

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

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

Written Direct Testimony of Douglas A. Kaplan

1. I am Douglas A. Kaplan, Senior Vice President for Business Affairs and Business Development, Entertainment and Sports, of Sirius Satellite Radio Inc. (“Sirius”). I offer this statement in support of Sirius’ written direct statement in this proceeding.
2. Sirius is filing this written direct statement with respect to the transmission of certain channels of its audio programming service (the “Sirius/Dish Service”) over the Dish Network satellite television service (“Dish Network”).
3. The primary business of Sirius is its subscription Satellite Digital Audio Radio Service (the “SDARS service”), offering more than 120 channels of music, sports (including, among others, the NFL, and NBA), news (including, among others, Fox News, CNN and NPR), talk (including, among others things, political talk) and other entertainment programming (including among others, Howard Stern and Martha Stewart) to its subscribers over its satellite system. The Sirius SDARS service is a “preexisting satellite digital audio radio service” (“Preexisting SDARS”) under section 114 of the Copyright Act. The statutory license fees for Preexisting SDARS will be established in the Preexisting Services Proceeding, Docket No. 2006-1 CRB DSTRA, which is occurring contemporaneously with this proceeding.

4. Prior to assuming my current position, I was Vice President and Deputy General Counsel of Sirius. In that capacity, I negotiated the agreement with EchoStar Communications Corp. and its affiliates (collectively "EchoStar") pursuant to which channels from the Sirius SDARS service are provided over the Dish Network to subscribers of the Dish Network. The Sirius channels are included in all but the most basic of the video packages made available to Dish subscribers. Subscribers are not charged any additional fee for receiving the Sirius channels and Dish did not change its package prices when the Sirius channels were added. ||

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5. ||

|| Sirius' business depends upon its gaining SDARS subscribers, and it has found that one effective method for introducing the service to consumers is through sampling, or allowing people to listen to the various channels of its service. Sirius' agreement with EchoStar was a way to expose the Sirius SDARS service to millions of potential subscribers.

6. ||

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7. The marketing and exposure benefits gained by Sirius from its agreement with EchoStar are designed to, and indeed do, accrue completely to the SDARS service. Record companies and performing artists already receive royalties from Sirius for its provision of the SDARS service and those royalty fees will be established in the Preexisting Services Proceeding. Any added obligation by Sirius to pay royalties under the EchoStar agreement based on the marketing and exposure benefits received by Sirius would be double counting.

8. Notwithstanding the fact that Sirius believes the value of the EchoStar agreement is exposure of its SDARS service and that royalties are double-payments, Sirius has been paying sound recording performance royalties as a Preexisting Subscription Service [[

]] That fee was originally set based on our incomplete understanding of what Music Choice paid SoundExchange for its preexisting subscription service as a show of good faith and to avoid controversy with SoundExchange.¹

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¹ Our attempt to avoid controversy with SoundExchange failed. Despite the fact that SoundExchange took our money as a PSS, and would not yet be entitled to any payments if the Sirius/Dish Service were a New Subscription Service, SoundExchange nevertheless claimed that the service was a New Subscription Service. SoundExchange's position on the status of the Sirius/Dish Service was recently upheld by the Copyright Office; we, therefore, have advanced paid a substantial amount to which SoundExchange was not entitled.

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9. The current regulations call for preexisting subscription services to pay 7.25% of their monthly gross revenue. 68 Fed. Reg. 39,837, 39,840 (July 3, 2003). This rate applies to music services offered in a bundle with cable or satellite television packages in the same manner as the Sirius/Dish Service.

10. We understand that the 7.25% rate was negotiated in settlement of a rate proceeding, and it was established in the context of ongoing litigation in the BMI Rate Court between Music Choice and BMI. In that case, BMI was seeking a fee of 3.75% of the licensee's revenues. Music Choice was offering to pay 1.75% of its revenue. The Court of Appeals, on January 14, 2003, had just reversed the district court's initial decision to adopt Music Choice's proposed 1.75% fee. *United States v. BMI (In re Application of Music Choice)*, 316 F.3d 189 (2nd Cir. 2003). On remand, the district court adopted BMI's proposed 3.75% rate. That decision also was vacated by the Court of Appeals.

11. BMI and Music Choice ultimately settled their dispute. We are not privy to the settlement, [[

]] In the meantime, Sirius has received firm offers for its Sirius/Dish Service from both ASCAP and BMI at rates of [[

]] The aggregate fee for all musical works performance rights for services such as the Sirius/Dish Service will, therefore, be at most [[plus a small increment to account for SESAC's repertory, which is about 4% of all music.² Using the fees proposed by BMI and ASCAP to Sirius as an upper bound, and allowing a 6% increment for SESAC, it is reasonable to conclude that the fair market fee for the entire musical work performance right for this type of service is 5.3%.

12. It is reasonable to conclude that the fee for the sound recording performance right for this type of service should be no more than 5.3%. If anything, the fee should be below 5.3% because, among other things, (i) the promotional value of Sirius' sound recording performances that accrues to sound recording copyright owners significantly exceeds the value that accrues to the music publisher and songwriters, and (ii) the other reasons set forth in paragraph 56 of the testimony of Dr. Tasneem Chipty, being offered by Sirius in this proceeding.

13. [[

]] Sirius recognizes, however, that the Act requires some minimum fee to be set. The preexisting services rule requires a minimum payment of \$100,000. For want of a better estimate of value, Sirius would accept a minimum fee of that amount.

² Based on testimony before the House Intellectual Property Subcommittee, I understand SESAC claims to license about 4% of the music played on radio. See Exhibit SIR NSS Ex. 1 (Response H.1.). Even this is likely to involve double counting, as much SESAC music is also licensed by ASCAP or BMI.

14. Even if, however, the “package” of advertising, promotional and marketing benefits” provided by EchoStar under the agreement is to be taken into account, that package should be evaluated at its fair market value, not the value of the benefits stated in the agreement, [[

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15. [[

]] Apart from promotional

value, for which SoundExchange will be compensated in the SDARS proceeding, that is the reasonable value Sirius has obtained in exchange for providing Sirius channels to EchoStar.

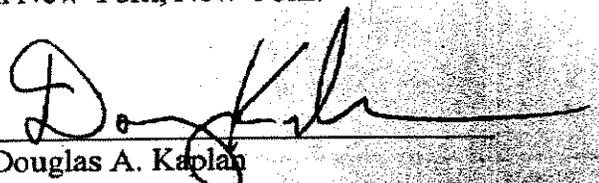
16. Dr. Chipty testifies that it is not possible to determine the value of the EchoStar agreement based on the consideration stated in the agreement. Instead, she determines the value of agreement (and, therefore, the revenue base against which to apply the fee rate) based on a comparable business that is selling the service—Music Choice. Sirius agrees with Dr. Chipty’s observation (at ¶¶ 46, 48) that there is no evidence to suggest that revenue varies proportionally with the number of channels offered. Accordingly, her per-channel, per-subscriber revenue calculation over-states the value of the Sirius/Dish Service.

17. In light of the fact that the value of the Sirius/Dish Service to the “willing buyer” (here Sirius) is essentially entirely in the promotional benefits to the SDARS Service, for which SoundExchange is already paid, and the fact that Dr. Chipty’s analysis makes several significant

conservative assumptions, Sirius is proposing a fee for performances and ephemeral recordings made to facilitate such performances based on the low end of Dr. Chipty's rate and revenue ranges. Specifically, Sirius is proposing a per-subscriber fee based on imputed revenue of \$0.0233 cents per subscriber and 5.30% of revenue, or \$0.001235 per subscriber per month. This fee should apply from the inception of the service through the term applicable to this proceeding. For years after 2008, the rate should be adjusted by the Producer Price Index for Cable Networks. In addition, I have reviewed the terms, including the notice and recordkeeping terms being proposed by Sirius and believe they are reasonable to both the licensee and licensors. Sirius has systems in place to comply with the proposed notice and recordkeeping terms and requiring different obligations would work a significant hardship on Sirius. The regulations we are proposing are the same as we are proposing for our SDARS.

Declaration

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing written direct statement is true and correct. Signed on October 30, 2006, in New York, New York.


Douglas A. Kaplan