positions of each party on each of the issues raised in the motions, and ordered the parties to file written arguments in support of each motion. The parties filed responses and written arguments. Having reviewed all motions, written arguments and responses, the Judges denied all the motions for rehearing. Order Denying Motions for Rehearing, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2005–1 CRB DTRA (April 16, 2007). As reviewed in the said Order, none of the grounds in the motions presented the type of exceptional case where the Determination is not supported by the

[1] Hereinafter, references to written direct testimony shall be cited as ''WDT'' preceded by the last name of the witness and followed by the page number. References to written rebuttal testimony shall be cited as ''WRT'' preceded by the last name of the witness and followed by the page number. References to the transcript record shall be cited as ''Tr.'' preceded by the date and followed by the page number and the last name of the witness. References to proposed findings of fact and conclusions of law shall be cited as ''PFF'' or ''PCL,'' respectively, preceded by the name of the party that submitted same and followed by the paragraph number. References to reply proposed findings of fact and conclusions of law shall be cited as ''RFF'' or ''RCL,'' respectively, preceded by the name of the party and followed by the paragraph number.

[2] Motions were filed by DiMA, IBS, WHRB, NPR, Radio Broadcasters, RLI, Small Commercial Webcasters, SoundExchange and CBI.

evidence, is erroneous, is contrary to legal requirements, or justifies the introduction of new evidence. 17 U.S.C. 803(c)(2)(A); 37 CFR 353.1 and 353.2. The motions did not meet the required standards set by statute, by regulation and by case law. Nevertheless, the Judges were persuaded to clarify two issues raised by the parties. This Final Determination includes a transition phase for 2006 and 2007 to use Aggregate Tuning Hours (''ATH'') to estimate usage as permitted under the prior fee regime. This limited use of an ATH calculation option should facilitate a smooth transition to the fee structure adopted in this Final Determination. Next, the regulations are corrected to refer to ''digital audio transmissions'' in place of the phrase ''Internet transmissions.''

III. The Statutory Criteria for Setting Rates and Terms

A. The Statutory Background

1. Music Copyright Law in General

Section 102 of the Copyright Act of 1976 (the ''Copyright Act'') identifies various categories of works that are eligible for copyright protection. 17 U.S.C. 102. These include ''musical works'' and ''sound recordings.'' *Id.* at 102(2) and 102(7). The term ''musical work'' refers to the notes and lyrics of a song, while a ''sound recording'' results from ''the fixation of a series of musical, spoken, or other sounds.'' *Id.* at 101. A song that is sung and recorded will constitute a sound recording by the entity that records the performance, and a musical work by the songwriter. Another performer may record the same song and that performance will result in another sound recording, but the musical work remains with the songwriter. Under these facts, there are two sound recordings and one musical work as a result of the two recordings of the same song. Typically, a record label owns the copyright in a sound recording and a music publisher owns the copyright in a musical work. 5/4/06 Tr. 24:11–27:16 (Simson).

Under the 1976 Copyright Act, a copyright owner receives a bundle of exclusive rights set forth in section 106. 17 U.S.C. 106. Among them is the right to make or authorize the performance to the public of a copyrighted work. The performance right is granted to all categories of copyrighted works with one exception: Sound recordings. Thus, while the owner of a musical work enjoys the performance right, the owner of a sound recording does not.[3] Congress did not begin to address this inequality until the end of the twentieth century.

2. The DPRA

In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act (''DPRA''), Public Law 104–39, 109 Stat. 336 (1995), which added a new section 106(6) to the Copyright Act. That provision grants copyright owners of sound recordings a limited performance right to make or authorize the performance of their works ''by means of a digital audio transmission.'' 17 U.S.C. 106(6). Often referred to as the ''digital performance right,'' the right was further limited by the creation of a statutory license for certain nonexempt, noninteractive subscription services and preexisting satellite digital audio radio services. 17 U.S.C. 114. The statutory license permits these services, upon compliance with certain statutory conditions, to make those transmissions without obtaining consent from, or having to negotiate license fees with, copyright owners of the sound recordings they perform. *Id.* Congress established procedures to facilitate voluntary negotiation of rates and terms including a provision authorizing copyright owners and services to designate common agents on a nonexclusive basis to negotiate licenses—as well as to pay, to collect, and to distribute royalties— and a provision granting antitrust immunity for such actions. *Id.*

Absent agreement among all the interested parties, the Librarian of Congress was directed to convene a Copyright Arbitration Royalty Panel (''CARP'') to recommend royalty rates and terms. Congress directed the CARP to set a royalty rate for the subscription services' statutory license that achieves the policy objectives in section 801(b)(1) of the Copyright Act. *Id.*

Under the DPRA, copyright owners must allocate one-half of the statutory licensing royalties that they receive from the subscription services to recording artists. Forty-five percent of these royalties must be allocated to featured artists; 2½ percent of the royalties must be distributed by the American Federation of Musicians to non-featured musicians; and 2½ percent of the royalties must be distributed by the American Federation of Television and Radio Artists to non-featured vocalists. 17 U.S.C. 114(g).

[3] Indeed, copyright owners of musical works have enjoyed the performance right since the nineteenth century.

3. The DMCA

The new statutory license for digital audio transmission of sound recordings was expanded in the Digital Millennium Copyright Act of 1998 (''DMCA''), Public Law 105–304, 112 Stat. 2860 (1998). It provided that certain digital transmissions and retransmissions, typically referred to as webcasting, are subject to the section 106(6) digital performance right and that webcasters who transmit/retransmit sound recordings on an interactive basis, as defined in section 114(j), must obtain the consent of, and negotiate fees with, individual owners of those recordings. However, webcasting would be eligible for statutory licensing when done on a *non-interactive* basis. Accordingly, Congress created another statutory license in sections 114(d)(2) & (f)(2) for ''eligible nonsubscription transmissions,'' which include non-interactive transmissions of sound recordings by webcasters. 17 U.S.C. 114(d)(2). To qualify for that license, the webcaster must comply with several conditions in addition to those that the DPRA applied to preexisting subscription and satellite radio services. As with these service royalties, webcaster royalties are allocated on a 50–50 basis to copyright owners and to performers.

Congress adopted the DPRA voluntary negotiation and arbitration procedures for the DMCA webcaster performance license. 17 U.S.C. 114(e), (f). However, it changed the statutory standard for determining rates and terms. The new standard is to determine what ''most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' 17 U.S.C. 114(f)(2)(B).

Congress also recognized that webcasters who avail themselves of the section 114 license may need to make one or more temporary or ''ephemeral'' copies of a sound recording in order to facilitate the transmission of that recording. Accordingly, Congress created a new statutory license in section 112(e) for such copies and extended that license to services that transmit sound recordings to certain business establishments under the section 114(d)(1)(c)(iv) exemption created by the DPRA. Congress retained the DPRA voluntary negotiation and arbitration procedures for the section 112 ephemeral license. 17 U.S.C. 112(e)(2), (3). Congress again applied the willing buyer/willing seller standard applicable to the section 114 webcaster performance license. 17 U.S.C. 112(e)(4). The webcasting and

ephemeral statutory licenses created by the DMCA are the subject of this proceeding.

The two DMCA licenses were the subject of one prior proceeding. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings (Final Rule), 67 FR 45240 (July 8, 2002) (codified at 37 CFR part 261) (''Webcaster I''). After a recommendation from a CARP, the Librarian applied the statutory standard to determine rates and terms. Many of the parties in this proceeding participated in that prior proceeding.

4. The Reform Act

Congress enacted a new system to administer copyright royalties with the Copyright Royalty and Distribution Reform Act of 2004 (the ''Reform Act''), Public Law 108–419, 118 Stat. 2341. The Copyright Royalty Judges were established to perform the functions previously served by the Copyright Royalty Tribunal and the Librarian of Congress. They were appointed January 9, 2006, and took over this proceeding.

B. Section 114(f)(2)

1. The Statutory Language

The criteria for setting rates and terms for the section 114 webcaster performance license are enunciated under 17 U.S.C. 114(f)(2)(B), which provides in pertinent part:

> * * * Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties, including—
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> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and
>
> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. 114(f)(2)(B).

The statute further directs the Judges to set ''a minimum fee for each such type of service'' and grants the Judges discretion to consider the rates and terms for ''comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements'' negotiated under the voluntary negotiation provisions of the statute. *Id.*

2. The Relationship of the Statutory Factors to the ''Willing Buyer/Willing Seller'' Standard

Webcaster I clarified the relationship of the statutory factors to the willing buyer/willing seller standard. The standard requires a determination of the rates that a willing buyer and willing seller would agree upon in the marketplace. In making this determination, the two factors in section 114(f)(2)(B)(i) and (ii) must be considered, but neither factor defines the standard. They do not constitute additional standards, nor should they be used to adjust the rates determined by the willing buyer/willing seller standard. The statutory factors are merely to be considered, along with other relevant factors, to determine the rates under the willing buyer/willing seller standard. Webcaster I; In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, No. 2000–9 CARP DTRA 1 & 2 (''Webcaster I Carp Report'').

3. The Nature of ''The Marketplace''

The parties agree that the directive to set rates and terms that ''would have been negotiated'' in the marketplace between a willing buyer and a willing seller reflects Congressional intent for the Judges to attempt to replicate rates and terms that ''would have been negotiated'' in a hypothetical marketplace. Webcaster I CARP Report at 21. The ''buyers'' in this hypothetical marketplace are the Services (and other similar services) and this marketplace is one in which no statutory license exists. *Id.* See also Noncommercial Educational Broadcasting Compulsory License (Final rule and order), 63 FR 49823, 49835 (September 18, 1998) (''[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect 'fair market value.' ''). The ''sellers'' in this hypothetical marketplace are record companies, and the product being sold consists of a blanket license for the record companies' complete repertoire of sound recordings. Webcaster I, 67 FR 45244 (July 8, 2002).

4. The Appropriate Willing Buyer/Willing Seller Rate

As noted, the statute directs us to ''establish rates and terms that *most clearly* represent the rates and terms that would have been negotiated in the marketplace.'' 17 U.S.C. 114(f)(2)(B) (emphasis added). In the hypothetical marketplace we attempt to replicate, there would be significant variations, among both buyers and sellers, in terms of sophistication, economic resources, business exigencies, and myriad other factors. Congress surely understood this when formulating the willing buyer/willing seller standard. Accordingly, the Judges construe the statutory reference to rates that ''most clearly represent the rates * * * that would have been negotiated in the marketplace'' as the rates to which, absent special circumstances, most willing buyers and willing sellers would agree. Webcaster I, 67 FR 45244, 45245 (July 8, 2002); Webcaster I CARP Report at 25, 26.

C. Section 112(e)

The criteria for setting rates and terms for the section 112 ephemeral license are enunciated under 17 U.S.C. 112(e)(4), which provides in pertinent part:

> The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—
>
> (A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
>
> (B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. 112(e)(4). As does section 114, this section further directs the Judges to set ''a minimum fee for each type of service.'' 17 U.S.C. 112(e)(4). Although section 112 does not explicitly grant the Judges discretion to consider the rates and terms for comparable types of services, it does explicitly grant discretion to ''consider the rates and terms under voluntary license agreements'' negotiated under the provisions of the statute. 17 U.S.C. 112(e)(4). Accordingly, while the language of the two sections varies in minor respects, the Judges interpret the criteria for setting rates and terms as

essentially identical. See Webcaster I Order of July 16, 2001, at 5.

IV. Determination of Royalty Rates

A. Application of Section 114 and Section 112

Based on the applicable law and relevant evidence received in this proceeding, the Copyright Royalty Judges must determine rates for two licenses, the section 114 webcaster performance license and the section 112 ephemeral reproduction license. The Copyright Act requires that the Copyright Royalty Judges establish rates for each of these two licenses that most clearly represent those ''that would have been negotiated in the marketplace between a willing buyer and a willing seller'' and directs the Copyright Royalty Judges to set a minimum fee for each license. In the case of both licenses, the Copyright Act requires the Copyright Royalty Judges to take into account evidence presented on such factors as (1) whether the use of the webcasting services may substitute for or promote the sale of phonorecords and (2) whether the copyright owner or the service provider make relatively larger contributions to the service ultimately provided to the consuming public with respect to creativity, technology, capital investment, cost and risk. 17 U.S.C. 114(f)(2)(B) and 17 U.S.C. 112 (e)(4).

Having carefully considered the relevant law and the evidence received in this proceeding, the Copyright Royalty Judges determine that the appropriate section 114 performance license rate is a per performance usage rate for Commercial Webcasters and an annual flat per-station rate for Noncommercial Webcasters for use up to a specified cap coupled with a per performance rate for use above the cap, while the appropriate section 112 reproduction license rate is deemed to be included in the applicable respective section 114 license rates.

The applicable rate structure is the starting point for the Copyright Royalty Judges' determination.

B. The Rate Proposals of the Parties and the Appropriate Royalty Structure for Section 114 Performance Licenses

1. Commercial Webcasters

The contending parties present several alternative rate structures for Commercial Webcasters. In its final revised rate proposal, SoundExchange argues in favor of a monthly fee equal to the greater of: 30% of gross revenues or a performance rate beginning at $.0008 per performance in 2006 and increasing annually to $.0019 by 2010.[4] This fee structure is proposed for nonsubscription services and is modified to add a third alternative in its ''greater of'' formulation of a $1.37 per subscriber minimum for new subscription services.[5] An exception to this ''greater of'' formulation is proposed for so-called ''bundled services'' from which SoundExchange seeks a per performance rate of $.002375 to be adjusted each year by the change in the CPI–U. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 2–12.

By contrast, DiMA on behalf of certain large commercial webcasters, proposes a fee structure under which webcasters could elect a fee equal to either $.00025 per performance or $.0038 per Aggregate Tuning Hour (''ATH'') or 5.5% of revenue directly associated with the streaming service. However, DiMA applies only its per performance usage rate to ''bundled services'' situations where the bundle price to the consumer is not allocated as between the individual component parts of the bundle. DiMA PFF at ¶¶ 35–38.

Smaller commercial webcasters present varying proposals. SBR Creative Media, Inc., a privately owned commercial webcaster, proposes a fee structure under which webcasters can elect a fee equal to either a use metric of $.0033 per Aggregate Tuning Hour (''ATH'') or 4% of gross revenue. SBR Creative Media PFF at ¶ 19. The self-styled Small Commercial Webcasters,[6] in contrast to all the other commercial parties, propose a pure revenue-based metric equal to 5% of gross revenues. Small Commercial Webcasters PCL at ¶ 24.

Radio Broadcasters propose an annual flat fee[7] structure generally related to usage as reflected in the format of the radio station being simulcast over the web. For example, Radio Broadcasters propose that music-formatted stations pay a fee ranging from as little as $500 per annum for small stations in low revenue ranked markets to as much as $8,000 per annum for large stations in high revenue ranked markets, but further propose that news, talk, sports and/or business stations pay $250 per annum irrespective of station size in low revenue ranked markets and $750 per annum irrespective of station size in high revenue ranked markets. Finally, Radio Broadcasters propose that stations with mixed music/non-music formats pay a percentage of the music format fee, depending on the percentage of programming identified as music programming. Radio Broadcasters PFF at ¶¶ 325–338.

In short, among the parties on both sides who have proposed rates covering Commercial Webcasters, only Small Commercial Webcasters propose a fee structure based solely on revenue. However, in making their proposal, this group of five webcasters clearly is unconcerned with the actual structure of the fee, except to the extent that a revenue-based fee structure especially one in which the percent of revenue fee is a single digit number (i.e., 5%)—can protect them against the possibility that their costs would ever exceed their revenues.[8] Their only witness, Kurt Hanson, CEO/President of AccuRadio, LLC, in fact, provided testimony indicating that the Small Commercial Webcasters were, at bottom, concerned with the amount of the fee rather than the structure of the fee. (''Obviously, were there to be a sound recording royalty based on performances that was at an extremely low rate * * * a percentage-of-revenue model might not be required. And just as obviously, a confiscatory percentage-of-revenue rate would not allow these companies [the Small Commercial Webcasters] to survive.'') Hanson, WDT at 4 n.2. Small Commercial Webcasters' focus on the amount of the fee, rather than how it should be structured, is further underlined by the absence of evidence submitted by this group to identify a basis for applying a pure revenue-based structure to them. While, at times, they suggest that their situation as small

[4] The latter $.0019 per performance rate is to be adjusted by the change in the CPI–U from December 2005 to December 2009 (accordingly, if the CPI–U increases by 3% in each of these four twelve-month periods, the resulting per performance rate for 2010 would increase from $.0019 to $.00214).

[5] In addition, SoundExchange proposes an adjustment to its revenue alternative based on time spent listening to music for so-called ''non-music'' services, a per performance rate of $.002375 to be adjusted each year by the change in the CPI–U for ''bundled services'' and a 25% premium for transmissions terminating on wireless devices for nonsubscription services, new subscription services and bundled services.

[6] The Small Commercial Webcasters are AccuRadio, LLC; Digitally Imported, Inc.; Radioio.com, LLC; Discombobulated, LLC; 3WK, LLC and Radio Paradise, Inc.

[7] Radio Broadcasters further propose that the structure increase across the board by 4% annually over the term of the license.

[8] It must be emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, the normal free market processes typically weed out those entities that have poor business models or are inefficient. To allow inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners. Furthermore, it would involve the Copyright Royalty Judges in making a policy decision rather than applying the willing buyer/willing seller standard of the Copyright Act.

commercial webcasters requires this type of structure, there is no evidence in the record about how the Copyright Royalty Judges would delineate between small webcasters and large webcasters.[9] Similarly, while Mr. Hanson asserts that a percentage-of-revenue is necessary because ''this is a nascent industry'' or because small entrepreneurs require such a structure, 8/3/06 Tr. 49:12–22 (Hanson), he offers no evidence to support that assertion or to help define the parameters of the assertion. Furthermore, the only other self-styled small entrepreneur to offer testimony in this proceeding, SBR Creative Media Inc., specifically includes a usage metric in its rate proposal and neither SBR Creative Media, Inc. nor the Small Commercial Webcasters offers any evidence to distinguish between their respective situations.

While each of the remaining contending parties—SoundExchange, DiMA, Radio Broadcasters and SBR Creative Media, Inc.—proposes a fee structure for Commercial Webcasters that contains revenue-based elements as well as either usage elements or a usage alternative, from the evidence of record, the Copyright Royalty Judges conclude that numerous factors weigh in favor of a per-performance usage fee structure for Commercial Webcasters.

First, as aptly stated by Dr. Adam Jaffe, revenue merely serves as ''a proxy'' for what ''we really should be valuing, which is performances.'' Jaffe, WDT Section N, Designated Testimony (Jaffe WDT in Webcaster I at 22). By contrast, a per-performance metric ''is directly tied to the nature of the right being licensed, unlike other bases such as revenue * * * of the licensee.'' *Id.* (Emphasis in original.) The more intensively an individual service is used and consequently the more the rights being licensed are used, the more that service pays and in direct proportion to the usage.[10] Jaffe, WDT Section N, Designated Testimony (Jaffe WDT in Webcaster I at 21–22). As Dr. Jaffe points out, with a usage metric, the resultant ''scaling'' of the royalty paid to the extent of use ''is intuitively appealing and is a common feature'' of intellectual property licenses. Jaffe, WDT at 32. Dr. Jaffe notes that, by contrast, ''Revenue is a less exact proxy for the scale of activity, because the revenue that a licensee derives, even from its music-related activities can be influenced by a variety of factors that have nothing to do with music.'' *Id.* Therefore, Dr. Jaffe cautions that a revenue-based metric should only be used as a proxy for a usage-based metric where the revenue base used for royalty calculation is ''carefully defined to correspond as closely as possible to the intrinsic value of the licensed property.'' *Id.* The Copyright Royalty Judges do not find a sufficient clarity of evidence based on the record in this proceeding to produce a revenue-based metric that can serve as a good proxy for a usage-based metric. Furthermore, there was no persuasive evidence offered by any commercial webcasting/simulcasting party to indicate that a usage-based metric is not readily calculable and, that as a consequence, the Copyright Royalty Judges must resort to some proxy metric in reaching their fee determination.

Second, percentage-of-revenue models present measurement difficulties because identifying the relevant webcaster revenues can be complex, such as where the webcaster offers features unrelated to music. Webcaster I noted this particular difficulty. 67 FR 45249 (July 8, 2002). Mixed format webcasters/simulcasters continue to make up a significant part of the commercial webcasting market and, in a number of cases, generate the more significant portion of their revenues from non-music programming. RBX1; RBX7; RBX20; 7/27/06 Tr. 283:7–285:12 (Hauth). Clearly, questions surrounding the proper allocation of revenues related to music use in such instances present greater complexity than a straightforward use of a usage-based approach.[11]

Third, percentage of revenue metrics ultimately demand a clear definition of revenue so as to properly relate the fee to the value of the rights being provided, and no such clear definition has been proffered by the parties. Indeed, the definition of revenue has been a point of substantial contention between two of the parties in this proceeding. SoundExchange sought an expansive definition of revenue, ostensibly covering revenues from subscription fees, advertisements (of many kinds including advertisements directly and indirectly derived from webcasting), sales of products and commissions from third party sales, software fees and sales of data. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 12–17. But the Copyright Royalty Judges are not persuaded that all the elements of the SoundExchange definition of revenue have been shown, in every instance, to be related to the use of the rights provided to licensees.[12] For example, there is some evidence presented by the Radio Broadcasters that on-air talent, programming director contributions and marketing skills impact the revenues of simulcasting webcasters. Radio Broadcasters PFF at ¶¶ 234, 237, 240. DiMA has proposed a much more restrictive definition of revenue as part of its rate proposal which it seeks to support through the testimony of its witness, Donald Fancher. On the whole, we find little to recommend Mr. Fancher's testimony, but the Copyright Royalty Judges do observe that even Mr. Fancher conceded that, on various points, the DiMA proposed definition was unclear. 6/22/06 Tr. 292:11–295:14; 308:1–309:1; 311:15–312:10; 315:17–317:14 (Fancher). The absence of persuasive evidence of what constitutes an unambiguous definition of revenue that properly relates the fee to the value of the rights being provided militates against reliance on a revenue-based metric.

Fourth, the use of a revenue-based metric gives rise to difficult questions for purposes of auditing and enforcement related to payment for the use of the license. The per-performance approach involves the relatively straightforward application of a rate to reports of use (recordkeeping) data that is already required to be produced by the Services. See 37 CFR part 370. While audit and enforcement issues may arise even with a pure usage metric, the alternative use of a revenue-based metric will give rise to additional, different issues of interpretation and controversy related to how revenues are defined or allocated. See, for example, Radio Broadcasters PFF at ¶ 258 and 7/31/06 Tr. 78:3–11, 79:1–13 (Parsons). In other words, the introduction of multiple payment systems will augment

[9] Indeed, since none of the small commercial webcasters participating in this proceeding provided helpful evidence about what demarcates a ''small'' commercial webcaster from other webcasters at any given point in time, any determination that a revenue-based metric was somehow uniquely applicable to small commercial webcasters would be speculative.

[10] Dr. Erik Brynjolfsson is similarly of the opinion that ''the rates paid by a given company should take into account that different companies use different amounts of music.'' 11/21/06 Tr. 251:2–18 (Brynjolfsson).

[11] This is illustrated in the SoundExchange rate proposal where an additional adjustment is made to the proposed revenue rate where services conform to a definition of ''non-music services'' as measured by the listening time of end users. By contrast, in the same rate proposal no such adjustment needs to be made to the proposed usage rate for the same services. The added information necessary for the adjustment as well as the process of adjustment to the revenue-based metric clearly would raise the transaction costs of implementing a revenue rate structure as compared to the usage-based metric. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 11–12.

[12] Moreover, the mere process of measuring such an expansive array of revenues must necessarily raise transaction costs for the parties.

the transactions costs imposed on the parties.

Fifth, the way that the contending parties, in particular SoundExchange and DiMA, suggest using a revenue-based metric in their rate proposals does not square with the basic notion agreed to by their respective experts (Dr. Brynjolfsson for SoundExchange and Dr. Jaffe for DiMA) that the more the rights being licensed are used, the more payments should increase in direct proportion to usage. See supra at Section IV.B.1. SoundExchange seeks to use the revenue-based metric to insure that it will share in any revenue produced by the Services that is greater than what it would receive based on a usage rate coupled with actual usage. Pelcovits WDT at 28. This could result in a situation where the Services would be forced to share revenues that are not attributable to music use, but rather to other creative or managerial inputs. DiMA, on the other hand, seeks to employ a revenue-based metric to protect against the failure of revenues produced by the Services (particularly as they pursue a shift to advertising-supported business models) to rise to the level necessary to pay for music use based on actual usage. Winston WDT at 10. This could result in a situation in which copyright owners are forced to allow extensive use of their property without being adequately compensated due to factors unrelated to music use such as a dearth of managerial acumen at one or more Services. The similar potentiality that webcasters might generate little revenue and, under a revenue-based metric, produce a situation where copyright owners receive little compensation for the extensive use of their property was a concern that animated the Librarian to approve a per performance metric rather than providing for a revenue-based payment option in Webcaster I. 67 FR 45249 (July 8, 2002).

For all of the above reasons, the Copyright Royalty Judges conclude that evidence in the record weighs in favor of a per-performance usage fee structure for Commercial Webcasters. This does not mean that some revenue-based metric could not be successfully developed as a proxy for the usage-based metric at some time in the future by the parties if the problems noted above were remedied. It does mean that the parties to this proceeding have not overcome these problems in the context of the proposals they have offered in this proceeding.[13]

A further consequence of the Copyright Royalty Judges rejecting the revenue-based metric as a proxy for a usage-based metric is to eliminate the need for a rate structure formulated as a ''greater of'' or ''lesser of'' comparison between per performance metrics and alternative revenue-based metrics.[14] Therefore, the Copyright Royalty Judges determine that a per-performance rate structure will be utilized for eligible nonsubscription transmission services, new subscription services and bundled services and where such services are commercial Services.

2. Noncommercial Webcasters

The Copyright Royalty Judges also find that a revenue-based metric is not a good proxy for a usage-based metric as applied to noncommercial webcasters in the non-interactive webcasting marketplace because, in addition to suffering from the same shortcomings discussed supra at Section IV.B.1. in the context of the Commercial Webcasters,[15] no evidence of negotiated agreements applying a revenue-based metric to Noncommercial Webcasters has been presented by any of the parties.

Only one party in this proceeding, SoundExchange, proposes that Noncommercial Webcasters should be subject to a rate structure incorporating a revenue-based metric as one alternative means of payment. SoundExchange specifically proposes that Noncommercial Webcasters pay according to the same structure and rates applicable to Commercial Webcasters, previously summarized supra at Section IV.B.1.

The Noncommercial Webcasters propose a variety of rates that are (or could be read as) per station flat rates. For example, NPR proposes a flat fee of $80,000 per annum, with successive years after the first year increased by a cost-of-living adjustment as determined by the change in the CPI. NPR proposes that this flat fee cover all NPR (798) and CPB-qualified stations (estimated at 100 or 200). Stern WDT at 13; 6/27/06 Tr. 154:18–155:18 (Stern).

The NRBNMLC proposes that non-commercial, non-NPR music stations pay a flat annual fee consisting of the lesser of (a) $200 per Internet simulcast and up to two associated side channels or (b) $500 per group of up to five Internet simulcasts and up to two Internet-only side channels per simulcast. The NRBNMLC further proposes that for news, talk, business, teaching/talk, or sports stations the aforementioned annual fee alternatives drop to $100 and $250 respectively. Mixed format stations would pay a pro rata share of these annual fees based on the demonstrated music-talk programming breakdown. Finally, NRBNMLC proposes that all five years of such fees covering the 2006–2010 license term be paid in one lump sum at the beginning of the term, except that a broadcaster that stops streaming before the end of the term would be entitled to a pro rata refund.[16] NRBNMLC Fee Proposal August 1, 2006.

IBS' amended rate proposal seeks a $100 annual rate for large college stations and a $25 annual rate for

[13] While both SoundExchange and DiMA have pointed to a number of agreements covering music rights that embody an alternative revenue-based metric, they have not shown: (1) Whether those agreements have overcome these problems or, (2) if so, how those agreements have overcome these problems or, (3) most importantly, how their proposed rate structures embody comparable mechanisms for overcoming these problems. Nor have they demonstrated whether these other agreements have been negotiated with a revenue-based option in the context of comparable circumstances-for example, an agreement negotiated with a revenue-based alternative because of an inability of some services to account for performances would not be comparable to the circumstances at hand because of our recordkeeping requirements at 37 CFR part 370.

[14] In addition, while SoundExchange proposes a third alternative—a per subscription minimum dollar amount—to be applied to new subscription services, the Copyright Royalty Judges do not find the basis for this alternative structure to be supported by persuasive evidence. SoundExchange cannot be proposing this per subscription alternative because of a lack of music usage data from subscription services, because the per subscription alternative itself requires such usage data in order to make a pro rata distribution of the per subscription minimum to the record companies. See Pelcovits WDT at 22. Nor does SoundExchange present persuasive evidence that the availability of this per subscription alternative is necessary because it is easier to administer and thus will reduce transaction costs. Indeed, although SoundExchange makes it an alternative to the per-performance fee in its proposed structure, SoundExchange presents its purpose as equivalent to the function served by the per-performance fee in its proposed fee structure. See Pelcovits WDT at 28–29. Moreover, SoundExchange's own expert economist, Dr. Brynjolfsson, further notes that in cases where webcasters ''monetize'' the value of the sound recording license through subscriptions or advertising revenue, ''counting the number of plays is a good proxy'' for that value. 5/18/06 Tr. 116:9–117:14 (Brynjolfsson). For all these reasons, the Copyright Royalty Judges decline to establish such a duplicative structure.

[15] Indeed, the use of a revenue-based metric in connection with Noncommercial Webcasters may further exacerbate transactions costs where defining of revenue, accounting for revenue and auditing of such accounts involve different concepts for the noncommercial, non-profit entities that populate this marketplace as compared to the accounting concepts and approaches applicable to commercial entities. For example, NPR derives significant amounts of its revenues from several sources not typically found as a source of commercial service revenue, such as underwriting, donations, public funds and the NPR Foundation. NPR PFF at ¶ 18.

[16] NRBNMLC also proposes a decrease in its annual fees ''to match the per station fees of NPR if the NPR station fees are lower than the above-stated fees.'' NRBNMLC Fee Proposal August 1, 2006.

smaller college stations.[17] IBS Clarification of Common Rate Proposal (August 10, 2006).[18] CBI proposed a flat annual fee of $175 for educational stations. CBI Amended Introductory Statement at 6.

For the reasons discussed infra at Section IV.C.2.a., the Copyright Royalty Judges determine that Commercial Webcasters and certain Noncommercial Webcasters represent two different segments of the marketplace. In contrast to the general commercial marketplace, agreements produced by the parties in this proceeding covering noncommercial services typically structured payments as flat fees. See, for example, SERV–D–X 157. Furthermore, no evidence was presented by the parties that could be used in a precise way to convert such flat annual fees into a reliable per-performance metric. Consequently, only a per station metric could be ascertained from such flat fees.

Flat annual fees do not present the complexity, measurement difficulties, accounting and enforcement issues presented by revenue-based alternatives, and, as a result, do not increase transaction costs beyond what might be experienced under a usage-based fee structure. On the other hand, flat fees do permit increasing usage without increasing payment.

However, as noted infra at Section IV.C.2.a, the Copyright Royalty Judges have determined that in order to preserve the distinction between the commercial webcasters and certain noncommercial segments of the marketplace over the period of the license term, a cap on usage must be established for certain noncommercial webcasters.

In short, the Copyright Royalty Judges conclude that, on balance, the most appropriate rate structure for noncommercial services that can be reliably derived from the record of evidence is an annual flat per-station rate structure for use by certain noncommercial webcasters up to a specified cap coupled with a per performance rate for use by noncommercial services that exceed the cap.

[17] The IBS rates herein summarized were to be applicable only to noncommercial educational stations not covered by the annual lump sum payment proposed by NPR and CPB.

[18] IBS' original proposal consisted of a flat fee of $500 per year for music stations and $250 per year for non-music stations, with additional payments in the event that the webcaster exceeded 146,000 aggregate tuning hours in a month. Kass WDT at Ex. A.

C. The Section 114 Royalty Rates and Minimum Fees

1. Commercial Webcasters

a. The ''Willing Buyer/Willing Seller Standard''

As previously noted hereinabove, supra at Section IV.A., the Copyright Act requires that the Copyright Royalty Judges establish rates for the section 114 performance license that ''most clearly'' represent those ''that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' Both the copyright owners and the commercial services agree that the willing buyer/willing seller standard should be applied by the Copyright Royalty Judges in determining the rates for the section 114 license and both the copyright owners and the commercial services agree that those rates should reflect the rates that would prevail in a hypothetical marketplace that was not constrained by a statutory license. Finally, both copyright owners and commercial services agree that the best approach to determining what rates would apply in such a hypothetical marketplace is to look to comparable marketplace agreements as ''benchmarks'' indicative of the prices to which willing buyers and willing sellers in this marketplace would agree. SoundExchange PFF at ¶¶ 215–219; SoundExchange PCL at ¶¶ 4–27; DiMA and Radio Broadcasters JPFF at ¶¶ 75–80; DiMA and Radio Broadcasters JPCL at ¶¶ 28–9; DiMA PFF at ¶¶ 39–45; Radio Broadcasters PFF at ¶¶ 296–301; SBR Creative Media, Inc. PFF at ¶¶ 17; Small Commercial Webcasters PFF at ¶¶ 24–28.

However, the parties, to some extent, appear to disagree about the degree of competition among sellers required by law in the hypothetical marketplace, resulting in different definitions of the sellers in the hypothetical marketplace.[19] SoundExchange accuses the Services of seeking a marketplace characterized by perfect competition. DiMA and the Radio Broadcasters claim that SoundExchange is championing a marketplace characterized by monopoly power on the seller's side. SoundExchange PCL at ¶ 38; DiMA and Radio Broadcasters JPCL at ¶¶ 29, 36. We find that these extreme characterizations miss the mark.

The question of competition is not confined to an examination of the seller's side of the market alone. Rather, it is concerned with whether market prices can be unduly influenced by sellers' power or buyers' power in the market. This issue was addressed in Webcaster I. An effectively competitive market is one in which super-competitive prices or below-market prices cannot be extracted by sellers or buyers, because both bring ''comparable resources, sophistication and market power to the negotiating table.'' 67 FR 45245 (July 8, 2002). In other words, neither sellers nor buyers can be said to be ''willing'' partners to an agreement if they are coerced to agree to a price through the exercise of overwhelming market power.

Furthermore, we find that in the hypothetical marketplace that would exist in the absence of a statutory license constraint, the willing sellers are the record companies. Any cognizable entity smaller than the record companies makes little sense because, in such cases, the larger buyers among the Services would enjoy disproportionate market power resulting in below-market prices. At the same time, if the sellers' side of the market were characterized by so many sellers as to be consistent with perfect competition, the transaction costs to the buyers of the copyrights would likely be prohibitive.

Webcaster I made clear that ''the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies and the product consists of a blanket license for each record company which allows use of that record company's complete repertoire of sound recordings.'' 67 FR 45244 (July 8, 2002) (emphasis added). None of the parties has adduced persuasive evidence that this definition of sellers has been altered in the marketplace as a result of greater or lesser competition between these sellers since Webcaster I was issued. For example, no party provided any empirical evidence on the elasticity of the demand curve facing these firms in the market or, more importantly, whether it has changed since Webcaster I. Similarly, no party produced persuasive evidence that market share had changed substantially among the record companies in the hypothetical marketplace since Webcaster I.[20]

[19] For example, at one extreme, if no competition exists on the seller's side of the market (i.e., the seller is a monopolist), then the degree of competition observed describes the number of sellers in the marketplace (i.e., there is a single seller in the marketplace).

[20] Dr. Jaffe presents some testimony implying anti-competitive market share differences and the potentially collusive use of ''most-favored-nations'' clauses in the interactive music service marketplace. See Jaffe WRT at 6–16. However, the Copyright Royalty Judges do not find Dr. Jaffe's testimony persuasive even with respect to this

Continued

As articulated in the Copyright Act, the ''willing buyer/willing seller standard'' encompasses consideration of economic, competitive and programming information presented by the parties, including (1) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords and (2) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. Because we adopt a benchmark approach to determining the rates, we agree with Webcaster I that such considerations ''would have already been factored into the negotiated price'' in the benchmark agreements. 67 FR 45244 (July 8, 2002). Therefore, such considerations have been reviewed by the Copyright Royalty Judges in our determination of the most appropriate benchmark from which to set rates. We have further reviewed the evidence bearing on these considerations to determine if the benchmark agreements require any further adjustment based on any evidence of differences between the benchmark market and the target hypothetical market. See infra at Section IV.C.1.c.

b. Benchmarks For Setting Market Rates

Notwithstanding their general agreement that a benchmark approach is the best way to setting rates in this hypothetical marketplace, the parties disagree about what constitutes the appropriate benchmark indicative of the prices to which willing buyers and willing sellers in this marketplace would agree. SoundExchange maintains that the most appropriate benchmark agreements, as analyzed by its expert economist, Dr. Michael Pelcovits, are those found in the market for interactive webcasting covering the digital performance of sound recordings. SoundExchange PFF at ¶ 216. On the other hand, DiMA, Radio Broadcasters and Small Commercial Webcasters argue that the most appropriate benchmarks are agreements between the performing rights organizations (especially, ASCAP and BMI) and webcasters covering the digital public performance of musical works. DiMA PFF at ¶¶ 39–45; Radio Broadcasters PFF at ¶ 297; Small Commercial Webcasters PFF at ¶¶ 24–26. SBR Creative Media, Inc. claims analog over-the-air broadcast music radio as its benchmark, with reference to musical composition royalties paid by such broadcasters to the performing rights organizations (''PROs''). SBR Creative Media, Inc. Rahn WDT at 11.

We find, based on the available evidence before us, that the most appropriate benchmark agreements are those reviewed by Dr. Pelcovits in the market for interactive webcasting covering the digital performance of sound recordings.

i. The Interactive Webcasting Market Benchmark

The interactive webcasting market is a benchmark with characteristics reasonably similar to non-interactive webcasting, particularly after Dr. Pelcovits' final adjustment for the difference in interactivity. Both markets have similar buyers and sellers and a similar set of rights to be licensed (a blanket license in sound recordings). Both markets are input markets and demand for these inputs is driven by or derived from the ultimate consumer markets in which these inputs are put to use. In these ultimate consumer markets, music is delivered to consumers in a similar fashion, except that, as the names suggest, in the interactive case the choice of music that is delivered is usually influenced by the ultimate consumer, while in the non-interactive case the consumer usually plays a more passive role. Pelcovits WDT at 5–15. But this difference is accounted for in Dr. Pelcovits' analysis. In order to make the benchmark interactive market more comparable to the non-interactive market, Dr. Pelcovits adjusts the benchmark by the added value associated with the interactivity characteristic. Pelcovits WDT at 37–41. In short, the Copyright Royalty Judges find the Pelcovits benchmark to be of the comparable type that the Copyright Act invites us to consider. 17 U.S.C. 114(f)(2)(B) (''In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).'').

ii. SoundExchange's Proposed Corroborative Evidence

SoundExchange offers additional relevant evidence from the marketplace for other types of digital music services to corroborate Dr. Pelcovits' analysis by showing that, for many types of music services, a substantial portion of revenue is paid to sound recording copyright owners above the current statutory rate, just as it would be under the rate proposal that Dr. Pelcovits' analysis seeks to support. See, for example, summary chart of Universal Music Group agreements covering various digital music marketplaces at SoundExchange PFF at ¶ 338. We find these additional voluntary agreements covering such digital services as clip licenses, permanent audio downloads, etc. of some general corroborative value. These data show that, in many cases, the price paid by buyers for the rights to utilize a sound recording in various ways is as much as or higher than the rate proposed by Dr. Pelcovits as a result of his benchmark analysis.[21] This shows that the prevailing rates in these other markets do not appear to undermine his analysis—some indication of general reasonableness.

At the same time, SoundExchange offered further purportedly corroborative testimony by its economic expert, Dr. Brynjolfsson, which seeks to support its rate proposal based on an analysis of costs and revenues related to webcasting and of the ''surplus'' that would be generated over the course of the license period. Dr. Brynjolfsson testified that one approach to determining the price a seller would obtain in the market is to measure the ''surplus'' that would be generated when the seller's input is added to the buyer's service and sold to the public, and then to divide that ''surplus'' between the buyer and the seller. In order to make the division, it is necessary to determine the revenue that would be generated by the retail sale of the service and the service provider's other costs of providing the service (i.e., costs other than expenditures on the input sought to be valued). This requires certain information about the buyer, the seller and the marketplace to determine how the ''surplus'' would be divided. We find that the Brynjolfsson analysis relies on unsupported assumptions about market behavior and how negotiations take place in obtaining his results. For example, Dr. Brynjolfsson makes a questionable assumption that conditions in the real world justify the use of a 75% licensor to 25% licensee ratio in bargaining power in his models for this market. 5/18/2006 Tr. 120:1–124–3 (Brynjolfsson). No evidence from this market was provided to support this assumption. A different assumption of equal bargaining power would yield a different estimate of the proposed royalty rate. Similarly, other assumptions such as a 20% annual growth rate in the sell-out rates for

different marketplace. See infra at Section IV.C.1.b.iii..

[21] Although, little effort is made in the presentation of this corroborative data to reconcile differences that may exist between these markets and adjust for such differences.

banner ads and a 10% annual growth rate in the sell-out rate for in-stream advertising are not solidly supported. DiMA and Radio Broadcasters JPFF at ¶¶ 206, 208. Different assumptions for these numbers would clearly provide different bottom-line rate determinations in Dr. Brynjolfsson's models. Then too, Dr. Brynjolfsson inputs data into his models in a less than rigorous fashion. For example, he relies on Accustream data as a source for certain cost data without examining the methodology used by Accustream in compiling the data. 5/18/2006 Tr. 141:1–6 (Brynjolfsson). Dr. Brynjolfsson also uses such data to project future growth rates even though the source, Accustream, does not appear to discuss its methodology for collecting their data in the written report that supplies the data. SERV–D–X 37. Thus, if there is error in the original data stemming from the way it is collected, that error is compounded by applying growth rates to an erroneous base. Dr. Brynjolfsson also appears to have double-counted or miscounted certain types of revenue. DiMA and Radio Broadcasters JPFF at ¶¶ 215, 216. In short, questionable assumptions coupled with concerns over the reliability of the data used in the Brynjolfsson models cause us to regard the ultimate findings of these models as effectively undeterminable. For those reasons, the Copyright Royalty Judges find that the Brynjolfsson models do not provide additional corroboration of SoundExchange's benchmark analysis and the rates proposed.[22]

iii. Services' Objections to Pelcovits' Interactive Webcasting Market Benchmark Analysis Are Not Persuasive

The Services' objections to the Pelcovits benchmark analysis are not supported by persuasive evidence. Their major objections are reflected in Dr. Jaffe's written rebuttal testimony and boil down to two: (1) The claim that this benchmark market is not adequately competitive and (2) certain alleged methodological flaws in the Pelcovits approach. Jaffe WRT at 4–24.

As we have indicated hereinabove, supra at Section IV.C.1.a., the law does not require a perfectly competitive target market if that is the thrust of Dr. Jaffe's objections; therefore, neither does it require a perfectly competitive benchmark market because that would not be comparable to circumstances in the target market. Indeed, Webcaster I emphasizes that buyers and sellers participate in a ''competitive'' market for purposes of the law when they have comparable resources and market power.[23] 67 FR 45245 (July 8, 2002).

On the other hand, if the thrust of Dr. Jaffe's concerns are that the benchmark market is not sufficiently competitive to be similar to the competitive circumstances that prevail in the target hypothetical market, we find that the evidence does not support such a view. On the contrary, the evidence establishes that the benchmark market is sufficiently similar to the target hypothetical market to merit comparison. There are multiple sellers and buyers in each market—indeed many are the same buyers and sellers. Pelcovits WDT at 12–13. In other words, the weight of the evidence supports the Pelcovits benchmark analysis.

Dr. Jaffe's claim that buyers in the market for interactive webcasting face a different seller than the record companies because they need the portfolios of the four major record companies in order to provide a service to consumers is largely unsubstantiated.[24] Dr. Jaffe himself concedes the possibility for competition among the record companies for market share in the interactive market. SoundExchange PFF at ¶¶ 304–305.

At the same time, Dr. Jaffe's contention that the interactive webcasting benchmark market is highly concentrated on the seller's side is not supported by any evidence of a super-competitive impact on prices in the benchmark market. Further undermining his contention is Dr. Jaffe's own admission that market concentration on one side of the market (i.e., among sellers) need not necessarily result in an outcome that looks markedly different from a competitive outcome so long as the buyers in the same market have comparable market power. SoundExchange PFF at ¶ 196.

Nor does Dr. Jaffe provide any persuasive evidence to support a collusion allegation among the sellers in the interactive webcasting benchmark market. SoundExchange PFF at ¶ 312. And he fails to substantiate his claim that the presence of so-called most favored nations (''MFN'') clauses in certain agreements in the interactive webcasting market is suggestive of anti-competitive behavior. MFN clauses are not automatically indicative of tacit collusion—they may simply reflect the need for price flexibility in the face of uncertainty in long-term contracts.[25]

In short, Dr. Jaffe's concerns that the benchmark market is not sufficiently competitive to be similar to the competitive circumstances that prevail in the target hypothetical market amount to little more than the theoretical speculations of an academic offering a quick outline of possible criticisms without carefully considering the applicable facts or alternative explanations. We find that the available evidence does not support such a view.

Apart from his concerns about the competitive comparability of the interactive webcasting market benchmark to the hypothetical target market, Dr. Jaffe also raises methodological criticisms of the projected rate results obtained by Dr. Pelcovits from the latter's use of interactive webcasting as a benchmark. While raising interesting potential issues, Dr. Jaffe's critique fails in its search for persuasive evidence. For example, Dr. Jaffe complains that the interactivity adjustment made by Dr. Pelcovits is based on incorrect and internally inconsistent assumptions—i.e., the assumption that ''elasticity at market equilibrium is the same for interactive services and non-interactive services.'' Jaffe WRT at 17. First, it should be noted that even if Dr. Jaffe's complaint were supported by the record, it would not eliminate the interactive webcasting market as an appropriate benchmark. As Dr. Pelcovits correctly notes, ''if demand elasticity were to differ significantly between the two markets, it could increase the copyright fee or decrease it.'' Pelcovits WRT at 36 n.14. But we are not faced with that difficulty here because the available evidence tends to support Dr. Pelcovits' assumption that demand elasticities were likely to be very close in the relevant range of the demand curves. SoundExchange RFF at ¶¶ 117–118; Pelcovits WRT at 25–27.

[22] We do not intend to imply that all of the evidence offered by Dr. Brynjolfsson through his testimony is without value; rather, we simply find that his two formal models taken as a whole suffer from significant defects for the purposes at hand.

[23] In other words, a ''competitive'' price could be deemed to have been set in a marketplace where sellers and buyers had roughly equal bargaining power, because the resulting price would be much closer to the perfectly competitive price than to a price determined in circumstances where the sellers exercised pure monopoly power or the buyers exercised pure monopsony power. That is, counterveiling power has the effect of yielding a more competitive result than does the absence of such counterveiling power.

[24] Additionally, there was testimony that directly contradicts any suggested generalization that the repertoires of all four majors are necessary as a prerequisite prior to undertaking the operation of a consumer music service in the various digital music service markets. For example, Mr. Roback testified that Yahoo! was able to operate its custom radio channels without Universal Music for two years, even though Universal may account for nearly one-third of the market in terms of repertoire. 11/9/06 Tr. 17:13–21 (Roback).

[25] At the same time, it should be noted that Dr. Pelcovits did review the MFN clauses in the agreements in question and concluded they were not anti-competitive or collusive. 5/15/06 Tr. 207:5–16 (Pelcovits).

Dr. Jaffe also contends that Dr. Pelcovits improperly extrapolates fees for non-subscription or ad-supported services from a model based entirely on subscription services because subscription services only account for a small percentage of non-interactive services. Jaffe WRT at 22–24. He says, without empirical support, that this small fraction is not representative of all non-interactive listeners. Jaffe WRT at 22–24. The implication is that ad-supported services are the predominant business model now for non-interactive webcasting and that ad-supported services would necessarily pay less than subscription services to use the same music in their non-interactive services because their advertising revenues have not yet grown to the point where ad-supported services are more lucrative on a per-listener hour basis. However, this criticism, besides providing no information on the degree of substitution by consumers between the subscription and non-subscription options, fails to take into account any improvement in ad-supported revenues over the term of this licensing period. SoundExchange PFF at ¶¶ 320–321, 323–324. Therefore, to the extent that ad-supported revenues may not yet have equalized subscription revenues on a per-listener hour basis but are expected to grow over the term of this applicable license, SoundExchange's proposed phase-in of the per-performance rates to the level indicated by the benchmark analysis represents a wholly reasonable approach to dealing with this potential issue.

Finally, Dr. Jaffe contends that one or more of the key data items in Dr. Pelcovits' rate analysis must be incorrect because their strict application would produce a negative royalty rate. Jaffe WRT at 20–22. But this criticism ignores the profits earned by interactive services, or, alternatively, assumes without basis that the same dollar amount of profit should be earned by services in the non-interactive market.[26] Jaffe WRT at 20–21; SoundExchange RFF at ¶¶ 122–123. We find no merit in this flawed critique.

In sum, the Services' objections to the Pelcovits benchmark analysis are not persuasive. This does not mean that Dr. Pelcovits' analysis and presentation is without any warts. For example, Dr. Pelcovits failed to fully account in his written statement for the reasoning behind his choice of variables and the functional form used in his hedonic model to isolate the value of interactivity to consumers of online music services. But for the fact that he subsequently provided most of that information orally in response to questions from the Copyright Royalty Judges, 5/16/2006 Tr. 267:16–276:14 (Pelcovits), such an omission may have led to more serious questions about this aspect of his model. And a more comprehensive study of the relative price elasticities of demand in the interactive and non-interactive webcasting markets would have been a welcome addition to the available evidence on this point, even though the available evidence weighed in Dr. Pelcovits' favor. On the other hand, the Copyright Royalty Judges find that these critiques are not sufficient to undermine the basic thrust and conclusions of the Pelcovits benchmark analysis. Moreover, as noted supra at Section IV.C.1.b.ii., his analysis benefits from some general corroborative evidence.

iv. A Flawed Musical Works Benchmark Offered by Dr. Jaffe

We have also considered and rejected Dr. Jaffe's offer of agreements from the musical works marketplace as a benchmark. This benchmark analysis appears to be little more than a hasty attempt to revive and rehabilitate some similar arguments that failed to prevail in Webcaster I.

The Copyright Royalty Judges find that the benchmark analysis offered by Dr. Jaffe is fatally flawed for several reasons. First, Dr. Jaffe's benchmark analysis is based on a marketplace in which, while the buyers may be the same as in the target hypothetical marketplace, the sellers are different and they are selling different rights. Therefore, contrary to Dr. Jaffe's expectations that the prices paid for the rights in each respective market dealing with similar rights should be the same, substantial empirical evidence shows that sound recording rights are paid multiple times the amounts paid for musical works rights in the markets for ring tones, digital downloads, music videos and clip samples. Pelcovits WRT at 4; Eisenberg WRT at 7–14.

Second, the Copyright Royalty Judges find that Dr. Jaffe's equivalence argument also fails because of his reliance on the assumption of ''sunk costs'' as a justification. This assumption must be rejected on both theoretical and empirical grounds. Dr. Jaffe claims that, while the sellers in his benchmark market are not the same, they come to the negotiation from a similar position because in both his proposed benchmark market and in the hypothetical target market, the costs of producing the underlying intellectual property are ''sunk.'' Jaffe WDT at 23. According to Dr. Jaffe, this means ''there is no incremental cost imposed on either the musical work or sound recording by virtue of making the underlying intellectual property available for digital performance.'' [27] Jaffe WDT at 24. As a matter of theory, Dr. Jaffe's proposed benchmark analysis ignores the long-established pattern of investment in the recording industry. Thus, not only are there some initial sunk investments, but there is a requirement of repeated substantial outlays year after year or, in other words, the repeated ''sinking'' of funds. If sellers are faced with the prospect of not recovering such sunk costs, then the incentive to produce such sound recordings is diminished. And the record is replete with evidence of a substantially greater investment of this type in sound recordings as compared to musical works. SoundExchange PFF at ¶¶ 449–461. Furthermore, recording companies will necessarily make future investment decisions based on their best estimates of the revenue sources available to them in the future from all sources including revenue streams derived from the non-interactive webcasting of sound recordings.[28] SoundExchange PFF at ¶ 478; Brynjolfsson WRT at 6–8. Thus, to suggest that they ignore such costs in their approach to pricing makes little sense. It would be tantamount to suggesting that services such as Yahoo! or AOL or Microsoft would never consider the cost of their research and development programs when pricing their products.[29] In short, we decline to accept Dr. Jaffe's ''sunk costs'' justification for his proposed benchmark.

[26] Dr. Pelcovits also noted that a negative royalty rate would be unlikely to occur in a dynamically adjusting market. Pelcovits WRT at 30.

[27] Curiously, at this point in his analysis Dr. Jaffe appears to back away from his insistence on a ''competitive'' market because to maintain that position would lead to a logically inconsistent result in his benchmark analysis. Since, in a perfectly competitive market situation, price at equilibrium is equal to marginal cost, then, logically, the price for the rights in question could be no higher than zero. Therefore, Dr. Jaffe opts for a necessarily different undefined market structure by saying that here, even though the price should be zero, the resulting royalty would be some greater amount apparently determined by the relative bargaining power of the buyers and sellers. Jaffe WDT at 26. If this benchmark market results in a price that is higher than what is expected under perfectly competitive conditions, then clearly the sellers must be exercising some degree of market power.

[28] In other words, this is not just a static process concerned with recouping past investment costs, but a dynamic economic process concerned with obtaining greater resources for future creative efforts.

[29] Indeed, even Dr. Jaffe concedes that the costs of sound recordings not yet created are not sunk. 6/28/06 Tr. 99:7–101–7 (Jaffe).

Third, there is ample empirical evidence in the record from other marketplaces to controvert Dr. Jaffe's premise that the market for sound recordings and the market for musical works are necessarily equivalent. SoundExchange PFF at ¶¶ 483–495.

For all these reasons, the Copyright Royalty Judges find that Dr. Jaffe's proffered benchmark is not useful to our determination of an appropriate benchmark from which to derive applicable rates. We, therefore, adhere to the Pelcovits benchmark analysis as a superior tool for that purpose.

v. Other Proposed Benchmarks Rejected

One other benchmark was proposed in this proceeding by a commercial party. SBR Creative Media, Inc. claims analog over-the-air broadcast music radio as its benchmark, with reference to musical composition royalties paid by such broadcasters to the performing rights organizations. SBR Creative Media, Inc. Rahn WDT at 11. We find that this is virtually the same benchmark as that proposed by Dr. Jaffe on behalf of the Services and rejected in Webcaster I. 67 FR 45246–7 (July 8, 2002). SBR does nothing to remedy the deficiencies from which this proposed benchmark was shown to suffer in Webcaster I. Furthermore, this proposed benchmark suffers from the same deficiencies we find fatal with respect to Dr. Jaffe's proposed benchmark discussed supra at Section IV.C.1.b.iv. For all these reasons, the Copyright Royalty Judges find that the SBR Creative Media, Inc. proffered benchmark is not useful to our determination of an appropriate benchmark from which to derive applicable rates and, therefore, adhere to the Pelcovits benchmark analysis as a superior tool for that purpose.

c. Conclusion: The Interactive Webcasting Market Benchmark Provides the Best Benchmark for Setting Commercial Rates Without Further Adjustment for Either Substitution or Promotion Factors or the Relative Contributions Made by the Copyright Owners and Webcasting Services in Bringing the Copyrighted Works and the Services to the Public

As discussed supra at Section IV.C.1.a., the ''willing buyer/willing seller standard'' in the Copyright Act encompasses consideration of economic, competitive and programming information presented by the parties, including (1) the promotional or substitution effects of the use of webcasting services by the public on the sales of phonorecords and (2) the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public. Because we adopt a benchmark approach to determining the rates, we agree with Webcaster I that such considerations ''would have already been factored into the negotiated price'' in the benchmark agreements. 67 FR 45244 (July 8, 2002). Therefore, such considerations have been reviewed by the Copyright Royalty Judges in our determination of the most appropriate benchmark from which to set rates. Nevertheless, we have also further reviewed the evidence bearing on these considerations to determine if the benchmark agreements require any further adjustment based on any evidence of differences between the benchmark market and the target hypothetical market.

We find that no further adjustment is necessary to the Pelcovits benchmark analysis to account for any of these considerations. Dr. Pelcovits explicitly examined the promotion and substitution issues and ultimately found no empirical evidence to suggest a net substitution/promotion difference between the interactive and the non-interactive marketplaces. Pelcovits WRT at 17–27. Because only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence of such a difference obviates the need for such further adjustment. Furthermore, even if the absolute levels of promotion/substitution in the non-interactive market alone were somehow relevant, as the Services appear to suggest, we find that the Services presented no acceptable empirical basis for quantifying promotion/substitution for purposes of adjusting rates in that market.[30]

Similarly, the parties' evidence with respect to the relative contributions made by the copyright owner and the webcasting service with respect to creativity, technology, capital investment, cost and risk in bringing the copyrighted work and the service to the public does not persuade us that any further adjustment needs to be made to the Pelcovits benchmark to account for quantifiable differences related to these factors. We find that such factors are implicitly accounted for in the rates that result from negotiations between the parties in the benchmark marketplace. Moreover, because only the relative difference between the benchmark market and the hypothetical target market would necessitate an adjustment, the absence of solid empirical evidence of such a difference obviates the need for such further adjustment.

Finally, the Radio Broadcasters seek to differentiate their simulcasting operations from the operations of other commercial webcasters and, thereby, obtain a different, lower royalty rate. The record before us fails to persuade us that these simulcasters operate in a submarket separate from and non-competitive with other commercial webcasters. Indeed, there is substantial evidence to the contrary in the record indicating that commercial webcasters such as those represented by DiMA in this proceeding and simulcasters such as those represented by Radio Broadcasters in this proceeding regard each other as competitors in the marketplace. SoundExchange PFF at ¶¶ 1107–1110. Therefore, the Copyright Royalty Judges do not find a basis for setting a different, lower rate for these simulcasters as compared to other commercial webcasters. Webcaster I, at 67 FR 45255, 45272 (July 8, 2002), reached a similar conclusion in finding no basis for treating these simulcasters any differently with respect to the per performance commercial rate, and we find no facts to persuade us of a change in circumstance since then.

d. Rates and Minimum Fees Applicable to Commercial Webcasters

i. Determination of Per Play Rates for Commercial Webcasters

Because we find that the interactive webcasting market is a benchmark with characteristics reasonably similar to non-interactive webcasting, particularly after Dr. Pelcovits' final adjustment for the difference in interactivity, the Copyright Royalty Judges find that this benchmark supports the explicit annual usage rates[31] proposed by

[30] For example, the Radio Broadcasters strenuously assert that over-the-air-radio is promotional and therefore that simulcasting must be promotional. But they present no persuasive evidence that would be useful for quantifying the magnitude of this asserted effect either for over-the-air-radio or for non-interactive webcasting and deriving a method for translating such magnitudes into a rate adjustment. Indeed, the quality of evidence presented by the Services on this issue consisted largely of assertions, recollections of conversations clearly evidencing common ''puffing'' in a business context, or anecdotes recounting subjective opinions. On a similar record, Webcaster I found no basis for a downward adjustment of the simulcast rate to account for the promotional value associated with over-the-air broadcasts because the net impact was indeterminate. 67 FR 45255 (July 8, 2002).

[31] For the reasons indicated supra at Section IV.B.1, only usage rates are determined.

SoundExchange. Therefore, we find that the per play rate applicable to each year of the license for Commercial Webcasters [32] is as follows: a per play rate of $.0008 for 2006, a per play rate of $.0011 for 2007, a per play rate of $.0014 for 2008, a per play rate of $.0018 for 2009 and a per play rate of $.0019 for 2010.[33]

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

Note: See footnote 33

We find no basis for making further adjustments to this usage rate to reflect inflation [34] or bundling.[35]

We are persuaded by the evidence in the record to apply these usage rates without any further adjustment for wireless transmission to all Commercial Webcasters. While SoundExchange's proposed rates included a 25% premium for ''wireless services,'' the Copyright Royalty Judges find no persuasive basis in the record for such a so-called ''mobility premium.'' The proposed wireless premium was not grounded on the Pelcovits benchmark analysis that underlies SoundExchange's primary rate proposal. Indeed, Dr. Pelcovits specifically declined to do so because of the absence of any data on mobile interactive services. Pelcovits WDT at 60–61. The alternative data offered by Dr. Pelcovits on this issue is not persuasive. Most of the relatively limited data he offers fails to address salient differences between the markets and products represented by that data and the non-interactive webcasting market and its product offerings. In addition, SoundExchange fails to provide any persuasive evidence that a music service delivered to a tethered laptop computer via the Internet is valued differently in the marketplace than the same music service delivered to a laptop computer via the Internet over private or public wireless Internet networks using Wireless Fidelity (''WiFi'') technology. SoundExchange's proposal to exempt wireless transmissions over ''personal, short range residential networks'' from its proposed wireless premium also underlines its own recognition of the absence of a difference. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 7. Therefore, on the record before us, we do not find a sufficient basis to support a proposed premium for the wireless transmission of non-interactive webcasts.[36]

ii. Determination of Minimum Fee for Commercial Webcasters

Under 17 U.S.C. 114(f)(2)(B), the Copyright Royalty Judges are directed to set a minimum fee for each type of service. SoundExchange points out that the Webcaster I CARP noted that one purpose of the minimum fee was to ''protect against a situation in which a licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties'' and another purpose was ''to capture the intrinsic value of the licensee's access to the full blanket license, irrespective of whether the service actually transmits any performances.'' SoundExchange PFF at ¶ 1349. We find no evidence in the record that establishes an amount for such an ''intrinsic value'' and, therefore, focus on the administrative cost issue. Here again, we are provided with little evidence of the administrative cost per licensee,[37] especially for a webcaster who may be generating few royalties. The benchmark marketplace agreements generally provide for substantial advance annual minimum fees that are non-refundable, but recoupable against future royalties. As compared to these amounts, SoundExchange's proposal of an annual non-refundable, but recoupable $500 minimum per channel or station payable in advance is a substantially smaller amount. SoundExchange Revised Rate Proposal (filed September 29, 2006). Even though its proposed minimum fee is low, SoundExchange must anticipate that it will cover its administrative costs even in the absence of royalties. Therefore, we find SoundExchange's minimum annual fee proposal is reasonable and

[32] Commercial Webcasters include such licensees who are eligible nonsubscription transmission services or new subscription services, irrespective of whether they transmit music in large part or in small part.

[33] The Judges recognize that a smooth transition from the prior fee regime to the new fee structure adopted by the Judges hereinabove may be aided by permitting the limited use of an ATH calculation option. Such a transition option enhances the ability of some Services to effectuate speedy payments and, in so doing, improves the ability of copyright owners to more quickly obtain monies due. In short, such a transition measure is reasonably calculated to facilitate a smooth, speedy transition to the new fee structure adopted hereinabove by the Judges. Therefore, the usage fee structure established in this Final Determination will continue use of an ATH option for timely payment of fees due for the years 2006 and 2007. See table near footnote 33 reference.

The following Aggregate Tuning Hours (ATH) usage rate calculation options will be available for the transition period of 2006 and 2007: Note: [See table for footnote 33 above] where ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

[34] We do not find that the benchmark supports an additional Consumer Price Index adjustment to the usage rate in 2010. No evidence has been submitted by SoundExchange to support this additional adjustment by what is, at this point in time, an indeterminate amount.

[35] We find that a usage rate is more directly reflective of the rights being licensed than other alternative rate metrics. See supra at Section IV.B. Moreover, the evidence presented fails to persuade us that receiving a music service as part of a bundle of services necessarily results in a higher valuation of that music service by the consumer than if it had been delivered as a non-bundled service. For example, SoundExchange's claim for an uplifted rate for bundled services is supported by only one custom radio agreement addressing bundled services and that agreement is specifically identified by its expert, Dr. Pelcovits, as part of a class of agreements that are ''not a good benchmark.'' Pelcovits WRT at 35 n.43. Therefore, we find no sufficient basis upon which to determine a different usage rate for bundled services as compared to non-bundled services.

[36] We are also troubled by SoundExchange's proposal to apply the wireless premium even in cases where the service cannot ''distinguish between transmissions to wireless devices and fixed line devices.'' This proposal is not supported by any evidence that a presumption of ''wireless'' transmission ought to apply. To the contrary, SoundExchange's own witness, James Griffin admits that, at least in some cases, webcasters simply may not be able to distinguish between transmissions to wireless devices and fixed line devices. Griffin WDT at 32.

[37] At the same time, there is evidence that the royalty collection and distribution operations performed by SoundExchange consist of substantial work, such as processing payments and reports of use, matching information received from licensees with information on copyright owners and performers, undertaking related research and quality assurance work, allocating and distributing royalties and resolving errors or disputes. See Kessler WDT at 3–16.

applicable to Commercial Webcasters.[38] Moreover, since this flat dollar minimum fee is not adjusted over the term of the license to reflect the impact of inflation, this minimum fee is likely to have a declining financial impact on the costs of the Services over the term of the license. Therefore, we determine that a minimum fee of an annual non-refundable, but recoupable $500 minimum per channel or station [39] payable in advance is reasonable over the term of this license.

2. Noncommercial Webcasters

a. The Willing Buyer/Willing Seller Standard Revisited

As previously noted hereinabove, supra at Section IV.A., the Copyright Act requires that the Copyright Royalty Judges establish rates for the section 114 performance license that ''most clearly'' represent those ''that would have been negotiated in the marketplace between a willing buyer and a willing seller.'' Both copyright owners and noncommercial services agree that the best approach to determining what rates would apply in such a hypothetical marketplace is to look to comparable marketplace agreements as ''benchmarks'' indicative of the prices to which willing buyers and willing sellers in this marketplace would agree. However, the copyright owners and the noncommercial services disagree on an appropriate benchmark.

The copyright owners insist there is no basis to apply a benchmark other than that used in the commercial market; and consequently, they maintain that the rates supported by the interactive benchmark analysis apply with equal force to Commercial and Noncommercial Webcasters. SoundExchange's Revised Rate Proposal (filed September 29, 2006). The Noncommercial Webcasters, on the other hand, maintain that they are distinguishable from commercial services and, as such, require a different, lower rate. In effect, they claim to be different buyers and, hence, a different benchmark should be consulted. Joint Noncommercial PFF [40] at ¶ 10; Joint Proposed Findings of IBS and WHRB at 9–15. The Noncommercial Webcasters propose lower rates, described supra at Section IV.B.2., based on several alternative benchmarks-(1) the musical works rates applicable to over-the-air broadcasting pursuant to section 118 of the Copyright Act and (2) rates loosely related to the 2001 NPR–SoundExchange agreement which covered streaming from 1998 to 2004 (SERV–D–X 157). Joint Noncommercial PFF at ¶ 35; NRBNMLC PFF at ¶ 52.

Based on the available evidence, we find that, up to a point, certain ''noncommercial'' webcasters may constitute a distinct segment of the non-interactive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for Commercial Webcasters. A segmented marketplace may have multiple equilibrium prices because it has multiple demand curves for the same commodity relative to a single supply curve. An example of a segmented market is a market for electricity with different prices for commercial users and residential users. In other words, price differentiation or price discrimination is a feature of such markets. The multiple demand curves represent distinct classes of buyers and each demand curve exhibits a different price elasticity of demand. By definition, if the commodity in question derives its demand from its ultimate use, then the marketplace can remain segmented only if buyers are unable to transfer the commodity easily among ultimate uses. Put another way, each type of ultimate use must be different.[41]

Certainly, there is a significant history of Noncommercial Webcasters such as NPR and the copyright owners reaching agreement on rates that were substantially lower than the applicable commercial rates over the corresponding period. See, for example, the 2001 NPR–SoundExchange agreement which covered streaming from 1998 to 2004 (SERV–D–X 157). And, even though SoundExchange offers no formal proposal exempting any Noncommercial Webcasters from its proposed commercial rates, its own economic expert suggests a continuation of differentiated rates where the service offered by such Noncommercial Webcasters does not appear to pose any threat of making serious inroads into the business of those services paying the commercial rate. Brynjolfsson WRT at 42. Dr. Brynjolfsson suggests a cap on listeners beyond which Noncommercial Webcasters would no longer enjoy the lower rate in order to reduce ''the chance that small noncommercial stations will cannibalize the webcasting market more generally'' and thereby adversely affect the value of the digital performance right in sound recordings. *Id.* SoundExchange does not disavow Dr. Brynjolfsson's testimony on this point, even citing it in its proposed findings of fact. In short, SoundExchange can itself envision circumstances under which a continuation of some regime of differentiated prices would continue.

The Copyright Royalty Judges also can envision such circumstances. But, as a matter of pure economic rationale based on the willing buyer/willing seller standard, those circumstances undoubtedly must include safeguards to assure that, as the submarket for noncommercial webcasters that can be distinguished from commercial webcasters evolves, it does not simply converge or overlap with the submarket

[38] Webcaster I found a $500 minimum annual fee per licensee to be reasonable in light of the CARP's reasoning that the RIAA would not have negotiated a minimum fee that failed to cover at least its administrative costs. 67 FR 45262–3 (July 8, 2002). In the agreement to push forward rates and terms in 2003, commercial webcasters and SoundExchange agreed that minimum annual fees would equal $2500, or $500 per channel or station, but in no event less than $500 per licensee. 37 CFR 262.3(d)(2). Again, it is reasonable to anticipate that SoundExchange would not have negotiated a minimum fee that failed to cover at least its administrative costs.

[39] This $500 minimum fee is applicable to each individual station and each individual channel, including each individual ''side channel'' maintained by broadcasters. ''Side channels'' are channels on the website of a broadcaster that transmit eligible transmissions that are not simultaneously transmitted over-the-air by the broadcaster. Thus, a broadcaster who transmits one simulcast over the Internet and also transmits an eligible transmission over one side channel is subject to a minimum fee of $500 for each respective transmission, for a total in this example of $1,000. In other words, the minimum fee is separately applicable to each side channel. We find no basis in the record for distinguishing between side channels and other stations or channels with respect to a minimum fee that reflects the costs of license administration. We have found, hereinabove, that SoundExchange's proposal of a $500 minimum fee for such administration is clearly reasonable. Further, such administration costs will align more clearly with per station or per channel reports of use where such reports of use are submitted in satisfaction of recordkeeping requirements.

[40] The ''Joint Noncommercial Proposed Findings of Fact and Conclusions of Law'' were submitted by National Public Radio, Corporation For Public Broadcasting-Qualified Stations, the National Religious Broadcasters Noncommercial Music License Committee (''NRBNMLC''), and Collegiate Broadcasters, Inc.

[41] See for example, Burkett, John P., Microeconomics: Optimization, Experiments and Behavior, (Oxford University Press, 2006) at 162 for an introductory microeconomic description of price discrimination. Typically, the submarket characterized by lesser price elasticity will exhibit a higher price. All the economists who testified in this proceeding for both the Services and the copyright owners generally agreed with this description. See, for example, 5/16/06 Tr. 222:19–223:5 (Pelcovits); 11/21/06 Tr. 14:20–15:11 (Brynjolfsson); 11/8/06 Tr. 63:4–64:8 (Jaffe); Picard WRT at 2–7, 11/13/06 Tr. 191:5–196:1 (Picard). For an introductory discussion of price discrimination in copyright markets, see Congressional Budget Office, Copyright Issues in Digital Media, August 2004 at 23–24 or Landes, William M. and Richard A. Posner, the Economic Structure of Intellectual Property Law, (Cambridge, MA: The Belnap Press of the Harvard University Press, 2003) at 374–78, 389–90.

for commercial webcasters and their indistinguishable noncommercial counterparts.

The Copyright Royalty Judges have reached this view after a careful consideration of the characteristics that help to delineate the noncommercial submarket, juxtaposed against evidence in the record that those characteristics may be changing for at least some members of the submarket. For example, the noncommercial broadcasters cite a myriad of characteristics that they claim set them apart from commercial broadcasters. Noncommercial licensees are non-profit organizations. Johnson WDT at ¶ 5; Papish WDT at ¶¶ 4, 12; Robedee WDT at ¶ 2; 6/27/06 Tr. 63:1–21 (Stern); 8/7/06 Tr. 13:11–17, 21:10–12 (Kass). The noncommercial webcasters' mission is to provide educational, cultural, religious and social programming not generally available on commercial venues. See, for example, Stern WDT at 4 and 8/1/06 Tr. 21:11–22:1 (Johnson). Noncommercial webcasters have different sources of funding than ad-supported commercial webcasters-such as listener donations, corporate underwriting or sponsorships, and university funds. Joint Noncommercial PFF at ¶ 20. The implication is that noncommercial webcasters do not compete with commercial webcasters. But as webcasting has developed, some of these traits have become blurred. Public and collegiate radio stations no longer necessarily face a limited geographic audience, but rather their music programming is geographically unbounded so that such stations may compete with commercial webcasters even ''worldwide.'' SoundExchange PFF at ¶¶ 1105, 1185. Some college radio stations use the Live365 service to stream their simulcasts, making them just another consumer choice available on Live365 together with numerous commercial stations. SoundExchange PFF at ¶ 1186. Commercial Webcasters view Noncommercial Webcasters as competition for an audience interested in listening to music. SoundExchange PFF at ¶ 1116. And some Noncommercial Webcasters, such as NPR, may view Commercial Webcasters as their competition for audience as well. SoundExchange PFF at ¶ 1170. Some noncommercial stations have adopted programming previously found on commercial stations for use on noncommercial side channels or expanding the use of side channels as music outlets. SoundExchange PFF at ¶¶ 1117, 1123. Music programming found on noncommercial stations competes with similar music programming found on commercial stations. SoundExchange PFF at ¶ 1122, SoundExchange RFF at ¶ 284. Sponsorships appear to monetize webcasting in a fashion similar to advertising. SoundExchange PFF at ¶¶ 1130, 1134, 1166. Some noncommercial stations use the functional equivalent of marketing materials that emphasize the size, income and demographics of their audience in much the same manner that commercial stations make their advertising sales pitches. SoundExchange PFF at ¶¶ 1135, 1142. In other words, as webcasting has evolved, some convergence between some noncommercial webcasters and commercial webcasters can be observed ultimately resulting in competition for audience. Brynjolfsson WRT at 40–41. To the extent such competition occurs, market segmentation breaks down, obviating the need for a separate lower royalty rate.

b. Proposed Benchmarks and Other Relevant Evidence

The copyright owners take the position that the same benchmark applies to the noncommercial and the commercial services in the marketplace. Consequently, they maintain that the rates supported by the interactive benchmark analysis discussed supra at Section IV.C.1.b.i. apply with equal force to Commercial and Noncommercial Webcasters. Because we have found that, up to a point, ''noncommercial'' webcasters, may constitute a segment of the non-interactive webcasting market that in a willing buyer-willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for Commercial Webcasters, we necessarily find that the benchmark proposed by the copyright owners is applicable to only some Noncommercial Webcasters (i.e., those that cannot be clearly distinguished from their commercial counterparts). In other words, the copyright owners' benchmark does not apply to those Noncommercial Webcasters that can be said to constitute a distinct submarket in the non-interactive marketplace. The interactive market benchmark analysis is based on agreements in which all of the services are Commercial Webcasters. There are no agreements that form part of that analysis that would adequately gauge what a Noncommercial Webcaster in a distinctly different submarket would be willing to pay as a willing buyer for the rights at issue in this proceeding.

The Noncommercial Webcasters offer several alternative benchmarks applicable to all noncommercial Services without distinction as well: (1) The musical works rates applicable to over-the-air broadcasting pursuant to section 118 of the Copyright Act and (2) rates loosely related to the 2001 NPR–SoundExchange agreement which covered streaming from 1998 to 2004 (SERV–D–X 157). We find neither of these approaches adequately deals with the segmented marketplace.

First, the Noncommercial Webcasters would apply the rates determined using their benchmarks to all noncommercial Services, irrespective of whether they were part of a submarket in the marketplace for non-interactive webcasting that was distinctly different from commercial non-interactive webcasting.

Second, even within a distinctly different submarket, the benchmarks proposed by the Noncommercial Webcasters suffer from serious flaws. For example, the musical works benchmark proposed by the Services is based on a very different marketplace characterized by different sellers who are selling different rights. Then too, as previously discussed, there is ample evidence in the record from other relevant marketplaces to controvert the underlying premise of this proposed benchmark that the market for sound recordings and the market for musical works are necessarily equivalent. SoundExchange PFF at ¶¶ 483–495. Similarly, the 2001 NPR–SoundExchange agreement covering streaming from 1998 to 2004 does not provide clear evidence of a per station rate that could be viewed as a proxy for one that a willing buyer and a willing seller would negotiate today—it provided for a lump sum amount to cover the entire 74-month term of the contract with no amount specified for different years, and there is nothing in the contract or the record to indicate the parties' expectations as to levels of streaming or the proper attribution of payments for any given year or how additional stations beyond the 410 covered by the agreement were to be handled. Moreover, the transformation of this proposed benchmark by the offering service, the NRBNMLC, into proposed rates adds further problems. In NRBNMLC PFF at ¶ 57, the entire lump sum payable under the 2001 NPR–SoundExchange agreement is divided by 798 stations to arrive at an estimated annual fee of less than $60 per station. But, as previously noted, the agreement in question covered only about half as many stations (410) and dividing the stated lump sum by 410 stations over the stated 74-month term of the agreement would yield a per station rate

twice the amount calculated by NRBNMLC. Furthermore, NRBNMLC's calculation does not add any adjustment for the time value of money in the latter years of the contract[42] nor add any adjustment to account for the erosion in the purchasing power of the dollar since 2004.[43] Finally, none of the final rate proposals[44] of the Noncommercial Webcasters would cover the minimum annual fee determined for Commercial Webcasters.

In short, we find neither SoundExchange's proposals based on its benchmark nor the Noncommercial Webcasters' proposals based on their suggested benchmarks adequate to provide a basis for determining the rates to be applicable to that part of the noncommercial market for non-interactive webcasting that can be identified as a distinct submarket from the commercial market. However, we observe that certainly the bare minimum that such services should have to pay is the administrative cost of administering the license. There is no evidence in the record to suggest that the submarket in which a Noncommercial Webcaster may reside would yield a different administrative cost for SoundExchange as compared to the administrative costs associated with Commercial Webcasters and SoundExchange, notably, makes no distinction between webcasters with respect to the $500 minimum fee. Webcaster I affirmed the notion that all webcasters—all Noncommercial Webcasters as well as all Commercial Webcasters—should pay the same minimum fee for the same license. 67 FR 45259 (July 8, 2002). We also find no basis in the record for distinguishing between Commercial Webcasters and Noncommercial Webcasters with respect to the administrative cost of administering the license.[45] Therefore, we determine that a minimum fee of an annual non-refundable, but recoupable $500 minimum per channel or station[46] payable in advance is reasonable over the term of this license.

Because this minimum fee of $500 is meant to cover administrative costs, it does not address actual usage. Therefore, it would be reasonable to add at least the bare minimum suggested by the Services' proposals as payment for usage to the $500 minimum fee for administration. However, based on the available evidence, we find that past practice has been to treat the minimum fee as recoupable against usage charges. Therefore, we have no basis upon which to add a usage element that is not recoupable to the minimum fee for this distinctive submarket of noncommercial webcasters. Moreover, we note that this minimum fee corresponds to the $500 original fee proposal of IBS and, therefore, demonstrates that, at least for some webcasters in the relevant submarket, the $500 amount represented a ceiling beyond which they would not be willing buyers. Kass WDT at Exhibit A.

We turn next to the derivation of a cap to delineate the boundaries of the submarket for which the effective $500 flat fee rate will apply.

c. Cap To Delineate Submarket and Rates and Minimum Fees Applicable to the Various Noncommercial Webcasters

Because there is evidence in the record that some Noncommercial Webcasters typically have a listenership of less than 20 simultaneous listeners—see, for example 8/2/06 Tr. 137 (Robedee) and 8/2/06 Tr. 243 (Willer)—Dr. Brynjolfsson suggests a cap of 20 simultaneous listeners (or about 14,600 ATH[47] per month) as the boundary for the noncommercial webcasting submarket to be subject to a lower rate.[48] At this level of operation, such a small Noncommercial Webcaster could not be viewed as a serious competitor for commercial enterprises in the webcasting marketplace. We find Dr. Brynjolfsson's suggested line of demarcation too limiting. Size here is only a proxy that aims to capture the characteristics that delineate the noncommercial submarket. See our consideration of these characteristics supra at Section IV.C.2. And, there is evidence in the record that some larger Noncommercial Webcasters, such as the typical NPR station extant in 2004, may also be distinguished from Commercial Webcasters. Indeed, the evidence of convergence in the record appears to apply more clearly to the stations at the larger end of the range of NPR station size. See, for example, SoundExchange PFF at ¶ 1122, SoundExchange RFF at ¶ 284.

The 2001 NPR-SoundExchange agreement covered the typical NPR webcasting station at a rate substantially less than the rate that applied to Commercial Webcasters as of 2004. Based on the available evidence, the typical NPR station in 2004, then, would not have been treated as the functional equivalent of a commercial station. This is significant because the latest available data on what might constitute a typical NPR streaming station consists of a survey of NPR stations undertaken in 2004. See SoundExchange Trial Ex. 67 (NPR Digital Music Rights Station Survey, 2004). According to that survey, the NPR stations averaged 218 simultaneous streaming listeners per station (or the equivalent of 159,140 ATH per month). This average (218) or a lesser number of listeners was exhibited by 80% of all of the NPR stations engaged in streaming that responded to the survey—in short, it encompassed the experience of all but a handful of NPR stations positioned at the extreme high end of the listenership

[42] Receiving the 2003 and 2004 fees well in advance of the year earned is more valuable to the recipient because it can be invested and earn interest that would not be available if paid when actually due.

[43] Purchasing power loss is complicated by the lack of attribution of amounts to particular years in the contract. Thus, the amount calculated by the NRBNMLC may be, at best, an average for the period. Therefore, a higher amount than that average would be the proper target for adjustment for the erosion in purchasing power since 2004.

[44] CBI's final proposed fees ranged from $25 to $175 per station; the NRBNMLC's proposed fees ranged up to $200 per simulcast but with up to two associated channels subsumed within that amount. NPR's proposed fees were $80,000 to cover at least 798 NPR stations (and an undetermined number of CPB stations) or approximately $100 per station.

[45] Moreover, even in the musical works benchmark market proposed by some Services such as the NRBNMLC, the minimal amount that a webcaster paid to cover the combined works administered by the three PROs was $636 for college stations in 2006 and $1135 for other public broadcasting entities—that is more than the minimum rate for a single station determined for the section 114 license hereinabove. For a similar analogy, see Webcaster I, 67 FR 45259 (July 8, 2002).

[46] This $500 minimum fee is applicable to each individual station and each individual channel, including each individual ''side channel'' maintained by broadcasters. ''Side channels'' are channels on the website of a broadcaster that transmit eligible transmissions that are not simultaneously transmitted over-the-air by the broadcaster. Thus, a broadcaster who transmits one simulcast over the Internet and also transmits an eligible transmission over one side channel is subject to a minimum fee of $500 for each respective transmission, for a total in this example of $1,000. In other words, the minimum fee is separately applicable to each side channel. We find no basis in the record for distinguishing between side channels and other stations or channels with respect to a minimum fee that reflects the costs of license administration. We have found, hereinabove, that SoundExchange's proposal of a $500 minimum fee for such administration is clearly reasonable. Further, such administration costs will align more clearly with per station or per channel reports of use where such reports of use are submitted in satisfaction of recordkeeping requirements.

[47] Aggregate Tuning Hours or ATH refers to the total hours of programming transmitted to all listeners during the relevant time period. Thus, one hour of programming transmitted to 20 simultaneous listeners would produce 20 aggregate tuning hours or 20 ATH. The number of ATH in a month could be calculated by multiplying the average number of simultaneous listeners by the average potential listening hours in a month or 730 (i.e., 365 days in a year multiplied by 24 hours in a day then divided by 12 months). Applying this calculation to an average of 20 simultaneous listeners yields 14,600 ATH per month.

[48] In contrast, the original IBS proposal had a cap of 146,000 ATH below which an annual per station rate of $500 would apply. Kass WDT at Exhibit A.

distribution.[49] See SoundExchange Trial Ex. 67 (NPR Digital Music Rights Station Survey, 2004) at CRB–NPR000036, CRB–NPR000054–57. Therefore, we find that a cap structured to include the typical NPR experience that was viewed by the parties as not being subject to commercial rates, results in a cap of 159,140 ATH per month.

Again, we stress that this cap is only a proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters in order to delineate a distinct noncommercial submarket in which willing buyers and willing sellers would have a meeting of the minds that would result in a lower rate than the rate applicable to the general commercial webcasting market.[50] Mere size alone, without evidence of the other characteristics that define membership in the noncommercial submarket discussed supra at Section IV.C.2.a., does not make a webcaster eligible for this lower rate. Members of this noncommercial submarket, by definition, are not serious competitors with Commercial Webcasters.[51]

A careful review of the record also does not persuade us to make any further adjustment to the lower $500 per station rate described hereinabove to account for such considerations as (1) the promotional or substitution effects on CD sales of webcasting by members of the noncommercial submarket or (2) the relative contributions made by copyright owners and webcasting services with respect to creativity, technology, capital investment, cost and risk. There is no showing of a quantitative effect of these considerations that is not already embraced within the lower rate we have set. Furthermore, inasmuch as that lower rate is also encompassed by the minimum fee necessary to support administration of the license, no showing has been made by any Noncommercial Webcaster that such administrative costs are somehow overborne by such considerations. Similarly, with respect to the higher rate (i.e., the Commercial Webcaster rate) applicable to Noncommercial Webcasters above the monthly 159,140 ATH cap, we find that no further adjustment is required for the same reasons that we found no such adjustment necessary for Commercial Webcasters subject to the commercial rate we set. See supra at Section IV.C.1.c.

In summary, first, we determine that the minimum fee applicable to Noncommercial Webcasters is an annual non-refundable, but recoupable[52] $500 minimum per channel or station payable in advance. In other words, we find no basis for distinguishing between Commercial Webcasters and Noncommercial Webcasters with respect to the minimum fee. See supra at Section IV.C.2.b and Section IV.C.2.c. Second, the following rates apply to Noncommercial Webcasters:[53] (1) an annual per station or per channel rate of $500 for stations or channels will constitute full payment for digital audio transmissions totaling not more than 159,140 ATH per month and (2) if in any month a Noncommercial Webcaster makes digital audio transmissions in excess of 159,140 ATH per month, then the Noncommercial Webcaster will pay additional usage fees[54] for digital audio transmissions of sound recordings in excess of the cap as follows: a per play rate of $.0008 for 2006, a per play rate of $.0011 for 2007, a per play rate of $.0014 for 2008, a per play rate of $.0018 for 2009 and a per play rate of $.0019 for 2010.[55] As indicated supra at Section IV.C.d.1., we find no basis for making further adjustments to the usage rates to reflect inflation or bundling.

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

Note: See footnote 55

D. The Section 112 Royalty Rates and Minimum Fees

1. Background

Section 112(e) of the Copyright Act directs the Copyright Royalty Judges to establish rates and terms for the making of ephemeral copies of digital recordings to enable or facilitate the transmission of those recordings under the statutory license in section 114. As is the case with the section 114 license, we are tasked with setting rates and terms that ''most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller,'' as well as establish ''a minimum fee for each type

[49] The reason the average (218) or a lesser number encompassed so many stations is that several very large stations at the upper end of the distribution influenced the average. This is statistically apparent from a comparison of the average (218) with the median number of simultaneous listeners (50).

[50] The Services also advance various public policy considerations which they maintain militate in favor of lower rates. However, the Copyright Act is clear that we are required to apply a willing buyer/willing seller standard in determining rates for all types of participants in the marketplace. We decline to deviate from this standard. We further decline to usurp the authority of Congress to consider potential public policy concerns and, if it chooses, to establish special nonmarket rates for certain noncommercial services.

[51] On the other hand, a Commercial Webcaster with an audience of less than 219 simultaneous listeners is, nothwithstanding its size, a direct competitor to other Commercial Webcasters.

[52] In effect, payment of the $500 minimum administrative fee by Noncommercial Webcasters whose monthly ATH is below the cap will satisfy the full royalty obligations of such webcasters because it fully encompasses the per station usage fee. 37 CFR 380.3(b). Therefore, as a practical matter, recoupment does not come into play for such webcasters.

[53] Noncommercial Webcasters include such licensees who are eligible nonsubscription transmission services or new subscription services, irrespective of whether they transmit music in large part or in small part.

[54] Subject to the credit attributable to any unused balance of the annual minimum fee pursuant to 37 CFR 380.3(b).

[55] The Judges recognize that a smooth transition from the prior fee regime to the new fee structure adopted by the Judges hereinabove may be aided by permitting the limited use of an ATH calculation option. Such a transition option enhances the ability of some Services to effectuate speedy payments and, in so doing, improves the ability of copyright owners to more quickly obtain monies due. In short, such a transition measure is reasonably calculated to facilitate a smooth, speedy transition to the new fee structure adopted hereinabove by the Judges. Therefore, the usage fee structure established in this Final Determination will continue use of an ATH option for timely payment of fees due for the years 2006 and 2007. Note: [See table near footnote 55 reference.]

The following Aggregate Tuning Hours (ATH) usage rate calculation options will be available for the transition period of 2006 and 2007: where ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

of service offered by transmitting organizations.'' 17 U.S.C. 112(e)(4). The types of ''economic, competitive, and programming information'' that we are to examine is the same for the section 112 license as it is for the section 114 license. *Id.*

Webcaster I set the royalty fee for the section 112 license at 8.8% of the total royalty fee by a Service under the section 114 license. 67 FR 45240, 45262 (July 8, 2002). This fee, as a separate charge, was not part of the 2003 ''push forward'' of the Webcaster I rates negotiated by SoundExchange and the Services. Rather, the parties agreed to incorporate the fee for section 112 within the rates for section 114 (which increased by a modest $0.000062 per performance over the Webcaster I rates), but the regulations adopting their agreement provided that of the total section 112/114 fee, 8.8% was ''deemed'' to comprise the charge for ephemeral recordings. 37 CFR 262.3(c).

2. Proposals of the Parties

SoundExchange proposes to carry forward the combination of section 112 and 114 rates from the prior license period, including the ''deeming'' of 8.8% of the total fee owed by Services as constituting the section 112 charge. SoundExchange's Revised Rate Proposal (filed September 29, 2006) at 4. DiMA agrees with this proposal. DiMA RFF at ¶ 115. Radio Broadcasters and the NRBMLC also believe that the fee for the section 112 license should be combined with that for section 114, but oppose the attribution of an 8.8% value for the section 112 license. They argue that the effect is to hide an independent value for the section 112 license within the overall fee even though SoundExchange failed, in their view, to provide any evidence to justify the 8.8% value. Radio Broadcasters ''take no position as to the percentage of the overall royalty that is to be designated as the portion attributable to the making of ephemeral copies,'' but submit that ephemeral copies have no economic value separate from the value of the performances they effectuate. Radio Broadcasters PFF at ¶ 319. The NRBMLC also contends that ephemeral copies have no independent economic value, citing the Copyright Office's 2001 DMCA Section 104 Report in support. NRBMLC PFF at ¶¶ 60, 62.

None of the other parties offer specific proposals as to section 112 rates. SBR Creative Media, Inc. combines section 112 with section 114 in its request for a single fee, while CBI asserts that its stations have no need of the section 112 license. SBR PFF at ¶ 14; CBI PFF at ¶ 19.

3. The Record Evidence

While the record in Webcaster I regarding the section 112 license was thin,[56] it is slimmer still in this proceeding. SoundExchange proffers that because copyright owners and performers agreed to include the section 112 charge within the section 114 fee in the 2003 negotiation provided that there was a recognition that section 112 constituted 8.8% of the total value, this is ''strong evidence'' of what copyright owners and performers believe to be the value of the section 112 license. SoundExchange PFF at ¶ 1370. But see SoundExchange PFF at ¶ 1371 (conceding that ''[t]here has been little evidence adduced on the value of ephemeral copies * * *''). SoundExchange further contends that two marketplace agreements—the WMG-Next Radio agreement for a custom radio service and the SONY BMG-MusicMatch custom radio agreement—support its assertion that 8.8% is within the zone of reasonableness. Both of these agreements provide that 10% of the overall fees for streaming are attributable to the making of ephemeral copies. SoundExchange Ex. 002 DR; SoundExchange Ex. 004 DR.

Radio Broadcasters and the NRBMLC counter that none of SoundExchange's witnesses discussed proposed rates or values for ephemeral recordings in written or oral testimony. Instead, they point to testimony of Adam Jaffe offered in Webcaster I that ephemeral copies have no independent economic value from the value of the public performances that they effectuate, Jaffe 2001 WDT at ¶ 82; Jaffe 2001 WRT at 81; 2001 Tr. 6556:10–13 (Jaffe), and offer the Copyright Office's 2001 DMCA Section 104 Report in support of Dr. Jaffe's view.

4. Conclusion

Of the thousands of pages of testimony and exhibits submitted by the parties in this proceeding, less than twenty of the pages are devoted to any discussion of the section 112 license and ephemeral copies. It is therefore evident that the parties consider the section 112 license to be of little value at this point in time, which may explain why SoundExchange is content to roll whatever value the license may have into the rates for the section 114 license. Nevertheless, SoundExchange asks the Copyright Royalty Judges to bless its proposal that whatever the royalty fee for the section 114 may be, 8.8% of that fee constitutes the value of the section 112 license. We decline to accept SoundExchange's invitation for two reasons.

First, the section 112 license requires us to determine the rate or rates that would have been negotiated between a willing buyer and a willing seller. SoundExchange's valuation of 8.8% is not a rate. Services will not be paying 8.8% more in total royalty fees because of this valuation, nor will they be subtracting 8.8% from their charge if they choose not to avail themselves of the section 112 license. Rather, the 8.8% valuation is nothing more than an effort to preserve a litigation position for future negotiations that the section 112 license has some independent value, as it did in Webcaster I. It is understandable why DiMA would not find the 8.8% figure objectionable since it does not represent any additional charges to its members in this proceeding.

Second, the paucity of the record prevents us from determining that 8.8% of the section 114 royalties is either the value of or the rate for the section 112 license. SoundExchange's assertion that its 8.8% proposal is ''strong evidence'' of copyright owners' and performers' belief as to the appropriate rate applicable to section 112 is bootstrapping. SoundExchange did not present any persuasive testimony or evidence from copyright owners or performers on this point. We also do not find the WMG-Next Radio and the SONY BMG-MusicMatch agreements to be supportive of an 8.8% rate for ephemeral copies, which SoundExchange asserts are evidence of marketplace negotiations and establish a ''zone of reasonableness'' for section 112 rates in the 10% range. These agreements are for custom radio, which SoundExchange has long avowed is not DMCA compliant, and both have expired. SoundExchange Ex. 002 DR at 10 (WMG-Next Radio Solutions webcasting agreement); SoundExchange Ex. 004 DR at 14 (SONY BMG-MusicMatch Internet radio agreement). More importantly, the 10% figure in both is not a rate but is, like SoundExchange's proposal, a proclamation as to how much of the total fees paid by Next Radio and MusicMatch are attributable to the making of ephemeral copies. Since the 10% figure does not represent any actual monies to be paid by Next Radio or MusicMatch, it can hardly be argued that those agreements are marketplace evidence of negotiated royalty rates for the section 112 license.

[56] See Webcaster I CARP Report at 99–103 (speculating as to the reasons why the parties themselves seemed to attach little importance to the section 112 license).

We are left with a record that demonstrates that, since the expiration of section 112 rates set in Webcaster I, copyright owners and performers are unable to secure separate fees for the section 112 license. The license is merely an add-on to the securing of the performance right granted by the section 114 license. SoundExchange's proposal to include the section 112 license within the rates and minimum fees set for the section 114 license reflects this reality and we accept it. In so doing we decline, for the reasons stated above, to ascribe any particular percentage of the section 114 royalty as representative of the value of the section 112 license.[57]

V. Terms for Royalty Payments Under the Section 112 and 114 Statutory Licenses

A. The Statutory Standard

Sections 112(e)(3) and 114(f)(2)(A) of the Copyright Act, 17 U.S.C., require the Copyright Royalty Judges to adopt royalty payment terms for the section 112 and 114 statutory licenses.[58] It is established that the standard for setting terms of payment is what the record reflects would have been agreed to by willing buyers and willing sellers in the marketplace. Webcaster I, 67 FR 45240, 45266 (July 8, 2002). It is not established, however, whether the terms adopted must, or should, be administratively feasible or efficient.

In Webcaster I the parties agreed to a set of terms and, with the exception of a few disputed terms, presented them to the CARP for acceptance. In adopting the parties' proposed terms, the CARP declined to make a determination as to whether they were feasible or efficient and deferred to the judgment of the Librarian of Congress. Webcaster I CARP Report at 129. The Librarian declined to address the issue as well and evaluated the agreed-upon terms according to the ''arbitrary or contrary to law'' standard that the Librarian applied to the other aspects of the CARP's decision. The Librarian did, however, state that he was ''skeptical of the proposition that terms negotiated by parties in the context of a CARP proceeding are necessarily evidence of terms that a willing buyer and a willing seller would have negotiated in the marketplace,'' and noted that he would not have adopted all of the negotiated terms if his ''task were to determine the most reasonable terms governing payment of royalties.'' 67 FR 45266 (July 8, 2002). The question therefore remains as to whether the Judges should consider matters of feasability and administrative efficiency in adopting payment terms. We conclude the answer is yes, for two reasons.

First, it is an axiom of the copyright laws that statutory licenses are designed to achieve efficiencies that the marketplace cannot. See, H.R. Rep. No. 94–1476, at 89 (1976). Typically, statutory licenses reduce transaction costs associated with licensing large volumes of copyrighted works from multiple rights holders. They guarantee access to the use of prescribed categories of works to those who satisfy the eligibility requirements of a license, while providing a return to the owners of the works subject to the license. Statutory licenses are about administrative efficiency. For example, they increase the speed and ease with which copyrighted works may be used. Adopting a set of terms whose operation is not practical, or creates additional unjustified costs and/or inefficiencies, is inconsistent with the precepts of statutory licensing, and we must avoid such circumstances.

Second, we observe that rational willing buyers and sellers themselves will, in their agreements with one another, select terms that are practical, efficient, and avoid excessive costs. Consequently, we have considered the terms presented in agreements offered by the parties to this proceeding, assessed their applicability to the blanket license structure of the statutory licenses, and adopted those terms that will facilitate an efficient collection, distribution and administration of the statutory royalties.

B. Collection of Royalties

1. Background

Unlike the statutory licenses set forth in sections 111, 119, and chapter 10 of the Copyright Act where royalty payments are submitted directly to a government collecting body (the Licensing Division of the Copyright Office), the section 112 and 114 licenses contain no such provision. Read literally, the licenses appear to require that licensees pay royalties directly to each copyright owner and performer. Recognizing the costs and inefficiencies of such an approach, the parties to the first section 112/114 proceeding negotiated a payment scheme whereby all services paid their royalties to a single ''Receiving Agent'': SoundExchange, Inc. See 37 CFR 262.4. SoundExchange was, at that time, an unincorporated division of the Recording Industry Association of America.[59] SoundExchange was then tasked with the responsibility of distributing royalties to those identified in the regulations as ''Designated Agents.'' By agreement of the parties, both SoundExchange and Royalty Logic, Inc. were identified as ''Designated Agents.'' The Librarian in Webcaster I reluctantly adopted this payment scheme. 67 FR 45267 n.45 (July 8, 2002).

The royalty collection and distribution scheme adopted in Webcaster I ended with the expiration of the 1998–2002 licensing period. In negotiations for rates and terms for the 2003–2004 licensing period, the parties retained the Receiving Agent/Designated Agent structure but did not recognize Royalty Logic as a Designated Agent.[60] Royalty Logic objected to the parties' agreement and requested the Librarian to convene a CARP on the issue of royalty collection and payment. However, prior to the convening of the CARP, it withdrew from the proceeding. RLI PFF at ¶ 46. Royalty Logic now requests that the Copyright Royalty Judges recognize it in the regulations as both a Designated Agent and a Receiving Agent for the 2006–2010 license period.

2. Royalty Logic

Royalty Logic, acting as an authorized agent for certain copyright owners and performers,[61] is a for-profit subsidiary of Music Reports, Inc. 6/14/06 Tr. 44:21–45:22, 50:20–51:1 (Gertz).[62] Royalty Logic presented the direct testimony of Ronald Gertz, its founder, and the rebuttal testimony of Mr. Gertz and Peter Paterno, Esquire, who represents the recording artists Metallica and Dr. Dre. RLI PFF ¶ 72.[63]

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[57] We are mindful that section 112(e)(4) prescribes inclusion of a minimum fee for each type of service offered by transmitting organizations. Because we are determining that the section 112 fee is included within the section 114 license fee, we are, likewise, based upon the record evidence, doing the same for the section 112 minimum fee.

[58] Consistent with Webcaster I, we are adopting terms for the collection, distribution and administration of royalty payments.

[59] SoundExchange is now an independent entity. SoundExchange PFF at ¶ 72.

[60] By the terms of the Copyright Royalty and Distribution Reform Act of 2004, the rates and terms adopted for the 2003–2004 licensing period were extended through the end of 2005. See Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, section 6(b)(3) (transition provisions), 118 Stat. 2341, 2370 (2004).

[61] Despite an invitation from the Copyright Royalty Judges to do so, Royalty Logic was unable to identify all the copyright owners and performers constituting the ''RLI Affiliates.'' The list appears to include Lester Chambers, North Star Media, Sigala Records, ABKCO Music & Records, Inc., the Everest Record Group, Metallica and Peter, Paul and Mary.

[62] MRI is a for-profit company whose principal business is to assist broadcasters in the licensing of musical works used in their programming. 11/15/06 Tr. 103:7–20 (Gertz).

[63] Royalty Logic also presented written direct testimony of Lester Chambers, a recording artist. Mr. Chambers, however, did not appear at trial and his testimony therefore was not considered.

Royalty Logic contends that it is necessary for the Copyright Royalty Judges to formally recognize it as a ''Designated Agent''—complete with direct accounting, reporting, payment and auditing rights vis-a-vis the Services—in the payment regulations to be adopted in this proceeding so that it may compete with SoundExchange as a royalty collection and distribution agent. The claimed need for competition is the central feature of Royalty Logic's presentation. According to Royalty Logic, Designated Agents can compete with one another on multiple levels, including: (1) The royalty rates to be charged; (2) interpretations of the statute; (3) distribution policies; and (4) costs. 6/14/06, Tr. 101:5–105:5; 124:14–127:20; 314:22–315:19 (Gertz). Royalty Logic advocates a payment scheme whereby a proportionate share of the royalties owed by each Service under the section 112 and 114 licenses would be allocated to each Designated Agent; i.e., it and SoundExchange. Both Designated Agents would be entitled to direct receipt of statements of account, royalty fees and the reports of use of sound recordings required by 37 CFR part 370. For the initial payment period, Royalty Logic proposes that it receive five percent of each Service's royalties, which subsequently would be adjusted either upwards or downwards depending upon the number of performances belonging to Royalty Logic's affiliates that were made by the Service. The identity and ownership of performances (and ephemeral reproductions, if any) would be determined through examination of each Service's report of use of sound recordings. Thereafter, royalty payments to Royalty Logic and SoundExchange would be based solely upon performances of the works of each organization's members, as determined by the reports of use from the prior payment period. Any disputes between the Designated Agents concerning royalty allocations would be resolved by the Copyright Royalty Judges. RLI PFF at ¶ 117(g).

3. SoundExchange

SoundExchange is a non-profit performing rights organization that represents thousands of record labels and artists who have specifically authorized SoundExchange to collect royalties on their behalf. Kessler WDT at 3. SoundExchange presented the direct testimony of John Simson, Barrie Kessler, Harold Ray Bradley, and Cathy Finks on the matter of royalty collection and distribution, as well as the rebuttal testimony of Thomas Lee.

SoundExchange submits that it would be inefficient for the Copyright Royalty Judges to select more than one agent to receive and distribute royalties. SoundExchange PFF at ¶ 46. It argues that it should be the sole collection and distribution agent because it is proven and well-run and is the most qualified and dedicated to the interests of copyright owners and performers. SoundExchange PFF at ¶¶ 1558–67. It contends that Royalty Logic is unsuitable to serve as an agent because it is owned by Music Reports, Inc., a company that represents licensees of musical works, and such connection creates a conflict of interest. SoundExchange PFF at ¶¶ 50, 51.

4. Receiving Agents and Designated Agents

At the outset, the Copyright Royalty Judges must address a fundamental misperception of Royalty Logic, and to a somewhat lesser extent SoundExchange, regarding Receiving Agents and Designated Agents. As noted above, Receiving Agents and Designated Agents and the terms governing their operation were established by agreement by the parties in Webcaster I and were adopted, reluctantly, by the Librarian of Congress. 67 FR 45240, 45266 (July 8, 2002); See also, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services (Final rule), 68 FR 39837, 39839 n.2 (July 3, 2003) (stating that in Webcaster I the Librarian ''expressed skepticism about the benefit of the two-tier structure involving a Receiving Agent and more than one Designated Agent, which adds expense and administrative burdens to a process the purpose of which is to make prompt, efficient, and fair payments of royalties to copyright owners and performers with a minimum of expense.'') The entire Receiving Agent/Designated Agent structure is a legal fiction with no basis or grounding in the statute,[64] and we are under no obligation to preserve it, if we determine that there are sound reasons for adopting a different royalty collection and distribution system.

In evaluating the Receiving Agent/Designated Agent system, we share in the Librarian's skepticism that it is an effective and efficient means of collecting and distributing royalties. The system was pressed in negotiations by the Services in Webcaster I as a means of enabling Royalty Logic to enter the business of collecting and distributing section 112 and 114 royalties even though Royalty Logic did not represent at the time a single copyright owner or performer entitled to those royalties. 68 FR 39839 (July 3, 2003). While Royalty Logic's participation may have presented the Services with a potential future benefit, it is difficult to determine what, if any, benefit was derived by copyright owners and performers. Royalty Logic responds that the benefit to copyright owners and performers is the fruits of competition between it and SoundExchange, yet there is no evidence in the record that demonstrates that any copyright owners or performers sought or claimed such a supposed benefit. If anything, the record reflects that copyright owners and performers prefer SoundExchange as the sole collection and distribution entity. SoundExchange Ex. 239 RP, 240 RP; Lee WRT at 4; Bradley WRT at 20; Fink WDT at 14.

We are also troubled by Royalty Logic's contention throughout this proceeding that an agent must be formally recognized by the Copyright Royalty Judges as a Designated Agent before it can have any involvement in the royalty distribution process. This position has no support in the statute. Sections 112(e) and 114(e) state that it is copyright owners and performers who may designate common agents for the receipt of royalties. As the Librarian observed in the 2003 section 112 and 114 preexisting subscription service proceeding:

> In fact, it is not clear that RLI needs to participate in a CARP proceeding or be named in a negotiated settlement in order to act as a designated agent for purposes of collecting royalty fees on behalf of copyright owners and performers who are entitled to receive funds collected pursuant to the section 112 and section 114 licenses. Section 112(e)(2) and section 114(e) of the Copyright Act both expressly provide that a copyright owner of a sound recording may designate common agents to negotiate, agree to, pay, or receive royalty payments. Under these provisions, it is plausible that a copyright owner or performer could designate any agent of his or her choosing (including RLI)—whether or not that agent had been formally designated in the CARP proceeding—to receive royalties from the licensing of digital transmissions and, by doing so, limit the costs of such agents to those specified in section 114(g)(4), as amended by the Small Webcaster Settlement Act of 2002.

68 FR 39840 n.4 (July 3, 2003).

Given our reservations about the Receiving Agent/Designated Agent

[64] Section 114(f)(5)(A) does reference the term ''receiving agent.'' However, that section of the law, which was created by the Small Webcaster Settlement Act of 2002, Public Law 107–321, 116 Stat. 2780 (2002), is no longer in force. Furthermore, ''receiving agent'' was defined by reference to § 261.2 of title 37 of the Code of Federal Regulations which are the very same rules adopted in Webcaster I.

scheme, and the fact that none of the parties have presented any supporting evidence as to why it must or should continue, the Judges decline to adopt it in this proceeding. Rather, we are adopting a system that effectively and efficiently collects royalties from Services and distributes them to copyright owners, performers, and the agents that they may designate.

5. The Royalty Collective

a. The Need for a Single Collective [65]

As noted above, a literal reading of the section 112 and 114 licenses suggests that the Services pay directly each and every copyright owner and performer for the use of their respective works. No one in this proceeding, however, has suggested this arrangement, nor do any of the statutory licenses in the Copyright Act function in that fashion. Direct payments would add enormous transaction costs to the Services as they would be forced to locate and make arrangements with all copyright owners and performers for the thousands and thousands of sound recordings they perform, thereby eliminating much, if not all, of the efficiencies achieved by statutory licensing. Consequently, the royalty payment and collection system that we adopt must promote administrative efficiency and economy and reduce transaction costs wherever possible. This stated purpose is wholly consistent with the willing buyer/willing seller standard.

In adopting an economically and administratively efficient royalty collection and distribution method, Royalty Logic proposes that we look to the marketplace for performance rights for musical works, which is dominated by three principal rights organizations: ASCAP, BMI and SESAC. These organizations operate on behalf of and are paid for by their members. Royalty Logic contends that competition among the performing rights organizations reduces the administration costs for collecting and distributing royalties in that market and is therefore more efficient than a single Collective such as SoundExchange. We reject application of the performing rights organization model to this proceeding for several reasons. First, the performing rights organizations do not operate exclusively within the confines of a statutory license. The majority of these organizations' activity is direct licensing with users of musical works.[66] While Royalty Logic's argument that multiple Collectives promote competition on pricing may make some sense in the direct licensing context where rates and terms are set through private agreement, it does not make sense where the rates and terms are governed by statutory licenses.

Second, performing rights organizations are member societies that license only the works of their members. The statutory licenses are blanket licenses that cover the works of all copyright owners and performers. Forcing owners and performers to choose membership in one or more Collectives when their works have already been licensed does not seem to serve a purpose and creates a significant practical difficulty in resolving how unaffiliated copyright owners and performers should receive their royalty distributions.

Third, while Royalty Logic vehemently argues that competition between it and SoundExchange will reduce the overall administrative costs in the royalty collection and distribution process and therefore result in greater returns for copyright owners and performers, it never presented evidence demonstrating the likelihood of such an outcome.[67] Further, Royalty Logic did not present any evidence showing that its administration costs on a per copyright owner or performer basis will be less than SoundExchange's, merely suggesting that they might be. 6/14/06 Tr. 51:9–14 (Gertz); 11/15/06 Tr. 140:18–21 (Gertz).

In sum, we find that selection of a single Collective represents the most economically and administratively efficient system for collecting royalties under the blanket license framework created by the statutory licenses. Transaction costs to the users of such a license are minimized when they can make payment to a single Collective, as opposed to allocating their payments among several. And there is no credible evidence that demonstrates copyright owners and performers suffer increased costs from a system with a single Collective. We now turn to the issue of which of the two parties in this proceeding, Royalty Logic or SoundExchange, will best fulfill the role of the Collective for section 112 and 114 royalties.

b. SoundExchange vs. Royalty Logic

SoundExchange, a non-profit corporation under 26 U.S.C. 501(c)(6), has operated as the royalty collection and distribution entity since the beginning of the statutory licenses involved in this proceeding, and collects and distributes the royalties paid by preexisting subscription and satellite digital audio services under the statutory license created by the Digital Performance Right in Sound Recordings Act of 1995, Public Law 104–39, 109 Stat. 336 (1995). Kessler WDT at 2. SoundExchange is controlled by an 18-member Board of Directors comprised of equal numbers of representatives of copyright owners and performers. Copyright owners are represented by board members associated with the major record companies (five), independent labels (two), the Recording Industry Association of America (one), and the American Association of Independent Music (one). Performers are represented by one representative each from the American Federation of Television and Radio Artists; the American Federation of Musicians; and seven at-large artist seats. Simson WDT at 33. Though it is a non-member organization, SoundExchange is authorized by over 12,000 performers, 3,000 record labels and 800 record companies to collect royalties on their behalf. SoundExchange PFF at ¶ 75. SoundExchange distributes royalties to nearly 15,000 copyright owner and performer accounts and, as of September 20, 2005, has processed over 650 million sound recording performances. Kessler WDT at 12, 16. It is the only organization that directly receives reports of use from the Services under the licenses in this proceeding. 37 CFR 370.3(d)(4).

SoundExchange presented Thomas Lee, President of the American Federation of Musicians, who testified that the structure of SoundExchange's Board provides the necessary checks and balances to ensure that performer interests are well represented. Lee WRT at 4–5. Several performer organizations—the American Federation of Television and Radio Artists, the Music Manager's Forum, and the Recording Artists' Coalition—wrote to Mr. Lee to express their preference and support for SoundExchange in these proceedings. SoundExchange Exs. 239 RP, 240 RP, 241 RP; Lee WRT at 4. Recording artists Harold Ray Bradley and Cathy Fink testified as to their preference for SoundExchange as the sole collective for section 112 and 114

[65] A ''Collective'' is defined in our rules as an organization that is designated by the Copyright Royalty Judges under section 114 to both collect and distribute royalties. 37 CFR 370.5(b)(1).

[66] The performing rights organizations do collect royalties on behalf of their members for several of the statutory licenses in the Copyright Act. Participation in royalty collection and distribution under these licenses, however, was after they had established their direct licensing businesses.

[67] The small amount of testimony adduced on this point suggests that SoundExchange's administrative costs are lower than those of ASCAP and BMI. Kessler WDT at 16; 6/6/06 Tr. 190:1–4 (Kessler).

royalties. Bradley WRT at 20; Fink WDT at 14.

Royalty Logic, a for-profit corporation, operated as a ''Designated Agent'' under the Webcaster I decision. Gertz WDT at 5–6; RLI PFF at ¶ 36. Royalty Logic was created and is currently managed by the principals of Music Reports, Inc. Music Reports is in the business of allocating royalty payments from television stations to performing rights societies for musical works performed by those stations. Royalty Logic recently received a significant investment from Abry Partners and may be reorganizing as a result. 11/15/06 Tr. 130:16–131:5 (Gertz). As described in footnote 61, supra, the precise number and identity of copyright owners and performers currently represented by Royalty Logic is unclear. Royalty Logic did not present any copyright owner or performer witnesses [68] in support of its request to be a royalty collection and distribution entity under the section 112 and 114 licenses. It did, however, present the testimony of Peter Paterno, a lawyer representing clients in the music publishing and recording business. Mr. Paterno testified that one of his clients, the rock group Metallica, is affiliated with Royalty Logic and that he has proposed affiliation to three or four other clients. 11/15/06 Tr. 157:10–18; 181:4–22 (Paterno). Royalty Logic also presented as an exhibit a royalty rate agreement between it and DiMA for performances under the statutory licenses, asserting that the agreement demonstrated at least one willing seller's preference for Royalty Logic. RLI PFF at ¶ 61.

After considering the presentations of both parties, the Copyright Royalty Judges conclude that SoundExchange is the superior organization to serve as the Collective for the 2006–2010 royalty period. SoundExchange has a proven track record in collecting and processing section 112 and 114 royalties, having done so since the inception of the statutory licenses. Its operational practices appear efficient and fair, and the Judges were not presented with credible evidence of significant failures or deficiencies.[69] Moreover, we are persuaded that the structure and composition of SoundExchange's Board of Directors—with equal representation for copyright owners and performers—provides a greater balance of competing interests than that of Royalty Logic, which is controlled by one person, Mr. Gertz. This was confirmed by the weight of performer testimony on this point which demonstrated a decided preference for the services of SoundExchange over those of Royalty Logic. As the direct beneficiaries of the royalties collected under the statutory licenses, the copyright owner and performer testimony on this point is particularly persuasive.

This testimony is not outweighed by the Royalty Logic/DiMA royalty rate agreement offered by Royalty Logic as evidence of the Services' preference for Royalty Logic. It is difficult to envision any interest that the Services can have in the administration and distribution of royalties, which are the essential functions of the Collective. The Services' views on this subject are not reflected in the agreement. More importantly, the value of the agreement itself is illusory. Signed only by DiMA, a trade organization, it does not bind any Service to its terms; and, to date, no Services have signed on to the agreement. 11/15/06 Tr. 108:7–15 (Gertz).

The Copyright Royalty Judges also have serious reservations about the bona fides of Royalty Logic to act as the Collective under the statutory licenses. Royalty Logic ''is a for profit organization whose acknowledged goal is to make a profit,'' 67 FR 45267 (July 8, 2002), and Mr. Gertz candidly offered that his reasons for seeking entrance into the royalty collection and distribution business was ''to make money.'' 11/15/06 Tr. 89:7–10 (Gertz). In addition, Mr. Gertz stated that Royalty Logic may decide to pay some copyright owners and/or performers more than others. 11/15/06 Tr. 79:22–80:10 (Gertz). These statements raise a concern as to whether Royalty Logic will act in the best interest of all copyright owners and performers covered by the statutory licenses. The concern is elevated by the fact that Royalty Logic's participation in Webcaster I was championed by the Services and is favored more in this proceeding by the Services than by copyright owners and performers.[70] As noted above, the Services should have little if any interest in the activities of the Collective to whom they pay their royalties (especially where they are relieved of the burden of paying more than one Collective) unless they have reason to believe that Royalty Logic may offer them reduced royalty fees in negotiations for future license periods. Mr. Gertz's business with MRI, which licenses the performance right for musical works on behalf of copyright users rather than owners and performers, suggests this outcome.[71]

Likewise, we have no basis in the record to expect that Royalty Logic will deduct lower administration fees, and therefore return greater royalties to copyright owners and performers, than SoundExchange. We were not presented with any comparison of Royalty Logic's and SoundExchange's administration fees, only an argument that competition between Collectives potentially could reduce the overall administration fees. Given that we are selecting only a single Collective, the potential effects of competition on administration fees to be charged to copyright owners and users is not relevant.

In sum, the Copyright Royalty Judges determine that SoundExchange will best serve the interests of all copyright owners and performers whose works are subject to the statutory licenses and, therefore, shall be the Collective for the 2006–2010 royalty period.

C. Terms

Having resolved the matter of who shall serve as the Collective for the 2006–2010 licensing period, the Copyright Royalty Judges now turn to other terms necessary to effectuate payment and distribution. Other than the few disputed terms, adoption of all the terms necessary for payment and distribution presents a decidedly unfortunate challenge, as is discussed below.

1. Webcaster I

In Webcaster I, the parties to the proceeding presented the CARP with a comprehensive, negotiated settlement of nearly all the payment, administration and distribution terms for the section 112 and 114 licenses. These terms included governing provisions for submission of payments and statements of account, confidentiality requirements, audit and verification of statements of account and royalty distributions, and unclaimed royalty

[68] See, supra, n.63.

[69] Mr. Gertz and Mr. Paterno did testify as to their awareness of some performers' dissatisfaction with SoundExchange—primarily due to its former ties to the Recording Industry Association of America, Inc.—but the statements were not corroborated by any copyright owner or performer testimony.

[70] The Copyright Royalty Judges find the testimony of Mr. Paterno an unpersuasive substitute for the views and preferences of copyright owners and performers. Only one of Mr. Paterno's clients, Metallica, has affiliated with Royalty Logic, and he admitted that he has not pressed his other clients to affiliate. 11/15/06 Tr. 157:10–18 (Paterno). Rather, Mr. Paterno stated that he would advocate that clients affiliate with the collective that offered the most money, but he has seemingly made no inquiries on this matter, preferring instead to ''see how things play out.'' Id. at 157:22–158:10.

[71] Our impression on this point is bolstered by the royalty agreement negotiated by Royalty Logic with DiMA, which adopts a rate (to be adjusted to our determination in this proceeding) far below any of the rates proposed by SoundExchange and is almost identical to the proposal of those commercial Services in this proceeding.

funds. The CARP was only called upon to resolve two relatively minor disputes regarding terms: whether to include four definitional provisions related to broadcast radio, and what to do with royalties for copyright owners who did not designate either SoundExchange or Royalty Logic to serve as their agent. Applying the willing buyer/willing seller standard, the CARP adopted wholesale the negotiated terms as being the best evidence of marketplace negotiations, chose not to adopt the disputed definitional provisions, and determined that willing buyers and willing sellers would choose SoundExchange for copyright owners who failed to choose a Designated Agent. Webcaster I CARP Report at 128–134.

The Librarian made significant alterations to the CARP's determination regarding terms. While he accepted the CARP's rejection of the broadcaster definitional terms and the determination that SoundExchange should serve as agent for unaffiliated copyright owners, he rejected a negotiated term limiting agents' liability for improper distributions and a negotiated term allowing agents to deduct litigation and licensing costs from collected royalty fees. 67 FR 45268–9 (July 8, 2002). He also modified a negotiated definition of ''gross proceeds'' and created two new definitional provisions: one for ''Ephemeral Recordings'' and another for ''Listener.'' Further, he extended the right to select a Designated Agent to performers in addition to copyright owners, granted performers the right to audit their Designated Agent, and ''clarified'' the negotiated terms for allocating royalty payments among Designated Agents and for allocation of royalties among parties entitled to receive such royalties. 67 FR 45270–1 (July 8, 2002).

2. Negotiated Terms

As noted previously, there was no CARP proceeding for the 2003–2004 licensing period. The parties settled their differences and offered the Librarian a negotiated agreement for rates and terms. The proposed agreement included the Webcaster I terms with some modifications. After offering the proposed agreement for public comment, the Librarian adopted it. See, Digital Performance Right in Sound Recordings and Ephemeral Recordings (Final rule), 69 FR 5693 (February 6, 2004). Codified in part 262 of the Copyright Office's regulations, the effective date of these rates and terms was extended by the Copyright Royalty and Distribution Reform Act of 2004 until December 31, 2005, the last day prior to the beginning of the rates and terms established by this proceeding. 37 CFR part 262; Copyright Royalty and Distribution Reform Act of 2004, Public Law 108–419, section 6(b)(3) (transition provisions), 118 Stat. 2341, 2370 (2004).

3. This Proceeding

The parties' approach to rates and terms was decidedly different in this proceeding than in Webcaster I. Even though the Copyright Royalty and Distribution Reform Act of 2004 eliminated the CARP system and thereby removed the Librarian and the Copyright Office from further involvement in royalty adjustment proceedings,[72] the parties apparently operated under the assumption that the terms contained in part 262 would remain in place for the 2006–2010 period plus the recommended amendments the Copyright Royalty Judges adopted. The existence of this assumption is confirmed in Part III of the written direct testimony of Barrie Kessler entitled ''Modifications Needed to License Terms,'' where Ms. Kessler only addresses those terms that she believed required amendment. The Services also refer to the regulations in part 262 as the ''current'' regulations. See, *e.g.* DiMA and Radio Broadcasters JPFF at ¶ 300.

In examining part 262, the Copyright Royalty Judges observe that these are the regulations of the ''Copyright Office, Library of Congress.'' The Copyright Royalty Judges do not have authority to amend, alter, or otherwise affect these regulations. There is no provision in the Copyright Royalty and Distribution Reform Act of 2004 that carries forward the regulations contained in part 262 or makes them applicable to the Copyright Royalty Judges.[73] Part 262 is therefore not a part of this proceeding.

Other than testimony and argument devoted to amendment of certain provisions contained in part 262, no other evidence was presented regarding terms for payment and distribution. The Copyright Royalty Judges anticipated that the parties would follow their approach from Webcaster I and present negotiated terms prior to the close of the record. When nothing was forthcoming, the Copyright Royalty Judges issued an order directing parties to file agreed-upon terms no later than the deadline for the submission of their reply findings of fact and conclusions of law. Amendment to Amended Trial Order, Docket No. 2005–1 CRB DTRA (November 28, 2006). When nothing again was filed, the Copyright Royalty Judges questioned counsel at closing arguments who stated that because of the press of time in drafting and filing proposed findings and reply findings, they were unable to discuss or negotiate any terms. Still nothing has been filed.

The failure to submit negotiated terms, coupled with the absence of further testimony, places the Copyright Royalty Judges in a difficult situation. While there is sufficient record testimony to resolve the disputed terms, see infra, the only evidence for the ''missing terms'' is the assumption of the parties that the provisions of part 262, plus our resolution of disputed terms, would constitute the terms for payment and distribution for the 2006–2010 statutory period. The parties' assumption is certainly thin evidence on which to proceed. Nevertheless, there are sufficient grounds to resolve the difficulty of the missing terms.

First, we observe that in Webcaster I the Librarian made several wholesale changes to the parties' negotiated terms even though the parties did not propose such changes. The Librarian created definitions for ''Ephemeral Recordings'' and ''Listener'' because, in his view, their absence from the regulations would lead to confusion. 67 FR 45269–70 (July 8, 2002). He extended the right of choosing a Designated Agent to performers as well as copyright owners and permitted them to audit Designated Agents because he could ''conceive of no reason why Performers should not be given the same choice'' as copyright owners. 67 FR 45271 (July 8, 2002). It is clear that the Librarian took these actions so that the regulations governing terms would be clearer, more efficient and fairer to the parties affected. In other words, the Librarian endeavored to make the operation of the statutory licenses as smooth, efficient, and fair as possible. This approach was both necessary and proper and we adopt it here. It is wholly consistent with our conclusion, discussed in Section V.A., supra, that it is our obligation to adopt royalty payment and distribution terms that are practical and efficient. Failure to so act would produce statutory licenses that are operationally chaotic and otherwise unusable, thereby frustrating the Congressional intention underlying their establishment.

Second, while an assumption that part 262 would apply to the new license period is not necessarily the best

[72] The exception is the limited role of the Register of Copyrights on questions of law. See 17 U.S.C. 802(f)(1)(A)(ii), 802(f)(2)(B)(i), and 802(f)(1)(D).

[73] In contrast, 17 U.S.C. 803(b)(6)(B) made the procedural rules of the CARP applicable to the Copyright Royalty Judges until 120 days after appointment of the Copyright Royalty Judges or interim Copyright Royalty Judges who were required to adopt new regulations.

evidence of the required terms, it nevertheless demonstrates the parties' intention to be bound by that provision (including, of course, their proposed changes). They certainly had ample opportunity to disavow this intention and did not do so. Rejection of the provisions contained in part 262 would, in addition to disrupting the operation of the statutory licenses, frustrate the demonstrated intention of the parties.

Consequently, the Copyright Royalty Judges are adopting the undisputed provisions of part 262 as the baseline for terms for the 2006–2010 licensing period, subject to the additions and changes adopted in this decision. Parties to future royalty rate proceedings are strongly urged to attach a greater importance to the adoption of terms and to create a more comprehensive and thorough record.

4. Disputed Terms

a. Late Payment Fees

SoundExchange requests that the Copyright Royalty Judges establish a fee for late payments of statutory royalties equal to 2.5% of the total royalty owed by the Service for that period. The 2.5% late fee represents a substantial increase from the 0.75% late fee adopted in Webcaster I.

SoundExchange argues that the increase is necessary. Barrie Kessler stated that many Services are late with their royalty payments and opined that a nominal late fee (0.75%) coupled with the high cost of bringing an infringement action for failure to pay royalties actually encourages late payments. Kessler WDT at 27–28; 6/8/06 Tr. 261:1–6 (Kessler). Ms. Kessler also requested that the late fee be doubled every five days beginning 20 days after SoundExchange sends a Service notification of late payment. Kessler WDT at 28.

In support of its request for the 2.5% late fee, SoundExchange offers several marketplace agreements between record companies and services containing, on average, a late payment fee of 1.5% per month, with a high of 2.0%. SoundExchange Ex. 012 DR (UMG-MusicNet subscription services agreement); SoundExchange Ex. 014 DR (UMG-Muze clip license agreement); SoundExchange Ex. 017 DR (UMG-Real Networks subscription agreement); SoundExchange Ex. 021 DR (SONY BMG-Muze clip license agreement); SoundExchange Ex. 002 DR (WMG-Next Radio Solutions webcasting agreement); SoundExchange Ex. 004 DR (SONY BMG-MusicMatch Internet radio agreement).

Radio Broadcasters and DiMA counter that a 0.75% late fee (9% per annum) is generous and is greater than the current cost of borrowing. DiMA and Radio Broadcasters JPFF at ¶ 286. They cite the testimony of Eugene Levin of Entercom Broadcasting who, while conceding that Entercom has agreements with a number of suppliers (including ASCAP, BMI and SESAC) that provide for late fees ranging from 12% to 18% per year, testified that late fees are often waived so as to promote a positive business atmosphere and maintain good relations. Levin WRT at 4–5; 11/14/06 Tr. 38:2–9, 41:5–12 (Levin). Radio Broadcasters cite Entercom's agreements with SESAC and Liquid Compass as evidence that late fees can be discretionary. Radio Broadcasters RFF at ¶¶ 137–138.

The Copyright Royalty Judges determine that the record evidence does not support continuation of a 0.75% per month late fee. Although Mr. Levin advocated that number, he did not provide a single agreement that his company had for music service that contained such a rate, nor did he state that he was aware of any agreements containing such a rate. To the contrary, Entercom's agreements with ASCAP, BMI and SESAC all provide for late fees ranging from 12% to 18% per annum. 11/14/06 Tr. 38:2–9, 41:5–12 (Levin). The agreements cited by SoundExchange also fall within this range.

We are not persuaded that contracting parties' ability to waive late fees requires rejection of a higher late fee. Contract provisions granting discretion to waive late fees were present in some of Entercom's agreements but were noticeably absent from the record company/music service agreements cited by SoundExchange. Mr. Levin was not aware of industry practices with respect to waiver. Moreover, his testimony that waiver promotes good business relationships with contractees is unavailing in the context of statutory licensing. While waiving a late fee can promote good feelings in a private agreement and thereby avoid termination of future goods and services by the offending party, it has no bearing for a statutory license where copyright owners and performers cannot, short of an infringement determination by a federal court, terminate access to their works under the license.

After reviewing the record, the Copyright Royalty Judges find that the record company/music service agreements provided by SoundExchange are the best evidence as to the appropriate late fee. While these are not agreements for DMCA-compliant webcasting,[74] there is no reason to believe that a term governing late payment, which is unrelated to the specific royalty rates of the agreements, would be any different in a DMCA-compliant agreement. The agreements establish a range of 1.5% to 2%, with the majority of the agreements containing the 1.5% figure. We adopt the 1.5% figure.[75] In doing so, we reject SoundExchange's request for a doubling of the late fee every five days when a royalty payment is later than 20 days because such a provision does not appear in any of the agreements, and SoundExchange has failed to demonstrate the need for such an extraordinary measure.

b. Statements of Account

i. Late Fee for Statements of Account

Webcaster I and part 262 of the Copyright Office's rules adopted a late fee for royalty payments but not for late statements of account. Ms. Kessler testified that it is not uncommon for SoundExchange to receive late and incomplete statements of account from Services. 6/6/06 Tr. 137:12–138:20 (Kessler). She urged the Copyright Royalty Judges to adopt a penalty fee for late and/or incomplete statements calculated as if the Service had failed to pay royalties when required. Kessler WDT at 29–30. Mr. Levin testified that it was inappropriate to assess a late fee when a Service did not submit a timely statement of account and particularly unfair where the statement contained good faith errors or omissions. Levin WRT at ¶¶ 16,19; 11/14/06, Tr. 44:18–45:11 (Levin).

The Copyright Royalty Judges determine that timely submission of a statement of account is critical to the quick and efficient distribution of royalties. The statement of account identifies the time period to which the royalty payment applies, enables SoundExchange to determine what music service is being paid for and whether the filer has attributed the correct royalty fee to the service or services it is paying for. Although Mr.

[74] We acknowledge that the status of whether ''custom radio'' services are DMCA-compliant remains unresolved, but resolution of this issue is not necessary to our determination.

[75] We note that Ms. Kessler testified that a 1.5% late fee, which is the late fee for the section 114 license applicable to preexisting subscription services, still does not discourage late payments. Ms. Kessler did not supply, other than her opinion, evidence to demonstrate that 2.5% is the magic number that will end, or virtually end, future late payments. Further, the Services demonstrated on cross-examination of Ms. Kessler that the frequency of late payments of the Services in this proceeding has not been so rampant as to warrant a much higher late fee. DiMA and Radio Broadcasters JPFF at ¶ 292.

Levin viewed the timely submission of statements of account as burdensome, we note that the regulations implementing the satellite, cable and digital audio recording devices or media (DART) statutory licenses require the simultaneous submission of royalty payments and statements of account. See 37 CFR 201.11 (satellite); 37 CFR 201.17 (cable); 37 CFR 201.28 (DART). Failure to timely submit a statement of account with the royalty payment requires payment of a late fee under those licenses. We do not see any unique burdens or circumstances for Services operating under the section 112 and 114 licenses that require a different outcome. Consequently, we adopt the 1.5% per month late fee for statements of account.

With respect to the completeness of the statement of account, the burden is upon the Service to provide as complete and error-free a statement as possible. All of the information needed to complete the statement—which is neither complex nor lengthy, see SoundExchange Ex. 212 DP—is in the possession of the Service. Inconsequential good-faith omissions or errors should not warrant imposition of the late fee.

ii. Confidentiality

There is considerable disagreement as to whether the information contained in statements of account is confidential and should be viewed by the Collective (SoundExchange) alone and not by copyright owners and performers. DiMA and Radio Broadcasters assert that a confidentiality requirement is necessary and is what willing buyers and sellers would agree to in a competitive market. DiMA and Radio Broadcasters JPFF at ¶¶ 297, 299. They cite to the confidentiality provisions of five agreements—SoundExchange Ex. 003 DR sec. 10(b) (WMG-MusicNet subscription services agreement); SoundExchange Ex. 004 DR sec. 10.01 (SONY BMG-MusicMatch Internet radio agreement); SoundExchange Ex. 006 DR sec. 8.1 (EMI standard wholesale agreement for streaming/conditional download licenses); SoundExchange Ex. 017 DR sec. 5(b) (UMG-Real Networks subscription agreement); SoundExchange Ex. 014 DR sec. 6 (WMG-Muze clip license agreement)—in support of this assertion. Further, Mr. Levin testified that the information concerning a Service's total royalty payments, listening minutes and aggregate tuning hours is not the kind of information that Services share with their competitors. 11/14/06 Tr. 47:14–48:7 (Levin).

SoundExchange counters that precluding copyright owners and performers from access to the information contained in the statements of account not only impedes the operation of its Board of Directors (which is comprised of owners and performers) but is a denial of the fundamental information necessary for enforcement of the statutory licenses. Kessler WDT at 33. Copyright owners and performers only see statement of account information from prior statutory license periods in the aggregate [76] and cannot make informed decisions to identify and act against Services that, in their view, are not satisfying their statutory requirements. *Id.* at 31. SoundExchange also views the evidence of marketplace activity differently from DiMA and Radio Broadcasters, citing two marketplace agreements between record companies and digital music services that require the reporting of revenues and number of performances so that the copyright owners can verify the calculation of the royalty fee owed under the agreement. SoundExchange Ex. 002 DR (WMG-Next Radio Solutions webcasting license agreement); SoundExchange Ex. 018 DR (UMG-Music Video Net video agreement). Radio Broadcasters counter that even these two agreements have a general confidentiality provision that prevents disclosure to the public of confidential business information. Radio Broadcasters RFF at ¶ 127.

The Copyright Royalty Judges are troubled by continuing the confidentiality restrictions adopted in Webcaster I and part 262 of the Copyright Office's regulations. Because they were the product of negotiations, there was no finding that the types of information contained in the statements of account were indeed ''confidential''; i.e., that their disclosure would harm the business interests of the reporting Services. Mr. Levin, the only witness offered by the Services on this point, did not articulate how the information contained in the statements can or could injure the competitiveness of a Service, or otherwise negatively affect its operation. 11/14/06 Tr. 96:11–104:11 (Levin). Further, he conceded that a competitor's subscription to Arbitron, a broadcasting rating and information service, would provide much of the same information contained in the statements. 11/14/06 Tr. 85:20–87:13, 97:13–99:14 (Levin). The Copyright Royalty Judges come to the conclusion that while Services may want the information contained in statements of account to remain confidential, they have not demonstrated how disclosure of that information is, or is likely to be, harmful.

Even more troubling is how the denial of information to copyright owners and performers impacts their substantive rights under the section 112 and 114 licenses. Without the information contained in a statement of account, a copyright owner and/or performer cannot begin to make an informed judgment as to whether a Service is complying with its statutory obligations and making the correct payments. Permitting the disclosure of the information contained in statements of account only to the Collective does not alter this concern and grants the Collective an inordinate amount of control as the only party knowledgeable of the compliance of each of the Services. No support can be found in the statute for an arrangement that effectively imbues only the Collective, or any other agent, with the information necessary to pursue an infringement action. In sum, copyright owners and performers should not be excluded from obtaining the information contained in a statement of account of a Service that performed his or her work.[77]

Review of the licensing agreements cited by Radio Broadcasters does not counsel a different result. The confidentiality provisions in these agreements generally prohibit disclosure of ''business'' information to those not party to the agreement, i.e., the public at-large. They do not deny the licensor—the copyright owner—access to this information. And several of the cited agreements permit the licensor to share obtained business information with others, including advisors, financial officers, bankers, and contractors with a need to know. SoundExchange Ex. 004 DR sec. 10.01(a) (SONY BMG-MusicMatch Internet radio agreement); SoundExchange Ex. 002 DR sec. 9.01(a) (WMG-NextRadio Solutions webcasting license agreement). In the statutory licensing setting, copyright owners and performers are the licensors of their works to the Services and certainly need to know the information concerning the Services' payments. Providing the information only to SoundExchange, as the Services request, is not consistent with these agreements.

What is consistent with these agreements, however, is a prohibition of disclosure of statement of account information to the general public, and we are adopting that restriction.

[76] See 37 CFR 262.5(c).

[77] This conclusion again is supported by the satellite, cable and DART licenses which permit copyright owners full and complete access to the statements of account of the users of those licenses.

Therefore, access to statements of account is limited to copyright owners and performers, and their agents and representatives identified in the regulations, whose works were used by a Service under the section 112 and 114 licenses. Copyright owners, performers, and the Collective are directed in the regulations to implement the necessary procedures to guard against access to and dissemination of statement of account information to unauthorized parties.

c. Audit and Verification of Payments

SoundExchange requests four ''clarifications'' to the part 262 regulations regarding verification of royalty payments made by the Services: (1) That the Services should be required to maintain their books and records for the three prior calendar years (January to December) and the entirety of those three years may be audited; (2) persons other than Certified Public Accountants (''CPAs'') should be allowed to serve as auditors and need only be independent from the Service they are auditing; (3) individual copyright owners and performers, in addition to the Collective, should be permitted to audit Services; and (4) the threshold for allocating the costs of an audit should be reduced from a 10% underpayment to a 5% underpayment, or if the Service underpays by $5,000 or more. SoundExchange PFF ¶¶ at 1314, 1342. With the exception of the first request, the Copyright Royalty Judges decline to accept SoundExchange's proposals.

By eliminating the requirements that an auditor be a CPA and independent from SoundExchange, SoundExchange is seeking to transform the prior verification process into what it calls ''technical audits.'' SoundExchange PFF at ¶¶ 1327, 1328. Technical audits would, in SoundExchange's view, reduce its costs by allowing in-house technical experts to conduct the audits rather than outside CPAs, who might lack the technical capability for the data processing and analysis and may be more expensive than in-house personnel. 6/6/06 Tr. 269:16–273:4 (Kessler). The Copyright Royalty Judges have reviewed the record company/music service agreements submitted by the parties and note that some agreements permit technical audits. SoundExchange Ex. 002 DR sec. 5.02 (WMG-NextRadio Solutions webcasting license agreement); SoundExchange Ex. 003 DR sec. 4(b) (WMG-MusicNet subscription services agreement). Others, however, require the auditors to be CPAs, (SoundExchange Ex. 001 DR sec. 4.01 (WMG-All Media Guide clip license agreement), SoundExchange Ex. 014 DR sec. 3.7 (WMG-Muze clip license agreement)), and that the auditor be independent of both the licensor and licensee. SoundExchange Ex. 001 DR sec. 4.01 (WMG-All Media Guide clip license agreement); SoundExchange Ex. 004 DR sec. 6.05 (SONY BMG-MusicMatch Internet radio agreement); SoundExchange Ex. 007 DR sec. 8(b) (EMI—MusicNet nonportable subscription services agreement). While technical audits by in-house personnel might be cheaper for the Collective, we conclude that it is more important, in the interest of establishing a high level of credibility in the results of the audit, that the auditor be independent of both parties. 11/14/06 Tr. 9:8–11:11 (Levin). Likewise, we find that requiring the auditor to be certified further raises confidence levels in the audit. CPAs have experience in the field of accounting, are familiar with the accepted standards and practices for auditing, and are governed by standards of conduct. If technical skills are required to process the data of a Service, the auditor can request assistance. In sum, the Copyright Royalty Judges are requiring that the auditor be certified and independent of both SoundExchange and the Service being audited.

The Copyright Royalty Judges are not persuaded that all copyright owners and performers should have the right to audit a Service. It is one thing for a Service that enters into a private agreement with a copyright owner to allow the owner to conduct an audit. Kenswil WDT at 10–11; Eisenberg WDT at 13. It is an altogether different matter to grant the right of audit to copyright owners and performers under a statutory licensing scheme where there is no privity of contract and the potential for a significant magnitude of audits. We agree with the Services that subjecting them to that kind of extensive auditing process could seriously impair their business operations. Levin WRT at ¶ 30.

Likewise, we are not persuaded that the underpayment threshold for shifting the cost of an audit should be reduced from an underpayment of 10% to one of 5% of the royalty fee due, or $5,000, whichever is less. Ms. Kessler stated that the 10% figure was too high and encourages the Services to deliberately underpay their royalties up to 9%, but she did not offer any direct evidence of this occurring. Furthermore, the 10% figure is consistent with several of the record company/music service agreements. SoundExchange Ex. 003 DR sec. 6(f) (WMG-MusicNet subscription services agreement); SoundExchange Ex. 004 DR sec. 6.06 (SONY BMG-MusicMatch Internet radio agreement); SoundExchange 010 DR sec. 5(c) (EMI-Muze clip license agreement).

Finally, the Copyright Royalty Judges agree with SoundExchange that the Services should retain their books and records for the three calendar years prior to the current year. Services need to know with precision how long they must retain their books and records as well as the time period that is potentially subject to an audit.

d. Other Matters

i. Recordkeeping

Subsequent to the conclusion of the hearings on the direct statements, the Copyright Royalty Judges issued an Interim Final Rule in Docket No. RM 2005–2, the docket establishing notice and recordkeeping requirements for certain digital audio services using the section 112 and 114 licenses. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License (Interim final rule), 71 FR 59010 (October 6, 2006). The Interim Final Rule prescribed the format and delivery requirements for reports of use of sound recordings, thereby completing the interim recordkeeping rulemaking process begun several years ago by the Copyright Office. Several of the parties in this proceeding, uncertain as to whether such recordkeeping issues would be addressed in this docket and noting the statutory language that permits the Copyright Royalty Judges to modify their existing recordkeeping rules, 17 U.S.C. 803(c)(3), submitted testimony on the matter. Although we ruled that recordkeeping matters would be addressed through notice and comment rulemaking and not in this proceeding, we did not strike the testimony. Instead, such testimony was allowed to remain in the record as evidence, if any, of the relative costs to the Services and the Collective associated with recordkeeping. Order Denying Radio Broadcasters' Motion for Clarification, Motion to Strike SoundExchange Exhibits 414–418 DP and Motion to Set Expedited Briefing Schedule, Docket No. 2005–1 CRB DTRA (September 8, 2006).

The costs of recordkeeping to both sides did not influence our determination of royalty rates in this proceeding, nor are we choosing to amend our existing recordkeeping regulations. See 37 CFR part 370. The testimony presented by the Services as to the costs associated with recordkeeping was vague and unsubstantiated and went little beyond the assertion that there are some costs associated with recordkeeping. Clearly,

any recordkeeping, no matter how modest, involves some costs. Nevertheless, the statute does require reporting. 17 U.S.C. 112(e)(4), 114(f)(4)(A). And despite the fact that most of the requirements for creating a report of use have been public since 2002, see Notice and Recordkeeping for Use of Sound Recordings Under Statutory Licenses (Notice requesting written proposals and announcement of status conference), 67 FR 59573 (September 23, 2002), the Services failed to quantify either the magnitude of the actual overall costs or the average costs to individual Services. In any event, because our recordkeeping regulations are interim and not final, there is ample opportunity to again address the Services' costs in a future rulemaking. The ability to influence and adjust the costs of recordkeeping is far more direct in that context than this rate determination proceeding and is more properly handled there.

Likewise, there was no persuasive testimony compelling an adjustment of the current recordkeeping regulations. SoundExchange presses for census reporting, but the record is incomplete as to effectiveness of the current periodic reporting requirement. Once again, the Copyright Royalty Judges conclude that this matter is more appropriate for a future recordkeeping rulemaking.

ii. Royalty Distribution

Having eschewed the Receiving Agent/Designated Agent model of the prior regulations in favor of a single Collective, we are adopting streamlined royalty distribution procedures. SoundExchange has the responsibility of collecting the royalties from the Services and distributing them to all eligible copyright owners and performers, including any agents designated by copyright owners and/or performers for their receipt. Deduction of costs by SoundExchange is governed by the statute, 17 U.S.C. 114(g)(3), and therefore we have no authority to address any resulting inequalities.

With respect to the distribution methodology, the Copyright Royalty Judges are retaining the requirement that all performances be valued equally by the Collective. SoundExchange is already familiar with and applies this requirement. 6/6/06 Tr. 171:2–172:10 (Kessler). Copyright owners and/or performers are certainly free to agree to subsequent distribution methodologies once they have received their distribution from the Collective.

VI. Determination and Order

Having fully considered the record, the Copyright Royalty Judges make the above Findings of Fact based on the record. Relying upon these Findings of Fact, the Copyright Royalty Judges unanimously adopt every portion of this Final Determination of the Rates and Terms of the Statutory Licenses for the digital audio transmission of sound recordings, pursuant to 17 U.S.C. 114, and for the making of ephemeral phonorecords, pursuant to 17 U.S.C. 112(e). The Copyright Royalty Judges exercise their authority under 17 U.S.C. 803(c), and transmit this Final Determination to the Librarian of Congress for publication in the **Federal Register**, pursuant to 17 U.S.C. 803(c)(6).

So Ordered.

James Scott Sledge,

Chief Copyright Royalty Judge.

William J. Roberts,

Copyright Royalty Judge.

Stanley C. Wisniewski,

Copyright Royalty Judge.

Dated: April 23, 2007.

List of Subjects in 37 CFR Part 380

Copyright, Sound recordings.

Final Regulation

■ For the reasons set forth in the preamble, Chapter III of Title 37 of the Code of Federal Regulations is amended by adding new Subchapter E to read as follows:

Subchapter E—Rates and Terms for Statutory Licenses

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Sec.

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

§ 380.1 General.

(a) *Scope.* This part 380 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2006, through December 31, 2010.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 shall comply with the requirements of those sections, the rates and terms of this part, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this part to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) *Aggregate Tuning Hours* (ATH) means the total hours of programming that the Licensee has transmitted during the relevant period to all Listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous Listeners, the service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one Listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

(b) *Broadcaster* is a type of Commercial Webcaster or Noncommercial Webcaster that owns and operates a terrestial AM or FM radio station that is licensed by the Federal Communications Commission.

(c) *Collective* is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2006–2010 license period, the Collective is SoundExchange, Inc.

(d) *Commercial Webcaster* is a Licensee, other than a Noncommercial Webcaster, that makes eligible digital audio transmissions.

(e) *Copyright Owners* are sound recording copyright owners who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

(f) *Ephemeral Recording* is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C.112(e).

(g) *Licensee* is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)), or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

(h) *Noncommercial Webcaster* is a Licensee that makes eligible digital audio transmissions and:

(1) Is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501),

(2) Has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted, or

(3) Is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

(i) *Performance* is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(j) *Performers* means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(k) *Qualified Auditor* is a Certified Public Accountant.

(l) *Side Channel* is a channel on the website of a broadcaster which channel transmits eligible transmissions that are not simultaneously transmitted over the air by the broadcaster.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. 114, and the making of ephemeral recordings pursuant to 17 U.S.C. 112 are as follows:

(1) *Commercial Webcasters:* (i) The per-performance fee for 2006–2010: For all digital audio transmissions, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Commercial Webcaster will pay a performance royalty of: $.0008 per performance for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010. The royalty payable under 17 U.S.C. 112 for any reproduction of a phonorecord made by a Commercial Webcaster during this license period and used solely by the Commercial Webcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments.

(ii) Optional transitional Aggregate Tuning Hour fee for 2006–2007: The following Aggregate Tuning Hours (ATH) usage rate calculation options, in lieu of the per-performance fee, are available for the transition period of 2006 and 2007:

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

(iii) ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

(2) *Noncommercial Webcasters:* (i) For all digital audio transmissions totaling not more than 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Noncommercial Webcaster will pay an annual per channel or per station performance royalty of $500 in 2006, 2007, 2008, 2009 and 2010.

(ii) For all digital audio transmissions totaling in excess of 159,140 Aggregate Tuning Hours (ATH) in a month, including simultaneous digital audio retransmissions of over-the-air AM or FM radio broadcasts, a Noncommercial Webcaster will pay a performance royalty of: $.0008 per performance for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010.

(iii) The following Aggregate Tuning Hours (ATH) usage rate calculation options, in lieu of the per-performance fee, are available for the transition period of 2006 and 2007:

	Other programming	Broadcast simulcast programming	Non-music programming
Prior Fees	$0.0117 per ATH	$0.0088 per ATH	$0.0008 per ATH.
2006	$0.0123 per ATH	$0.0092 per ATH	$0.0011 per ATH.
2007	$0.0169 per ATH	$0.0127 per ATH	$0.0014 per ATH.

(iv) ''Non-Music Programming'' is defined as Broadcaster programming reasonably classified as news, talk, sports or business programming; ''Broadcast Simulcast Programming'' is defined as Broadcaster simulcast programming not reasonably classified as news, talk, sports or business programming; and ''Other Programming'' is defined as programming other than either Broadcaster simulcast programming or Broadcaster programming reasonably classified as news, talk, sports or business programming.

(v) The royalty payable under 17 U.S.C. 112 for any reproduction of a phonorecord made by a Noncommercial Webcaster during this license period and used solely by the Noncommercial Webcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments.

(b) *Minimum fee.* Each Commercial Webcaster and Noncommercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each calendar year or part of a calendar year of the license period during which they are Licensees pursuant to licenses under 17 U.S.C. 114. This annual minimum fee is payable for each individual channel and each individual station maintained by Commercial Webcasters and Noncommercial Webcasters and is also payable for each individual Side Channel maintained by Broadcasters who are Licensees. The minimum fee payable under 17 U.S.C. 112 is deemed to be included within the minimum fee payable under 17 U.S.C. 114. Upon payment of the minimum fee, the Licensee will receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* A Licensee shall make the royalty payments due under § 380.3 to the Collective.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the **Federal Register** within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 by the 45th day after the end of each month for that month, except that payments due under § 380.3 for the period beginning January 1, 2006, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that:

(1) Payment due under § 380.3(b) for 2006 and 2007 shall be due 45 days after the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms.

(2) Payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments and statements of account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment is received by the Collective.

(f) *Statements of account.* Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or

their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 370.3 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Licensee, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(h) *Retention of records.* Books and records of a Licensee and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§ 380.5 Confidential information.

(a) *Definition.* For purposes of this part, ''Confidential Information'' shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) *Frequency of verification.* The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.7 Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of verification.* A Copyright Owner or Performer may conduct a single audit of the Collective

upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the **Federal Register** a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and retention of report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) *Costs of the verification procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

Dated: April 23, 2007.

James Scott Sledge,

Chief Copyright Royalty Judge.

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